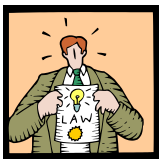
e-MANTSHI

A KZNJETCOM Newsletter

October 2012 : Issue 81

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



New Legislation

1. The Criminal Amendment Act no 9 of 2012 was published on 25 September 2012 in Government Gazette no 35714. The Act substitutes section 49 of Act 51 of 1977, as substituted by section 7 of Act 122 of 1998.The amended section reads as follows:

"1. The following section is hereby substituted for section 49 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977):

[ ] Words in bold type in square brackets indicate omissions from existing enactments

"Use of force in effecting arrest
49. (1) For the purposes of this section-
(a) **'arrestor'** means any person authorised under this Act to arrest or to assist in arresting a suspect; **[and]**
(b) **'suspect'** means any person in respect of whom an arrestor has **[or had]** a reasonable suspicion that such person is committing or has committed an offence; and

(c) **'deadly force'** means force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm.

(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing **[: Provided that the arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds-**

***(a)* that the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;**

***(b)* that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or**

***(c)* that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm],**

but, in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if-

(a) the suspect poses a threat of serious violence to the arrestor or any other person; or

(b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.".

2. This Act is called the Criminal Procedure Amendment Act, 2012."

2. The Minister of Police has published a Dangerous Weapons Bill, 2012, which will be introduced in the National Assembly soon. It was published in Government Gazette no 35815 dated 23 October 2012.

The Bill, as it will be introduced, is available on the Internet from 23 October 2012 at the following websites: www.policesecretariat.gov.za and www.saps.gov.za .

The Bill seeks to repeal all the existing legislation regulating dangerous weapons in the Republic and the areas which constituted the TBVC states prior to 27 April 1994,

and to provide for uniform legislation that will apply throughout the Republic. The Bill furthermore seeks to prohibit the possession of dangerous weapons, firearms or replicas or imitation firearms in public. "Dangerous weapon" is defined as meaning "any object, other than a firearm, designed as a weapon and capable of producing death or serious bodily harm.

Clause 2(1) of the Bill prohibits the possession of dangerous weapons, firearms or replicas or imitation firearms and provides that any person who is in possession of any dangerous weapon or any firearm, replica or imitation firearm under circumstances which may raise a reasonable suspicion that the person intends to use the dangerous weapon, firearm, replica or imitation firearm for unlawful purposes is guilty of an offence. The penalty provided for is a fine or imprisonment for a period not exceeding three years.

Clause 2(2) of the Bill provides for factors which must be taken into account in determining whether a person intends to use the dangerous weapon, firearm, replica or imitation firearm for an unlawful purpose.

Clause 3(1) of the Bill repeals, in whole, all the Dangerous Weapons Acts presently in force in the Republic and the areas which were formerly known as the TBVC states.

Clause 4 of the Bill amends the Regulation of Gatherings Act, 1993 (Act No. 205 of 1993), in order to provide for a prohibition on the possession of—

(a) airguns, firearms, imitation firearms, muzzle loading firearms or any object which resembles a firearm and that is likely to be mistaken for a firearm; and

(b) dangerous weapons,

during gatherings and demonstrations. Exceptions which may be allowed under certain conditions are in respect of cultural or religious purposes and historical enactments.

Recent Court Cases

1. S v NHLAPO 2012 (2) SACR 358 (GSJ)

In order for a court to discharge its adjudicative responsibilities when considering sentence it is necessary for the state to produce the accused's SAP 69.

Spilg, J

"There is a disconcerting feature in this case which ought to be addressed. It concerns the extent of the prosecutor's duty (and by extension that of the

investigating officer) to establish whether an offender has a previous conviction. In a number of cases the prosecutor no longer affirms that the SAP 69 reflects the absence of previous convictions. Instead the prosecutor informs the court, as in this case, that the docket does not contain an SAP 69 and that the State does not intend proving any previous convictions. An SAP 69 is a record extracted from the South African Police's Criminal Record System. It details the offender's previous convictions including the nature of the offence, the date of conviction and the sentence imposed. After conviction the State ordinarily produces this document in court and in compliance with section 271(2) of the Criminal Procedure Act 51 of 1977 (the "CPA") the offender is required by the Court to admit or deny its contents. The offender will usually sign the SAP69 if the previous convictions are admitted and the Presiding Officer will be requested to certify, by signing in the space provided on the document, that the previous convictions are admitted. The SAP69 will also state if there is no record of a previous conviction.

15. The practice mentioned earlier of not even obtaining an SAP69 before deciding not to prove any previous convictions , if indeed it is a practice, falls short of the obligations that are implicitly imposed on a prosecutor in fulfilling his or her duty to the Court in regard to sentencing. The duty of a prosecutor to place information before a Court that is relevant to the exercise of its discretion in respect of bail is well understood and is apposite because there a Court is obliged to exercise a discretion within the confines of the CPA and the public interest is also a relevant consideration.

16. Suffice it that a prosecutor's duty embraces an obligation to protect the public interest and a duty to place before Court information relevant to the exercise of its functions within the limitations of the pressures under which prosecutors work. See Carmichele v Minister of Safety and Security and Another 2002(1) SACR 79 (CC) at paras 72 and 73 in respect of bail. See also S v Rozani; Rozani v Director of Public Prosecutions; Western Cape 2009(1) SACR 540 (C) per Thring J at 549h-550a; Du Toit et al Commentary on the Criminal Procedure Act 1-4T-6; Compare Kruger Hiemstra's Criminal Procedure (2008) at 1-6/7 who submits that prosecutors are "... public officers who should assist the court in ascertaining the truth" .

17. There are a number of Full Bench decisions which held that the prosecution exercises a discretion whether to prove previous convictions. This was in the context of a direct request to the offender by the court for such information. See for instance S v Khambule 1991 (2) SACR 277 (W) at 283b-c which was explained in S v Maputle 2002(1) SACR 550 (W) at 555e on the basis that a Magistrate has no power to question an accused regarding whether he had previous convictions in the absence of the prosecution providing an SAP69. In Khambule the Magistrate assumed the roll of the prosecution, and asked the accused directly if he had

previous convictions. This was after the prosecutor had indicated that the SAP69 was still outstanding and that the State wished the case to be finalised (at 282g-l). See also S v Delport 1995(2) SACR 496(C) (and the observation by Terblanche in Guide to Sentencing in South Africa (2nd) at p80 para 3.3.1 ftn 13) and generally the cases cited by Terblanche in para 3.3.1 at ftn 12 which span a period from 1977 to 2002. While some of the later cases effectively followed the precedent set, the earlier cases expressed concern about a Magistrate directly questioning an accused where the State had not produced an SAP69. Those cases confined the enquiry by reference to an interpretation of the provisions of section 271(1) of the CPA and a fortiori assumed that the prosecutor had at least considered the contents o the SAP69 before electing not to prove it Section 271(1) reads ;

"The prosecution may, after an accused has been convicted but before sentence has been imposed upon him, produce to the court for admission or denial by the accused a record of previous convictions alleged against the accused." (emphasis added)

18. In my respectful view these cases appear to have been influenced by concerns regarding the prejudicial nature of a court undertaking an enquiry mero motu with the risk of consequent perceptions of bias and partisanship. Concern was also expressed about the fallibility of the offender's own recollection. Moreover the earlier cases were decided at a time when the presiding officer generally exercised a discretion regarding sentencing unfettered by statutorily imposed considerations regarding previous convictions. Since these cases had regard to the provisions of section 271(1) of the CPA in the limited context of a Magistrate assuming the roll of inquisitor, the courts were not called on to consider whether the prosecutor had nonetheless a duty to provide details of previous convictions bearing in mind that the over-riding considerations regarding sentencing are to be informed by section 274 of the Act. This was touched upon in S v Sethokgoe 1990(2) SACR 544 (T) where the court considered that it was undesirable not to prove previous convictions but weighed it against the possible work and logistical constraints imposed on prosecutors particularly in outlying areas. See also S v Pietersen 1994(2) SACR 434 (C).

19. Section 274(1) of the CPA provides that "a court may… receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed" (emphasis added).

20. It is trite that the imposition of a proper sentence requires a consideration of the triad of factors, one of which is the public interest. Accordingly irrespective of whether the offence is one subject to the minimum sentence regime under section 51 of the Criminal Law Amendment Act 105 of 1997 ("CLAA") or not, public interest

cannot be properly considered and weighted unless a court is apprised of whether the offender has previous convictions, and if so, for what.

21. In my respectful view the distinguishing features in the earlier cases are the specific concern the courts wished to address, and hence the confinement of the enquiry to section 271 of the CPA in the earlier decisions without reference to section 274 of the Act, and also the logistical difficulties that may have arisen, particularly in outlying Magisterial areas, in obtaining an SAP69 timeously. It is also necessary to take into account the provisions of section 51 of the CLAA and the landscape as defined by more recent authority of the SCA regarding the general duties of a court when considering sentencing and its concern that the interests of society must be properly taken into account. See for instance S v Swart 2004(2) SACR 370 (SCA) paras 12 and 13 and S v Abrahams 2002(1) SACR 116 (SCA) at paras 24-26 and Director of Public Prosecutions, KwaZulu- Natal v Ngcobo and Others 2009 (2) SACR 361 (SCA) para 22 which includes the following statement: “Surely , the nature of the offence related to the personality of the offender, the justifiable expectations of the community and the effect of a sentence on both the offender and society are all part of the equation? Pre and post- Malgas the essential question is whether the sentence imposed is in all the circumstances, just.”

22. The significance of the question whether the court interferes with the apparent discretion afforded to the prosecutor when calling for an SAP69 or whether the prosecutor is impermissibly tying a court’s hands by not providing it are more clearly exposed where the legislature has specifically directed that, absent sufficient and compelling reasons, previous convictions must have a material impact on either the nature of sentence that can be imposed or the minimum period of a custodial sentence. By way of illustration;

1. A first offender may be eligible for correctional supervision under section 276(1)(h) of the CPA whereas a second or multiple offender who falls within the ambit of section 51(1) or (2) read with section 52 of the CLAA will not be so eligible by reason of section 276(3)(b) of the CPA;

2. A first offender convicted of robbery with aggravating circumstances faces a minimum custodial sentence of 15 years, whereas the minimum if the offender has been convicted previously for the same offence is 20 years and 25 years if there is more than one previous conviction (see Part II of Schedule 2 of the CLAA read with section 51(2)(b) of the CPA;

3. In the case of rape there is a material deviation in minimum sentence between a first offender who does not otherwise fall within the provisions of Part I of Schedule 2, where the minimum sentence is 10 years, and a person who falls within its provisions by reason of two or more convictions for rape

where the prescribed sentence is life imprisonment. See Part III and Part I of Schedule 2 read with section 51(1) and (2) (b) of the CLAA. See also the minimum sentence for a second and third or subsequent offender under section 51(2) (b) which is 15 and 20 years respectively.

23. Accordingly the permissive nature of section 271 of the CPA must now yield to ensure that the peremptory provisions of section 51 of the CLAA, which is the more recent enactment, are implemented as intended; 'lex posterior prior derogat' . See New Modderfontein Gold Mining Co v Transvaal Provincial Administration 1919 AD 365 at 397. Insofar as non-section 51 offences are, the discretion accorded to the prosecution to elect whether previous convictions will be relied upon appears to have been informed by the logistical and technological limitations of the times (compare Sethokgoe at 545i-546g).

24. While it is accepted that at the sentencing stage the State's duty is even more consonant with a non-adversarial stance, it remains the only party to the trial able to procure the information necessary to enable the Court to discharge its sentencing responsibilities under section 274(1) of the CPA. A Court would be remiss in complying with the legislative injunctions of section 51 of the CLAA read with Schedule 2 if it failed to take into account for sentencing purposes; a fact the section obliges it to. The prosecutor would be remiss in not presenting the Court with the facts which the section requires to be considered in determining the sentence to be imposed. See generally S v Siebert 1998(1) SACR 554 (SCA) at 558j

25. Mr Mathabatha on behalf of the State confirmed that no difficulty should be experienced by the prosecution in obtaining an SAP69 promptly on request off the South African Police Record System. The SAP69 should already be contained in the docket if bail was previously sought.

26. Accordingly the issue no longer presents itself as one where the prosecutor appears entitled to exercise a discretion which may or may not impermissibly tie the court's hands. Nor does the issue of unnecessary delay arise since an SAP69, or at the very least the underlying data on the South African Police's Record System of an offender's previous convictions, ought to be readily available to a prosecutor even if there was an initial oversight in calling for the record in good time. See the competing concerns raised by Preiss J in Sethokgoe at 545i-546g at a time prior to the general utilisation of computers and the ability of authorised personnel in remote areas to instantly access or obtain and download the relevant data. Any current exception ought not to make the rule.

27. Accordingly in order for a court to discharge its adjudicative responsibilities when considering sentence, including those imposed by statute, it is necessary for the court to have placed before it details of previous convictions. To accord the

prosecutor a discretion which is not subject to judicial oversight may result in like offenders being treated differently, even if the prosecutor had obtained the SAP69 beforehand. It appears that the permissive nature of section 271(1) must yield both to the legislative intent of section 51 of the CLAA and the inherent danger of conferring an arbitrary and potentially discriminatory power on the prosecution.

28. A failure to properly establish and inform the presiding officer of previous convictions imposed on the offender adversely affects the proper administration of justice and undermines the court's responsibilities where the minimum sentencing regime applies under the Criminal Law Amendment Act. At best it ought to be countenanced only in exceptional circumstances that are properly explained to the court. Ordinarily there is no apparent reason why the SAP69 should not have been requested by and provided to a prosecutor before sentencing and in good time to enable the accused to consider it "

2. S v NYUMBEKA 2012(2) SACR 367 (WCC)

A magistrate has a duty to make sure that a proper record is submitted to the High Court in automatic review proceedings.

"UNDUE DELAY IN TRANSMITTING THE PROCEEDINGS FOR REVIEW

[15] Before I finally dispose of this matter, I wish to record my displeasure and unhappiness with the manner in which this review was dealt with by the magistrate and the officials of the Department of Justice for their failure to comply with the provisions of Section 303 of the Criminal Procedure Act 51 of 1977, after the matter had been disposed of by the magistrate.

In terms of Section 303, which is a peremptory provision, the Clerk of the Court shall within one week forward to the Registrar the record of the proceedings in order for the Registrar to lay such proceedings before a judge in chambers. This was clearly not done.

[16] The accused had been sentenced on 30 June 2010 and this matter was only submitted and received by the High Court for review on 15 September 2010. Almost three (3) months after the sentenced was imposed, for the first time.

On 20 September 2010, Klopper, AJ. requested the presiding magistrate to correct the record and to submit the full record including the transcribed proceedings to him.

Thereafter, only on 12 November 2010, almost a further two months thereafter the magistrate made some of the corrections and once it was received at the High Court on 26 November 2010. once again the record was incomplete.

[17] When queries were made through the magistrate's Head of Court, an excuse was forwarded that the Clerk of the Court had sent the transcribed record to the Registrar who misplaced it. This it seems was incorrect, because through his Head of Court, it transpired that the record, before it was sent on review, initially was never transcribed.

Clearly, the magistrate never checked or verified the corrections and completeness of the record when it was sent on review in September 2010. He should have at that stage already have enquired from the Clerk of the Court why after almost three months after conviction and sentence is the record only being made available to be sent on review. This is disturbing and clear indolence on the part of the magistrate.

[18] The full record including the transcribed portion thereof was received by the High Court before 8 December 2010. It was only then that the reviewing judge could fully examine and peruse the record to see whether the proceedings were in accordance with justice. Thereafter, the record together with queries raised by me, which are dealt with in the earlier part of this judgment, was sent back to the magistrate for his comment,

[19] According to the Registrar, this review matter was placed in the 'pigeonhole" for cases of the Khayelitsha Court and it was never collected by the Clerk of the Court, Khayelitsha. on 9 December 2010. After about two months on 7 February 2011, after it had not been collected by the Clerk of the Court, Khayelitsha, the Registrar sent it by mail to the relevant court.

According to the date stamp on the correspondence, it seems that this case was only received on 18 February 2011. by the Clerk of the Court, Khayelitsha. The magistrate received it 3 days thereafter.

Thereafter, the review was submitted back to the High Court and received by this office on 3 March 2011, with the Magistrate's reply to my queries. This, after almost 9 months after the date of sentence. The delays in this matter were inexcusable.

[20] The functions of a Magistrate go beyond merely adjudicating matters in court. Magistrates have a duty in terms of the Constitution and the law to make sure that the orders of their court and matters relating thereto are implemented and given effect to. They should not sit idly and take it for granted that the administrative component and the clerk of the court at the various Magistrates offices will implement and give effect to their orders. They should supervise and make sure that effect is given to it.

Their judicial authority is founded in terms of Section 165 of the Constitution 108 of 2006. fn particular, they should ensure that in terms of Section 165(e) that

"Organs of State, must assist and protect the courts to ensure independence, impartiality, dignity accessibility and effectiveness of the courts". **(own emphasis)**

[21] When imposing a reviewable sentence, Magistrates should check:

i) that it had been entered in to the review register;

ii) that the full record had been properly typed, where it had been handwritten and transcribed, where there was a mechanical recording of the proceedings;

iii) that all the evidence presented at the trial are included, and where it is not available, try and reconstruct, such evidence from the handwritten notes, with the assistance of all the parties concerned;

iv) that all documents and annexures are attached to the record;

v) that no incomplete or incorrect record should be sent on review, because this will lead to delays as has happened in this matter. Should this happen, the Magistrate would be clearly negligent in executing his/her duties and functions imposed by the law, especially, Section 303 of the Criminal Procedure Act.

[22] Whilst the preparation of a record for a review and an appeal is primarily a function of the Clerk of the Court, it is ultimately the function of the Magistrate to see to it that a proper record is send to the High Court.

The Clerk of the Court, unlike the one in this case, should see to it that this is done timeously and within the periods prescribed by law and should follow-up after having checked the register, as to why reviews are delayed. Here they have also clearly failed in their duty in terms of Section 165(4) of the Constitution to give effect to an Order of Court.

[23] The credibility of the justice system will be severely tarnished if effect is not given to court orders, Magistrates who are at the coal face of the justice system, should ensure that this is done. This does not only apply to reviews but also to all other matters, whether of a criminal, civil or *qausi* judicial nature."

3. PANDAY v MINISTER OF POLICE 2012(2) SACR 421 KZD

Section 205 of Act 51 of 1977 does not impose a formal requirement that a magistrate has to keep a record of proceedings when considering the issue of a subpoena in terms of section 205.

Murugasen, J

"Section 205 of the Criminal Procedure Act provides as follows:

205 Judge, regional court magistrate or magistrate may take evidence as to the alleged offence

(1) A Judge of a High Court, a regional court magistrate or magistrate may, subject to the provisions of subsection (4) and section 15 of Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002, upon the request of a Director of Public Prosecutions or a public prosecutor authorised hereto in writing by the Director of Public Prosecutions, require the attendance before him or her or any other judge, regional court magistrate or magistrate, for examination by the Director of Public Prosecutions or the public prosecutor authorised hereto in writing by the Director of Public Prosecutions, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided that if such person furnishes that information to the satisfaction of the Director of Public Prosecutions or public prosecutor concerned prior to the date on which he or she is required to appear before a judge, regional court magistrate or magistrate, he or she shall be under no further obligation to appear before a judge, regional court magistrate or magistrate.

[Sub-s (1) substituted by s 59 of Act 70 of 2002.]

(2) The provisions of sections 162 to 165 inclusive, 179 to 181 inclusive, 187 to 189 inclusive, 191 and 204 shall *mutatis mutandis* apply with reference to the proceedings under subsection (1).

(3) The examination of any person under subsection (1) may be conducted in private at any place designated by the judge, regional court magistrate or magistrate.

(4) A person required in terms of subsection (1) to appear before a judge, a regional court magistrate or magistrate for examination, and who refuse or fails to give the information contemplated in subsection (1), shall not be sentenced to imprisonment as contemplated in section 189 unless the judge, regional court magistrate or magistrate concerned, as the case may be, is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order.

[S 205 substituted by s 11 of Act 204 of 1993]

The failure to keep records

[9] Section 205 does not prescribe the formality that the 4th respondent must retain copies of the application or record.

[10] The applicant however avers that the failure of the Fourth Respondent to retain the affidavits and other relevant information in the application placed before the magistrate, is inconsistent with the Constitution as he is consequent to such failure, deprived of access to the information.

[11] The applicant avers further that the respondents seem to acknowledge the validity of his objection and complaint in this respect, as the procedure relating to the

records of applications in terms of Section 205 has been revised. He relies on a Circular 16/2010 issued by the Acting Judicial Head : Administrative Region 7, the contents of which relate to the keeping of records and registers for search warrants and subpoenas in terms of section 205 (the circular).

[12] In the circular the acting Judicial Head, S F van Niekerk, refers to a lack of uniformity of practice relating to the keeping of records of search warrants and subpoenas in terms of Section 205. After pointing out the obligation on judicial officers to exercise their discretion judicially in authorising warrants or subpoenas, Van Niekerk also warns of the potential for constitutional challenges which occur after the lapse of a period of time after the authorisation and will therefore entail sight of the application in order for the judicial officer to furnish reasons and to demonstrate that his discretion was exercised judicially.

Van Niekerk therefore suggests in the circular that a register of the details of such applications are maintained at each office, and a copy of each application be kept in a file.

The circular, firstly, confirms that there is no peremptory requirement relating to the keeping of records of Section 205 applications or the recording of reasons therefor.

[13] However, contrary to the contention of the applicant, the effect of the circular is not an acknowledgement that the failure to retain the records constitutes an infringement of or non compliance with Section 205 or any other statutory requirement or that such failure constitutes a drastic procedural irregularity which vitiates or taints the issuing of the subpoenas, rendering same unconstitutional. Nor does the circular have the effect of a prescriptive directive to ensure compliance with the requirements of Section 205.

[14] The circular sets out the obligations on the magistrate before whom an application in terms of S205 lies for determination, and thereafter suggests a formalised process to be implemented in respect of record keeping, which will assist the magistrate in responding to any subsequent query, as ‘it is not expected of a judicial officer to have a precise recollection of every such matter that came before him/her’.

[15] Therefore while it is acknowledged in the circular that the retention of the record of a request and the decision by the magistrate may facilitate the resolution of any queries raised in connection therewith and subsequently assist the magistrate to provide reasons for his decision, the circular does not impinge on the validity of the procedure under and in terms of which the subpoenas were issued nor does it sustain the applicant’s allegation that the failure to keep records of the Section 205 applications constitutes a drastic procedural irregularity on which this review application is grounded. The reliance on this circular is, in my view, illconceived.

[16] Although the Fourth Respondent acknowledges that the maintenance of a register and a file of applications is good practice, the mere failure to keep records cannot detract from the accountability and obligation of the issuing officers to premise their decision on a factual basis. Section 205 imposes these obligations on the judicial officers without imposing the formal requirement to maintain records. The issuing officers have confirmed that they applied their minds before authorising the subpoenas although they did not retain copies of the applications.

[17] Although the Fourth Respondent did not keep records of the processes by virtue of which the subpoenas were issued, the applicant has been furnished with copies of the applications and the subpoenas, the correctness and completeness of which have been confirmed by the respondents.

[18] The onus lies on the applicant to show that he is prejudiced in his claim to review the decisions to issue the subpoenas because he does not have access to the same and all the information placed before the magistrates or that the record furnished to him is unreliable or susceptible to manipulation by the respondents. I am unable to find that the applicant has shown such prejudice because of the lack of particularity in his objections as to why the records furnished to him are susceptible to a challenge based on a failure to access the correct and complete information considered by the magistrates.

[19] In the premises the applicant cannot rely on a dispute of fact, and there is merit in the submission on behalf of the respondents that the material averments of Van Loggerenberg confirming that the record furnished to the applicant is a true copy, remain unchallenged and fall to be accepted as correct in accordance with the legal principle set out in Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51**;** 1984 (3) SA 623 (A) at 635 A-C.

[20] Consequently I do not find any merit in the contention that the failure by the magistrates to keep records of Section 205 applications constitutes an unconstitutional practice and a fatal procedural irregularity making the issuance of the subpoenas susceptible to being reviewed and set aside.”

From The Legal Journals

Kelly-Louw, M

"The statutory in duplum rule as an indirect debt relief mechanism"
2011 *SA Mercantile Law Journal* 352

(The article contains a very nice example of how the statutory in duplum rule can be applied in practice.)

Subramanien, D & Whitear-Nel, N

"The exclusion of evidence obtained by entrapment: an update"
2011 32.3 *Obiter* 634.

d'OLIVEIRA, J A v S

"Theft of electricity: a short circuit? *S v Ndebele* 2012 1 SACR 245 (GSJ)"
2012 THRHR 312

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

Contributions from the Law School

Belief in witchcraft as a mitigating factor in sentencing[1]

1 Introduction & the case of *Latha*

While courts have recognized the phenomenon of belief in witchcraft as a valid consideration in respect of sentencing for many years, the question arises to what

[1] A fuller version of this discussion will be published in 2012 (33(2)) *Obiter*.

extent this ‘benighted belief in the blight of witchcraft’ (in the words of Holmes JA in *S v Mokonto* 1971 (2) SA 319 (A) at 324C-D) ought to be taken into account in the second decade of the 21st century. It is clear that this issue regularly falls to be decided by the courts (see, for example, the recent report on a current case before the Pietermaritzburg High Court, relating to multiple counts of murder and attempted murder arising out of attacks apparently motivated by a belief that some of the victims practised witchcraft (‘Murder: Man denies guilt’ in *The Witness* October 24, 2012 at 4)).

This problem recently arose in the case of *S v Latha and Another* 2012 (2) SACR 30 (ECG), where the accused, who were cousins, pleaded guilty to the murder of their grandmother, as well as a contravention of section 1(*a*) of the Witchcraft Suppression Act 3 of 1957. (The second accused also pleaded guilty to assaulting a family member at the time of the killing.) Whilst the court did not find that the accused’s level of intoxication did not afford any reduction in moral blameworthiness, it accepted that both accused believed the deceased ‘to be possessed of some extraordinary and evil powers, and to be responsible for the death of second accused’s mother’ (at para [15]).

In crafting an appropriate sentence, the court took into account certain cases where the effect of a belief in witchcraft on sentencing was examined (*Phama v S* [1997] 1 All SA 539 (E); *R v Fundakubi and Others* 1948 (3) SA 810 (A); *R v Biyana* 1938 EDL 310; *S v Malaza* 1990 (1) SACR 357 (A); and *S v Magoro & Others* 1996 (2) SACR 359 (A)). The court noted the arguments in aggravation of sentence: that the deceased was the grandmother of both accused; that the deceased was elderly and defenceless and had been attacked in her own home by people from whom she should have been able to obtain protection; that the attack had been of a brutal and sustained nature; that first accused had a previous conviction for assault; that neither accused was youthful, and that their level of education and responsible employment meant that neither could be categorized as ‘illiterate people from deeply rural backgrounds’ (at para [26]-[27]). However, prosecution counsel conceded that substantial and compelling circumstances which would justify the non-imposition of a mandatory or minimum sentence could be present *in casu*, and after a discussion of the pertinent case authority in this regard (the Supreme Court of Appeal decisions in *S v Malgas* 2001 (1) SACR 469 (SCA) and *S v Vilakazi* 2009 (1) SACR 552 (SCA)) the court affirmed that such sentences would indeed be inappropriate in this case (at para [34]). Given the finding of the court that the accused had displayed remorse, that their actions were influenced by the intake of alcohol, and that the accused could be rehabilitated, effective sentences of fifteen years’ imprisonment and ten years’ imprisonment were respectively imposed upon the first and second accused (at para [40]).

Thus, the primary basis for mitigation of sentence in the present case was belief in witchcraft. Indeed the court explains its conclusion that minimum sentences would not be appropriate by stating (at para [34]) that it is satisfied that, as was held in the *Biyana* case (*supra*), the accused were labouring under a delusion which 'though impotent in any way to alter their guilt legally, does in some measure palliate the horror of the crime and thus provide an extenuating circumstance'. This begs the question as to the extent to which a belief in witchcraft should be regarded as a mitigating factor in sentencing, most commonly in the context of the physical injury or death of the person suspected of practicing witchcraft. This question will be examined below in the context of South African case law.

2 The development of the rule that a belief in witchcraft mitigates punishment

It is trite that a belief in witchcraft has always existed amongst the South African population. After some sceptical dicta in early cases decrying such belief as unreasonable and irrational (*Ex parte Du Plooy* (1892-1893) 10 SC 7; *R v Zillah* 1911 CPD 644), in *R v Biyana supra* in 1938 the court, describing an extenuating circumstance as 'a fact associated with the crime which serves in the minds of reasonable men to diminish morally albeit not legally the degree of the prisoner's guilt' held that 'the mentality of the accused' may provide such a fact, including 'a delusion, erroneous belief or defect' which would make a crime committed in the context of such state of mind 'less reprehensible or diabolical than it would be in the case of a mind of normal condition' (at 311). The court noting the 'universal belief in witchcraft by the vast majority of Bantu people', found that the prisoners' belief in witchcraft was 'profound', and that though such belief was greatly deplorable, 'I am not sure that we Europeans are entitled, having regard to our own history, to give them unqualified condemnation for clinging to such a belief'. The court consequently found such genuine belief in witchcraft to 'in some measure palliate the horror of the crime' and thus provide an extenuating circumstance (at 312).

This approach, which was consistently followed, was confirmed in the leading judgment of *R v Fundakubi supra*, where it was held by the Appellate Division that witchcraft 'is a factor which does materially bear upon the accused's blameworthiness' (at 818). However, the court was not entirely positively disposed to such belief operating as a mitigating factor, and thus that

> 'the imposition of suitably severe punishments should be made the occasion, not so much for expressions of sympathy with the accused, as for public admonition or reprobation of those criminally foolish persons who allow themselves to be induced by utterly unfounded suspicions of innocent persons to commit the most savage murders.' (at 819)

Moreover, the court noted that not all killings associated with witchcraft could qualify to be regarded as having been committed in circumstances justifying a lesser punishment. Thus 'ritual' murders where the victim is killed to enable access to parts of his or her body for use for 'medicinal' purposes would not be less blameworthy (at 819). Even killings which would *prima facie* qualify to be regarded as part of this category by reason of a genuine belief in witchcraft may not ultimately give rise to a finding of extenuating circumstances: where murder is incited, or where excessive cruelty is used, this may not be the case (at 819). Schreiner JA carefully qualified the latter example however, noting that the mere multiplicity of wounds caused to the deceased, whilst brutal and savage, does not necessarily establish calculated cruelty, as genuine belief in witchcraft, and the attendant threat to the accused or his nearest and dearest, may spark a rage which gives rise to the situation that the accused 'is really beside himself and acts with the unthinking fury that he might be expected to show towards a venomous snake that had bitten his child' (at 820).

Since the *Fundakubi* case, a genuine belief in witchcraft was confirmed as a factor mitigating punishment on a number of occasions by the Appellate Division (*S v Dikgale* 1965 (1) SA 209 (A); *S v Mokonto* 1971 (2) SA 319 (A); *S v Nxele* 1973 (3) SA 753 (A); *S v Ngubane* 1980 (2) SA 741 (A)). The courts have reaffirmed the dictum in *Fundakubi* to the effect that not all killings associated with witchcraft could be regarded as less blameworthy, and that in each case the facts of the matter will be decisive (*S v Nxele supra* at 757; *S v Modisadife* 1980 (3) SA 860 (A) at 863; *S v Mojapelo* 1991 (2) SACR 462 (A) at 260). The following factors can (where no other mitigating circumstances are applicable) negate the mitigating effect of a belief in witchcraft: where the motivation for the killing was primarily personal gain (*S v Sibanda* 1975 (1) SA 966 (RA) at 967; *S v Ngubane* 1980 (2) SA 741 (A) at 746; *S v Mavhungu* 1981 (1) SA 56 (A) at 69; *S v Munyai* 1993 (1) SACR 252 (A) at 255); where the victim was innocent and was not a threat to the accused (*R v Myeni* 1955 (4) SA 196 (A) at 199; *S v Modisadife supra* at 863; *S v Malaza supra* at 359); where the killing is not motivated by any immediate threat (*R v Ncanana* 1948 (4) SA 399 (A) at 407); and where the killing was committed with excessive cruelty (see *S v Matala* 1993 (1) SACR 531 (A) at 539). With regard to the last factor, courts have however held, following *Fundakubi*, that where the vicious attack arises out of a 'frenzied state of mind rather than cold-blooded cruelty' (*S v Ndhlovu* 1971 (1) SA 27 (RA) at 30, see also *S v Mojapelo supra* at 260) the nature of the attack should not negate the mitigatory effect of the belief in witchcraft.

Just prior to the inception of the Constitution, the legal position with regard to belief in witchcraft serving as a mitigating factor in the context of murder was summarized by Kriegler AJA in *S v Motsepa* 1991 (2) SACR 462 (A) at 470 (approved in *S v Lukhwa* 1994 (1) SACR 53 (A) at 57) as follows:

> ‘’n Opregte en gevestigde geloof in die toorkuns wat in ‘n beskuldigde se gemoed gedien het as dryfveer vir die pleging van ‘n moord, was feitlik altyd ‘n oorweging by die bepaling van die aanwesigheid al dan nie van versagtende omstandighede. By sodanige ondersoek…het verskeie faktore ‘n rol gespeel. Daaronder was die opregtheid en diepte van die beskuldigde se bygeloof, die omvang van die vrees wat dit by hom ingeboesem het, die onmiddellikheid van die aangevoelde bedreiging, die verwantskap tussen die beskuldigde en die waargenome bedreigde, asook die wreedheidsgraad waarmee die vermeende towenaar om die lewe gebring is.’
> (A genuine and established belief in witchcraft which served in the mind of the accused as a motive for committing a murder was almost always a consideration at the determination of the presence or absence of mitigating factors. At such an inquiry various factors have played a role. Among them was the genuineness and depth of the accused’s superstitious belief, the extent of the fear which it aroused in the accused, the immediacy of the perceived threat, the relationship between the accused and the threatened party (the ‘witch’), as well as the degree of cruelty with which the alleged witch was killed.’ (my translation)

3 A new approach?

The advent of a constitutional democracy, along with a justiciable Bill of Rights, radically altered the South African legal framework. However, not only were the precepts of the Constitution supreme over other legal rules, but the values upheld by the Constitution became the fundamental values in South African society. In the light of this transformation, the question arises whether the courts would have a different perspective on the well-established approach that a belief in witchcraft could serve as a mitigating factor.

Although it was evident in 1996 in *S v Magoro supra* that killing witches was the goal of the accused’s conduct, the court did not accept in respect of any of the accused that the belief in witchcraft rendered the conduct less blameworthy. Instead it was held that where one of the accused knew the deceased very well, such accused’s conduct was more reprehensible (at 367).

In *S v Phama* 1997 (1) SACR 485 (E) at 487 (also reported in the All South African reports, cited *supra*) Jones J, noting that two innocent people were deliberately and needlessly killed, stated the following:

> ‘Nothing can undo the dreadful wrong that has been done to them. Society demands that other people like them should not suffer the same fate. The deterrent and preventive elements of criminal justice, and also, but not to the same extent, the retributive element, require that my sentence should reflect

> the revulsion of society at the readiness to resort to criminal violence; the horror of society that human life should be made so cheap; and the need to show the accused and other potential offenders that the price they must pay for resorting to murder in order to eliminate an alleged witch or wizard from their midst is not worth it.'

Whilst the court acknowledged that a belief in witchcraft has been regarded as mitigation in the past in these circumstances, it held that given the relative sophistication of the accused in this case must militate against too much weight being afforded to this aspect (at 487-488):

> 'The accused…is not a tribesman from some remote district completely cut off from the influences of modern civilization…While he may not have escaped entirely from the beliefs and superstitions of his forebears, he is expected to control those beliefs and superstitions instead of allowing them to regulate his behaviour towards his fellow human beings. The accused, the victims, and their families do not come from a primitive society, and the message which my sentence must send out is not a message for a primitive society.'

In the case of *S v Zuma* [2000] JOL 7061 (N), the court once again noted the 'accepted fact' that a genuine belief in witchcraft could be a mitigating factor (at 114), and sentenced the accused accordingly, but also struck a dissenting note (at 114-115):

> 'One wonders how much longer that sort of factor can be taken into account in a country where everybody of adult age has the vote. Killings for witchcraft died out in other countries centuries ago. In essence there is very little difference between killing a person because you think he has bewitched you and killing a person who you believe has stolen your property or committed some other crime towards you. Either it constitutes an act of taking the law into your own hands or an act of revenge, neither of which can be excused. The courts are here to deal with complaints against people which take the form of a crime. They cannot deal with suspicions and the public cannot be allowed to take the law into their own hands simply because of their own suspicions.'

The court in *S v Mbobi* 2005 JDR 0016 (E) regarded as correct the concession by the State that the accused's genuine belief in witchcraft, which motivated his killing of the two deceased, reduced his moral blameworthiness. Consequently, it was held that this constituted a substantial and compelling circumstance justifying the imposition of a lesser sentence than the prescribed life imprisonment (at 9-10). Nevertheless, the court regarded the killings of two innocent persons, who had done the accused no harm whatsoever and had not bewitched him, as extremely serious.

Citing with approval the passages from *S v Phama* quoted above, the court stated (at 12):

> 'So too in the present case is the accused not a primitive tribesman cut off from civilisation. Genuine though his belief in witchcraft may be, he is expected to control that belief and to regulate his conduct accordingly. He had the advantage of two consultations with medical practitioners and his illness was diagnosed as being tuberculosis. He was, however, not prepared to accept this diagnosis and on the flimsiest of evidence…was prepared to accept that he had been bewitched and to take the lives of innocent people.'

In two further recent cases, the accused's belief in witchcraft did not avail the accused. It was held in *S v Ngwane* [2000] JOL 7052 (N) that the mere belief that the victim had bewitched a family member did not constitute substantial and compelling circumstances justifying a departure from the mandatory punishment of life imprisonment. In *S v Alam* 2006 (2) SACR 613 (Ck), the court held, in the context of a killing to obtain blood for a 'traditional healer', that there was 'no evidence that [the accused] believed in witchcraft when he stabbed the deceased' (at para [19]). The context of ritual murder would suggest otherwise. The court determined sentence on the basis of other considerations.

4 Concluding remarks

The court in *S v Latha* found on the facts of the case that the genuineness of the accused's belief in witchcraft could serve to mitigate sentence such that the prescribed minimum sentences should not apply. This finding cannot be faulted in terms of the legal development. It is however notable that the caution (and occasionally disquiet) evident in judgments dealing with killing in such circumstances appears to be returning in even greater measure in the recent decided cases. In cases such as *Phama*, *Zuma* and *Mbobi* the courts appear to be prepared to particularly scrutinize the level of sophistication of the accused in the light of the prevailing societal standards. Schreiner JA's warning in *S v Fundakubi supra* at 819 against excessive leniency in these matters resonates with these concerns, and whilst a genuine belief in witchcraft must necessarily be taken into account in sentencing, it seems that the trend is to regard such mitigating effect as increasingly less substantial. Whilst in sentencing the facts of the particular case must be determinative, such a development would seem to reflect the modern South African society. It seems, in the light of the heavy sentence imposed in *S v Latha*, that this was indeed the approach of the court in this case.

Shannon Hoctor
University of KwaZulu-Natal, Pietermaritzburg

Matters of Interest to Magistrates

The Problem with South African Criminal Justice Performance Indicators

How many reported crimes result in convictions? The answer would tell us how well the South African criminal justice system (CJS) functions. The current information provided by the annual reports of the police, justice department and correctional services don't provide the answer. This is because each department records different information in ways that cannot be linked. Research by the South African Law Commission (SALC) in 2001, which tracked cases from the moment they were recorded by the police through the courts in an attempt to measure conviction rates, concluded that 'crime pays'. This research found that for every 100 violent crimes (murder, rape and aggravated robbery) reported to the police, in only six cases had 'the perpetrators been convicted after more than two years'.

These research findings raised concern about the performance of the CJS. However, statistics collected by the various departments did not allow for a clear diagnosis as to where the systemic problems lay. This resulted in the government undertaking a comprehensive *Review of the South African Criminal Justice System* in 2007. Following the review, cabinet adopted a seven-point plan. One of the seven key recommendations was to establish an 'Integrated and Seamless National Criminal Justice Information System'. Work commenced in mid-2008, but with the change in administration from President Thabo Mbeki to Jacob Zuma little progress has been made. Five years later we still struggle to make sense of criminal justice data.

From the South African Police Service (SAPS) we get information on crime trends. We know, for example, that South Africa's overall crime levels peaked with 2,7 million crimes reported in the 2002/2003 financial year. Since then total crime levels have decreased by about 24% to 2,08 million in the most recent figures for 2011/2012. Of this total, 623 486 were serious crimes ranging from murder to shoplifting. This is 2,3% fewer than in the previous year (638 468) and 7,8% fewer than two years ago (684 199).

The SAPS also reports that since 2002/2003, arrests for serious crimes increased by 75%. In 2011/2012, the police arrested a total of 777 140 suspects for priority crimes and 836 114 for 'other' crimes less serious than shoplifting. This means that in the last financial year, the police made1,6 million arrests, of which 18,9% (303 202) were for serious violent crimes.

The police state that they solved or 'detected the perpetrator' in 1 134 355 cases last year. This amounts to 53,4% of all crimes reported to the SAPS. We also know that the number of case dockets that were 'court ready', meaning that the investigation

was completed and all available evidence against a criminal suspect was in the docket, stood at 48,2%, up from 30,2% the previous year. The police explain that this was because they had managed to clear more than 30% of the backlog at Forensic Services.

When the 2011/2012 Annual Report of the National Prosecuting Authority (NPA) is examined, it becomes clear that there is no way to link the police statistics to those of the NPA. For example, the NPA reported that it achieved 29 628 convictions in the regional or high courts for serious crimes in 2011/2012. For all offences, including petty crimes, the NPA achieved verdicts in 316 098 cases. This figure reflects a 22% decrease in the number of cases prosecuted with verdicts compared to 2003/2004, when 406 915 verdicts were achieved. In summary, while the SAPS is reporting a substantial increase in the number of arrests and court-ready dockets, the NPA is reporting a substantial reduction in the number of cases with verdicts over the past decade.

Unfortunately, because of the inability of the CJS to implement an integrated information management system, we cannot tell what exactly the problem is and how to fix it. This is because the statistics continue to be collected and reported in a compartmentalised way and do not speak each to other.

A good example is the recent high-profile case of musician Molemo ‘Jub Jub’ Maarohanye and his co-accused Themba Tshabalala, who were drag racing in Protea Glen on March 8, 2010 when they crashed into a group of schoolchildren. A day after the incident the two were charged with culpable homicide and reckless or negligent driving. Detectives were able to identify and arrest the suspects and get eyewitness statements with relative ease. By the time the trial started in October 2010, each suspect faced 10 criminal charges including four of murder, two of attempted murder, reckless driving, driving under the influence of drugs and alcohol, and failing to assess the injuries of the victims.

This month, after a two-year trial period, each of the co-accused was convicted on four counts of murder and two counts of attempted murder, instead of the lesser original charges of culpable homicide. Therefor, the police recorded two arrests for culpable homicide in 2009/2010 and, because the trial started in October 2010, the SAPS would record one court-ready docket in 2010/2011. The NPA will now record one guilty verdict irrespective of the number of charges and one conviction involving murder and attempted murder in one case finalised, in its 2012/13 Annual Report. It starts to become clear that the statistics released by the SAPS and NPA don’t really tell us much about the functioning of the criminal justice system.

A CJS Review Research Project commissioned in 2009 by the Department of Justice and Constitutional Development concluded *inter alia* that SAPS and NPA conviction rates are not comparable and that neither ‘reflects the likelihood that any charge laid will result in a conviction’.

Large-scale once-off studies are expensive and their findings go out of date relatively quickly. A more sustainable option is to implement the e-docket system,

which has been in a pilot phase for well over five years as part of the 'integrated and seamless information and technology database' recommended for the CJS over a decade ago.

The National Development Plan adopted by cabinet earlier this year urges that this seven-point plan be implemented as a matter of urgency. Let`s hope that the Ministers of the Justice Crime Prevention and Security Cluster will finally act to improve the CJS after spending the last three years with little to show. Until more meaningful, integrated, timely and reliable information is published on the efficiency and effectiveness of the CJS, public confidence in the criminal justice system will remain low. Unless, of course, such a system reveals that the CJS is performing much worse than what the annual reports present.

By 2012 the National Treasury had committed almost 9% or R95 billion of the R1,06 trillion national budget to the CJS. This represents an increase in expenditure by almost 300% in the past decade. One consequence is a dramatic increase of 62% in police numbers over this period. According to the 2011/2012 SAPS Annual Report, we currently have one police member for every 321 citizens. However, due to the absence of a proper information management system for the CJS, we are not able to determine if this money is used to improve performance or simply hire more people. We hope that the recommendations of the National Development Plan are implemented so that we are able to improve the functioning of the criminal justice system. To date, there is little evidence of the political will to do so.

Lizette Lancaster, Manager: Crime and Justice Hub, Crime and Criminal Justice Programme : ***Institute For Security Studies.***

Family Court Matters

ENQUIRY INTO ABUSE OF OLDER PERSONS IN TERMS OF THE OLDER PERSONS ACT, NO. 13 OF 2006

1. Definition of Older Person: Section 1: "A person who, in the case of a male, is 65 years of age or older and, in the case of a female, is 60 years of age or older"

2. What is abuse?: Section 30 (2): “Any conduct or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress or is likely to cause harm or distress to an older person constitutes abuse of an older person.
(3) For the purposes of subsection (2), "abuse" includes physical, sexual, psychological and economic abuse and—
(*a*) "physical abuse" means any act or threat of physical violence towards an older person;
(*b*) "sexual abuse" means any conduct that violates the sexual integrity of an older person;
(*c*) "psychological abuse" means any pattern of degrading or humiliating conduct towards an older person, including—
(i) repeated insults, ridicule or name calling;
(ii) repeated threats to cause emotional pain; and
(iii) repeated invasion of an older person's privacy, liberty, integrity or security;
(*d*) "economic abuse" means—
(i) the deprivation of economic and financial resources to which an older person is entitled under any law;
(ii) the unreasonable deprivation of economic and financial resources which the older person requires out of necessity; or
(iii) the disposal of household effects or other property that belongs to the older person without the older person's consent.”

3. Section 27 Procedure (Family Court).

Procedure to bring alleged offender to court:

- Report of suspected abuse of older person (who may also suffer from abuse related injury) is made to police official.

- Police official is satisfied that it is in the best interests of the older person if the alleged offender is removed from the residence of older person .

- Police official issues written notice to alleged offender which contains the following:
  - notice to leave residence of older person and refrain from entering residence or having contact with older person until court hearing;
  - notice to appear at a magistrate’s court on a specified date to advance reasons why not permanently prohibited from entering residence;
  - date must be first court day after issuing of notice
  - police official certifies that original written notice was handed to alleged offender and explained to him/her.

- Police official forwards duplicate original of notice to clerk of court.
    - Section 55 of Criminal Procedure Act applies to notice.

When alleged offender appears before court:
- Court summarily inquires into circumstances giving rise to issue of notice.
- After hearing circumstances giving rise to issuing of notice and alleged offender, the court may make the following orders:
  a) prohibit the alleged offender from entering the residence or having contact with older person for a period;
  b) allow entering of residence on conditions which will ensure best interests of the older person;
  c) make an order deemed fit.

4. Section 28/29 Procedure (Criminal Court).

Procedure to bring alleged abuser of older person before court:
- health care worker or social worker makes affidavit to public prosecutor alleging that a person abuses an older person;
- public prosecutor obtains a report on the alleged abuse from social worker or health care provider;
- prosecutor requests clerk of the court to issue summons for alleged abuser to appear before magistrate.

If a magistrate has reason to believe on grounds in affidavit that health care provider or social worker will be prevented from entering residence of older person or has been prevented from doing so s/he may, on application of public prosecutor issue warrant authorising them to enter to make investigation.

- Magistrate must enquire into correctness of allegations in summons issued i.t.o. section 28.
- Rights to legal representation and legal aid explained to person.
- Determine whether proceedings *in camera* or not.
- Evidence to be led by prosecutor and alleged abuser.
- Law relating to criminal trials applicable.
- Report by social worker or health care provider must be submitted to magistrate.
- Magistrate may direct that older person be examined by district surgeon, psychiatrist or clinical psychologist and furnish report.
- Contents of this report to be handed in and interrogated.

If a magistrate makes finding after hearing that allegations in summons is correct (on a balance of probabilities) s/he may order:

a) person to accommodate or care for older person on conditions or

b) prohibit accommodating or caring for older person for any period not exceeding 10 years.

5. Section 24 : Effect of Act on Domestic Violence Act, 1998.—The provisions of this Act must not be construed as limiting, amending, repealing or otherwise altering any provision of the Domestic Violence Act, 1998 (Act No. 116 of 1998), or as exempting any person from any duty or obligation imposed by that Act or prohibiting any person from complying with any provision of that Act.

Gerhard van Rooyen
Magistrate/Greytown

A Last Thought

"With respect to legal education, it is vital that members of the judiciary acquire not only technical mastery of the law and of legal process but also the ability to enter imaginatively, yet critically, into the inner worlds and life ways of the varied individuals that come before them. In Martha Nussbaum's words, "we need judges who are appropriately emotional." This requires an education of both heart and mind.

Reflecting on the necessary attributes of judges in society, social thinker Simone Weil advised: "[They should be] drawn from very different social circles; be naturally gifted with wide, clear, and exact intelligence; and be trained in a school where they receive not just a legal education but above all a *spiritual* one; and only secondarily an intellectual one. They must be accustomed to love truth."

A "spiritual" education is needed to help judges understand that all human beings are fallible, that everyone, including themselves, is capable of great evil in certain circumstances, and that those on whom they must sit in judgment have been formed by personal and social forces often beyond their control. A "love of truth" ensures that judges will hold the guilty accountable. But it also guarantees that they will take into consideration all the contextual factors that have contributed to their offending."

From *Compassionate Justice (p 298)* by Christopher D Marshall.