JUTA LAW

CRIMINAL JUSTICE REVIEW

A bi-annual update complementing the

Commentary on the Criminal Procedure Act

NO 2 OF 2013

Andrew Paizes, Author (Editor)

Steph van der Merwe, Author

EDITORIAL NOTE

The feature articles in this issue deal with two very interesting questions. The first examines the constitutional validity of s 1(1)*(b)* of the Criminal Procedure Act which deals with what constitutes 'aggravating circumstances' in relation to robbery or attempted robbery. The second considers the impact of ineffective legal representation on the fairness of a criminal trial and how to determine when ineffective representation is sufficiently prejudicial to warrant constitutional redress. Both questions have been the focus of recent judicial attention, the first eliciting decisions in the High Court that were not in harmony and, in the end, an appeal to the Constitutional Court that has settled the issue. The decision of that court is subjected to critical analysis.

The past six months have also seen two important challenges to the exercise of the National Prosecuting Authority's powers. One involved a decision to withdraw criminal charges or to discontinue a criminal prosecution (see *Freedom Under Law v The National Director of Public Prosecutions and five others*).The other concerned the extent to which the Prosecuting Authority could rely on state privilege in refusing to make disclosure of various records and other materials in defending its decision to withdraw criminal

charges (see *Democratic Alliance v Acting National Director of Public Prosecutions & others*). In each of these cases, the decision of the court went against the National Prosecuting Authority.

There will, it seems, be an appeal against the first decision, where it was ordered that the cases in issue 'be prosecuted diligently and without delay'. Should the order of Murphy J be confirmed on appeal, all eyes will be on the NPA to see how quickly and comprehensively it will respond to carry out its constitutional responsibilities and duties

Also in the last six months, the 'Torture Act' came into operation, which gives effect to South Africa's obligations in terms of an international convention to curb torture globally, and an important decision of the Supreme Court of Appeal (*S v Bokolo*) was handed down on the mechanics of DNA profiling and its admissibility as a particular kind of circumstantial evidence in criminal cases.

Andrew Paizes

For a printable .pdf version of this Review click here.

IMPORTANT NOTICE:

Register at **www.jutalaw.co.za** to receive future editions of the *Criminal Justice Review*

To receive future editions of this email newsletter, please create a user profile on the Juta Law website (click here) and register to receive this FREE service under 'Newsletters'. Juta Law customers with an existing website profile (which include Jutastat Online subscribers) can simply add this newsletter to their existing profile.

CONTENTS

    - *Factors to be considered in sentencing*
    - *Extra-territorial jurisdiction*
    - *Written authorisation of National Director of Public Prosecutions*
    - *Expulsion, return or extradition*
    - *Amendment of certain Schedules in the Criminal Procedure Act 51 of 1977*
- The Criminal Procedure Amendment Act 8 of 2013
    - *The amended s 316(10)(c)*
    - *The amended s 316(12)*
- The Dangerous Weapons Act 15 of 2013

CASE LAW

Criminal Law

- The principle of legality (*nullum crimen sine lege*)
- Conspiracy in terms of s 18(2)*(a)* of the Riotous Assemblies Act 17 of 1956
- Theft – property capable of being stolen
- Accused found in possession of stolen goods reasonably suspected of being stolen: elements of offence.
- Fraud by silence or non-disclosure
- Carrying on the business of a company 'in a reckless manner' – meaning of in s 424 of the Companies Act

Criminal Procedure and Evidence: Pre-sentence

- s 57: Setting aside of a payment of admission of guilt fine
- s 60(11)*(a)*: Bail and exceptional circumstances
- s 77, s 78 and s 79: Non-triability as opposed to criminal incapacity
- s 106(1)*(d)*: The plea of prior acquittal (*autrefois acquit*)
- s 106(1)*(h)*: Plea of no title to prosecute
- s 155, s 156 and s 157: Joinder of accused at trial
- s 162 and s 164: Capacity to understand oath and capacity to distinguish truth and falsity distinguished
- s 202: State privilege – ambit of – right to access to information
- s 208: Cautionary rule – accomplice evidence – indemnity against prosecution
- s 210: Similar fact evidence
- s 217: Confession – meaning of
- s 217: Confessions: Trial within a trial and duty of prosecutor to alert court to intention to tender evidence which might constitute confession
- s 225: DNA evidence: The mechanics of DNA profiling; its admissibility in evidence; its nature and how to evaluate it
- s 225: Improperly obtained evidence – invalid search warrant – whether there can be consent to admissibility
- Circumstantial evidence: cardinal rules of reasoning
- Assessment of circumstantial evidence – evidence of fingerprint and palm-print

Sentencing

- s 274(1): Lack of evidence for purposes of sentencing and protection of the right to a fair trial
- s 310A: Appeal by state against sentence for white collar crime with a difference

Appeal and Review

- Review: Inherent jurisdiction of High Court where Child Justice Act 75 of 2008 not applied
- Review of prosecuting authority's decision to withdraw charges
- Review: Nature of irregularity envisaged in s 24(1)*(c)* of the Supreme Court Act 59 of 1959

TABLE OF CASES

FEATURE ARTICLES

Robbery with aggravating circumstances and the constitutional validity of s 1(1)(b) of the Criminal Procedure Act; two conflicting decisions

Section 1 (1)*(b)* of the Criminal Procedure Act provides that 'aggravating circumstances' in relation to robbery or attempted robbery means:

(i) the wielding of a fire-arm or any other dangerous weapon;

(ii) the infliction of grievous bodily harm; or

(iii) a threat to inflict grievous bodily harm,

by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence.

In two recent cases, the constitutional validity of the phrase 'or an accomplice' in this section has been considered. In one, *S v Masingili & others* 2013 (2) SACR 67 (WCC), it was held that the phrase did violence to s 12(1)*(a)* of the Constitution, which protects the right to freedom and to security of the person, as well as s 35(3)*(h)*, which entrenches the right to be presumed innocent, and that the phrase could not be saved by the limitation clause (s 36). In the other, *S v Mofokeng & another* (unreported, GNP case no A644/11, 16 August 2013), that approach was emphatically rejected, the court expressing the view that *Masingili* was 'wrong in law' and 'not to be followed' until confirmed by a higher court, a prospect Lamprecht AJ considered 'highly unlikely to happen' (at [19]).

The *Masingili* decision has since been the subject of an appeal to the Constitutional Court. In *Minister of Justice and Constitutional Development & another v Masingili & others* (unreported, (CCT44/13) [2013] ZACC 41, 28 November 2013), the court settled the issue by overturning the decision of the Western Cape High Court. That court had itself overturned the decision of a magistrate, who had convicted X and Y (as well as two others) of robbery with aggravating circumstances. X had acted as a 'scout' in the robbery and Y had driven the vehicle that transported the robbers to and away from the scene. The basis of their conviction was unclear, but the High Court, after considering various options, concluded that they must have been found to have been accomplices to robbery only, and were thus convicted of robbery with aggravating circumstances on the strength of s 1(1)*(b)*. It then upheld a constitutional challenge against the phrase 'or an accomplice' in that section on the ground that the phrase created strict liability 'on the part of an accomplice or perpetrator who has no *dolus* with respect to the perpetration of the aggravating circumstances'. In doing so it relied on the fact that the state had to prove the perpetration of aggravating circumstances during the first stage of the trial culminating in the verdict (see *S v Legoa* 2003 (1) SACR 13 (SCA) at [39]). It relied, too, on *S v Dhlamini & another* 1974 (1) SA 90 (A) at 93H and 95B–C for the scope and meaning of the phrase, the language of which suggested strongly the creation of strict liability.

The Constitutional Court (*per* Van der Westhuizen J), however, disagreed. In its view, even if the words 'or an accomplice' did not appear in s 1(1)*(b)*, the convictions of X and Y would still stand since, 'by scouting and driving the getaway vehicle they intentionally furthered the commission of the armed robbery by the other two respondents' and, thus, satisfied the requirements for 'accomplice' liability (at [22]). The words 'or an accomplice', said Van der Westhuizen J, extended liability *only* in what he called the 'mirror image case' where the accomplice committed the aggravating circumstances – 'for example wielding a knife during the flight just after the actual robbery' – but the perpetrator never does. In the absence of that phrase, the aggravating circumstances, he added, would have to have been committed by the perpetrator, not the accomplice, for the perpetrator to be liable for robbery with aggravating circumstances. In his view, therefore, the decisions of the Appellate Division in *R v Sisilane* 1959 (2) SA 448 (A) and *Dhlamini* (supra), relied on by the Western Cape High Court, 'were incorrect in holding that the words extend liability to the accomplice when the perpetrator commits the aggravating circumstances', since this was 'already done by the common law of accomplice liability' (at [26]). But, he added, this was 'leaving aside for the moment the question whether *intent* regarding the aggravating circumstances [was] required either on the part of the perpetrator or the accomplice, over and above the intent to further the elements of *mere* robbery' (at [26]; emphasis added). It was to *this* question that he turned next.

In address this question, Van der Westhuizen J made these observations and findings:

1. Robbery with aggravating circumstances is *not* a separate crime; it is not distinct from mere robbery. It must, it is true, be shown before conviction that aggravating circumstances existed, but this is for reasons of fairness, so that the accused can address the state's case comprehensively. Armed robbery is merely a form of robbery, and the aggravating circumstances are relevant for sentencing.
2. The common-law and constitutional importance of culpability is not impaired by a finding that robbery is *not* a separate offence or by the notion that 'the state has to prove *dolu*s regarding the definitional elements of robbery only, in order to secure a conviction of armed robbery' (at [42]).
3. Section 12 of the Constitution 'requires appropriate proportionality between the offence and its sentence on the one hand and the level of intent on the other': the prescribed minimum sentence for robbery with aggravating circumstances is subject to an exception for 'substantial and compelling circumstances' justifying the imposition of a lesser sentence (s 51 of Act 105 of 1997 read with Part II of Schedule 2). The fact that the state had not, in a given case, proved that the aggravating circumstances were intended would, he considered, be relevant in determining whether such substantial and compelling circumstances existed.
4. Section 1(1)*(b)* does not expressly require any mental element with respect to the aggravating circumstances; instead only 'objective facts' constituting those circumstances are mentioned. Nor is intent implicit in the section: see *R v Jacobs* 1961 (1) SA 475 (A).
5. Reading s 1(1)*(b)* not to require *specific* fault does not offend against the presumption against strict liability, since that principle was 'already satisfied because intent is a requirement for robbery'.
6. Section 12(1)*(a)*of the Constitution is not violated by such an interpretation of the section since the increased penal jurisdiction was not manifestly inappropriate but was a 'rational means to achieve a constitutionally permissible end: confronting violent crime' (at [52]). The accused 'actively and culpably chose to participate in an inherently violent unlawful activity' and 'may be held accountable for this choice, even if she or he did not intend the exact circumstances that occurred, or method used' (at [56]).
7. The presumption of innocence (in s 35(3)*(h)*) is not violated either, because the state *does* have to prove *dolus* in the context of robbery, and since armed robbery is not a separate offence, this is sufficient. In any event, he added, 'an insufficient fault requirement and a violation of the presumption of innocence are conceptually two different things'; '[o]ne cannot argue that there is a constitutional defect in an offence due to a missing element, and simultaneously that an accused faces conviction despite the existence of reasonable doubt on that element, since by definition the element is not there' (at [58]).

There are several aspects of this judgment which I would, with respect, question and which cause me some disquiet.

To begin with, the judgment pivots on the proposition that robbery with aggravating circumstances (or 'armed robbery', as the court sometimes describes it) is *not* a crime separate from mere robbery but is merely a *form* of robbery in which the aggravating

circumstances are 'relevant to sentencing'. This may be true in a *formal* or *technical* sense, but form cannot be allowed to triumph over substance. The Constitution operates at a very deep level of substantive principle. It does not permit fundamental rights to be compromised by the outward manner of things or by the garb in which legislation is presented. It is true that the Act presents 'aggravating circumstances' in a way that suggests that they are an adjunct to the existing offence of robbery, and that no new, distinct offence is being created. But there can be no doubt that the cumulative *effect* of the legislation is to create a separate and significantly more serious 'criminal status', in terms of which more dire criminal consequences *must* be imposed upon an accused unless substantial and compelling circumstances exist which justify the imposition of a lesser sentence. And it is not to say that these consequences are limited to sentencing: as Van der Westhuizen J himself observed, there are three other important factors which add to the accused's penal burden: first, the fact that the right to prosecute armed robbery never prescribes, whereas prescription occurs after 20 years for mere robbery (see s 18 of the Criminal Procedure Act). Second, that bail is significantly more difficult to attain in cases of armed robbery. And, third, that the stigma attaching to armed robbery is far worse than that attaching to robbery.

The courts, moreover, have recognised the need to treat robbery with aggravating circumstances in a way that respects this 'status'. In *S v Isaacs & another* 2007 (1) SACR 43 (C), Yekiso J rejected the view that no onus attached to the proof of aggravating circumstances. He held that the onus should be on the state to prove the presence of those circumstances since this was a matter that had a significant impact on the quantum of the sentence which a court was likely to impose in view of the minimum sentence legislation. And in *S v Qwabe* 2012 (1) SACR 347 (WCC) the court, when it came to determining whether the accused was a 'second offender' on a charge of robbery with aggravating circumstances, held that the legislation (s 51(2)*(a)*(ii) of Act 105 of 1997) relating to a minimum sentence would not be triggered by a previous conviction of robbery; it would require a conviction of robbery with aggravating circumstances to do so.

The significantly increased penal and social consequences to which an accused is exposed when aggravating circumstances are present do not, in my view, permit a court to place its trust in the legislature's apparent failure to identify armed robbery *formally* as a separate offence. Arguments of this kind, although not uncommon in the pre-constitutional era, are insufficiently faithful to the spirit and thrust of the Constitution.

One should remember that robbery with aggravating circumstances in the past warranted the imposition of the death sentence whereas robbery did not. The difference, for a convicted person, between a criminal status that rendered him liable to capital punishment and one that did not was of considerably greater significance than a formal difference between distinctly articulated crimes that did not have anything like this effect. Today the difference, which concerns whether or not a minimum sentence is to be imposed, is less stark but still remains very significant. Why should the decisive factor be

the style in which the offence is created rather than the impact that a conviction of the offence will have on the accused and his fundamental rights?

If form is decisive, what would there be to stop the legislature, if it was of the view that too many convictions for a common-law crime (such as murder) were being lost to the need to prove *dolus*, from adding an overlay of 'aggravating circumstances' to a lesser common-law crime (such as assault) that would render a person convicted of that crime with aggravating circumstances liable to a sentence usually imposed in respect of the more serious crime? If the causing of death were such an aggravating circumstance, a person convicted of assault with aggravating circumstances could have the more severe sentence imposed on him without the state having to prove the intent to kill.

Even more objectionable, however, would be the entire removal of the element of *dolus* by the legislature. If it would violate the right to be presumed innocent to put the onus on the accused to prove the absence of the intent to kill, how could it not do so if the legislature took the far more drastic and invasive step of removing that element altogether? In an article I wrote in 1998 (see (1998) 11 *SACJ* 409), I argued that the right to be presumed innocent in statutory offences does *not m*ean the right to be presumed innocent of a crime as it happens to be defined by the legislature, but, rather, once we take into account what is proper and necessary in the shape and construction of criminal offences, the right to be presumed innocent of a crime that is *required* to contain an element of fault. The decision in *Masingili* suggests that a further qualification may be necessary: it must be proved, too, that the element of fault relates to every material act, consequence or circumstance that may materially affect the penal status of the accused. For, if the accused is to be punished substantially more severely for causing death as opposed to injury, how can it be enough to prove only that he intended to cause injury?

It follows that I disagree with Van der Westhuizen J's view that 'an insufficient fault requirement and a violation of the presumption of innocence are conceptually two different things' (at [58]).

There is an echo in this judgment of the doctrine of *versari in re illicita*, in terms of which one could, before 1962, be held liable for the unintended consequences of an illegal activity. Consider, for instance, the court's observation (at [56]) that, once the accused 'actively and culpably chose to participate in an inherently violent unlawful activity' he 'may be held accountable for this choice, even if she or he did not intend the exact circumstances that occurred, or method used'. And (at [54]), that '[t]he decision to participate in a robbery is the crucial moral threshold which, once crossed, ordinarily renders the accused culpable', so that, 'provided the requirement of proportionality between the unlawful act and its punishment is satisfied, it is ordinarily justified for the law to impose liability on him or her for the consequences that flow from the unlawful act'.

What is needed, instead of an adherence to form or an application of *versari*-type thinking, is a careful examination of what the legislation does, what its effect is on the accused and his fundamental rights, and whether those rights are adequately protected.

What, then, does s 1(1)*(b)* of the Criminal Procedure Act do? Quite simply, it creates a status, exposing an accused to significantly enhanced penal consequences, by the articulation of a set of circumstances called 'aggravating circumstances' in the case of robbery or attempted robbery. In *S v Sisilane* 1959 (2) SA 448 (A), Schreiner JA examined what he called the 'shape' of the definition of aggravating circumstances in the 1955 Act. He found that the expression 'aggravating circumstances' was 'stated to mean something "in relation to" the offence' (at 452). And what it meant was 'a noun describing action by a person', and not the mere existence of impersonal circumstances, such as, for instance, whether the robbery was a 'pay roll robbery', or involved the 'use of a motor vehicle'.

This observation, in my view, provides the key to understanding the impact of the phrase 'or an accomplice' in s 1(1)*(b)* of the 1977 Act. Where the person who actually performs the robbery (the 'offender' in s 1(1)*(b)*) actually performs the actions described in that section *himself*, he has aggravating circumstances attributed to him by reason of his *own* conduct. But where those actions are performed by 'an accomplice', the attribution arises by virtue of the conduct of *another*. If this conduct is such that it can be attributed to him by the operation of the doctrine of common purpose, no problem arises, as it is, in law, treated as being his conduct in any event. But if it is *not*, what s 1(1)*(b)* in effect does, is to hold the 'offender' responsible for conduct that is *not* his own, either in fact *or* in law.

And, unless the term 'accomplice' is interpreted to mean a party to a common purpose, this is, in my view, why the phrase is objectionable. It is an objection that goes further than the creation of strict liability, since not only is there additional criminal responsibility without fault in respect of the circumstances that create the extra responsibility, but there is, moreover, responsibility for *conduct* that is not one's *own*. This violates one of the foundational principles upon which our criminal law is built. It is unwarranted and unjustifiable. It is also no answer, in my view, to rely on 'substantial and compelling circumstances' for redress: first the accused should not be exposed to the *risk* of the enhanced penal jurisdiction in the first place; second, there is no logic in regarding a factor (whether the absence of intent *or* the more serious objection regarding the absence of conduct that is one's own) as 'substantial' and 'compelling' when it is clearly the legislature's intention that neither 'intent' nor 'own conduct' is necessary in order to attach aggravating circumstances to an accused's crime to begin with; and, third, these considerations are incapable of providing redress in the other situations in which aggravating circumstances apply to increase the accused's criminal burden (such as bail and prescription).

These are my most serious reservations about the judgment. I have others, but these will be explored on another occasion.

Andrew Paizes

The right to effective legal representation: Three recent cases

Belli *The Law Revolt* (*Vol I*): *Criminal* (1968) at 77 refers to a case decided in 1896 in Georgia, United States, as an example of a case where the accused on a murder charge would possibly have been better off without the assistance of his two learned counsel. On motion for a new trial and appeal, the accused alleged that one counsel was so young and inexperienced that he was incompetent, whereas the other counsel – whose experience was not in question – was so drunk during the whole trial that he was 'insensible'. In closing arguments on the merits, the inexperienced counsel argued that the accused was not guilty whereas the other counsel (yes, the intoxicated one) tearfully conceded that the accused was guilty and, in a voice choking with emotion, pleaded to the jury to jail the accused for life. The members of the jury rejected the submissions of both counsel. They voted for the death penalty. In an application for a new trial, the court decided that 'neglect of counsel' in this case did not call for a new trial. The American jurisprudence concerning the right to effective counsel has come a long way since 1896 – as will be evident from the discussion below.

To succeed in the United States in a claim of ineffective legal representation, the applicant must demonstrate both ineffective assistance and prejudice that deprived him of a fair trial, 'a trial whose result is reliable' (*Strickland v Washington* 466 US 668 (1984)). This dual approach has been referred to as the 'performance' prong and the 'prejudice' prong (Bradley (ed) *Criminal Procedure – A Worldwide Study* 2 ed (2007) at 545). The USA has established a considerable body of case law dealing with the right to effective assistance of counsel, which is based on the 6th Amendment of the US Constitution, which guarantees an accused the right 'to have the Assistance of Counsel for his defense'. See generally Fatino 'Ineffective Assistance of Counsel: Identifying the Standards and Litigating Issues' 2003 – 2004 (49) *South Dakota Law Review* 31; Bennett 2003–2004 (42) *Brandeis Law Journal* 189 and Alper 'Toward a Right to Litigate Ineffective Assistance of Counsel' 2013 (70) *Washington and Lee Law Review* 839.

Since just over a decade ago, there have been an increasing number of South African cases where courts were required to address issues concerning the right to effective legal representation. Two important Supreme Court of Appeal cases are S *v Halgryn* 2002 (2) SACR 211 (SCA) and *S v Tandwa & others* 2008 (1) SACR 613 (SCA). Important High Court cases include the following: *S v Moshoeu* 2007 (1) SACR 38 (T); *S v Charles* 2002 (2) SACR 492 (E); *S v Chabedi* 2004 (1) SACR 477 (W); *S v Mponda* 2007 (2) SACR 245 (C); *S v Mafu & others* 2008 (2) SACR 653 (W) at [25].

All the cases referred to in the previous paragraph are discussed in *Commentary*, s 73, sv *Competent legal assistance: Right to and test for*. The three new cases discussed below add further valuable perspectives on issues which have a direct or indirect bearing on the right to effective legal assistance. That there ought to be such a right is not disputable: 'The right to legal representation' said Louw AJ in *S v Mofokeng* 2004 (1) SACR 349 (W) 355*b* 'cannot be a right to anything but effective legal representation'.

***S v Sewnarain* 2013 (1) SACR 543 (KZP)**

In this case the applicant in a notice of motion sought an order setting aside his conviction for the murder of his wife and his sentence of life imprisonment. He alleged that the attorney who appeared on his behalf at his trial where he had pleaded guilty, had no authority to represent him (at [11]) and had, at any rate, handled his case incompetently in that he, the applicant, was given an inadequate opportunity to give proper instructions (at [14]). The applicant also alleged that he was 'tired and drowsy' and whilst he had no recollection of making any written statements in court, he could recall 'being approached by a male who introduced himself as an attorney representing me' (at [11]). This, according to the applicant, prevented him from appointing the attorney of his choice. It was also alleged that the attorney concerned had 'failed to consult properly' with the applicant in that the attorney had obtained statements from the applicant when the latter 'was not in a proper state to appreciate what he was writing and signing' (at [14]). The applicant also filed statements by a psychiatrist and two psychologists. These statements seemed to indicate that the applicant had pleaded guilty, and had given instructions to his attorney for purposes of a s 112 statement, in circumstances where he was on account of mental incapacity unfit to stand trial (at [25]). However, the applicant's allegations were countered by affidavits made by the attorney concerned, the investigating officer, a magistrate who recorded an out-of-court confession and the regional magistrate who presided at the trial. Swain J concluded that there was in his view 'a real, genuine and bona fide dispute of fact . . . on the papers, as to whether the applicant was in his sound and sober senses when he confessed and pleaded guilty to the crime for which he was charged' (at [32]). At [38] it was said that the issue is one 'where the interests of justice demand that the evidence be properly tested'. Swain J accordingly ruled that the matter be referred for the hearing of oral evidence (at [38] and [39*(a)*(i)].

Relying on *S v Tandwa & others* (supra), Swain J ruled as follows as regards waiver of legal professional privilege (at [15], emphasis added):

In my view, it is quite clear that the applicant charged Attorney Moodley as his "legal representative" with incompetence or neglect giving rise to a fair trial violation: (*Tandwa* supra at 626*c–d*). Such allegations "require that a waiver be imputed to the extent of obtaining the impugned legal representative's response to them". Consequently, *the contents of Attorney Moodley's affidavit are admissible to assess the applicant's claims, that he did not consult with him properly and did not properly prepare his defence, and*

to refute the applicant's allegation that he did not receive a fair trial. On this basis, the contents of annexure DM5 are admissible, as its contents are directly relevant to the issue of whether Attorney Moodley properly ascertained whether the applicant had any defence to the charge.

In the USA the above kind of waiver is (somewhat inaccurately) described as the 'self-defense exception' to legal professional privilege. It has been explained that this exception 'is premised on fairness, and without such an exception a lawyer accused of wrongdoing would be defenceless against false claims' (Joy and Mc Munigal 'Confidentiality and Claims of Ineffective Assistance' 2011 *Criminal Justice* 42 at 43). See also generally *S v Boesman* 1990 (2) SACR 389 (EC) and the discussion of imputed waiver of legal professional privilege in *Commentary*, s 201, sv *Waiver*.

The decision by Swain J in *Sewnarain* (supra) to refer the matter for oral evidence was absolutely necessary. Serious allegations such as incompetence and professional neglect can hardly be decided *in vacuo*, especially since there is the real risk that a desperate accused might resort to false allegations of incompetence. The rights of the advocate or attorney should also be considered. See generally *S v Chabedi* (supra) at 488*d–e*. Allegations of incompetence must have a factual basis. In *S v Dlamini* (unreported, GSJ case no CC 313/1997, 17 April 2013) an application for leave to appeal against conviction was refused because nothing was advanced in support of the applicant's allegation that at his trial, state-appointed counsel had 'not properly defended' him (at [2]). There are cases where incompetence or ineffective representation is clear on the basis of the trial record itself. See generally *S v Moshoeu* (supra) at 40*j*–41*b* and *S v Mafu & others* (supra) at [25]. But *Sewnarain* was not one of these.

***Pretorius & others v Magistrate, Durban, & others* 2013 (2) SACR 153 (KZP)**

In the above case the applicants – by way of notice of motion, supported by affidavits – sought an order that criminal proceedings which resulted in their convictions for drug offences be reviewed and corrected or set aside. The applicants contended that at their trial they 'did not have proper, effective and competent legal representation' and that their trial was accordingly unfair and not in accordance with their fundamental right to legal representation in terms of s 35(3)*(f)* of the Bill of Rights and s 73 of the Criminal Procedure Act (at [9]). They alleged, more particularly, that their former counsel (third respondent) had conducted their case incorrectly and had also never obtained their version of events, a version which indeed constituted a complete defence to the charge.

In *Pretorius* Kruger J was – unlike Swain J in *Sewnarain* (supra) – in a position where he could decide the factual and other disputes on the basis of the available affidavits. Kruger J was satisfied that there had been 'adequate and proper consultation between the applicant and third respondent' and that the applicants had agreed to the strategy which the third respondent had followed in representing them at the trial (at [20]). Of the utmost importance in this regard were the following statements in the third

respondent's first affidavit: '[T]he accused had confessed to me and because they refused to plead guilty to the charges, I could only conduct their defence on the basis of the interpretation of the definition contained in the Drugs Act . . . I informed the accused that I could not run an affirmative defence as I could not mislead the court' (at [24]). These averments were never challenged (at [25]) and Kruger J explained that the third respondent's handling of the situation was indeed in accordance with paragraph 4.11 of the Uniform Rules of Professional Ethics of the General Council of the Bar. See also *Commentary*, s 73, sv *Defending the admittedly guilty*.

Concerning the allegation that the third respondent had erred in raising the constitutional challenge only after closure of the prosecution's case, Kruger J – referring to the decision of the Supreme Court of Appeal in *S v Halgryn* (supra) – concluded as follows (at [29]):

Whether [the third respondent] was right or wrong in this approach can hardly be described as incompetence . . . Indeed it is always easy in hindsight to allege that an accused's defence was improperly conducted. This is precisely what Harms JA . . . warned about in *S v Halgryn* (supra). Given the highly competitive nature of criminal practice, one will often find another legal representative who will offer what he . . . would undoubtedly term a 'better alternative'. This of course is usually after an accused person has been convicted (as in casu) . . .

It was accordingly held that there was no improper, ineffective or incompetent defence (at [30]). The application was dismissed with costs (at [32]).

The decision in *Pretorius* must be welcomed as one that – in line with *S v Halgryn* (supra) – confirms the broad principle that flexibility is required in determining whether the unsuccessful trial strategy was based upon incompetence causing such a degree of prejudice to the client that an unfair trial resulted. The following statement by Harms JA in *S v Halgryn* (supra) must also be kept in mind (at [15]): 'Whether a defence was so incompetent that it made the trial unfair is . . . a factual question that does not depend upon the degree of ex post facto dissatisfaction of the litigant. Convicted persons are seldom satisfied with the performance of their defence counsel. The assessment must be objective, usually, if not invariably, without the benefit of hindsight . . .' The Supreme Court of the USA has also decided that a court should avoid second-guessing and relying on hindsight, and ought to evaluate each claim in light of the totality of circumstances (*Strickland v Washington* 466 US 668 (1984) at 688–689). It has also been said that an accused 'is not entitled to perfect representation, rather, only that which falls within the normal range of competency' (*State v Rice* 543 NW 2d 884 888 (1996) Iowa).

***Saloman & others v S* 2014 (1) SACR 93 (WCC)**

In the above case Davis J referred to *S v Halgryn* (supra); *S v Tandwa* (supra) and three USA Supreme Court decisions to demonstrate 'the willingness of a court to flesh out the content (or basic) obligations of counsel if a trial is to be considered fair' (at [18]).

Saloman concerned the pre-trial lack of effective legal assistance when the police questioned the first appellant in the presence of his attorney. At [24] Davis J observed:

This evidence, read as a whole, supports first appellant's case that, by his failure to intervene in the interests of his client, [his attorney's] conduct fell well short of that which could reasonably be considered to be effective assistance to a client within the context faced by first appellant. [The attorney] made absolutely no effort to protect his client's constitutional rights. He failed to intervene when the statement which was made by his client to the police deviated significantly from that which had been the product of the consultation between himself and his client. In his own words, he was surprised and shocked at the contents of first appellant's statement to [the police]. He made no attempt to intervene in order to procure an opportunity to consult with his client, pursuant to the altered statement which was being made to [the police] in order, at the very least, to warn his client of the implications of the content of this new statement.

It was held that the first appellant's attorney – unlike 'a reasonably competent attorney' (at [27]) – brought 'no professional skill, judgment or knowledge to the advantage of his client' (at [26]). At [27] it was held that the attorney's passive conduct (or 'lack of any adequate conduct') went to the heart of the fairness of the trial and the first appellant's protection against self-incrimination. The statement made by the latter to the police was accordingly excluded as the 'product of a manifest failure' of what the first appellant was entitled to in terms of his right to effective legal assistance (at [28]).

It should be noted that *Saloman* underlines the importance of effective legal assistance at the investigative stage when an accused may have to make critical decisions which will only surface at trial level and which may have a crucial impact on the trial. Indeed, the right to effective legal assistance covers not only the pre-trial and trial stages but – as was pointed out by Marcus AJ in *S v Ntuli* 2003 (1) SACR 613 (W) 619*f–g* – also the appeal stage.

Steph van der Merwe

LEGISLATION

The Prevention and Combating of Torture of Persons Act 13 of 2013

The above Act (hereafter the Torture Act) came into operation on 29 July 2013. See *GG* 36716 of 29 July 2013. The Torture Act gives effect to South Africa's obligations in terms of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This convention was adopted by the General Assembly of the United Nations on 10 December 1984 and ratified by South Africa on 10 December 1998. As

state party to this Convention, South Africa was required to adopt legislative, judicial and other measures to prevent acts of torture.

Statutory description of conduct constituting 'torture'

'Torture' has the meaning assigned to it in s 3 of the Torture Act (s 1). In terms of s 3 'torture' means 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . .' However, s 3 contains further key elements which distinguish the crime of torture from common-law crimes such as common assault and assault with intent to do grievous bodily harm.

First, section 3 requires that the pain or suffering concerned must be inflicted or instigated by – or must be with the consent or acquiescence of – a public official or someone acting in an official capacity. In terms of s 1 of the Torture Act, a 'public official' is 'any person holding public office and exercising or purporting to exercise a public power or a public function in terms of any legislation'.

Second, the conduct as described above, will also only constitute torture if the pain or suffering was inflicted 'for any reason based on discrimination of any kind' (s 3*(b)*) *or* for at least *one* of the following purposes: obtaining information or a confession from the victim or any other person (s 3*(a)*(i)); punishing the victim for an act committed by him or another person, including a suspected or planned act (s 3*(a)*(ii)); or intimidating or coercing the victim or any other person to do – or to refrain from doing – anything (s 3*(a)*(iii)).

It should be noted that in terms of s 3, 'torture' does 'not include pain or suffering arising only from . . . lawful sanctions', or pain or suffering otherwise 'inherent in or incidental to lawful sanctions'.

Torture offences and penalties

A person who commits torture (s 4(1)*(a)*) or attempts to commit torture (s 4(1)*(b)*) or incites, instigates, commands or procures any person to commit torture (s 4(1)*(c)*), is guilty of the offence of torture and is on conviction liable to imprisonment, including imprisonment for life. Similar sentences exist in respect of participation in torture and conspiring with a public official to aid or procure the commission of torture (s 4(2)).

Exclusion of certain defences

Section 4(3) provides that the fact that an accused person is or was a head of state or government (or a member of a government or parliament, or an elected representative or a government official) shall neither be a defence to a charge of torture nor a ground for any possible reduction of sentence in the event of a conviction. The same exclusion and the same prohibition of the possible reduction of sentence also apply to the situation

where the accused was under a legal obligation to obey a manifestly unlawful order of a government or superior (s 4(3)*(b)*).

The above exclusions and prohibitions apply despite the provisions of any other law, including customary international law (s 4(3)).

In terms of s 4(4) '[n]o exceptional circumstances whatsoever . . . may be invoked as justification for torture'.

Section 4(5) also contains the following provision, which is in line with the core values protected by the Torture Act: 'No one shall be punished for disobeying an order to commit torture'.

Factors to be considered in sentencing

When considering the presence of aggravating circumstances for purposes of determining an appropriate sentence for any offence under the Torture Act, a court must – without excluding other relevant facts – take the following into account: any discrimination against the victim (s 5*(a)*); the state of the victim's mental or physical health, the infliction of serious mental or physical harm to the victim and the physical or psychological effects the torture had on the victim (s 5*(b)*, *(g)* and *(k)*); whether the victim had any mental or physical disability and whether the victim was under the age of 18 years (s 5*(c)* and *(d)*); whether the victim was also the victim of a sexual act as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (s 5*(e)*); the use of any kind of weapon and the conditions in which the victim was detained (s 5*(e)* and *(h)*); and the convicted person's role in the offence and his previous convictions relating to the offence of torture or related offences (s 5*(i)* and *(j)*).

Extra-territorial jurisdiction

A South African court has jurisdiction over offences under the Torture Act even if these offences are committed outside the borders of South Africa and regardless of whether or not these offences constitute an offence at the place of its commission (s 6(1)). However, this extra-territorial jurisdiction will only exist where at least one of the following connecting factors is present; if the accused is a South African citizen or is ordinarily resident in South Africa (s 6(1)*(a)* and *(b)*); if the accused person is, after commission of the offence, present in the territory of South Africa, or in its territorial waters or on board a ship, vessel, off-shore installation, a fixed platform or aircraft registered or required to be registered in South Africa and the accused concerned is not extradited for the relevant offence (s 6(1)*(c)*); or if the accused committed the offence against a South African citizen or against a person ordinarily resident in South Africa (s 6(1)*(d)*).

Section 6(1) of the Torture Act is the latest example of the growing number of statutory provisions establishing extra-territorial jurisdiction in respect of certain statutory offences. Seven other examples are referred to in *Commentary on the Criminal Procedure Act* in the discussion of s 110 of the Criminal Procedure Act, sv *Examples of statutes which create extraordinary jurisdiction in respect of certain statutory offences*.

Written authorisation of National Director of Public Prosecutions

A prosecution for an offence under the Torture Act and which is based on extra-territorial jurisdiction as provided for in s 6(1) of this Act may be instituted only on the written authorisation of the National Director of Public Prosecutions (NDPP), who must also designate the court in which the prosecution must be conducted (s 6(2)). For several other examples where statutes require the written authorisation of the NDPP for purposes of a prosecution, see *Commentary on the Criminal Procedure Act*, Chapter 1, sv *Written authorisation of NDPP required for prosecution of certain offences*.

Expulsion, return or extradition

In terms of s 8(1) no person shall be expelled, returned or extradited to another country if there are 'substantial grounds for believing' that the person concerned 'would be in danger of being subjected to torture'. For this purpose consideration must be given to, amongst other factors, the existence 'of a consistent pattern of gross, flagrant or mass violations of human rights' in the country concerned (s 8(2)).

Amendment of certain Schedules in the Criminal Procedure Act 51 of 1977

The offences created by s 4(1) and (2) of the Torture Act have been added to Schedule 1 and Parts II and III of Schedule 2 of the Criminal Procedure Act. See s 11 of the Torture Act.

The Criminal Procedure Amendment Act 8 of 2013

The above Act came into operation on 22 July 2013. See *GG* 36691 of 22 July 2013. This Act amended s 316(10) and (12) of the Criminal Procedure Act 51 of 1977. It should be noted that in terms of s 2 of Act 8 of 2013 the amendment *is deemed to have become law with effect from 10 September 2010*.

The purpose of the amendment was to avoid unnecessary expenses and delays caused by the earlier requirement that a registrar of a high court was obliged, upon receipt of a notice of a petition as provided for in s 316(9), to forward to the registrar of the Supreme Court of Appeal a copy of the proceedings in the high court in respect of which the application for leave to appeal was refused. Under the amended s 316(10)*(c)*, the unnecessary submission of the trial record is avoided. See further paragraphs 2.2 to 2.4

of the memorandum which accompanied the Criminal Procedure Bill [B26-2012] which preceded Act 8 of 2013.

The amended s 316(10)(c)

The effect of the amended s 316(10)*(c)* is that the registrar of a high court who receives notice of a petition as provided for in s 316(9) is no longer automatically obliged to forward the record of the trial to the Supreme Court of Appeal. Registrars are now only required to do so in the circumstances set out in s 316(10)*(c)*(i)–(iv), namely if

(i) the accused was not legally represented at the trial; or

(ii) the accused is not legally represented for the purposes of the petition; or

(iii) the prospective appeal is not against sentence only; or

(iv) the judges considering the petition, in the interest of justice, request the record or only a portion of the record.

In *Sengama v S* 2013 (2) SACR 377 (SCA) the Supreme Court of Appeal pointed out that use of the word 'or' to separate each of the circumstances described in (i) to (iv) above, may cause confusion: if taken as four separate alternatives (ie if they are all read disjunctively) the amendment would make little sense as registrars would be obliged to furnish the trial record to the Supreme Court of Appeal in virtually every case (at [6]). At [7] Wallis JA (Brand and Leach JJA concurring) observed: 'Clearly the word "or" is not intended to be read disjunctively in every case where it has been used in the amended s 316(10)*(c)*. It is accordingly permissible to read it *conjunctively* where that is necessary to give effect to the manifest purpose of the legislation, which was to dispense with the need to file the record of proceedings in most cases.' Emphasis added.

Wallis JA accordingly held that where 'or' appears at the end of s 316(10)*(c)*(ii) it should be read as if 'and' appeared at this point. At [8] the following was accordingly stated:

To summarise, a registrar must furnish the record of proceedings to this court on receiving notice of a petition in cases where . . . *(a)* leave is being sought to appeal against conviction and the applicant was not legally represented at the trial; *(b)* leave is being sought to appeal against conviction and the applicant is not legally represented for the purposes of the petition . . . Where the judges dealing with the petition after it has been filed, in circumstances where it was not necessary for the registrar to prepare and file the record of proceedings, request that all or a portion of the record be furnished the registrar shall comply with that request forthwith.

In *Sengama v S* (supra) the Supreme Court of Appeal was, on account of the new s 316(10)*(c),* in a position to dispose of the petition without awaiting the furnishing of the record of proceedings in the high court.

The amended s 316(12)

Paragraph *(c)* was added to the above section by s 1*(b)* of Act 8 of 2013. Section 316(12)*(c)* now provides – with effect from 10 September 2010 – that judges considering a petition may call for a copy or portion of the record of the proceedings if it was not submitted in terms of s 316(10)*(c)*. According to paragraph 2.4*(b)* of the memorandum which accompanied the Bill that preceded Act 8 of 2013, the purpose of the new s 316(12)*(c)* is 'to give judges considering the petition a discretion to call for the submission of the record of the proceedings'. See also generally *Sengama v S* (supra) at [5].

The Dangerous Weapons Act 15 of 2013

The Dangerous Weapons Act 15 of 2013 was assented to on 24 July 2013 and comes into effect on 2 January 2014. The Act makes provision for certain prohibitions in respect of the possession of dangerous weapons; it repeals the Dangerous Weapons Act of 1968, and it amends both the Regulation of Gatherings Act 205 of 1993 and the Firearms Control Act 60 of 2000. The definition of 'dangerous weapon' has changed. In the 1968 Act, it meant 'any object, other than a firearm, which is *likely* to cause serious bodily injury if it were used to commit an assault'. In the 2013 Act, it means 'any object, other than a firearm, *capable* of causing death or inflicting serious bodily harm, if it were used for an unlawful purpose'. The ambit of the definition has been widened, but it is important to note the exemptions specifically provided for in s 2.

The scope of the offence relating to the possession of dangerous weapons has also changed. In s 2(1) of the 1968 Act, as amended, the offence was created in these terms:

Any person who is in possession of any dangerous weapon, or of any object which so resembles a firearm that, under circumstances such as those under which such person is in possession thereof, it is likely to be mistaken for a real firearm, shall be guilty of an offence, unless he is able to prove that he at no time had any intention of using such weapon or object for any unlawful purpose, and shall on conviction be liable to a fine or to imprisonment for a period not exceeding two years.

The 2013 Act provides thus in s 3(1):

Any person who is in possession of any dangerous weapon under circumstances which may raise a reasonable suspicion that the person intends to use the dangerous weapon for an unlawful purpose, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years.

The following differences are significant:

- Pivotal to the old Act was whether the object in question was 'likely to be mistaken for a real firearm'; the new Act has, as its focus, whether the circumstances were such as to 'raise a reasonable suspicion that the person intends to use the dangerous weapon for an unlawful purpose'.

- The new Act (in s 3(2)) requires a court to take into account a list of factors in making its determination as to whether the person intend to use the object as a dangerous weapon for an unlawful purpose. The list is, however, not a closed one.
- The 'reverse onus' contained in the old section, which probably violated an accused's constitutional right to be presumed innocent, is no more. It is noteworthy, further, that one of the amendments to the Firearms Control Act, contained in s 10A, which sets out a list of factors to be considered in determining whether the person intended to use the object in question to commit an offence, specifies, as one of those factors, 'any explanation the person may wish to provide . . .'. It is expressly provided that 'this paragraph shall not be interpreted as an obligation on the person to explain his or her possession . . ..' This, too, is to prevent the legislation falling foul of the same constitutional right.

CASE LAW

Criminal Law

The principle of legality (*nullum crimen sine lege*)

S v Williams (unreported, WCC review case no C512/11, 21 December 2012).

The accused had been convicted of escaping from 'lawful custody' in contravention of s 117*(a)* read with s 1 of the Correctional Services Act 111 of 1998 as amended. It was alleged that he had escaped from a 'place of safety' to which he had been remanded. Section 117*(a)* did not make escaping from a place of safety a criminal offence, said Ndita J (Yekiso J concurring). Moreover, the section, before its amendment, referred to 'any prisoner' and the accused could clearly not be described as a prisoner.

The conviction was set aside for two reasons. First, it violated the principle of legality (*nullum crimen sine lege*). The courts, said Ndita J, did *not* have the power to create new crimes (see *S v Malgas* 2001 (1) SACR 469 (SCA) at 472). Second, it violated his right to a fair trial under s 35(3), a right which (in para *(l)*) is defined to include the right 'not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed'.

Conspiracy in terms of s 18(2)*(a)* of the Riotous Assemblies Act 17 of 1956

S v Mzondi (aka Siljulwa) & others (unreported, WCC appeal no A47/2011, 6 September 2013)

Section 18(2)*(a)* of the Riotous Assemblies Act provides as follows:

Any person who . . . conspires with any other person to aid or procure the commission of or to commit . . . any offence, whether at common law or against a statute or statutory regulations, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

In respect of this provision, the court set out the following principles, relying on the views of Snyman *Criminal Law* (5 ed) at 294–7:

- The section does not differentiate between a conspiracy that is followed by the actual commission of the offence and one that is not.
- There can be a conspiracy only if it is found that there was a *definite agreement* between at least two individuals to commit a crime: actual agreement must be reached, and mere knowledge of the existence of a conspiracy between others is not sufficient.
- There is no conspiracy if one of the two individuals only pretends to agree but in fact secretly intends to inform the police of the other's plan so that he may be apprehended.
- The conspiracy need not be express. It may be tacit, but it is still necessary for the other party *consciously* to agree to the scheme.
- A conspiracy may *be inferred*, as long as it is the only reasonable inference.
- A conspiracy may arise where one party discusses and agrees with different other parties (described as an 'umbrella spoke' conspiracy), or where each party agrees with the next (called a 'chain' conspiracy). It is thus not required that there be direct communication between *all* the conspirators.
- Although there must be agreement, it is not necessary that there be agreement about the exact manner in which the crime is to be committed.

Theft – property capable of being stolen

S v Oosthuizen (unreported, ECG case no CA & R 205/12, 23 August 2013)

One of the elements of theft is that the property stolen must, in fact, be capable in law of being stolen. It was this element that was disputed in *Oosthuizen*. The complainant had paid money to the accused as part of the purchase price for a business sold to the complainant by her. It was *not* a deposit but, rather, an 'out and out payment of the purchase price'. The magistrate had found that the agreement had been effectively cancelled when the complainant, on discovering certain alleged misrepresentations relating to the business, met with the accused and told her that, because of these misrepresentations, she was placing a stop order on the cheque which had been deposited in the accused's bank account.

Two days later, the accused issued cheques and withdrew almost all of the money. The court held that the magistrate had erred in finding, on the facts, that the contract had been cancelled when the parties met. It was not cancelled said the court, until nine days thereafter.

Thus, when the accused withdrew the money, the contract was still in existence. The money was, then, still due to and owned by the accused arising out of a debtor-creditor relationship in respect of the purchase price. It was not, as a result, property 'capable of being stolen'.

Accused found in possession of stolen goods reasonably suspected of being stolen: elements of offence.

S v Oforah (unreported, GSJ case no A153/2011, 26 August 2013), see also page 26 below.

In terms of s 36 of the General Law Amendment Act 62 of 1955, 'any person who is found in possession of any goods, other than stock or produce as defined in section thirteen of the Stock Theft Act (Act no 26 of 1923), in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence . . ..'

In *Oforah* the court considered two aspects relating to the nature of the '*suspicion*' that must have arisen before an accused may be convicted of contravening this provision. Following what had been said in *S v Essack* 1963 (1) SA 922 (T) and *R v Ismail & another* 1958 (1) SA 206 (A), it held: first, that the suspicion must be founded on reasonable grounds. In *Oforah* the items in question were various stamps which resembled official government stamps. They were, however, clearly forgeries, so it was evident that they could *not* have been stolen from government departments. Thus, even if there had been a suspicion, it could not, objectively speaking, have been based on reasonable grounds.

Second, it held that the suspicion must appear in the mind of the person holding that suspicion at the time when the accused was still in possession of the goods. Here, if it was formed at all, it was formed 'afterwards, when the prosecution perhaps concluded that possession of stolen property was an easier charge to prove in the circumstances than fraud or forgery' (at [65]).

Fraud by silence or non-disclosure

S v Malan 2013 (2) SACR 655 (WCC)

The appellant had failed to apply to SARS to register a close corporation for the purpose of VAT. The question was whether this constituted a fraudulent non-disclosure sufficient to render her criminally liable for fraud. Had she, expressly or impliedly, through words or conduct, represented to SARS that the close corporation did not carry on business and was thus not liable for VAT? The magistrate held that she had; that she did not want SARS to know about the existence of the corporation in order to evade VAT, and that the state had proved beyond a reasonable doubt that she had the requisite intent to defraud.

Schippers J (with Ndita J concurring) held that the magistrate had erred as the state had not proved a criminal fraudulent non-disclosure. A 'misrepresentation', said the court, involved 'a bilateral and not a unilateral act' (at [10]), and since SARS did not even know about the appellant's existence, she could have made no representation to SARS.

It was difficult, if not impossible, said the court, to impute a *duty* to disclose in circumstances where there was no interaction or relationship between the appellant and the complainant, or where there had been no direct dealings between them. In *S v Heller (2)* 1964 (1) SA 524 (W) the state relied on the fiduciary relationship between a director and his company to establish the duty of disclosure. And in *S v Brande & another* 1979 (3) SA 371 (D), where the accused fraudulently submitted entries to newspaper crossword puzzle competitions after dishonestly obtaining knowledge of the official solutions, it was held that a contract had come about between the newspaper company and the contestant. Since parties to a contract warrant the absence of bad faith, a duty to disclose arose out of the accused's knowledge that the newspaper had accepted the entry in the belief that it was made honestly.

Non-disclosure, the court added, could not constitute fraud unless the circumstances were such as to equate the non-disclosure with a *positive* representation, which could be implied. The magistrate erroneously equated the appellant's failure to register for VAT with a positive representation to SARS that the close corporation did not exist. . She had, in fact, made *no* such representation: she failed to apply to register the corporation for VAT, 'pure and simple' (at [12]). To see this otherwise would mean that an unlicensed driver found driving a motor vehicle would be guilty of fraud because he is representing to the licensing authority that he has a licence. A trader or bottle store owner who carries on a business without the necessary licence would similarly be guilty of fraud. Such an approach, said Schippers J, 'would take fraudulent concealment in criminal law to new and far horizons' (at [12]).

Moreover, if SARS had been unaware of the existence of the close corporation, it could not in any way have been deceived or induced to act or abstain to its prejudice or potential prejudice. And there could have been no intention to defraud, as there was no intent to cause prejudice as a result of any misrepresentation, had there been one.

Carrying on the business of a company 'in a reckless manner' – meaning of in s 424 of the Companies Act

S v Levenstein (unreported, (890/12) [2013] ZASCA 147, 1 October 2013)

The question before the court was whether the appellant was knowingly a party to carrying on the business of the company 'in a reckless manner' in contravention of s 424 of the Companies Act. It was held by Leach JA (for the majority) and Willis JA (for the minority) that the test for recklessness was *objective*, and that consciousness of risk was not an essential component of recklessness in this context (at [109]). The court followed what had been said by Howie JA in *Philotex (Pty) Ltd & others v Snyman & others* 1998 (2) SA 138 (SCA) at 143G – that 'recklessly' does not connote mere negligence but, at the very least, gross negligence, and that nothing in s 424 warrants the word being given anything other than its ordinary meaning. In applying this test, said the court in *Philotex*, regard must be had to 'the scope of operations of the company, the role, functions and powers of the directors, the amount of the debts, the extent of the company's financial difficulties and the prospects, if any, of recovery'.

In *Tsung v Industrial Development Corporation of South Africa Ltd* 2013 (3) SA 468 (SCA) the court endorsed the principles set out in *Philotex* and held that the conduct of a director which deliberately diminished the company's ability to repay its debts fell within the ambit of s 424. The court in *Levenstein* took note of this decision as well as what was said by Cameron JA in *Ebrahim v Airport Cold Storage (Pty) Ltd* 2008 (6) SA 585 (SCA) at [15] where he said that s 424 becomes applicable 'when the level of mismanagement of the corporation's affairs exceeds the merely inept or incompetent and becomes heedlessly gross or dishonest'. He added, too, that 'those running the corporation may not use its formal identity to incur obligations recklessly, grossly negligently or fraudulently' (at [110]).

In *Levenstein* the appellant had been responsible for the company's purchase of many of its own shares at a time when its liquidity was in crisis, in order to prevent the share price collapsing. This, said Leach JA, *was* enough to constitute the reckless carrying on of the company's business. He had, then, correctly been convicted of contravening the section.

(b) Criminal Procedure and Evidence

i. Pre-sentence

s 57: Setting aside of a payment of admission of guilt fine

In *S v Mutobvu* 2013 (2) SACR 366 (GNP) the accused paid a fine under the mistaken belief that he was paying a traffic fine. He never thought that he would, on account of such payment, acquire a criminal record – a fact of which he only became aware when he had applied for a job with a gold-mining company. Ranchod J (Mothle J concurring), in finding in favour of the accused, observed as follows (at [11]):

The inference is inescapable that the accused, in the light of the circumstances, could have equated the fine with a traffic fine. A lay person would not know that a criminal record is the result of the payment of such a fine. It is also important to note that the official summons (J175) which was handed to the accused does not set out the consequences of paying an admission of guilt fine. On the face of it the summons appears to be akin to a traffic fine.

S v Mutobvu (supra) should also be read with *S v Claasen* (unreported, FB case no 410/2012, 13 December 2012). In this case the accused was arrested in December 2009 for assault and taken to a police station where he made an exculpatory statement after having been informed of his constitutional rights. A police captain enquired from the accused whether he would be prepared to pay an admission of guilt fine of R150. In his affidavit which accompanied the review, the accused also alleged that two police captains had assured him that an admission of guilt fine would not result in him having a criminal record. He then paid the fine. The accused discovered, almost three years later, that as a result of paying the admission of guilt fine, he had a previous conviction for assault and *crimen iniuria*, and the latter charge was never preferred against him (at [9]). In his affidavit the accused explained that he paid the fine notwithstanding his belief that he was not guilty. He paid so that he could get back to his business, which was running a bottle store. He was having a good trade during the December concerned and he could not afford to be absent. He also explained that he pepper sprayed the complainant in the bottle store on account of the latter's unacceptable conduct in the store. The accused only became aware of his 'previous convictions' when he applied for a renewal of his professional driver's permit (at [6]). This explained the long delay in bringing the review as provided for in s 304(4) of the Act. Given all the circumstances of the case, Matlapeng AJ concluded as follows (at [9]): '. . . I believe it is only fair and just that the accused should be relieved of the unintended results of his ill-considered action . . .'. The conviction and sentence were set aside.

The two cases referred to above illustrate the importance of requiring that the summons or written notice issued in terms of s 57 of the Act should alert an accused to the consequences of paying an admission of guilt fine, especially since some people pay an admission of guilt fine not because they consider themselves guilty but simply to be rid of the worry, inconvenience and expense of disputing a very minor 'criminal' offence. See *NGJ Trading Stores (Pty) Ltd v Guerreiro* 1974 (1) SA 51 (O) at 53H–54A.

It is submitted that there is much merit in the following observation by Dlodlo J in *S v Parsons* 2013 (1) SACR 38 (WCC) at [5]: 'It is not only fair to draw the accused person's

attention to the fact that a conviction shall be noted against his name, but it is also constitutionally obligatory on the part of an officer serving such an accused person with either the summons or written notice . . . to do so'. After all, payment of an admission of guilt fine was designed to dispose of cases where people are guilty and not to serve as a procedural trap for the innocent. See further the discussion of *S v Parsons* (supra) and *S v Tong* 2013 (1) SACR 346 (WCC) in *Commentary*, s 57, sv *Duty of peace officer to inform accused of rights and consequences*.

s 60(11)*(a)*: Bail and exceptional circumstances

In *S v Nkambule* (unreported, GSJ case no A 134/2013, 2 May 2013) the appellant, charged with robbery with aggravating circumstances, was denied bail by the regional magistrate who took the view that the appellant had failed to establish exceptional circumstances as required by s 60(11)*(a)*. On appeal Mudau AJ pointed out that the appellant's alibi defence was supported in an affidavit by his landlord (at [18]) and that the state, on its own version, would rely 'solely' on the complainant's evidence as regards the identity of the perpetrator (at [18]) and in circumstances where no identification parade was held (at [14]). Mudau AJ concluded that the following facts and considerations amounted to exceptional circumstances (at [21]):

According to the papers, the identity of the perpetrator(s) is seriously disputed. The appellant was not identified in a manner that is above reproach, as no identity parade was held. His evidence as to identification will be dock identification. He is a South African citizen with no interest beyond the borders of the Republic. Appellant has no previous convictions or pending cases. He is the father of two children. The fact that he has been a tenant in the same place for at least five years establishes a degree of permanency regarding his place of abode.

S v Nkambule (supra) is really one of those cases indicating that proof of exceptional circumstances cannot be set so high as to make release on bail impossible, even where the interests of justice clearly call for release on bail.

s 77, s 78 and s 79: Non-triability as opposed to criminal incapacity

In *S v Matumbela* (unreported, WCC case no 2/13, 14 June 2013) the accused, without having pleaded to the two charges against him, was sent for mental observation in terms of s 79. The medical report that followed indicated that the accused was not only incapable of understanding the proceedings so as to make a proper defence (s 77), but also lacked criminal responsibility at the time of the commission of the offences, in that he would not have been able to appreciate the wrongfulness of his acts (s 78). The magistrate, relying on s 78(6)*(b)*(ii)*(aa)*, acquitted the accused by reason of mental

illness and ordered his detention at Valkenberg Hospital, to be treated as an involuntary health care user as contemplated in s 37 of the Mental Health Care Act 17 of 2002. On review, Fortuin J (Allie J concurring) noted that the 'magistrate's ruling in terms of s 78 [was] not correct as the accused [had] not yet pleaded to the charge' (at [5]). The magistrate's order in terms of s 78 was set aside and replaced with a ruling in terms of s 77(6)*(a)*(i) of the Act (at [6]). At [5] it was also noted that the charges remained 'alive' and that the accused could, in terms of s 77(7), be prosecuted again should he later be found fit to stand trial. It would seem as if this last remark was meant to convey that it is only once the accused has regained the mental capacity to make a proper defence and tender a plea, that the merits of the matter – that is, the issue concerning an acquittal on account of criminal non-responsibility as provided for in s 78 – can be addressed. After all, once an accused is triable he may not even wish to pursue the defence as provided for in s 78(1) of the Act, preferring to contest the conclusion in the earlier medical report.

An acquittal is obviously also not possible where an accused has not yet pleaded to the charge.

s 106(1)*(d)*: The plea of prior acquittal (*autrefois acquit*)

The above section provides that when an accused pleads to a charge he may plead that he has already been acquitted of the offence – the plea of prior acquittal or the so-called 'double jeopardy rule'. The acquittal must have been on the merits. In *Plaatjies v Director of Public Prosecutions, Transvaal* (unreported, (043/2013) [2013] ZASCA 66, 27 May 2013) it was argued that the plea of prior acquittal should, given its status as a constitutional guarantee in s 35(3)*(m)* of the Bill of Rights, be developed by the Supreme Court of Appeal in terms of its powers under s 39(2) of the Constitution, so as to extend the ambit or scope of the plea to include cases where a court in an earlier appeal had not examined the merits. At [8] this argument was rejected by a full bench of the Supreme Court of Appeal, relying on the fact that the Constitutional Court had 'already expressed itself' on this point in *S v Basson* 2004 (1) SACR 285 (CC) at [64]–[65] and *S v Basson* 2007 (1) SACR 566 (CC) at [255]–(256).

In *Plaatjies* it was held the prosecution was entitled to recharge the appellant in that his earlier acquittal was not on the merits but on the basis of a technicality which stemmed from the trial magistrate's failure to sit with assessors or to dispense with this requirement in compliance with s 93*ter*(1) of Act 32 of 1944.

Where the plea of prior acquittal (or conviction for that matter) cannot assist the accused in avoiding successive prosecutions, his remedy to ensure finality and avoid an infringement of his right under ss 35(3)*(d)* and 38 of the Bill of Rights would be to bring a substantive application for a permanent stay of prosecution (at [15]).

Section 324*(c)* provides that where a conviction has been set aside on the grounds of a 'technical irregularity or defect in the procedure', a prosecution may be reinstituted in respect of the same offence. In *Davids v S* (unreported, WCC case no A571/12, 18 March 2013) the appellant's appeal against conviction and sentence was set aside on account of the fact that in the absence of a record the merits of the appeal could not be assessed, a situation which infringed the accused's constitutional fair trial right. Counsel for the respondent then submitted that the court of appeal should make an order in terms of s 324*(c)* to the effect that a fresh prosecution of the appellant could be instituted by the state. Bozalek J refused to do so. At [16] he said that s 324

does not envisage a prior order or declaration by the court of appeal that there has been a technical irregularity or defect and therefore I see no warrant for making such an order as a necessary prerequisite to the State reinstituting prosecution. It is for the Director of Public Prosecutions or his / her delegee to form a view on the matter and take a decision on whether to re-institute proceedings or not.

s 106(1)*(h)*: Plea of no title to prosecute

In terms of s 38(1) of the National Prosecuting Authority Act 32 of 1998 the prosecuting authority may in certain circumstances 'engage under agreement in writing, persons having suitable qualifications and experience to perform services in specific cases'. The 'services' referred to in s 38 include the conducting of a prosecution under the control and direction of the National Director of Public Prosecutions, or a Deputy National Director or a Director (s 38(4)).

In *S v Delport & others* (unreported, GNP case no A 458/2012, 13 June 2013) the prosecuting authority, relying on s 38 of Act 32 of 1998, had appointed an advocate at the Pretoria Bar and an advocate in the SA Revenue Service, to conduct the prosecution of several accused on charges ranging from contraventions of the Customs and Excise Act 91 of 1964 to the Value-Added Tax Act 89 of 1991. Some several months into the trial, the respondents – relying on s 106(1)*(h)* of the Criminal Procedure Act – pleaded that the two advocates concerned had no title to prosecute. This plea is one of the possible pleas an accused can raise when pleading to a charge. See the discussion of s 106 in *Commentary*, sv *Section 106(1)(h): Plea that prosecutor has no title to prosecute*.

The state appealed against several conclusions of law reached by the trial magistrate in addressing the issues. Makgoba and Van der Byl JJ took the view that the two advocates were not, in addition to their 'engagement' in terms of s 38, required to take the oath as prescribed in s 32 of Act 32 of 1998 (at [74*(c)*]). The oath or affirmation of advocates when admitted, suffices (at [73 *(b)*]). It was also held that the two advocates' 'engagement' in terms of s 38 was sufficient and did not require any further authorisation to prosecute as envisaged in s 20(5) and (6) of Act 32 of 1998: '[A]n

appointment in terms of section 38 provides, not only for the engagement, but also . . . the authority to prosecute' (at [69]).

The court of appeal also took the view – in relation to the question whether the respondents were entitled to rely on s 106(1)*(h)* at any time during the trial – that the respondents 'having been aware of all the facts relevant to their plea, were in the circumstances of this case not entitled to have raised such a plea at any time after the commencement of the trial' (at [74*(b)*]).

s 155, s 156 and s 157: Joinder of accused at trial

S v Maringa & another (unreported, GNP case no A127/2013, 17 September 2013)

This appeal was based on a finding by the court *a quo* that there had been no misjoinder of the two appellants in a trial involving 399 counts of fraud, theft, forgery and uttering. The appellants had been charged, together with other co-accused, in the same charge sheet, even though the two appellants had not been charged with all the charges with which the remaining co-accused had been charged.

It was argued that it was irregular to join where there was no connection, in either time, space or fact between the charges because of the potential for prejudice: an accused could spend weeks in court while evidence affecting his co-accused was heard which had nothing to do with him. It was argued, too, that the regional magistrate had erred in holding that the prejudice to the prosecution in *not* joining the appellants outweighed the prejudice to the appellants. And it was argued, further, that a court had no discretion when interpreting s 156 because that section provided that no such discretion existed.

The court held, however, that s 156 could not be interpreted so restrictively. The section *did* make a joint trial possible, even where the charges did not *entirely* flow from the same facts, where there was evidence which implicated more than one of the accused, even though not all at the same time. There had, however, to be a *common purpose*. The section allowed for different accused to be charged on different counts, provided these two requirements were met: that the offences were committed at the same place and at the same time or at about same time; and that the prosecution informed the court that the evidence admissible in the trial of one of the charged persons would also be admissible at the trial of any of the other charged persons.

On the facts of *Maringa's* case, these conditions were satisfied: the corruption charges, with which the appellants had *not* been charged, were 'an essential part and the very essence to committing the fraud which the accused [were] standing trial for' (at [10]). A 'broad contextual approach' had to be adopted: the purpose of the section was 'to prevent the repetition of evidence' (at [11]), and s 156, which went further than s 155, made possible a joint trial where the charges did not *entirely* flow from the same facts

but where there was evidence which, in the view of the prosecutor, implicated more than one of the accused, although not all at the same time: see *S v Ramgobin* 1986 (1) SA 68 (N) and S*v Naidoo* 2009 (2) SACR 674 (GSJ). In *Naidoo* (discussed in *Commentary* in the notes to s 156), other cases were distinguished on the ground that the accused in those cases were charged with offences which could not be linked to all of them in time or by act of participation.

Where there was a common purpose, it had to be kept in mind that where each party had a different role to play, it was inevitable that, due to the separate acts of the accused, *some* evidence would not pertain to each and every accused. In this regard it was important to bear in mind the constitutional values and, in particular, the right to a fair trial. The court *a quo* was thus, said Poterill J (with whom Cambanis AJ agreed), correct in weighing up the prejudice suffered by the appellants against that ensuing to the state. And it did *not* misdirect itself in finding that the latter outweighed the former: a non-joinder would have the practical result that 'two courts [would] have evidence before them not in chronological order, the trials [would] be duplicated at great costs with the state being at risk that there [was] the possibility that the accused [might] raise [the objection] that they [were] in the second trial being prosecuted on the same set of facts and that certain evidence [would] not be admissible in separate trials' (at [12]).

s 162 and s 164: Capacity to understand oath and capacity to distinguish truth and falsity distinguished

S v Matshiva (unreported, (656/12) [2013] ZASCA 124, 23 September 2013)

The case for the state in a rape case depended on the testimony of the minor complainant who was 8 years of age at the time of trial, and her 13-year-old brother. The question was whether there had been proper compliance with s 162, read with s 164, of the Criminal Procedure Act. Zondi AJA examined the questions which the trial court had put to the children and concluded that it was not clear, from those questions, what the purpose of the inquiry was: was it to establish their capacity to understand the nature and import of the oath *or* their ability to distinguish between truth and falsity? The witnesses had simply been sworn in before their capacity to understand the nature and import of the oath had been properly determined.

Section 164(1), said the court, is resorted to when a court is dealing with the admissibility of the evidence of a witness who, from ignorance arising from youth, defective education or other cause, is found not to understand the nature and import of the oath or the affirmation. Such a witness must, instead of taking the oath, be admonished to speak the truth. There must, however, be some kind of inquiry to see if the witness *does* understand the nature and import of the oath. If he or she does *not*, it is necessary for the court, before admonishing the witness to speak the truth, to establish whether the witness is able to distinguish between truth and lies.

The Constitutional Court in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* 2009 (2) SACR 130 (CC) (see *Commentary* in the notes to s 164) made it clear, said Zondi AJA, that the crucial question was whether the evidence was *reliable*, and the court concluded that, in the light of the trial court's failure to comply with ss 162 and 164, no reliance could be placed on the evidence of the two children.

s 202: State privilege – ambit of – right to access to information

Democratic Alliance v Acting National Director of Public Prosecutions & others (unreported, GNP case no 19577/09, 16 August 2013)

In respect of charges pending against him, the third respondent, the President of the Republic, had, in pursuance of his right to make representations to the prosecuting authority, made such representations 'on the basis of confidentiality and on a without prejudice basis'. After this, the acting NDPP (the first respondent) announced his decision to withdraw charges against the President in a public statement in which it was set out that such representations had been made, and that these included reference to telephone conversations and recordings which motivated the withdrawal of the charges. It was set out, further, that the acting NDPP had investigated the matter and had been advised through the National Intelligence Agency that it had these taped conversations, which had been lawfully obtained, and that the Agency had provided him with transcripts of the telephone conversations.

The applicant then launched review proceedings against the decision of the first respondent, which went to the Supreme Court of Appeal (2012 (3) SA 486 (SCA)). That court made an order that the acting NDPP was 'directed to produce and lodge with the Registrar of [that] court the record of the decision', which record 'shall exclude the written representations made on behalf of the third respondent . . . if the production thereof would breach any confidentiality attaching to the representations'. The present application was launched to enforce this order after a failure to comply with it.

The chief issues before the court were whether the first respondent had to (i) hand over to the applicant the electronic recordings and the transcripts thereof; and (ii) produce *internal* NPA memoranda, reports or minutes of meetings dealing with the contents of the recordings and transcripts insofar as these did not directly refer to the third respondent's written or oral representations.

On the *first* issue, Mathopo J held (at [29]) that it was 'not appropriate for a court exercising its powers of scrutiny and legality to have its powers limited by the *ipse dixit* of one party'. In his view, 'substantial prejudice' would ensue if reliance were placed on the value judgment of the acting NDPP. To permit him to be the 'final arbiter' and to determine which documents must be produced was 'illogical': he was not an 'impartial

stakeholder', but a party to the order of the Supreme Court of Appeal. The President, moreover, had not put up any case as to *why* the representations were confidential.

As far as the transcripts were concerned, the court took the view that they were, on a proper reading of the order of the Supreme Court of Appeal, in the public domain, so that no confidentiality or privilege could attach to them (see *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A)). No case had been made that producing the transcripts would adversely affect the third respondent's right to a fair trial, and he had not asked the court for protection in that regard.

On the *second* issue, the first respondent had argued that the consideration of the *public interest* made it obligatory, when a party made representations to the prosecuting authority on condition of confidentiality, to expect that such an undertaking should be honoured. The third respondent, however, had not explained how and why the disclosure of the memoranda, minutes, notes or reports would affect his right to confidentiality. He relied, instead, on a 'blanket prohibition of the disclosure' of these materials, 'despite the fact that no legal claim of confidentiality [had] been asserted' by him (at [38]). The court rejected a reliance on submissions from the bar as a ground for confidentiality as 'misplaced' (at [39]), and rejected the claims for non-disclosure for the following reasons:

- The first respondent, as an organ of state, had a duty to prosecute without fear, favour or prejudice by upholding the rule of law and the principle of legality. It was also a constitutional body with a public interest duty which 'behoves its officials to operate with transparency and accountability' (at [40]).
- In pursuance of its constitutional obligations it was incumbent upon the first respondent to 'pass the rationality test and inform the public why it quashed the charges'. Not to do so would make the public lose confidence in the office. The documents in question would assist in determining the rationality of the decision.
- It simply could not be said that *all* the documents submitted, whether oral or written, were covered by the privilege; that would amount to 'stretching the duty of privilege beyond the realms of common sense and logic' (at [40]).
- It was not good enough to 'hide behind the privilege: the third respondent had to *specify* and itemise the relevant material and state in what respect he was protected by the privilege. There was an obligation on his part to disclose matters which concerned confidentiality. He could be required, by order of court, to identify and mark those parts of the materials where disclosure might cause a breach of confidence so the court might attain 'a fair balance' between the right of access to information and the right to confidentiality. But *both* the first and third respondents would then have to set out the *basis* for non-disclosure, so that the determination was not left to one party alone.

s 208: Cautionary rule – accomplice evidence – indemnity against prosecution

S v Ndawonde 2013 (2) SACR 192 (KZD)

The court had to consider how to treat the evidence, in a murder trial, of an accomplice who was the person who had arranged with the accused to kill her stepfather after she had reported to her mother that he had made sexual advances to her. By the time of the trial of her mother and brother for the murder, she had received indemnity against prosecution.

Sanders AJ held that the fact of indemnity placed her in a completely different position from the usual accomplice warned in terms of s 204 of the Criminal Procedure Act. Usually the witness 'was obliged to tread a very lonely path as he desperately strove to disgorge enough information about the crime he and his erstwhile partners in crime committed, in order to establish their guilt, while at the same time implicating himself sufficiently in the commission of the crime to establish his bona fides, thereby securing his indemnity from prosecution at their expense' (at [8]). Such a witness, he added, 'faced the ghastly prospect, should indemnity not be granted for whatever reason, that prosecution could ensue and upon conviction the very real possibility of confronting his erstwhile partners in crime in some dimly lit prison corridor or, worse yet, in a crowded prison cell in the dead of night, loomed large'.

It was no wonder, said Sanders AJ, that such a witness's evidence should be treated 'with the utmost care'. But *none* of these considerations applied here because of the indemnity. The court still had to be mindful of the fact that she was an accomplice as well as a single witness, but Sanders AJ found himself in agreement with Wigmore *On Evidence* at para 2057 that the supposed promise or expectation of conditional clemency was the essential element of the cautionary approach, and that, without it, the whole basis of mistrust failed. He agreed, too, with what had been said in *Isaacs & another v S* 2007 (1) SACR 43 (C) that, in such a case, his intimate knowledge of the planning and commission of the crime, far from being a basis for not trusting his testimony, ought to be regarded as adding value to it.

He concluded by approving the views of Zeffertt and Paizes *The South African Law of Evidence* (2 ed) 2009 at 863, where the authors criticise the mechanical use by some courts of the cautionary rule to tick off various factors as if it were a statutory provision, and call for a more flexible approach. This, said Sanders AJ, 'represents the better and majority view'. In this case she was a very good witness in terms of her attention to detail and her ability to recall and relate events in the chronological order of their occurrence. She had sufficient opportunity to observe; no reason falsely to implicate the accused; and could identify clothing of the accused which he admitted he had in his wardrobe. This, said Sanders AJ, 'takes us beyond the realm of coincidence and misfortune' which is what the accused relied upon in his bare denial of guilt (at [18]).

s 210: Similar fact evidence

S v Makhakha (unreported, WCC case no SS41/2012, 11 June 2013)

There were, in this case, three separate incidents of sexual assault, two of them leading to the death of the victims. The third victim escaped that end because of the intervention of a third party. The events were linked by certain similarities: the three victims were young females between the ages of 16 and 25; each was alone at the time; each was strangled in the same manner, by the application of pressure with the hands on the front part of the neck above the collarbone on the soft tissue. The two deceased had facial injuries and had been turned over on their stomachs when they were found. Semen had been found on the panties of both; neither had genital injuries. All three women were attacked in the bushes, and it appeared from the injuries of the two deceased that they had been dragged into the bushes.

The accused lived near where all three victims had resided, and there was strong DNA evidence and other circumstantial evidence linking the accused with the crimes. The surviving victim, moreover, identified the accused as her assailant: she was close to him during the attack, and made a close observation of his features; she identified a scar on his nose; she remembered and described his clothes, which matched those worn by him in her identification of him later the same day; the attack was in broad daylight when the sun was shining; and the ordeal took all of 20 minutes. She also made a dock identification.

In the light of all this evidence, the court accepted the state's contention that the similarities in the method of attack, place and way of operating pointed cumulatively to the accused as the only attacker.

In respect of the first deceased, there was insufficient DNA evidence on the swabs to prove rape, but the DNA samples on the victim's panties were enough to prove beyond a reasonable doubt that he had committed attempted rape. His conviction of murder was supported by the similar fact evidence and the other circumstantial evidence, his defence of an alibi being rejected as not reasonably possibly true. This evidence was enough, too, to establish his guilt in respect of the murder of the second deceased.

s 217: Confession – meaning of

S v Zulu 2013 JDR 1413 (KZP)

The appellant had been confronted by the complainant's mother and grandmother and told that he had raped the complainant. He remained silent at first, but when the mother insisted that she 'hear from him whether it is the truth or not the truth', he said, simply, 'yes'. And, when asked why he had done that, he answered that if they wanted him 'to pay compensation', he wanted to know 'what must he pay as compensation'.

All this was enough to convince the court that the appellant had admitted every element of the offence and that his statement amounted, as a result, to a confession.

s 217: Confessions: Trial within a trial and duty of prosecutor to alert court to intention to tender evidence which might constitute confession

S v Gama (unreported, (127/13) [2013] ZASCA 132, 27 September 2013)

The trial court had relied on a confession made by the appellant to an undercover policeman, a captain in the SAPS, in convicting him of housebreaking and robbery. The confession was held by that court to have been admissible since it was made to someone who was, *ex officio*, a justice of the peace, and was made freely and voluntarily.

Saldulker JA (with the other judges concurring), however, pointed to a 'disquieting feature of this case' (at [14]): at no stage had the prosecution told the court that evidence would be led off the confession. This, said the court, amounted to a 'fundamental miscarriage of justice' (at [6] and at [14]). If there had been any doubt as to whether the appellant's statement amounted to a confession, the prosecution was duty bound to inform the trial court accordingly. A preliminary inquiry should then have been held to determine, first, whether the appellant had made the statement and, if so, the *nature* of the statement. If the finding was that it did amount to a confession, a trial within a trial would have *had* to be held to determine its admissibility, a proposition for which the courts relied on *Commentary* at 24-51 and *S v Nkosi* 1980 (3) SA 829 (A) at 844–5). If the proper procedure had been followed, said Saldulker JA, the state would have had to prove the requirements for admissibility.

The court turned to the requirements under s 217(1)*(a)*, and found that the statement *had* been made to a peace officer, which is defined in s 1 of the Criminal Procedure Act as including a 'police official'. It found, too, that a 'commissioned officer of the SAPS is a member holding the rank of lieutenant or higher, and is in terms of s 4 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 read with the First Schedule of the Act, *ex officio* a justice of the peace and therefore entitled to take a confession' (at [8]). The underlying rationale of s 217(1), he added, was 'the fundamental principle that no inducement or coercion be brought to bear on an accused person to confess'.

But the prosecution's failure to comply with its duty and the absence of a trial within a trial were fatal to the admissibility of the statement. An accused, said the court, 'has a right to a fair trial to be conducted in accordance with "notions of basic fairness and justice"', and the admission of a confession in the absence of a trial within a trial in the circumstances of this case offended against these notions (at [15]). A prosecutor, Saldulker JA stressed (at [16]), had a 'public duty to perform his or her duties impartially and fairly, with honesty and integrity, consistently performing his or her functions independently and objectively, with lawful authority, and at the same time upholding human rights and protecting human dignity'. The prosecutor 'cannot use irregular and improper means to secure a conviction', and the 'injustice of placing before the trial court the confession of the appellant, without first alerting the court of this fact,

the effect it would have, the undesirability of doing so and the potential prejudice to the appellant should have been plain to see' (at [16]).

s 225: DNA evidence: The mechanics of DNA profiling; its admissibility in evidence; its nature and how to evaluate it

S v Bokolo (unreported, (483/12) [2013] ZASCA 115, 18 September 2013)

This case is a valuable contribution to our jurisprudence on a highly technical and difficult area – DNA evidence. Van der Merwe AJA (with whom Malan, Theron, Majiedt JJA and Zondi AJA agreed) acknowledged that he derived 'valuable assistance' from the work *DNA in the Courtroom: Principles and Practice* (2010) by Professor Meintjies-Van der Walt.

The judgment contains a very helpful account of how DNA profiling works in practice (at [7]–[16]). It is too long and complex for the scope of the *Criminal Justice Review*, but see Revision Service 52 of *Commentary*, which will deal with this question in the notes to s 225.

The court went on to accept that evidence that a match between a DNA sample taken at the scene of a crime and the profile of an accused person is *circumstantial evidence*. Its weight depends on a number of factors. These include:

- the establishment of the 'chain evidence', that, in other words, the respective samples were properly taken and kept safe until tested in the laboratory;
- the proper functioning of the machines and equipment used to produce the 'electropherograms', which are computer generated graphs produced when DNA fragments produced by a 'polymerase chain reaction' (PCR) technique are subjected to a process called 'electrophoresis';
- the acceptability of the interpretation of the electropherograms;
- the probability of such a match or inclusion in the particular circumstances; and
- the other evidence in the case.

The weight of the expert opinion evidence provided by the analysts who interpret the electropherograms depends, said the court, on the extent to which those opinions were founded on 'logical and coherent reasoning' (at [19]). If the profiles differed in respect of even a single allele (which is each of two forms of a gene at a particular locus, or location on a chromosome), then the accused *must* be excluded as a source of the crime scene DNA. The converse, however, is not true: because only a limited number of loci are analysed, a short tandem repeat profile (STR profile), as was used in this case, cannot identify a person. Everything, then, depends on the *probability* of such a match occurring in a *particular* population. Without such evidence the profile match 'means no more than that the accused person cannot be excluded as a source of the crime scene DNA' (at [20]).

If the profile in question may be found in many individuals, a match will have little or no probative value. And this is particularly important where the crime scene DNA is a mixture, which increases the likelihood that the profiles of other members of the population can be read into the mixture. An extremely rare profile, on the other hand, points strongly to the involvement of the accused.

This part of the evidence is usually presented in the form of statistical analysis of a population database. The more loci that are included in the profile, the less chance there is of an adventitious match with another person. In making statistical calculations of this kind, said Van der Merwe AJA, experts generally make use of what is called the 'product rule' (as to which see Zeffertt and Paizes *The South African Law of Evidence* 2 ed at 36–40), which postulates that the probability of several independent things occurring together is the product of their separate possibilities. It is used to calculate, in this context, the probability that a particular profile may occur in a particular population, or, in its alternative form, the probability that a person randomly chosen from that population will have the same profile. He stressed, however, that the results of these calculations are 'not absolute' (at [22]).

On the facts of the case, the court held that there was at least a reasonable doubt as to whether the STR profile of the appellant could be read into the STR profile of the two pads in question. Moreover, even if it could, there was 'no clear evidence on record as to the probability of that occurrence in the particular population' (at [32]), and the other facts of the case pointed strongly to the innocence of the accused. His appeal was accordingly upheld.

s 225: Improperly obtained evidence – invalid search warrant – whether there can be consent to admissibility

S v Oforah (unreported, GSJ case no A153/2011, 26 August 2013)

The appellant had been convicted of fraud, several counts of forgery, and several relating to the possession of stolen property (see page 12 above). It was held, however, that most of the evidence was obtained as a result of a search which was unlawful because the warrant had been invalidly issued. The evidence was, thus, unlawfully obtained and fell to be excluded under s 35(5) of the Constitution if it would render the trial unfair *or* otherwise be detrimental to the administration of justice.

Levenberg AJ (Tsoka AJ concurring) held that *both* legs of s 35(5) were violated in this case. The evidence rendered the trial unfair 'because the fruits of the unlawful search [were] the only evidence against the Appellant on most of the offences charged', and the 'risk of a miscarriage of justice [was] made that much greater by the fact that there [was] no . . . corroborating evidence' (at [42]).

It was detrimental to the administration of justice because the warrant was 'so inadequate, cavalier and fatally defective, and the extent to which its terms were exceeded so significant, that the conduct of the SAPS, however well-intentioned it may have been, [could] not be countenanced' (at [43]). To allow evidence obtained 'in such a flagrantly unacceptable manner could lead to a plethora of similar unlawful searches and seizures by police'.

Could and did the appellant *consent* to the search? It was argued that he did because he did not object to it, but this was rejected. Consent, said the court, requires knowledge of the rights allegedly waived, and the appellant was a layman. It would be asking too much of him, said Levenberg AJ, to 'scrutinise the warrant, determine precisely in what respect it was invalid, and then have the courage to demand that the police desist from conducting the search' (at [44]). Moreover, as Thring J held in *Beheersmaatschappij Helling INV & others v Magistrate, Cape Town & others* 2007 (1) SACR 99 (C) at 120–1, it was trite that no amount of consent or agreement by the targets of a search could have the effect of rendering valid or lawful a warrant that had been unlawfully issued.

The fact that there had been no objection at the trial to the admissibility of the evidence also did not signify: the language of s 35(5) was peremptory in requiring exclusion if either of the conditions was present. It would, however, be a relevant factor in determining whether the trial was unfair or whether there was prejudice to the administration of justice. On the facts, however, the police conduct was so flagrant that the failure to object could not override the other considerations militating against the admissibility of the evidence.

In this case the reliance on the improperly obtained evidence was 'especially egregious' because *all* of the evidence was illegally obtained (at [52]).

Circumstantial evidence: cardinal rules of reasoning

S v Nkubungu 2013 (2) SACR 388 (ECM)

In *R v Blom* 1939 AD 188 at 202–3, Watermeyer JA, in a celebrated passage, set out two 'cardinal rules of reasoning' which, in his view, could not be ignored when reasoning by inference in criminal trials:

(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

The first rule, as HC Nicholas observed in his article in *Fiat Institia: Essays in Memory of Oliver Deneys Schreiner* (1983) 312 at 317 (and cited by the court at [23]), 'was given striking expression by TH Huxley: The great tragedy of Science – the slaying of a beautiful hypothesis by an ugly fact'. In this case the appellant had been convicted of murder on the strength of circumstantial evidence. In overturning this conviction, Eksteen J (Bartle J concurring) identified what he regarded as the 'ugly fact in the present matter': the fact that the appellant did not have a gun in his possession and did not have sufficient time, between the shooting of the deceased and the time when he was found standing with bloodstained clothing next to the deceased's body, to have disposed of a firearm (at [24]).

The second rule, too, had not properly been observed in the court's view: the court *a quo* had erred in not exploring a reasonable possibility other than that the accused had shot the deceased: there was no evidence of the distance from which the deceased had been shot, and there was uncontroverted evidence that there were several people seated on the bench close to the door of the deceased's office where he was shot. These 'other co-existing circumstances', said the court, certainly served to weaken the inference drawn by the trial court. Once it is accepted that a 'rival theory' such as this – that some *other* person may have shot the deceased – is *reasonably possible*, what is required is an examination whether there is 'sound reason to exclude [it]' (at [30]). This the court *a quo* did not do.

Assessment of circumstantial evidence – evidence of fingerprint and palm-print

S v Sibeko (unreported, FB case no ASH44/11, A116/13, 1 August 2013)

The two separate incidents giving rise to the appellant's convictions in this case involved, first, alleged housebreaking and theft from a house and, second, a theft from a car in a school yard. There were no eyewitnesses, and the convictions were based on circumstantial evidence: an expert testified that the fingerprint and palm-print lifted at the two crime scenes were indubitably those of the appellant. The appellant denied guilt. He did not dispute that the prints were his but offered innocent explanations for their presence, which he claimed were reasonable enough to cast doubt on the two convictions.

The court upheld the convictions for the following reasons:

- It followed the 'holistic approach' to circumstantial evidence set out in *R v Hlongwane* 1959 (3) SA 337 (A) at 340–1 and *S v Van der Meyden* 1999 (2) SA 79 (W) at 81B–C and followed in several decisions of the Supreme Court of Appeal, that the alibi defence does not have to be considered in isolation but, rather, 'in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses'.

- It followed, too, what was said by Nugent J in *Van der Meyden* (at 82A and C–E): that the court's conclusion, whether to convict or acquit, had to account for *all* the evidence; it was wrong to look at the exculpatory evidence in isolation. In *S v Trainor* 2003 (1) SACR 35 (SCA) the court warned against a piecemeal assessment of the facts, and in *S v Stevens* [2005] 1 All SA 1 (SCA) it warned against a 'compartmentalised approach' to assessing the evidence.
- Murray AJ (with whom Ebrahim J agreed) followed *S v Chabalala* 2003 (1) SACR 134 (SCA) at 139–140 at [15], where it was said that the 'correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude a reasonable doubt about the accused's guilt'.
- In respect of the cautionary rule relating to single witnesses, *S v Mahlangu & another* 2011 (2) SACR 164 (SCA) at [23] was followed: a failure by a court *expressly* to use the term 'cautionary rule' is not fatal as long as the substance of the rule was observed. It was 'trite', said Murray AJ, that a conviction could be based *solely* on the evidence of a fingerprint if the expert's evidence was clear and convincing: see *S v Arendse* 1970 (2) SA 367 (C).
- The court rejected the appellant's explanation as 'pure speculation' and as sufficiently improbable to warrant a conviction in the light of the evidence: see *Lachman v S* 2010 (2) SACR 52 (SCA) at [43]. It found it 'difficult to see how a defence [could] possibly be true if at the same time the State's case with which it [was] irreconcilable [was] "completely acceptable and unshaken"' (in the words of Nugent J in *Van der Meyden*).

ii. Sentencing

s 274(1): Lack of evidence for purposes of sentencing and protection of the right to a fair trial

In terms of the above section a court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. It is trite law that where the prosecution and defence fail to adduce such evidence, the court should take steps to receive such evidence. See *S v Rasengani* 2006 (2) SACR 431 (SCA) where Farlam JA noted that, given the general background of the case, the trial judge ought to have relied on s 274(1) in determining the presence or absence of substantial and compelling circumstances.

The unfortunate consequences of a court's failure to rely on s 274(1) are highlighted by the recent decision of the Supreme Court of Appeal in *Rasirubu v S* (unreported, (651/12) [2013] ZASCA 140, 30 September 2013).

In *Rasirubu* the accused was charged with, pleaded guilty to and was convicted of rape of a 13-year-old victim who suffered injuries confined to her genitalia (at [2]). The accused's s 112(2) statement, submitted in support of his guilty plea, 'merely recited the

elements of the offence' (at [5]). When testifying in mitigation, the accused expressed remorse, confirmed that he had a clean record and claimed that he was in grade 11, living with his unemployed mother and younger siblings whom he maintained financially by doing odd jobs (at [3]).

Despite the 'paucity of information' before the trial court when it considered and imposed sentence, the accused was sentenced to life imprisonment. The trial court, furthermore, had conducted no enquiry to determine the possible presence of substantial and compelling circumstances justifying a lesser sentence than life imprisonment as prescribed by s 51(1)*(a)* of the Criminal Law Amendment Act 105 of 1997.

At [5] Tshiqi JA (writing for a full bench) noted the following: there was no evidence of the circumstances surrounding the commission of the offence, nor any information concerning the relationship, if any, between the accused and his victim; no pre-sentence report was submitted, despite the accused's youthful age; there was no 'victim impact assessment report', and no evidence on the impact the rape had on the life of the victim. Reference was made to the following statement by Mpati JA in *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) at [13]: 'Life imprisonment is the heaviest sentence a person can be legally obliged to serve. Accordingly, where s 51(1) applies, an accused must not be subjected to the risk that substantial and compelling circumstances are, on inadequate evidence, held to be absent'.

At [5] Tshiqi JA concluded that the trial judge had misdirected himself because, even within the categories of rape identified in the minimum sentence legislation, 'there are bound to be differences in the degree of their seriousness as well as the facts and circumstances of each case'. The trial judge 'was not excused from his duty to ensure that all relevant information was placed before the court, regardless of the failure by counsel to do so' (at [6]).

Given the nature of the misdirection as described above, an appeal court would normally remit the matter to the trial court to receive the evidence required to enable it to exercise its discretion properly and pass sentence afresh. However, in *Rasirubu* there was a complication which called for a deviation from the normal appeal court order: the accused had been in custody since November 2004 (ie when he was sentenced by the trial judge) and he had, by the time of the appeal court judgment, effectively served a period of approximately nine years. This led Tshiqi JA to conclude as follows:

The appellant's continued incarceration pending the finalisation of the matter if it were to be remitted to the high court would . . . not be in the public interest. The interests of justice demand therefore that, in view of the passage of time, this court should impose what it considers to be an appropriate sentence based on the information at its disposal.

The accused was accordingly sentenced to imprisonment equal to the time already spent in prison, appropriately antedated to ensure that he would not have to serve any further period of imprisonment (at [8]–[9]).

One therefore has the rather quaint but inevitable situation that the 'paucity of facts' caused by the passive attitude of the trial judge (and the parties) that led to the material misdirection, was all that was available to the Supreme Court of Appeal in imposing sentence afresh. But this time around the appeal court as sentencing court could take into account that, in all fairness to the accused, finality in the criminal process demanded no further delay. It would, for example, have been somewhat farcical to have called for a pre-sentence report almost a decade after the commission of the offence, requiring a social worker to find sources who could reliably impart information pertaining to the relevant time and incident. Furthermore, any official questioning of, or interview with, the victim who would now have been in her early twenties, is in many respects risky and undesirable. The Supreme Court of Appeal did what it could, and ensured that the lack of information weighed in to the benefit of the accused in order to protect the constitutional right to a fair trial. The right to a fair trial includes fair sentencing procedures. See *S v Dzukuda & others*; *S v Tshilo* 2000 (2) SACR 443 (CC) at [9]. In *S v Mokela* 2012 (1) SACR 431 (SCA) at [14] Bosielo JA said that there is

the hallowed principle that, in order to arrive at a fair and balanced sentence, it is essential that all facts relevant to the sentence be put before the sentencing court. The duty extends to a point where a sentencing court may be obliged, in the interests of justice, to enquire into the circumstances, whether aggravating or mitigating . . . This is in line with the principle of a fair trial.

s 310A: Appeal by state against sentence for white collar crime with a difference

S v Boshoff (unreported, ECG case no CA &R 390/12, 27 September 2013)

In this case the state appealed, in terms of s 310A, against the trial court's sentence of an effective seven years' imprisonment imposed on the respondent who had pleaded guilty to, and had been convicted of, the following eight offences: four counts of fraud; a contravention of s 4(1)*(a)*(i)*(aa)* of the Prevention and Combating of Corrupt Activities Act 12 of 2004; defeating or obstructing the course of justice; incitement to commit a crime in contravention of s 18(2)*(b)* of the Riotous Assemblies Act 17 of 1956; and theft of three firearms which belonged to the South African Police Service (SAPS). These offences were all based on a dishonest and devious scheme devised by the respondent (hereafter 'accused') to satisfy his greed and not to meet a need (at [4], [5] and [32]). The accused was a lieutenant-colonel in SAPS, with 24 years' service (at [2]). He abused his office and power to set up the following system. He registered someone as a police informer and stole firearms from SAPS. He then had these firearms planted in or near the homes of innocent people. Having arranged this, he then claimed to have received information from the informer as to the whereabouts of the firearms. After the 'successful recovery' of the firearms the accused made a claim for the 'reward' to be paid

to the informer who would then pay 75% or more of the money so received to the accused (at [4]). For instance, in respect of counts 1 and 2 the reward was R20 000 for each event, with the informer's share as R5 000 and the accused's as R15 000

On appeal it turned out that the trial magistrate had failed to consider the prescribed minimum sentence applicable to law enforcement officers guilty of an offence involving an amount of more than R10 000 (at [14]). Section 51(2) of the Criminal Law Amendment Act 105 of 1997, read with Part II of Schedule 2, provides that a minimum sentence of 15 years' imprisonment must – in the absence of substantial and compelling circumstances – be imposed in respect of an offence of, amongst others, fraud committed by a law enforcement officer and involving an amount in excess of R10 000 (as was, indeed, the case in respect of the first three counts against the accused). The trial magistrate's failure to consider this provision amounted to a material irregularity, vitiating the sentences imposed by him and requiring the appeal court to pass sentence afresh.

At [25] Plasket J (Eksteen J concurring) noted as follows:

The first factor that makes this case more serious than the run-of-the-mill white-collar crime is [the accused's] cynical disregard for the dire consequences of his scheme on innocent people. This is plastered on top of the layer of dishonesty represented by the theft of the firearms with the ultimate goal of defrauding money from the public purse. The irony is great: he defrauded the State of money intended for the combating of crime.

The court also made the telling observation that the damage that the accused's conduct 'does to the administration of justice is difficult to over-state' (at [27]). At [31] it was said that '[t]he idea of a senior policeman using his knowledge of the system, his experience and his expertise to frame innocent citizens for his own pecuniary gain should send shudders down the spines of right thinking people'. The accused also planned and committed his offences over a period of ten months and had ample time to reconsider, yet carried on regardless so that he could benefit financially from his unlawful activities at the expense of the taxpayer and the rights of his innocent victims (at [32]). The accused also tainted the informer system. This much is confirmed by Plasket J's observation that the scheme of the accused 'fed off the closed and confidential nature of the system of informers and their payment, which makes the system vulnerable to unlawful schemes like this. [The accused] used this weakness to his advantage' (at [33]).

The accused's abuse of the informer system, as highlighted by Plasket J, goes to the core of the matter. Police in countries across the world make use of the informer system – without informers they would be severely hampered in their attempts to prevent, detect and investigate crime. 'The informer system' said Kriek JP in *Els v Minister of Safety and Security* 1998 (2) SACR 93 (N) 101*b* 'is one of the cornerstones of the battle

against organised crime'. Any police abuse of the system of informers (the very system developed in terms of our common law in order to assist the police and protect society) should not be tolerated.

Plasket J paid special attention to the interests of society (at [34]–[38]). At [39] he noted that society is 'sick and tired of the widespread corruption on the part of state functionaries that has become endemic in this country'.

The personal circumstances of the accused, it was found at [42], had to 'pale in the face of the aggravation . . . present'; and it was accordingly concluded that in all the circumstances of the case – both mitigatory and aggravating – the accused's personal circumstances could not qualify as substantial and compelling circumstances justifying a departure from the minimum sentence of 15 years' imprisonment in respect of counts 1 to 3. The sentences on all the counts were ordered to run concurrently so that the accused would have to serve an effective 15 years' imprisonment, antedated to 31 August 2012, ie when the accused was sentenced by the magistrate.

iii. Appeal and Review

Review: Inherent jurisdiction of High Court where Child Justice Act 75 of 2008 not applied

In *S v Gxaleka* 2013 (2) SACR 399 (ECB) the High Court had to invoke its inherent jurisdiction to review the proceedings in the lower court before the conclusion of such proceedings in that court. Although this is a power to be exercised sparingly, the circumstances of the case were such that it was necessary to avoid a grave injustice that would have resulted in the absence of a review.

In *Gxaleka* the fact that the accused was under the age of eighteen only came to the magistrate's attention during the cross-examination of a state witness. The age of the accused was a crucial fact. It was known to the legal representative of the accused that the accused was under the age of eighteen but he, for some inexplicable reason, never brought this fact to the attention of the prosecutor prior to the commencement of the trial; nor did he do so before entering a plea (at [21]). The result was that the accused was not dealt with in terms of the Child Justice Act. At [18] Dukada J (Van Zyl J concurring) observed as follows:

In my view the failure in these proceedings to deal with the accused as a child in terms of the Child Justice Act, but instead to conduct these proceedings in accordance with the Criminal Procedure Act 51 of 1977, was a serious anomaly tantamount to a gross irregularity and with a great potential to lead to a miscarriage of justice in respect of the accused.

It should be recalled that in terms of s 4 of the Child Justice Act (which came into operation on 1 April 2010), the Criminal Procedure Act applies in relation to children except in so far as the Child Justice Act 'provides for amended, additional or different provisions or procedures'. These different provisions and procedures cannot be ignored, especially since they seek to accommodate the child in a wide range of measures which include preliminary enquiries, diversion processes, sentencing options, etc. See also *S v RS & others* 2012 (2) SACR 160 (WCC) at 164*a–c*.

In *Gxaleka* (supra) it was concluded that '[a] failure to intervene in these proceedings would result in great injustice to the child, which the Child Justice Act seeks to prevent' (at [22]). The proceedings in the lower court were accordingly set aside; and an order was given that the trial of the accused should commence *de novo* in accordance with the Child Justice Act (at [24]).

A case like *Gxaleka* also emphasises the importance of proper age determination prior to trial. See also Dukada J's references to s 15 of the Child Justice Act and s 337 of the Criminal Procedure Act (at [8] and [9]). The latter section is discussed in detail in *Commentary*, where attention is also given to expert medical evidence as regards age, s 337 sv *Some physical indicators doctors rely on in estimating age*.

In *Gxaleka* concern was expressed that the age of the accused and the applicability of the Child Justice Act had escaped the attention of the prosecutor who handled the case, especially since the National Director of Public Prosecutions has, in accordance with s 97(4) of the Child Justice Act, issued directives published under GN R252 in *GG* 33067 of 31 March 2010, which the Director of Public Prosecutions having jurisdiction, and his prosecutors, should follow in order to secure the goals of the Child Justice Act (at [20]). It should be noted that these directives – which are indeed of the utmost importance to secure prosecutorial implementation of the Act – also appear in the Supplementary binder to *Commentary* in the section 'National Prosecuting Authority' and are headed 'Directives (Public Prosecutions), 2010 in terms of s 97(4) of Child Justice Act 75 of 2008'.

Finally, in *Gxaleka* Dukada J stressed 'that legal practitioners also have a role to play in ensuring that the objectives of the Child Justice Act are achieved' (at [21]). The whole review would have been unnecessary if the attorney had, prior to trial, shared his knowledge of the accused's age with the prosecutor.

Review of prosecuting authority's decision to withdraw charges

Freedom Under Law v National Director of Public Prosecutions & others 2014 (1) SA 254 (GNP)

In the above matter the applicant, a public interest organisation known as Freedom Under Law (hereafter 'FUL'), sought an order directing the National Prosecuting Authority to reinstate several withdrawn criminal charges (which included murder, fraud and corruption) against the fifth respondent. It also sought an order directing that the criminal charges concerned be immediately reinstated and prosecuted to finalisation. FUL succeeded in obtaining both orders sought. Murphy J held that a review of the decision not to prosecute is constitutionally permissible and required, and also not excluded by the Promotion of Administrative Justice Act 3 of 2000 (at [124]–[126]). In terms of s 1*(ff)* of PAJA only decisions to institute or continue a prosecution are excluded from the definition of administrative action (at [124]); and a decision 'to withdraw criminal charges or to discontinue a prosecution . . . meets each of the definitional requirements of administrative action' (at [131]).

The fraud and corruption charges were withdrawn by the third respondent, a Special Director of Public Prosecutions who was the Head: Specialised Commercial Crime Unit. However, it was held that in terms of s 24(3) of the National Prosecuting Act 32 of 1998, he could only have done so with the concurrence of the Director of Public Prosecutions concerned (at [153]). Murphy J held that, on the facts, the third respondent did not have such concurrence (at [159]). It was for this reason – and various other reasons – that the third respondent's decision and instruction to withdraw the fraud and corruption charges had to be set aside: 'It was illegal, irrational, based on irrelevant considerations and material errors of law, and ultimately so unreasonable that no reasonable prosecutor could have taken it' (at [176]).

The decision by or on behalf of the NDPP to withdraw the murder and related charges was also reviewed and set aside. It was held that this decision 'was taken in the face of compelling evidence [and was] irrational and therefore reviewable on legality and rationality grounds, as well as in terms of section 6(2)*(e)* and *(f)* of PAJA and falls to be set aside' (at [186]).

Counsel for the NDPP submitted that the criminal charges be referred back to the NDPP for a fresh decision instead of the court ordering a prosecution. This submission drew the following response from Murphy J (at [237]):

I would venture the old adage: "where there is a will there is a way". In the hands of skilled prosecutors, defence counsel and an experienced trial judge, I am confident that justice will be done on the evidence available, leading as the case may be to convictions or acquittals on the various charges in accordance with the law and justice. But more than ever, justice must be seen to be done in this case. The NDPP and the DPPs have not demonstrated exemplary devotion to the independence of their offices, or the expected capacity to pursue this matter without fear or favour. Remittal back to the NDPP, I expect, on the basis of what has gone before, will be a foregone conclusion, and further delay will cause unjustifiable prejudice to the complainants and will not be in the public interest. The sooner the job is done, the better for all concerned. Further

prevarication will lead only to public disquiet and suspicion that those entrusted with the constitutional duty to prosecute are not equal to the task.

As far as could be established, *Freedom Under Law v National Director of Public Prosecutions & others* is the first South African case where a court not only set aside the prosecution's decision to withdraw criminal charges but also ordered that the cases concerned 'be prosecuted diligently and without delay' (at [24.1*(e)*]).

Review: Nature of irregularity envisaged in s 24(1)*(c)* of the Supreme Court Act 59 of 1959

In *S v Marques* 2013 (2) SACR 369 (GNP) it was held that a discovery during cross-examination of a state witness that the prosecutor had, two days prior to trial, assisted the witness to change his statement, was not a gross irregularity as envisaged in s 24(1)*(c)* of Act 59 of 1959 and that the matter was not reviewable prior to conclusion of the proceedings. The complaint did not involve a mistake in law or an incorrect application of the law (at [10]). There was also no complaint 'against the method of proceedings conducted by the presiding judicial officer' (at [8]). At [7] Phatudi J said: 'A gross irregularity in lower court proceedings means an irregular act or omission *by the presiding judicial officer* in respect of the proceedings'. Emphasis added.

In the present instance the trial magistrate should have proceeded with the trial. It was his duty to evaluate the credibility and reliability of the evidence tendered (at [12]). No statutory intervention by the High Court was required and the High Court also refused to invoke its inherent jurisdiction (at [13]).

It should be noted that in *Marques* neither the automatic review procedure in terms of s 302 nor the special review provisions under s 304(4) of the Criminal Procedure Act covered the situation because not only had no sentence been passed but both accused in the matter had legal representation. See generally *S v Gxaleka* 2013 (2) SACR 399 (ECB) at [6].

The case was accordingly remitted to the trial magistrate 'for hearing of the matter to finality' (at [15]).

Table of Cases

Click here to see the full Table of Cases of the *Criminal Justice Review No 2 of 2013*

Review

Click here for a printable .pdf version of this Revie

NEW RELEASES FROM JUTA

Sexual Offences - Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 & Regulations; Sexual Offences Act 23 of 1957
Criminal Law Casebook / Strafregsakebundel
Criminal Procedure Act 51 of 1977 & Regulations
Domestic Violence Act 116 of 1998 & Regulations
Probation Services Act 116 of 1991 & Regulations
Bail: A Practitioner's Guide
Guide to Bail Applications, A
Criminal Procedure Workbook
Commentary on the Criminal Procedure Act (Du Toit)
Sexual Offences Commentary