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'To No One Will We Sell, To No One Deny or Delay Right or Justice'

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EDITORIAL

Dear readers,

Welcome to the July edition of our monthly newsletter. This issue is dedicated to the rights of children as well as to the combat against child abuse, more particularly sexual offences against children. The DPP has renewed his commitment for a concerted approach with all stakeholders in this area.

In this edition, we review the steps taken by our Office in this area and confirm our engagement in promoting children's rights, whether by way of carrying out training with officers of relevant authorities or by having recourse to awareness campaigns through publications such as 'Tanya so Zistwar'.

We publish an article received at our end from a student of Phoenix SSS on his vision for a better tomorrow and less abuse on children- this is at page 12.

We look at the recent Supreme Court judgment in the case of *Madhewoo M. v The State Of Mauritius and Anor* and the issues raised by the biometric card (page 6). An article on the infamous Ponzi Schemes, and how to recognise them, is also included.

Training workshops at the ODPP this month are reported on .

We wish you a pleasant and fruitful reading!

Miss Anusha Rawoah,

State Counsel

Tirer la sonnette d'alarme sur l'abus sexuel des enfants

Le Bureau du Directeur des Poursuites Publiques réaffirme son allégeance à une répression draconienne des abus sexuels perpétrés sur les enfants. Nos 'Newsletters' antérieurs témoignent de l'engagement de prioriser ces faits de sociétés dans le collimateur de la justice. La vulnérabilité entachée à la personne de l'enfant justifie que ce fléau soit érigé en priorité nationale, comme nous l'avons fait ressortir dans le 'Newsletter' d'avril 2015. La pornographie, le 'sexting', le commerce de l'exploitation sexuelle sur les enfants, le devoir de divulgation des psychologues, le contre-interrogatoire des enfants ainsi que l'introduction d'un 'Sexual Risk Order', sont tant de thématiques qui ont été abordées précédemment par le Bureau du DPP afin d'illustrer l'envergure du danger. De 2012 à 2014, les statistiques démontrent une croissance alarmante des cas rapportés, dénombrant plus de 400 plaintes pour l'année 2014.

Avant d'envisager l'efficacité des poursuites concernant les infractions sexuelles commises contre les mineurs, il conviendrait de fixer une préoccupation prioritaire sur l'intérêt supérieur de l'enfant. Si les textes nationaux et internationaux donnent une définition de l'enfant par rapport à son âge, ils n'en donnent pas de celle de l'intérêt de cet enfant. Il est souvent dit que ce n'est pas à l'enfant d'apprécier son propre intérêt, car il n'a pas de capacité juridique ou peut manquer de discernement, mais à ses parents ou au juge si ces derniers sont défaillants. A cet effet, la convention de New York relative aux droits de l'enfant (1989) dispose, dans son article 3-1, que « l'intérêt supérieur de l'enfant doit être une considération primordiale », et c'est l'un des principes fondamentaux sur lesquels ce traité s'appuie. La coutume est de retenir surtout cet article de la Convention lorsque l'intérêt de l'enfant est évoqué.

L'efficacité des poursuites engagées va de pair avec le volume de dénonciation de ces comportements. La signalisation de ces agissements a été favorisée par la publication et la distribution de « Tanya so Zistwar », une bande dessinée, adressée principalement aux enfants, les habilitant à s'identifier en tant que victime d'abus sexuel et de faire le pas vers la dénonciation. Force est de constater que l'appréhension de ce phénomène passe par une synergie des institutions publiques, du secteur privé et des membres de la société civile. Il serait inopérant de vouloir parler d'abus sexuel à des enfants quand il existe une hostilité initiale à aborder le sujet du « sexe ». Ainsi l'intervention des officiers du bureau du DPP dans les institutions scolaires se heurte à l'imperméabilité d'adresser le sujet. L'ère technologique façonne favorablement un environnement interactif, accessible aux enfants et convoité par les prédateurs sexuels. Il appartient à tout un chacun, surtout aux fournisseurs de service internet et aux autorités compétentes, de s'assurer que l'usage d'internet par les enfants soit filtré et surveillé.

Une question qui resurgit fréquemment dans le débat est celle qui a trait à la majorité sexuelle. Une discordance entre les dispositions du code pénal et celles du «Child Protection Act 1994 » est pointée du doigt. En effet, alors que l'article 249(4) du Code Pénal condamne les « relations sexuelles » avec une personne de moins de 16 ans, la combinaison des articles 2 et 14 du « Child Protection Act 1994 », prévoit que des « abus sexuels » sur un enfant, c.à.d. un mineur non-marié de moins de 18 ans,

constitue un délit. Selon les terminologies utilisées par le législateur, on constate que l'acte matériel n'est pas le même. L'acte sexuel et l'abus sexuel sont fondamentalement différents. Le terme « non-marié » prévu par le « Child Protection Act 1994 » peut être interpréter à contrario pour déduire que le texte de loi ne concerne pas ceux sur lesquels pèse une présomption d'émancipation sexuelle par le mariage qui, selon les dispositions civilistes, peut être autorisé à partir de 16 ans.

En dépit de l'indifférence du consentement de la victime dans les deux cas, la notion « d'abus » manifeste un degré de gravité supérieur qui se constate par la gravité des sanctions imposées. En effet, alors que le « Child Protection Act 1994 » sanctionne à un maximum de 20 ans d'emprisonnement, et de 30 ans si la victime a un handicap mental, le code pénal prévoit quant à lui une peine maximale de 10 ans. D'ailleurs, l'article 249(7) du code pénal exonère le suspect si ce dernier prouve qu'il a eu la croyance légitime que la victime avait plus de 16 ans. Les dispositions du « Child Protection Act 1994 » sont plus rigides et n'accordent aucune dérogation au principe de responsabilité pénale.

Tous ces éléments tendent à étayer l'argument selon lequel, la question de majorité sexuelle ne relève pas du «Child Protection Act 1994 », qui a comme finalité première d'engager des poursuites à l'encontre de personnes perpétrant des 'abus sexuels' sur une personne non-mariée de moins de 18 ans. La majorité sexuelle, qui est l'âge à laquelle on peut avoir des rapports sexuels sans courir le risque de faire l'objet d'une poursuite, est indubitablement fixée à 16 ans. Ceci n'exclut pas la protection accordée par le « Child Protection Act 1994 » à une personne de 16 ou 17 ans, qui serait sujet à des abus sexuels. La question épineuse a plutôt trait à la notion « d'abus sexuel » qui est défini par la section 14(2) du « Child Protection Act 1994 » comme une activité pornographique, obscène, indécente ou toute autre exploitation. Il incombe ainsi à nos juridictions de privilégier une approche qui tendrait à la protection de l'enfant sans négliger la présomption d'innocence qui pèse sur le suspect.

L'article 249(5) du code pénal établit également une liste de personnes à l'encontre desquelles des relations sexuelles ou un attentat à la pudeur, qu'ils soient consentis ou non, sont prohibés et les peines aggravées. Parmi ces personnes figurent les ascendants et descendants et alliés dans la même ligne, les frères et sœurs, les oncles et nièces, les tantes et neveux, les beaux enfants, les enfants adoptifs, les enfants sous garde légale et tout enfant ou toute personne ayant un handicap mental vivant sous le même toit que l'agresseur. Dans ce contexte, la peine maximale pour un attentat à la pudeur est rehaussée à 8 ans tandis que la peine prévue pour les relations sexuelles est de 30 ans maximum. L'aggravation de la peine s'explique par la présomption de l'existence préalable d'une relation de confiance qui aurait été exploitée pour faciliter l'acte. On constate que dans la majorité des cas, les prédateurs sexuels ne sont pas étrangers aux victimes.

Nonobstant l'argumentaire ci-dessus, la législation mauricienne doit faire l'objet d'une approche contemporaine à la lumière de l'évolution des comportements. La loi doit répondre à l'impératif de précision et de clarté afin de démocratiser autant que possible la connaissance du fonctionnement des instruments juridiques disponibles pour cerner et traiter le problème. Les textes de loi concernant la protection des enfants doivent être accessibles à tous les protagonistes qui composent l'environnement habituel de l'enfant tel que les parents ou les enseignants. Le lexique juridique employé doit permettre à tout

un chacun d'identifier un cas d'abus sexuel et de le dénoncer. La question d'une réforme et d'une harmonisation législative mériterait peut être un questionnement nouveau.

L'efficacité de la procédure pénale est inhérente à la garantie d'une condamnation dans les cas d'abus sexuels. Il a été suggéré que la procédure pénale qui entoure les abus sexuels sur les enfants doit faire l'objet d'une table ronde autour de laquelle les principaux protagonistes, tels que les officiers du CDU, les avocats du parquet, les 'Probation Officers' ou les membres de la force policière, se réunissent pour valider une approche coordonnée. Par ailleurs, l'établissement de procédures accélérées (fast-track procedures) devrait être préconisé car la prolixité du délai influe bien souvent sur la motivation de la victime de collaborer. Le procès est un rappel constant du traumatisme qu'a vécu l'enfant et devrait être écourté autant que possible. Il serait également plus adéquat d'assouplir le test de crédibilité applicable aux témoins car les enfants reflètent souvent une dépendance à l'égard de leurs agresseurs surtout dans le milieu familial ou dans les zones d'exclusion et ont ainsi tendance à retourner auprès d'eux. Ceci devrait être pris en considération lors de la recevabilité des témoignages.

Comme le fait ressortir Zaynah Essop, State Counsel, dans la 27e édition du Newsletter, le contre-interrogatoire des enfants suscite souvent des inquiétudes quant à l'obtention des preuves. Les techniques utilisées sont parfois enclin à intimider l'enfant qui, en se rétractant, n'est plus apte à formuler l'expression de la réalité. Dans des cas répertoriés, les affaires sont classées sans suite parce que l'enfant, le témoin principal, fait un blocage face à l'agressivité des interrogations. Les avocats ont ainsi le devoir d'adapter leurs questions et leurs formulations en fonction de l'enfant, et le respect de ce devoir doit être garanti par les juges et les magistrats. Dans certaines juridictions, la liste des questions posées aux enfants est soumise préalablement au juge ou au magistrat qui opère une validation avant que ces questions ne soient posées en Cour.

Parallèlement, l'ambiance qui règne au sein d'une Cour de Justice peut s'avérer être angoissante pour un enfant. A ce niveau, les Cours commencent graduellement à être aménagées pour apaiser l'enfant. La preuve présentée à huit clos (evidence in camera) ou les preuves recueillies par vidéoconférences (evidence by live video link), sont des dispositions législatives existantes dont l'usage devrait primer sur les méthodes classiques en la matière. On note également que la contrainte financière joue aussi sur la continuité de la poursuite. Des cas sont abandonnés faute de moyen suffisant pour la famille de la victime de se déplacer à la Cour. L'enfant doit être accompagné tout au long de la procédure et cet accompagnement requiert un représentant qui aurait les compétences nécessaires pour rassurer la victime à chaque étape.

Hormis la répression des crimes et délits, le volet de la réhabilitation doit être partie intégrante de la politique pénitentiaire. L'efficacité d'une peine d'emprisonnement se mesure à la lumière de la réinsertion sociale et de la récidive. L'intervention de psychologues et de psychiatres est déterminante à ce niveau. La réhabilitation doit également s'étendre à la victime. L'obtention d'une condamnation est nécessaire mais pas suffisante. Les séquelles ont des répercussions importantes sur l'épanouissement de l'enfant et celles-ci devraient être comprises et traitées aussitôt que possible.

Dans le cadre de la formation des officiers, qui sont confrontés aux litiges en matière d'abus sexuel, le bureau du DPP a organisé et a participé à plusieurs sessions interactives concernant les droits des victimes tant au niveau national qu'international dans un élan de mieux protéger l'intérêt supérieur de l'enfant : C'est la considération primordiale du bureau du DPP. Dans la sphère internationale, une conférence a été organisée par le « Africa Prosecutors Association », datant du 13 au 15 novembre 2013, à Maputo, à laquelle ont participé plusieurs officiers du bureau du DPP sur la thématique suivante : « Protecting the vulnerable against gender and sexual based violence crimes » (Issue 31, DPP's Newsletter). Dans le context national, une justice efficace pour des enfants victimes de violences sexuelles passe aussi par une formation spécialisée des officiers du « Child Development Unit ».Dans cette lignée, en avril 2015, le bureau du Directeur des Poursuites Publiques a été sollicité par le ministère de l' Egalité des Genres, du Développement de l'enfant et du Bien-être de la famille , afin de dispenser des cours de formation aux officiers de la CDU. La formation a été délivrée par les officiers du bureau du DPP, membres du « Victim and Witness Support Unit ».

Conforme à la campagne nationale de sensibilisation qui est menée à Maurice en ce moment, le bureau du DPP s'engage à fournir son artillerie pour prévenir et neutraliser le phénomène d'abus sexuel sur les enfants. A ce titre, des ressources ont été déployées pour former les officiers du bureau afin qu'ils puissent gérer les affaires de cette nature. Les conférences nationales et internationales sont impératives afin que le droit mauricien soit constamment irrigué par des idées novatrices. Pour sa part, le « Victim and Witness Support Unit » au sein du bureau du DPP œuvre pour la démocratisation de la connaissance du droit en organisant des ateliers de formation pour les officiers qui sont en lien direct avec les enfants, tel les officiers de la « Child Protection Unit » ou les membres de la force policière.

Conclusion

Nous sommes face à un danger qui pénètre indistinctement toutes les couches sociales nécessitant un élan déterminé de tout un chacun. Le Bureau du Directeur des Poursuites Publiques rejoint la dynamique amorcée et déploiera ce qui est nécessaire pour neutraliser et réprimer ces abus.

Mr Satyajit Boolell SC,

Director of Public Prosecutions

Constitutional right to privacy: Fighting identity fraud in a vulnerable security system

The eagerly-awaited judgment on the constitutionality of the **National Identity Card Act 2013** has temporarily soothed the climate of uncertainty prevailing in the Mauritian legal order in this area. The decision handed by our jurisdiction has the merit to be focused upon for our constitutional right to privacy has taken a major turning point.

The verdict is based on the principle that although section 9 of the Mauritian **Constitution** is not similar to the provisions of the **European Convention on Human Rights (ECHR)** and that section 3 does not afford constitutional safeguards against the taking of fingerprints, ECHR jurisprudence affords persuasive guidance on the content of fundamental rights which call for a generous interpretation. The Constitution should not be narrowly construed in such a manner as to produce "anomalies" and "inconsistencies".

According to the Court, the terms "search of his person" enshrined in section 9(1) "no doubt" need to be viewed through the lens of a purposive interpretation, thereby extending the protection to "any undue intrusion or any examination or inspection of any part of the body of the person". Fingerprints, which contain sensitive personal information about an individual, are highly personal and private in nature. The coercive taking of fingerprints and the extracting of its minutiae thus, according to the Court, fall within the scope of the protection afforded to the integrity and privacy of the person under section 9(1) of the Constitution.

This being affirmed, the provisions of the **National Identity Card Act 2013** were held to however "reasonably interfere" with constitutional rights under section 9(1) on the grounds of public interest, which in this context was comprised of safeguarding against identity fraud by having a reliable system of identity authentication. In order to sustain that the Act pursued a legitimate aim, the Court considered that the legal provisions created a "sound and secure identity protection system for the nation", thus answering a "pressing social need". It is worth noting that the plaintiff also failed to prove that the interference was not justified in a democratic society.

The second part of the decision deals with the constitutionality of storage and retention of a person's fingerprints and other biometric data. Such registration is already provided by existing legislation, namely the **Data Protection Act** and therefore constitutes a public order justification. For similar reasons as above, the storage and retention of data is being considered to respond to a "pressing social need", a legitimate aim addressed at combatting identity fraud. Nonetheless, based on expert evidence adduced the indefinite period of storage coupled with risks and dangers associated with the vulnerable security features, do not tip in favor of the proportionality of the measure with regards to the legitimate aim pursued. The Courts averred that "there is a high potential for misuse and abuse". Moreover, the storage and retention is not justifiable in a democratic society since under the **Data Protection Act**, there is already a low threshold for obtaining access to personal information. "It is inconceivable to the court that there can be such uncontrolled access to personal data in the absence of vital safeguards afforded by judicial control".

Should an appeal arise, it would most certainly be directed towards appreciating whether in the present context, the safeguard of identity fraud by identity authentication is a "pressing social need" amounting to a public interest, which would in turn justify a "reasonable interference" with the fundamental right to privacy enshrined in section 9(1) of our constitution. If and until this happens, the coercive nature of providing fingerprints for the purpose of the **National Identity Card Act 2013** is legally binding upon all citizens.

Ajmal Toofany, Legal Research Officer

Charles Ponzi's infamous legacy

Recently, Ponzi schemes have been making the headlines. Belvedere, Sunkai and White Dot are amongst the most important suspected Ponzi schemes being investigated. People should exercise extra care when investing their money.

There is no legal definition of what amounts to a Ponzi scheme. My understanding of how a Ponzi Scheme functions comes from the case of Charles Ponzi, who in 1919 in Boston elaborated a scam to swindle people: he claimed that postal coupons purchased in Europe could be redeemed in America for six times their value, due to the difference between currency values. He promised the people who invested with him that they could double their money within 90 days. That is an interest rate of 100% over a period of 90 days. This was a highly attractive alleged return on investment. However, Ponzi was not trading those coupons. In reality, he was paying out investors' returns using the money coming from new investors' money.

As such, a Ponzi Scheme is regarded as a scheme where the company does not invest its money to be able to provide returns to pay its clients. Instead, it pays clients using the money coming from newer clients. There is thus no complicated investment being done by the company, but simply an exercise of book-keeping where the company makes sure that clients are being paid on time. This is the simplistic description of a Ponzi Scheme. But a company can start off as a legitimate business, and later turn into a Ponzi where part of its activities is being run in that way.

In essence, a Ponzi Scheme needs a constantly increasing inflow of money to avoid crashing. This is why it is also referred to as a Pyramid Scheme. The day the inflow is not sufficient, it will no longer be able to remunerate its clients, thus causing the scheme to crash.

There are certain features that can help spot a Ponzi Scheme:

- High returns with little or no risks: usually, any investment carries a level of risk. The higher the risk, the higher the potential return. Ponzi schemes on the other hand, purport that they will provide very high returns over a short period of time, with no risk of losing the client's money. This should raise suspicion
- Overly consistent returns: returns on investments are subject to the relevant market conditions. When the relevant market is up, the return increases. When the relevant market is down, the return decreases. A Ponzi scheme however, typically provides steady returns, regardless of market conditions.
- Unregistered products: Ponzi Schemes promoters usually sell products which have not received the necessary approvals from the regulators. Registration is the process where the regulator accesses the products to make sure it complies with all the laws and regulations which are intended to protect the market and protect the clients. However, not everyone will think about checking that a financial product they are buying is duly registered.
- Unlicensed sellers: the law in Mauritius provides that all professionals and investment companies operating in Mauritius must be registered and licensed by the Financial Services Commission or the Bank of Mauritius, depending on their field of activity. However, not everyone will try and verify that the company is duly licensed to operate before they invest with the company.

- Difficulty in receiving payments: further suspicions should arise when an investor is having problems to receive a payment or to cash out. Ponzi Scheme promoters try as much as possible to prevent clients from cashing out so that they do not run into a liquidity problem which could cause the scheme to crash.

So far, there are few cases that have been uncovered in Mauritius and we are yet to see one be prosecuted. In France, Ponzi Scheme promoters have been prosecuted under the offence of swindling, which is similar to article 330 of our **Criminal Code**, which provides that: "any person who, by using a fictitious name, or assuming a false character, or by employing fraudulent pretenses, to establish the belief of the existence of any fictitious operation or of any imaginary power or credit, or to create the expectation or apprehension of any success, accident or other chimerical event, or who, by means of a cheque drawn on any banker in Mauritius to the order of any person or to bearer, for the payment of which there is insufficient provision at the time of the presentment thereof, obtains the remittance or delivery of any funds, movable property, obligation, condition, bill, acknowledgement, acquaintance or discharge, and by any such means as aforesaid, swindles another person out of whole or of a part of his property shall be punished by penal servitude for a term not exceeding 20 years, and by a fine not exceeding 150,000 rupees".

In the United Kingdom, the **Fraud Act 2006** provides for the offence of "fraud by false representation". As such, a person is in breach of section 2 of the **Fraud Act 2006** if he "dishonestly makes a false representation, and intends by making the representation (i) to make again for himself or another, or (ii) to cause loss to another or to expose another at a risk of loss". The same Act provides that a representation is false if "it is untrue or misleading", and "the person making it knows that it is, or might be, untrue or misleading". There is also section 9(1) of the **Fraud Act** which criminalizes the offence of "fraudulent trading", defined as "carrying a business with intent to defraud creditors of any person or for any fraudulent purpose". For example, these two offences have been used successfully in the case of **R v Atkinson [2009] All ER (D) 79 .**

I believe that, in order to try to avoid investing in a Ponzi Scheme, people should be on the lookout for the characteristics described above. In case they have any doubt before investing in a company, they should contact the FSC to ensure that the company is duly registered and licensed, and that the financial product they intend to invest in is duly registered and authorized by the regulator.

Yudish LUTCHMENARRAIDOO ,

Pupil

4th Regional Prosecutors Conference on Piracy and Maritime Crime - DJIBOUTI

I was honoured to participate as a facilitator in the 4th Regional Prosecutors Meeting dealing with piracy and other maritime crimes in Djibouti on the 14th and 15th June 2015 organised by EUCAP Nestor. EUCAP Nestor aims to support the development of maritime security systems in the Horn of Africa/Western Indian Ocean states, thus enabling them to fight piracy and other maritime crime more effectively and to reduce the freedom of action for those involved in piracy in the region.

Prosecutors from Somalia – Mogadishu, Puntland, Galmudug, and Somaliland – participated in the event as well as prosecutors from Seychelles and Djibouti, a Supreme Court Judge from Seychelles and an academic from the University of Nairobi.

The conference started with a mock arrest of Somalian pirates performed at sea, facilitated by the personnel of EUNAFOR Atalanta ship, Fregatte Bayern, a German warship. This was followed by a mock trial. The participants were split into defence and prosecution teams and judges delivered a final verdict. I facilitated the prosecution team by ensuring that everyone in the prosecution team was fully involved in the mock trial, advised and supported each member of the team to overcome the challenges of working through interpreters.

It is to be noted that the participants were from both adversarial and civil law systems, but a common approach was adopted for the purposes of the mock trial. It came with various challenges which were somehow successfully circumvented.

The conference continued with interesting sessions dealing with "The challenges of prosecuting suspected pirates in domestic courts" and "Lessons learned on prosecuting piracy cases".

The efforts of Seychelles in this area were commended as the Office of the Attorney-General, in collaboration with the UK's Crown Prosecution Service, published a handbook on prosecuting piracy cases. Each participant was handed a copy to take to their home country.

Ashwina Joree, State Counsel

Financial Interview: Practical Techniques workshop by My Eugene McConville

On 25th June 2015, the Office of the Director of Public Prosecutions held a third Asset Recovery workshop entitled "Financial Interview: Practical Techniques," by Mr McConville Eugene, AML Consultant at UNODC. The one day workshop was attended by several representatives from the CCID, ICAC, MRA as well as law officers of the ODPP and the investigative officers of the Asset Recovery Unit.

The main goal of the workshop was to enhance the participants' understanding about the value of interviewing a witness or suspect and to ensure the understanding of legalities and human rights. Furthermore, the session aimed to assist the participants in identifying areas that may lead to other lines of inquiry or investigations and to show how interviews can ultimately assist in asset recovery opportunities.

The focus of the first session was mainly on the process for conducting interviews using the framework known as the 'PEACE' model of interviewing, a thorough model used to guide the investigative interview process. While the workshop was more geared towards the methods for approaching interviews on planning and preparation, every individual was able to gain valuable information and knowledge which could be applied in almost every type of interviews.

The second half of the day which consisted of a practical role play exercise on interviewing a suspect/witness, allowed the participants to apply the knowledge acquired in the first session.

Throughout this workshop, the ability to strategically plan and execute effective interviews was pointed out as a key attribute for every successful interviewer.

Miss Toshika Bobeechurn,

Legal Research Officer

2ème Session interactive de Droit Pénal avec le Professeur Romain Ollard

Dans un élan de continuité des sessions interactives de droit pénal débutées le 6 et 7 mai 2015, sous la direction du Professeur Romain Ollard, le bureau du Directeur des Poursuites Publiques a eu l'honneur de recevoir l'éminent professeur afin de diriger une deuxième rencontre le 9 et 10 juin 2015. Au cours de ladite session, des questions précises du droit pénal spécial entre des membres de différentes institutions telle que la Law Reform Commission, les membres du bureau du DPP et d'autres personnes émanant de la profession légale ont été soulevées.

Par conséquent, cela a débouché sur des constats concernant des vides juridiques dont notre droit pénal peine encore à trouver une réponse adéquate.

Le parcours juridique passionant et hors pair du pénaliste, originaire de Bordeaux, ayant déjà été traité au cours du « DPP's Newsletter » du mois dernier, nous nous attarderons pas sur ce point. Les thèmes abordés lors du rencontre interactif visent la sphère des atteintes contre les personnes, d'une part(telles que le meurtre, l'euthanasie ou encore l'atteinte contre l'intégrité du cadavre) et d'autre part, les atteintes contre les biens (telles que l'escroquerie, l'abus de confiance ou le vol). Comme argumenté par le Professeur, un même fait peut faire l'objet d'un concours de qualification. Par le biais de plusieurs cas pratiques calqués sur des faits d'espèces, le Professeur Ollard donne son avis sur lesdites problèmes juridiques en se fondant sur une analyse du droit positif français. Néanmoins, les solutions apportées par le pénaliste français se heurtent souvent à l'obsolescence de certaines dispositions légales mauriciennes. La raison de cette conséquence semble être flagrante selon le pénaliste. En fait, même si notre droit pénal fut inspiré du code napoléonien de 1810, force est de constater que le code de 1810 a fait l'objet de 200 ans d'évolution légale et jurisprudentielle dans un but d'adaptation aux mœurs sociaux alors que le droit pénal mauricien est resté figée, pour une grande partie de ses dispositions, sur le code de 1810. L'exemple pris par le spécialiste de droit pénal est l'hypothèse de l'abus de confiance où notre droit pénal est cerné par les contrats limitativement énumérés par l'ancien code pénal (1810). Or, le droit positif français a fait l'objet d'un élargissement du champ d'application de l'abus de confiance dans la mesure qu'un abus de confiance peut être constitué en dehors de tous contrats.

Ce fut une session interactive enrichissante sur le plan juridique mais surtout ce fut un moment d'échange des connaissances juridiques dans le domaine du droit pénal comparé, qui peut être considéré comme un élément moteur pour la modification de certaines dispositions légales devenues inadaptées à l'aube du 21ème siècle.

Mr Nitish Bissessur, Legal Research Officer

My Magna Carta: To protect each and every child.

The Magna Carta, a Latin term meaning "Great Charter" was signed in June 1215 between the barons of Medieval England and King John. It was an attempt by the barons to stop a king - in this case John – from abusing of his power on the people of England who kept suffering. Magna Carta has not lost its power as the centuries have passed and it stands today as an icon of freedom and a foundational document for the democratic process. It challenges our society to live up to the highest ideals in political, social and religious life and demands our attention as we address the challenges of the twenty first century **(Magna Carta – "An Icon For The Twenty First Century?", A Lecture by Canon Professor Mike West, Chancellor of Lincoln).**

'In this bid, I have come up with a clause that addresses the issue with regard to the child and his or her welfare. The clause is as follows:

"Each and every child deserves the right to protection against criminal offences and the one found guilty of such offences will have to bear stricter punishment."

According to "The Child Protection Act 1994", a child is defined as "any unmarried person under the age of 18." The child who will be the leader and citizen of tomorrow, deserves protection and this makes it imperative that we accord the highest priority to his or her well-being. In the contemporary society, there is a panoply of criminal offences that affect the child like for instance, 'Abandonment of child', 'Abduction', 'Ill - treatment', 'Sexual offences' amongst others. My paper will thus focus on child protection with particular attention to one of the many criminal offences, namely sexual offences.

In fact, sexual offences are a pressing issue and are on the rise and my Magna Carta focuses on this specific matter. In this perspective, I have framed another clause which foreshadows this subject - matter:

"Sexual offence is a crime but sexual offence on a child is a heinous crime."

In my opinion, a child is vulnerable since he or she is going through a phase of development and he or she does not have the knowledge of the world and there is greater reliance on others to get things done and thus he or she is defenceless.

As far as the local context is concerned, there are numerous cases of sexual offences upon children. Nightmarish incidents include that of the 2010 **State v/s Prodigue L.V** case where the accused was found guilty of rape and murder upon a child of two and a half years. The accused was sentenced for 29 years for this atrocious crime. Another example is that of **Police v/s Naiken**

case in 2012 where the accused was found guilty of an attempt upon chastity upon a child of less than 12 years. He was sentenced to a penal servitude of three years. These are but a sample of the reported cases and represent the tip of the iceberg threatening the individual and society.

"A crime should be judged by the atrocity to which it is committed."

I am of opinion that the above mentioned sentences are too lenient and that a case should be made for stricter sentences.

There is an urgent call to those who are involved in the law making process to review the types of the sentences which in my point of view is inadequate for the offences. Sexual offences are atrocious and sinful especially when the life of an innocent, here a child, is concerned and thus I firmly believe that the assailant should be severely punished to deter others.

The three clauses mentioned in my paper hence are the pillars of my Magna Carta and I believe that this will safeguard and promote the rights, privileges and liberties as far as the children of my country are concerned. In the light of the ideas discussed, a Magna Carta still has huge significance for us today as it is directly relevant to so many areas of our lives, especially those concerning human rights and the establishment of the Human Rights Acts.

Seysh Goburdhone

[Seysh Goburdhone is the son of our Senior Human Resource Executive Shirley Goburdhone and is in form 4 at Phoenix SSS.]

SUMMARY OF COURT JUDGMENTS: April 2015

PRIADEVI BALLCHAND UDHIN v THE ICAC & THE STATE OF MAURITIUS [2015 SCJ 229]

By Hon. Mungly Gulbul, Judge and Hon. Chan Kan Cheong, Judge

Section 5 of FIAMLA – Sentence – Interpreter – Section 10(1) of the Constitution

The Appellant was prosecuted before the Intermediate Court on a charge of "Limitation of payment in cash" in breach of Sections 5(1) and 8 of the Financial Intelligence and Anti Money Laundering Act 2002 (FIAMLA) as amended by Section 11(a) of Act 15 of 2006. The charge against the Appellant was that she had "willfully and unlawfully made a payment of EUR 20,000 (Rs 810,000) in cash to SBM Ltd, Plaine Magnien Branch".

The Accused pleaded guilty when the charge was read over to her in creole and she stated that she would not retain the services of counsel. However, on the hearing date, the Appellant was represented by Counsel and the latter made a motion for a change of plea on her behalf on the ground that she had not properly understood the charge at the time she pleaded guilty and that the plea was entered as a result of a mistake. After hearing arguments on the issue, the Magistrate set aside the motion and proceeded to hear evidence for sentencing purposes. The Court thus found the Appellant guilty as charged and sentenced her to pay a fine of Rs 25,000 and Rs500 costs.

The Appellant appealed against the judgment initially on 12 grounds most of which were dropped and only four grounds were pressed upon namely:

"1. the Appellant's right to a fair trial encapsulated under Section 10(1) of the Constitution has been repeatedly violated in as much as:

(a) she was not informed as soon as reasonably practicable in a language that she understood and in detail of the nature of the offence allegedly committed by her, in breach of Section 10(2)(b) of the Constitution.

(b) She was not initially afforded the assistance of an interpreter (qualified) at the trial in breach of Section 10(2)(f) of the Constitution"

Under the above mentioned ground the Court held that there was no breach of the Appellant's right under Section 10(2) (b) of the Constitution. The Court held that the information was read over to the appellant in the creole language which the Magistrate found that the Appellant was conversant in creole since the latter was born in Mauritius from Mauritian parents and only migrated to Sweden during her childhood. When she was called at the ICAC in company of her legal adviser she was addressed in Creole and when she deponed in Court she even spoke in Creole. As far as the interpreter was concerned the Court held that she was afforded the right to have a Swedish interpreter and there was nothing on record to suggest that the interpreter's interpretation was not correct or adequate. The above grounds thus failed.

The Appellant on the other ground of appeal argued that the Magistrate was wrong to have refused the Appellant's motion for change of plea in as much as the Appellant gave her plea, whilst laboring under confusion and misunderstandings. The Court held that the Magistrate's findings that the Appellant was well aware of the charge against her since the start and that her plea was not equivocal were amply warranted in the circumstances as explained above.

Lastly, the Appellant argued that the sentence was manifestly harsh and excessive and same was rejected by the Appellate Court after having considered the cases of Abongo v The State [2009 SCJ 81], Meeajun v The State [2011 SCJ 141] and Beezadhur v The ICAC [2013 SCJ 292].

The Appeal was dismissed with Costs.

STATE v J.S. ST PIERRE & ANOR [2015 SCJ 224]

By Hon. A. Caunhye, Judge

Stay of proceedings – Independence of the DPP

The Accused No.1 was being prosecuted for an offence of attempt to transport dangerous drug as a drug trafficker in breach of Sections 2 and 45 of the Interpretation and General Clauses Act coupled with Sections 30(1) (d) (ii), 41(3)(4), 45(1) and 47(2)& 5(a)(b) of the Dangerous Drugs as amended by Section 12(b) of Act 30/2008.

Counsel for Accused No.1 moved that the prosecution against the Accused No.1 be stayed as it is in violation of Sections 1, 10(1) and 72(3) and 72(6) of the Constitution. In line with the above motion, Counsel filed a plaint with summons entered by the DPP against the State and it was argued in accordance with the averments in the

plaint that the DPP did not have the independence which he ought to have under section 72(6) of the Constitution. It was also submitted that there was a breach of Section 10(1) of the Constitution by virtue of which every accused has the constitutional right to be charged by an independent Director of Public Prosecutions on behalf of a sovereign democratic state so that he may enjoy a fair trial.

The Court held that there was nothing in the Plaint which impeded the DPP in the exercise of his constitutional powers to prosecute Accused No.1. The DPP's appointment under Section 72(1) of the Constitution entitles him to exercise all the powers with regard to the institution of criminal proceedings in accordance with the Constitution and the law.

The security of tenure of the DPP was secured by the Constitution. He may not be removed from office nor be precluded from exercising his constitutional powers to prosecute except in the manner expressly laid down in the Constitution itself.

The Court also held that the charge brought against the Accused by the Director of Public Prosecutions was a matter which falls automatically under the control of the Courts. The DPP only brought a criminal charge against Accused No.1 and same had to be proved beyond reasonable doubt. The Court concluded that there was no breach or any likely breach of any of the constitutional rights of the Accused no.1 which had been disclosed and which would warrant a stay of the criminal proceedings against him.

L. AUGUSTE v THE STATE [2015 SCJ 221]

By Hon. Matadeen, Chief Justice and Hon. Chan Kan Cheong, Judge

Disqualification – Sentencing

This is an appeal against the judgment of the Learned Magistrate of the Court of Rodrigues finding the Appellant guilty of the offence of driving a motor vehicle with a proportion of alcohol in his blood which exceeded the prescribed limit and sentencing him to undergo imprisonment for a term of 6 months and to pay a fine of Rs 20,000. He was further disqualified from holding or obtaining a driving licence for a period of one year.

There were originally five grounds but Counsel for the Appellant dropped most of the grounds except one. The only ground read as follows:

"Because the LM failed to direct herself in so far as the case of Couronne v The State of Mauritius is concerned, this leading to a severe miscarriage of justice"

The record of the proceedings in the Court below shows that not only the appellant had pleaded guilty to the offence charged but that he had also in a written statement to the police admitted that (a) he was stopped by the police whilst riding his motor cycle (b) a breath test taken there and then had indicated that the proportion of alcohol in his breath or blood was likely to exceed the prescribed limit and (c) a specimen of blood provided at Mont Lubin Hospital where he was taken revealed an alcohol level of 62 milligrams of Ethyl Alcohol per 100 millimeters. The present appeal based on the above was dismissed and the Court stated that in the case of Sunkur & Ors v The State & Ors 2013 SCJ 185, the three judges hearing the case found that the case of Couronne v The State was wrongly decided.

The Court's attention was drawn however to a mistake in the sentencing process by Counsel for the Respondent. As a matter of fact there was no indication in the court record that after the prosecutor had filed a certificate of previous conviction for a similar offence, the previous conviction was admitted by the Appellant or established in accordance with Section 211 of the Criminal Procedure Act. The case was on that basis remitted to the Court of Rodrigues for the case to be heard anew before the present Magistrate of the Court of Rodrigues since the one who heard the case was no longer posted in Rodrigues.

STATE v VOLCY & ANOR [2015 SCJ 214]

By G. Jugessur-Manna, Judge

Murder- Sentencing

Both Accused stand charged with having criminally, willfully and unlawfully killed one Balmy Ramhit also known as "touca" in breach of Sections 215 and 223(3) of the Criminal Code. The Prosecution adduced evidence at the hearing for the purposes of sentencing.

On Friday 18 September 2009, Accused No.1 was at his concubine's residence at Cite Barkly when at around 23.00 hrs he left to buy cigarettes but all the shops were closed. He then went to steal some iron bars found in the yard of Mr. Touca which he brought to his

concubine's yard. Thereafter he proceeded to the premises of Mr. Touca to steal again when he saw Accused No.2 searching in the yard of Mr. Touca. They both got into the house through the kitchen's door. Therein according to Accused No.1, Mr. Touca was sleeping on a sofa with a saber in his hands. The deceased suddenly woke up, switched on the light and walked towards them with the sabre. Accused No.1 got hold of deceased's hands and struggled with him till the latter fell down. When the deceased shouted "voleur", the Accused No.2 pressed his cheeks with his hands to prevent him from shouting. The Accused No.2 mobilised the deceased's hands and feet with electric wires. After a while the deceased stopped shouting and moving and they realized that he might have passed away. Accused No.1 ran away from the deceased's place leaving behind Accused No.2. He was arrested with blood in his hands and confessed having stabbed the deceased. The Accused No.2 denied the charge and only confessed when he was confronted with the phone calls which he made on that night.

Each accused made a statement from the dock and expressed remorse. After having taken all the mitigating factors in consideration and the plea in mitigation made by Counsel, the Court held that both accused deserved a long custodial sentence and sentenced each to undergo 30 years penal servitude.

LOLLJEE R v THE STATE OF MAURITIUS [2015 SCJ 195]

By D. Chan Kan Choeng, Judge and O.B. Madhub, Judge

Insult – Challenging the facts of the case on appeal

The Appellant was prosecuted for insult in breach of Section 296(a) of the Criminal Code before the District Court of Upper Plaine Wilhems. He pleaded not guilty and was represented by Counsel. The Magistrate found the Appellant guilty as charged and sentenced him to pay a fine of Rs 2,000. The grounds of appeal were mainly challenging on the appreciation of the evidence by the Learned Magistrate.

The Complainant gave evidence to the effect that the police came to his home at the appellant's request as he was allegedly playing loud music. He turned his music off. The Appellant then started to make noise with his water pressure cleaner. When the complainant asked the appellant to switch it off, he grew vexed and insulted the complainant. The Complainant felt humiliated as his wife and other people were in the vicinity. The Prosecution also called the complainant's wife who confirmed his version save that she did not actually see the appellant but heard his voice.

The Court held that it was well settled that an appellate court should be loath to interfere with the findings of fact of a trial court, which has the undeniable advantage of seeing and hearing the witnesses and is therefore in a better position to assess their credibility. Irrespective of this, the Court reviewed the evidence on record and the judgment of the Learned Magistrate. The Court held that the latter comprehensively set out and carefully considered both the prosecution and defence versions. Based on the evidence on record, the magistrate preferred the prosecution version to that of the defence and made a finding of guilt.

With regard to the reliance of the Learned Magistrate on the testimony of the complainant's wife as rightly pointed out by learned counsel for the State, it was not a case of voice identification but one of voice recognition since the parties involved were neighbours and knew each other.

Based on the above, the Appellate Court found no ground warranting their intervention. The appeal was therefore dismissed.

MUHOLEE R v THE STATE [2015 SCJ 182]

By Hon. A. Hamuth, Judge and G. Jugessur-Manna, Judge

Inops Consilli – Direction of Magistrate to Unrepresented Accused

The Appellant was prosecuted before the District Court of Pamplemousses for using a handheld telephone whilst driving, in breach of Regulations 90(1) and 125 of GN 53/10 of the Road Traffic Regulations 2010 as amended by GN 170/10. He pleaded not guilty and was inops consilli. He was convicted and sentenced to pay a fine of Rs 3000. He was now appealing against his conviction and sentence under 5 grounds.

On the day of the hearing of the appeal, Counsel for the appellant moved for a postponement in the ground that fresh and new evidence pertaining to an alleged issue of identification of the then accused, now appellant at trial stage; need to be adduced before this Court. After hearing both counsel, the Court found no good reason to entertain the said motion which was based on information which came out of the blue from third parties. The

said motion was set aside and the appeal was heard.

Submissions were only offered on Grounds 3 and 4 and the other grounds were drooped. Grounds 3 and 4 read as follows:

"Ground 3:

The Learned Magistrate failed to address his mind to the issue of identification at all.

Ground 4:

The Learned Magistrate failed to give guidance to the appellant when he had pleaded not guilty, explained his case, although refrained partly and he was unrepresented."

Both the above mentioned grounds were argued together as they relate to the issue of identification and guidance to be given by the magistrate when such issue was raised and the accused was inops consilli.

Ground 3 was dismissed because there was no evidence at trial stage putting identification in issue before the trial court.

With regards to **Ground 4**, the record showed that prior to the trial, the appellant stated that he had no defence witness. Again the ground was dismissed because in the course of trial the appellant was given the opportunity to cross examine the witness for the prosecution and after the close of the case, the record confirmed that the Appellant was explained his constitutional rights, options and procedure. The Appellate Court held that based on the record, the Learned Magistrate gave sufficient guidance to the Appellant as to his rights at all appropriate stages before the lower court and the trial was fair and just.

The appeal was dismissed with costs.

We would like to extend our hearty congratulations to Mr Yashvind Kumar Rawoah, Legal Research Officer, who was recently awarded a post graduate degree in LLM at the University of Wolverhampton. We are so proud to have him as part of our team and would also like to wish him even more success in the future.

THOUGHT OF THE MONTH

I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.

-Martin Luther King, Jr.