# Office of the Director of Public Prosecutions

## E-Newsletter

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

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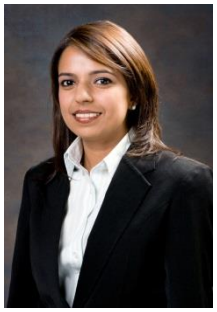
## EDITORIAL



In 1997, Nelson Mandela said that, 'the true character of a society is revealed in how it treats its children...together as a nation, we have the obligation to put sunshine in the hearts of our little ones. They are our precious possessions. They deserve what happiness life can offer.' Following the recent undercover investigation by Weekly magazine showing how vulnerable our children can be to sexual predators, the Director of Public Prosecutions, Mr Satyajit Boolell SC, discusses in this issue the problem of sexual abuse in our society and the slow progress which has been made over the years despite tremendous efforts on the part of various stakeholders. Just like Nelson Mandela, Mr Boolell SC considers that tackling the problem of child sexual abuse ought to become a national priority and that what is required is a package of legal and social measures in order to offer a better life to the children of our society.

Another problem in our society is that of the countless number of stray dogs around the island. You will find an analysis of the relevant sections of the law on stray dogs in the Animal Welfare Act 2013 and the offences which have been provided accordingly. You will also read about the offence of forgery and the difference between a 'faux matériel' and a 'faux intellectuel.' Mr Mervyn Anthony, legal trainee, discusses the need for adopting a contemporary approach to the issue of miscarriages of justice.

In February 2015, the Office of the Director of Public Prosecutions hosted a three-day workshop on trafficking in persons at the Rajsoomer Lallah Lecture Hall and it was delivered by the United Nations Office on Drugs and Crime experts. Last March, the law officers from the Victim and Witness Support Unit of the ODPP have also given a training course to Child Development Unit workers.

As usual, the summary of the latest Supreme Court judgments have been provided to you.

I wish you a pleasant reading.

**Ms Zaynah Essop**

***State Counsel***

## CHILD SEXUAL ABUSE: A NATIONAL PRIORITY

Child sexual abuse is a serious offence. Abusing a child sexually is degrading and inhumane. Those who do so can only be described as vicious predators and child molesters.

In recent years, a number of significant measures have been taken by this Office, the Police and the Child Development Unit to tackle cases of child sexual abuse. Both the police and the Office of the DPP have specialized units staffed by specially trained officers to deal with sexual offences. The ODPP, through its Victim and Witness Support Unit conducts training for CDU officers and when necessary interacts with civil society to have a better understanding of the problem. The booklet "Tanya So Zistwar" was launched to create awareness amongst parents and children alike on the scourge of sexual abuse and exploitation. NGOs like Pedostop, Dis-Moi, Cedem to name a few, act proactively to create awareness and fight child sexual abuse.

Yet, despite all these well-intended efforts, there has been slow progress. Many cases simply do not reach the courts or if they do, are withdrawn at the request of the victims at the last minute. Many victims complain about the considerable delay in hearing cases, by which time they may have moved on with their lives. The court atmosphere can be unfriendly and additionally they have to suffer a hostile cross-examiner in court.

What is required, though, is a national consensus on a package of legal and social measures. I shall stick to the legal ones. First as regards sexual abuses and exploitation of children, there is an imminent need to re-evaluate our legislation. Our law to punish sex offenders is regrettably outdated, restrictive, fragmented and completely out of tune to the realities surrounding these cases. There is no definition of rape under our Criminal Code and the notion of rape as understood and applied in 1838, still governs our approach today. Other jurisdictions have moved on by providing that rape consists of any form of sexual penetration without consent, which includes the use of any object. Under this definition a woman can be guilty of rape, which is not the case under our legislation. In the case of children, the law cannot agree on the age of consent. It differs depending whether the Criminal Code or the Child Protection Act is applied. Under the Code it is sixteen years of age, whilst under the Act it is eighteen.

A newly consolidated law should reverse the burden of proof in cases involving children. Take for instance cases of date rape or night-out rape, a problem afflicting mostly teenagers. The perpetrator is someone the victim may know and even got on with quite well. They go on a date or meet at a bar or nightclub. There are the drinks that follow, a few to start with and a lot later and maybe even drugs. Both parties may have indulged in drinking and very often the young woman is more vulnerable. The effect of alcohol can be devastating on her capacity to consensual sex. When it happens or as it happens she may not have been in a position to protest or even realize what she is being subjected to. She is too weak, too comatose and too intoxicated. Yet she has just been raped since she has not consented in the first instance.

In such a case, there is an evidential presumption that the complainant did not consent unless sufficient evidence is adduced by the defendant to raise an issue as to whether the complainant consented. There could also be situations of strict liability, where the court can conclusively infer that the complainant could not have consented to the sexual act. These circumstances relate to situations where the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act; or where the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

By way of conclusion let me mention the undercover investigation carried out by Weekly magazine. It is a direct proof of how vulnerable our children are to sexual predators. It is high time that the problem of child sexual abuse becomes a national priority.

**Mr Satyajit Boolell SC**

**Director of Public Prosecutions**

## CHIENS ERRANTS : APPEL À LA RESPONSABILITÉ DE TOUT UN CHACUN

La situation des chiens errants à Maurice mérite qu'on s'y attarde. Certains défenseurs de la cause des animaux sont contre une "opération nettoyage" du gouvernement visant quelques 200,000 chiens errants. Le but de cet article n'est pas de donner raison à l'un des deux partis mais plutôt de voir ce que la loi prévoit déjà à ce sujet et aussi de sensibiliser le public sur les responsabilités des propriétaires de chiens.

L'Animal Welfare Act de 2013 contient les dispositions requises pour éviter qu'une telle situation ne se (re)produise. Prenons premièrement l'article 31 de la loi. Tout propriétaire se doit de faire enregistrer son chien à la Mauritius Society for Animal Welfare dans un délai de 30 jours et de 15 jours s'il s'agit d'un chien dangereux. En enregistrant son chien, le propriétaire doit signifier en écrit si son chien sera utilisé pour l'élevage ou pas et s'il est d'accord pour que celui-ci soit stérilisé. Enfreindre cette disposition mène à une amende ne dépassant pas Rs 5000 si trouvé coupable.

La loi donne aussi la liste des chiens dangereux dans sa première annexe : Alaskan Malamute, American Pit Bull Terrier, American Staffordshire Terrier, Blue Nose Pit Bull, Boerboel, Bull Mastiff, Cane Corso, Dobermann, Dogo Argentino, Fila Brasileiro, Japanese Tosa, Kangal, Mastino Napoletano, Presco Canario, Red Nose Pit Bull, Rhodesian Ridgeback, Rottweiler et Staffordshire Terrier.

La première question qu'il faut toutefois se poser est : dans quelle mesure un chien devient-il « errant »? La loi définit le terme « stray » par tout animal en liberté ou en dehors du contrôle ou de la charge de quelqu'un. Ce qui est intéressant à savoir c'est qu'un chien enregistré peut aussi devenir un chien errant. En effet, l'article 41(3) stipule qu'un chien errant enregistré au moment de son appréhension peut être rendu à son propriétaire, contre amende, si celui-ci se manifeste. Le propriétaire du chien a trois jours pour se manifester et doit payer une amende de Rs 1000 si l'animal a été capturé pour la première fois et Rs 200 pour la deuxième fois. Toutefois si un chien a été capturé à l'aéroport, au port, dans un centre hospitalier ou pour la troisième fois celui-ci sera directement euthanasié. Au cas contraire, ou si le chien n'est pas enregistré, la Mauritius Society for Animal Welfare peut disposer de l'animal. La loi définit « disposer » par être vendu, euthanasié, échangé ou offert à l'adoption ou comme un cadeau.

Selon l'article 3 (h) de la loi, tout propriétaire d'un animal de compagnie, et qui **délibérément ou négligemment** laisse son animal errer ou abandonne un animal dans des circonstances qui l'expose à la détresse, à la douleur, à la souffrance ou à la maladie commet un délit. Contrairement à la croyance populaire, les propriétaires de chiens n'ont pas le droit de les laisser errer dans la rue même à une heure tardive. La rue est un espace public et il est le devoir de tout un chacun de contribuer à ce que cet espace reste sûr. Beaucoup de propriétaires sont persuadés que leurs chiens ne sont pas violents mais personne ne peut prédire la réaction d'un animal face à certaines situations. Le chien qui sort de la cour de son propriétaire et mord un piéton ou encore le chien qui poursuit un motocycliste. Qui serait alors responsable? A qui demander des dommages?

Nous ne nous attarderons pas sur les chiens dangereux et ni sur l'article 34 de la loi qui a pour trait l'incitation à causer une attaque sur autrui car ce sujet a déjà été discuté en long et en large par Nitish Bissessur dans notre Newsletter d'Octobre 2013. Nous y retiendrons toutefois que la jurisprudence mauricienne tient pour responsable le propriétaire du chien (Saufhaus v Martin, 1998 SCJ 146) qui peut être poursuivi au civil pour des dommages physiques et moraux. Dans cette affaire, la plaignante avait obtenu gain de cause et la cour avait ordonné au propriétaire de la dédommager à hauteur de Rs 371,674 dont Rs 250 000 en tant que dommages moraux.

L'article 33 de l'Animal Welfare Act soutient que le propriétaire du chien qui attaque, se précipite ou pourchasse toute personne ou un animal domestique risque une amende ne dépassant pas Rs 10,000 et un emprisonnement ne dépassant pas 6 mois. Cette sentence s'applique également pour le propriétaire du chien qui court après un véhicule et causant des dommages à celui-ci. Ceci ne s'applique toutefois pas si une personne entre dans la propriété où habite le chien et que ce dernier l'attaque.

L'article 32 de la loi parle des obligations des propriétaires de chiens notamment celle d'ériger une barrière, un mur et/ou un portail pour veiller à ce que son animal ne puisse sortir de la propriété. Si le propriétaire veut faire sortir son chien de sa propriété, il doit le faire avec une laisse, dans sa cage ou l'enfermer dans son véhicule. Dans le cas d'un chien dangereux, la loi stipule que le chien doit porter une muselière quand il n'est plus dans la propriété de son maître.

Le problème ne vient pas de la loi mais dans son application. S'il y a un enregistrement obligatoire et contrôlé, cela permettra de savoir à qui appartient le chien qui a été capturé et le propriétaire pourra alors être verbalisé. La stérilisation des chiens permettrait de contrôler le nombre de chiens errants et réduirait leur nombre dans quelques années. Même si les légistes doivent faire preuve de rigueur concernant les dispositions légales en la matière, une démarche civique et de sensibilisation s'avère indispensable pour une application effective de la loi.

Les autorités ont maintenant le choix. Il faudrait peut-être investir plus sur des campagnes de sensibilisation et de stérilisation des chiens mais cela prendrait des années. Les autorités ont cependant la dure tâche de décider s'ils sont prêts à risquer que les attaques se multiplient entretemps. Ou encore de continuer à supporter les dégâts à l'environnement et l'insalubrité dans les quartiers résidentiels ou sur nos plages. L'option de la chasse aux chiens errants reste toutefois la solution la plus rapide et la plus efficace dans le court terme mais il faut aussi penser sur le long terme. C'est pour cela qu'une opération de capture uniquement n'est sans doute pas la solution au problème. Et il ne faut surtout pas ignorer l'argument des militants pour la cause des animaux, disant qu'il s'agit là d'une maltraitance.

Comme le disait le juge Vinod Boolell dans l'affaire **Saufhaus v Martin**, *« Il est regrettable que ce pays, qui repose largement sur l'industrie du tourisme, n'a pas encore été en mesure de faire comprendre à ses citoyens que les plages publiques ne doivent pas être gardés par des chiens appartenant à des propriétaires de propriétés arborant la plage, plus particulièrement s'ils ont une disposition à attaquer des étrangers. »* Et quand on voit la situation en 2015 sur le littorale et ailleurs, on peut sans ambages dire que les tentatives d'éduquer les propriétaires de chiens ont été vaines et inefficaces jusqu'à présent.

**Mr. Ashley Victor**
**Public Relations Officer**

## TRAINING OF LAW ENFORCEMENT OFFICERS & PROSECUTORS ON "TRAFFICKING IN PERSONS"


The Office of the Director of Public Prosecutions hosted a three-day course on Trafficking in Persons(TIP) from 23rd to 25th February 2015 at the Rajsoomer Lallah Lecture Hall. The course was tailor-made for 25 participants, 15 of whom were law enforcement officers and 10 prosecutors . It was delivered by UNODC experts Peter Cronje and Reiko Fujibayashi.

Participants were taught how to draw the line between the smuggling of migrants (SOM) and TIP. The training also focussed on the detection, investigation and prosecution of TIP perpetrators and awareness amongst participants was raised with regards to a supportive approach towards victims of TIP.

It is worth noting that Mauritius enacted the Combatting Trafficking in Persons Act in 2009; however so far there have been no prosecution under this piece of legislation. This is not to say that law enforcement did not detect the crime. Crimes were detected but prosecution were instigated under other pieces of legislation such as the Criminal Code and the Child Protection Act.

The elements of Trafficking in Persons under the Combatting of Trafficking in Persons Act (section 11) may be summarised as follows:

**Action**

- the recruitment, sale, supply, procurement, capture, removal, transportation, transfer, harbouring or receipt of a person, and the adoption of a person facilitated or secured through illegal means

**Means**

- by the use of threat, force, intimidation, coercion, abduction, fraud, deception, abuse of power or abuse of a position of vulnerability; or by the giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person;

**Purpose**

- "exploitation" includes- a) all forms of slavery or practices similar to slavery, including forced marriage; b) sexual exploitation; c) forced labour; and d) the illegal removal of body organs

Any conviction under section 11 will give rise to penal servitude not exceeding 15 years.

**Ms Kevina Poollay Mootien**
**Ag. Senior State Counsel**

## OUR LAW ON FORGERY : 'FAUX MATERIEL' VS 'FAUX INTELLECTUEL'

### I. Our law

The offence of forgery is provided under our law in sections 106, 107 and 108 of the criminal code which read as follows:

**Section 106: 'Forgery by public officer'**

Any functionary, or public officer, acting in the discharge of his duty, who commits a forgery –

(a) by a false signature;

(b) by the alteration of any act, date, writing, or signature;

(c) by falsely stating the presence of a person; or

(d) by any writing made or interpolated in any register or other public act, after it has been completed or closed, shall be punished by penal servitude.

**Section 107 : 'Fraudulent alteration of public document'**

"Any functionary, or public officer who, in drawing up a document or writing in the discharge of his duty, fraudulently alters its substance or particulars, whether by inserting any condition other than that directed or dictated by the parties, or by stating any false fact as true, or any fact as acknowledged which has not been so acknowledged, shall be punished by penal servitude."

**Section 108: 'Forgery by private individual of public or commercial writing'**

Any other person who commits a forgery in an authenticated and public writing, or in a commercial or bank writing –

(a) by counterfeiting or altering any writing, date or signature, or by the use of a fictitious name;

(b) by fabricating any agreement, condition, obligation or discharge, or inserting it in any such act after it has been completed; or

(c) by adding to any clause, statement or fact which such act was intended to contain and certify, or by altering such clause, fact or statement, shall be punished by penal servitude.

As was held by the Court in the case of **Procureur General v. Olivier (1950) MR 218**, "sections 106 and 107 reproduce articles 145 and 146 of the French Penal code and deal with forgeries committed by functionaries or public officers in the discharge of their duties whereas section 108 (article 147 of the French Penal Code) deals with forgeries in authenticated and public writings committed by persons other than functionaries or public officers."

As these sections are borrowed from the French Penal Code, we should have recourse to French doctrine and case-law in order to ascertain the meaning of the expressions which occur therein.

### II. The difference between 'Faux matériel' and 'Faux intellectuel'

(1) Faux matériel - It consists of the 'falsification physique et corporelle d'un écrit ... commis au moyen de l'un des trois procédés énumérés'.

(2) Faux intellectuel- It is committed 'sans laisser aucune trace matérielle apparente. Il consiste dans l'altération, non de l'écriture de l'acte, mais sa substance, non dans sa forme matérielle, mais dans des clauses qu'il doit contenir. Les écritures sont matériellement vraies, mais l'expression en est fausse...(Dalloz, Répertoire pratique, v° Faux en écritures, note 95).

In a French judgment delivered by the Cour de Cassation (Cass. crim. 24 mai 2000 Bull. crim. n° 203 p.597), it was held as follows:

'On parle de faux intellectuel lorsque l'on est en présence d'un document dont les mentions comportent une altération de la vérité. Le faux est dit intellectuel lorsqu'il porte sur le contenu d'un acte et ne laisse aucune trace matérielle.

For instance, 'une attestation faisant état de faits matériellement inexacts contient un faux intellectuel manifeste.'

According to Chauveau Adolphe et Faustin Helie, Théorie du Code Pénal, tome 2, paras. 687, 688, 690, 699, 691 and 701, the French law has, in articles 145 and 146 of the French Penal Code, in fact catered for 2 types of forgery: **(i) Faux matériel (ii) Faux intellectuel**

"690. - Après avoir défini les écritures qui sont réputées publiques, il faut examiner les différentes espèces de faux qui sont commis dans ces écritures par les fonctionnaires publics.

La loi a séparé dans deux articles le faux matériel et le faux intellectuel. Le premier est prévu par l'art. 145, ainsi conçu..."

699. - Nous avons vu que les fonctionnaires publics peuvent se rendre coupables de faux, non seulement par l'altération matérielle des actes, mais encore par l'altération intellectuelle des clauses que ces actes, doivent contenir. Cette deuxième espèce de faux est prévue par l'art. 146 portant..."

Moreover, according to Garraud, Droit Pénal Français, 3rd Edn., Vol. 4, p. 121:

"1370 . . . Les principaux cas de faux matériel sont prévus dans l'article 145 et dans les trois premiers alinéas de l'article 147; ceux de faux intellectuel, dans l'article 146 et le dernier alinéa de l'article 147 . . ."

It follows from the above that sections 106, 107 and 108 of the Criminal Code are different from each other by virtue of the 'modes d'execution' provided therein. It can therefore be deduced that:

- Section 106 of our Criminal Code (Art. 145 of French Penal Code) caters for 'faux matériel' by public officers,
- Section 107 of our Criminal Code (Art. 146 of French Penal Code) caters for 'faux intellectuel' by public officers, and
- Section 108 of the Criminal Code (Art. 147 of the Criminal Code) caters for both 'faux matériel' (under section108 a&b) and 'faux intellectuel' (under section 108(c)) by persons who are not public officers .

**III. Elements of the offence**

The French law in fact makes no distinction regarding the elements of the offence under sections 106,107 or 108 of the Criminal Code. The only distinction it makes is in relation to the 'modes d'exécution' of forgery provided under these sections.

It is therefore well-settled law that the elements which constitute the offence of forgery are:

1) the alteration of truth in a document;

2) the document has the character of an authenticated and public writing or a commercial or bank writing (as the case may be);

3) the intention to do injury or to cause prejudice;

4) injury or the possibility of injury resulting from the alteration of truth; and

5) the said alteration has been done 'par un des moyens déterminés par la loi' (this will determine whether the forgery is one of 'faux matériel' or 'faux intellectuel').

*Vide* - **Bhunjun v. The Queen [1955 MR 256], Thalwansing and anor. v. R., [ 1895 MR 2 6 ]; Panchoo v. R., [ 1922 MR 3 7 ]; Li Ah-Chong v. R., [ 1933 MR 21 0 ]; Loivette and Robinson v. R., (1955, Record No. 1836)**

Therefore, under our law:
A 'faux matériel' is committed where the means used to commit the forgery fall under section 106 and section 108 (a),(b) and (c) of the Criminal Code;
A 'faux intellectuel' is committed where the means used to commit the forgery fall under section 107 and section 108 (d) of the Criminal Code;

**Ms Anusha Rawoah**
**State Counsel**

## THE CALL FOR A CONTEMPORARY APPROACH TO THE ISSUE OF MISCARRIAGE OF JUSTICE

In the passionate world of law practitioners and human rights activists, the month of March 2015 was in itself symbolic with regards to the issue of miscarriage of justice as it relates to the historical judgment of 14th March 1991, a judgment that stunned the world and paved the way for the constant questioning and investigation of possible issues of miscarriage of justice. This stunning judgment overruled the conviction of the Birmingham six who emerged as free citizens after being jailed for sixteen years in relation to the bombing that led to the murder of 21 people in two pubs in Birmingham (Pierce, 2011:1-7). The above-mentioned findings provide a detailed summary to illustrate the fact that the essence of their conviction was based on unsafe evidence given that the confessions were taken out of them under torture.

The issue of miscarriage of justice may naturally emerge when the unveiling of new information give rise to serious doubt about the safety of a conviction, thereby paving the way for an appeal of the said conviction in the light of the emergence of new evidences. We owe the truth and justice to the victims as well as to all those who may have been or who are subject to miscarriages of justice. Since the justice system is heavily accountable to the victims, it is not easy to prove a case of miscarriage of justice unless compelling new evidences are assembled and put forward to justify the requirement to quash a conviction that is unsafe. According to Hammond (2006:13-14), the leading modern authority in New Zealand regarding miscarriages of justice is R v. Bain (SC 13/2009) whereby the test identified for the admissibility of new evidence is that the appellant must demonstrate that the new evidence is sufficiently fresh and credible, implying that the evidence would not be sufficiently fresh if it could have been produced at the trial.

This test however is not an immutable criteria given that the overriding criterion is always to adopt the most reliable course through which the interest of justice will prevail. Mauritius is a commonwealth state with the privy council as the last resort of appeal similarly to New Zealand. The stand in Mauritian law regarding miscarriage of justice is that the court has been delegated wide discretionary powers under Section 9 of the Criminal Appeal Act (1907) which imply that unless new compelling and fresh evidence emerged beyond all reasonable doubt we have to preserve the verdict of the jury in the interest of justice. The jury system is indeed the essence of the Mauritian Criminal Justice System.

Given that the judiciary and more so the state is duty bound to ensure that justice must not only be done but must be seen to be done, there is a binding duty to provide the required assurance that the prevailing criterion concerning miscarriage of justice tallies with what is logic and fair in accordance with common law principles regarding the preservation of the finality of a jury's verdict unless in the light of the emergence of compelling new evidences, it will be reasonably correct to allow an appeal for justice to prevail.

The case of the Birmingham six was subject to a lot of hurdles until the truth was unveiled to foster the triumph of justice. In accordance with the findings of Robins (2012:4), Justice Sweeney's analysis made it clear that in spite of existing safeguards and the commitment of the vast majority of law practitioners who are involved in safeguarding the values attached to the operations of the criminal justice system, this system is far from being perfect and the risk of miscarriage of justice is very well present. Thereby raising the need for us to continue to recognise the existence of this risk and face it boldly. He further highlights the need to identify and redress past miscarriage of justice as well as the need to strive to minimize future miscarriage of justice.

Our justice system is an evolutive concept that is supposed to be subject to constant improvement in order to reflect the societal requirement of contemporary Mauritius. In the United Kingdom for example, the Criminal Cases Review Commission has been in operations for more than a decade with the main responsibility of undertaking the examination of claims that a miscarriage of justice has occurred and for referring to the Court of Appeal cases of unsafe convictions in the light of new evidences whereby there are real possibilities that the appeal will be allowed.

According to official sources available online, out of 548 cases referred to the Court of Appeal, 378 convictions were quashed and 154 upheld. Even though the aspect of the work of the commission has been subject to public critics which are in themselves an assurance that democracy is at work. The available figure supported by public critics for improvement is indeed a good thing for the future minimization of the possibility of miscarriage of justice.

The issue of miscarriages of justice is an issue of national interest that deserves a lot of involvement from all the stakeholders of the state, including a revival of the concern of the public, the executive, the parliament, the extra-parliamentary opposition, the media, public pressure groups and Non-Governmental Organisations. The rising concern of these stakeholders may push for creative reforms that may lead towards the creation of an effective Mauritian Organisation similar to the Criminal Cases Review Commission of the UK in order to investigate claims of alleged miscarriages of justice. However the setting up of an organization similar to the Criminal Cases Review Commission (CCRC) alone is not enough; in order to minimize the possibility of miscarriage of justice, we need to create a synergy between the targeted new organization and our existing legal structure such as The Law Practitioners Act in regard to Continuous Professional Development while targeting the highest standard of ethics and professionalism.

The challenge of miscarriage of justice is therefore an issue of managerial efficiency of the state with regards to the administration of our Criminal Justice System including the prospective re-engineering of setting up of a new organization similar to the CCRC of the UK which implies that each case is unique and requires a specific approach from the investigation to the appeal of a conviction whereby the reigning criterion will be to ensure the triumph of the interest of justice.

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**Mervyn Anthony,**
**Service to Mauritius Programme Legal Intern**

## FORMATION POUR LES OFFICIERS DE LA 'CHILD DEVELOPMENT UNIT'

En ligne avec l'objectif de la Child Development Unit (CDU), d'appliquer le **Child Protection Act 1994**, le bureau du Directeur des Poursuites Publiques a été sollicité par le Ministère des Egalité des Genres, du Développement de L'enfant et du Bien-Être de la famille, afin de dispenser des cours de formation auprès d'une vingtaine de ses officiers de la CDU.

La formation a été délivrée par les officiers du bureau du DPP, membres du Victim and Witness Support Unit sous la direction de Me. Denis Mootoo (Ag. Assistant DPP).

Les sessions de formation ont couvert les thèmes suivants: (i) le fonctionnement des juridictions; (ii) la législation actuelle; (iii) les procédures pour loger un cas en Cour; et (iv) le soutien donné aux enfants victimes et témoins.

La formation a été offerte sous forme de session interactive. Cela a permis aux participants de partager leurs expériences et de discuter des moyens d'avancer dans le cadre de leur travail auprès des enfants victimes d'abus, de négligence ou de maltraitance.

Le programme de formation a été dispensé du 16 mars au 1er avril sur une base de deux sessions par semaine. Chaque session a couvert un thème précédemment mentionné, ayant pour but d'accroître les habilités de ces officiers qui sont les principaux acteurs en matière d'enquêtes criminelles touchant les enfants.

A la fin de la formation, des certificats de participation ont été remis aux officiers qui ont pris part au cours.

**Miss Jouana Genave**

**Training officer under the Service to Mauritius scheme**

## SUMMARY OF COURT JUDGMENTS: March 2015

### SITHANEN N v THE STATE [2015 SCJ 81]

**By Hon. A. F. Chui Yew Cheong, Judge and Hon. G. Jugessur-Manna, Judge**

*Intention to distribute drug; packaging; sentencing; mitigating factors*

The appellant was prosecuted for the offence of unlawful possession of cannabis resin for the purpose of distribution in breach of sections 30(1)(f)(ii) and 47(5)(a) of the Dangerous Drugs Act, following which he was sentenced to undergo three years' penal servitude and to pay a fine of Rs10,000.

It was contended on appeal that in the absence of direct evidence, the Court erred in concluding that the appellant had the intention to distribute the drugs. In reaching its verdict, the Court took into account the quantity of drugs as well as the manner in which they were wrapped. It was also argued that the sentence offended the principle of proportionality considering that the appellant was a first time offender who did not deny possession.

It was held that the trial court rightly took into consideration the packaging of the drugs to infer intention to distribute. In such circumstances, a Court may legitimately question the motive of a citizen who is enjoying his freedom of movement whilst in possession of drugs. However the Court allowed the appeal against sentence by taking into consideration the quantity of drugs, clean record and age of the offender. Whilst the appeal against conviction failed, the sentence was reduced to two years in order the meet the ends of justice.

### GOOLAMY M A v THE STATE [2015 SCJ 79]

**By Hon. A. F. Chui Yew Cheong, Judge and Hon. A. Hamuth, Judge**

*Copyright Act 1997; Infringed copies & copies; Mark or stamp affixed to label or container; defective information*

The appellant was prosecuted for the offence of 'having in his possession in the course of trade any apparatus; article or thing, knowing that it is to be used for making infringing copies of a work or for a purpose of manufacturing or importing for sale or rental', in breach of section 44(1) (c), (3) and (4) of the Copyright Act 1997 and for the offence of 'having in his possession, a copy of a sound recording without a mark or stamp of the Society is affixed to its label or container' in breach of section 28(1)(4) of the Copyright Act 1997.

It was contended on appeal that, the evidence adduced by the appellant was to the effect that the apparatus and articles were for the purpose of making copies and not infringed copies contrary to the charge against him. Referring to the case of A.S. Baharay v The State [2014 SCJ 155], counsel for the respondent conceded that "the information was defective in that it failed to aver that the copies of the sound recording made for commercial purposes which did not bear the mark or stamp of M.A.S.A were in respect of copies falling under section 28(1)". The appeal was allowed, quashing the conviction and the sentence with respect to the above counts.

### FABIENNE F D v THE STATE [2015 SCJ 80]

**By Hon. A. F. Chui Yew Cheong, Judge and Hon. G. Jugessur-Manna, Judge**

*Disparity in sentence*

This is an appeal against sentence for an offence under the Dangerous Drugs Act 2000.The appellant was prosecuted for the offence of unlawful possession of heroin in 0.62 gram of brown substance for the purpose of distribution in breach of section 30(1)(f)(ii) and 47(5)(a) of the Dangerous Drugs Act. He was sentenced to undergo three years' penal servitude and to pay a fine of Rs 20,000 and Rs 500 as costs.

The issue in this case was whether a Court can pass a sentence lesser than provided by the law. The Judicial Committee of the Privy Council in Gangasing Aubeeluck v The State of Mauritius [2010] UKPC 13 is of the view that the Court is entitled to pass a sentence lesser than the minimum of 5 years' penal servitude provided by section 30(1)(f)(ii) of the Dangerous Drugs Act for drug dealing offences and that the sentence imposed must not be wholly disproportionate to the offence and the circumstances of the case. It was the submission of Counsel for appellant that the three years' penal servitude imposed in the present matter was also disproportionate to the other sentences imposed by other Courts. The Court of Appeal agreed that a credible justice system should aim at eliminating gross and unexplained disparities among the sentences imposed by the different Courts for similar offences.

The appeal was allowed. The Appellate Court quashed the sentence of 3 years' penal servitude imposed by the trial Court and substituted therefore 18 months' imprisonment.

**PALMYRE J L v THE STATE [2015 SCJ 72]**

**By Hon. Matadeen, Chief Justice, Hon. N. Devat, Judge and Hon. D. Chan Kan Cheong, Judge**

*Possession of Cannabis – Value of Drugs*

The appellant was charged with the unlawful possession of 1688.2 grammes of cannabis for the purpose of distribution, which was found in different containers. The information averred that "having regard to the quantity of cannabis secured, the manner in which it was packed, the street value which exceeds one million rupees and all the circumstances of the case", it could be reasonably inferred that the appellant was a drug trafficker .

After hearing evidence, including that of the appellant and the defence witness, the learned trial Judge found the appellant guilty of possession of 1688.2 grammes of cannabis and, after making a further finding that the appellant was a drug trafficker, sentenced him to undergo 30 years' penal servitude and to pay a fine of Rs 100,000.

The judgment of the learned trial Judge was challenged on several grounds. It was stressed that the grounds of appeal against conviction in no way challenged the learned trial Judge's finding that the appellant was in possession of the specified quantity of drugs, and the drugs were meant for distribution.

The present appeal questioned only the finding of drug trafficking and the related issue of the street value of the drugs. It is to be noted that the learned Judge had considered all the circumstances relevant to the issue of trafficking and had analysed the evidence adduced on both sides before convicting. Moreover, the manner in which the drugs were packed and found in various places in the appellant's house led the learned Judge to conclude that they had been "conveniently prepared to facilitate their dissemination and distribution in small quantities by retail sale or otherwise".

In relation to the other ground of appeal, it was further noted that the learned trial Judge did not simply discard the evidence of the defence witness on the ground that he was related to the appellant.

The learned Judge explained clearly that he was unable to prefer his version to that of two experienced and senior officers of the ADSU. The fact that defence witness, a self-confessed smoker of cannabis, could have been a mere "témoin de complaisance", given the fact that he was living with the appellant's daughter as man and wife, could not be excluded.

With regards to another ground which was raised in this appeal, it was clear ex facie the judgment that the learned trial Judge had properly assessed the street value of the drugs both in law and on the facts. Given the express terms of section 59 of the Act, the learned Judge was perfectly entitled to rely on the evidence of the officers of the ADSU. The evidence placed before him were reviewed and his conclusion was fully justified on that issue.

As for the sentence of penal servitude for a term of 30 years inflicted on the appellant, it was wrong to say that it was manifestly harsh and excessive, given the seriousness of the offence, the untold damage that such an amount of drugs would have caused to our population and the sentencing pattern that emerges for such offences.

The appeal was accordingly dismissed.

**THOUGHT OF THE MONTH**

« The truth does not change according to our ability to stomach it »

**-Flannery O'Connor**