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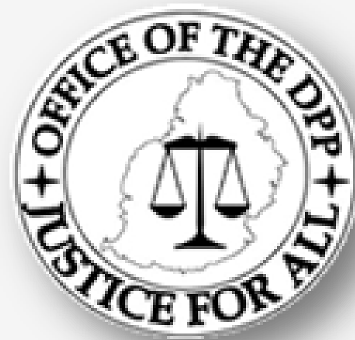

'To No One Will We Sell, To No One Deny or Delay Right or Justice'

Chapter 40, Magna Carta 1215

August 2017 - Issue 73

IN THIS ISSUE:

	PAGE
Editorial	1
Nuances.....	2 - 3
Not such a minor offence?	4 – 6
Sentencing in Involuntary Homicide Cases	7 - 8
An Insight on the Rule of Hearsay in Criminal Proceedings	9 - 11
Workshop on Social Justice: Empowering the citizens to seek justice	12 – 14
Case summary	15 - 19

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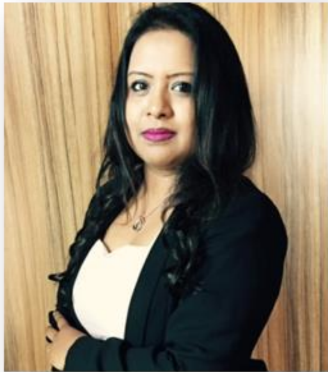
EDITORIAL



Dear Readers,

Welcome to the 73rd issue of our monthly newsletter. In the present issue, the Director of Public Prosecutions, Mr Satyajit Boolell, SC reflects on the distinction to be made between the political and non-political Executive .

Thereafter, our readers will benefit from an article which considers the criminal liability of children and the issue of 'discernment'.

We also bring to you an overview on the sentencing process adopted by Mauritian courts for the offence of involuntary homicide, in relation to fatal road accidents. The article looks at the distinction to be made between a well-planned murder and the absent-minded driver.

Moreover, a beguiling article is included in this issue on the exclusion of hearsay evidence in criminal proceedings. While addressing the source of the law of evidence in Mauritius, the article further spells out the various statutory exceptions to this rule under our law.

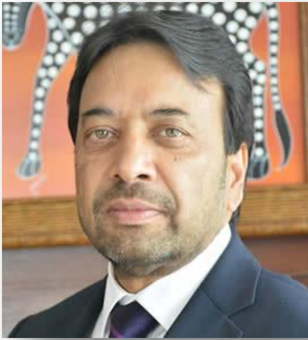
Recently, a workshop on "Access to Justice for All" was organised by the University of Mauritius, in partnership with the US Embassy whereby one of our law officers was invited to discuss on the accessibility of our judicial system to the Mauritian citizens. An review of same is provided in this issue.

Finally, summaries of recently delivered Supreme Court judgments are provided at pages 15 to 19.

We wish you a good read.

Miss Anusha Rawoah
State Counsel

Nuances.....



"You suggest in your book that the DPP is part of the executive. Some people still think that the DPP is part of the judicial system. Can you shed some light on that?

*I think very often there is some confusion on this. There was a Privy Council case where it was said that the DPP was part of the executive. When the Privy Council said that, it was in relation to a particular issue. Though our judges had said from time to time that there should be some kind of review, the general rulewas that decisions of the DPP were not subject to judicial review. So, it is in this context that the Privy Council pointed out that he is part of the executive and, as such, his decisions are amenable to review." (**Newspaper extract**)*

As I read the interview of Milan Meetarbhan, barrister and author of "Constitutional Law of Mauritius" in L'Express (4 September 2017), I tell myself that there is one *"nuance"* that we often fail to make or acknowledge, and it is as follows.

The DPP is part of the executive, and not the judiciary. Nobody doubts, or disputes this proposition. If there was any doubt, this was put to rest by the Judicial Committee of the Privy Council in its decision of **Mohit v DPP [2006 UK PC 20]**. The Board reviewed provisions similar to section72 of the Mauritian Constitution from several Commonwealth States like Fiji, Guyana, Barbados and Jamaica, and came to the conclusion that the decisions taken by a DPP are amenable to judicial review.

But this is only one side of the coin. It should not obliviate the fact that our Constitution splits executive powers between the political Executive (answerable to Parliament) and the non-political Executive (not answerable to Parliament). The latter category comprises of the Public Service Commission, the Disciplined Forces Service Commission, Electoral Supervisory Commission, the Director of Public Prosecutions etc. None of these institutions are answerable to Parliament (although they are accountable on budgetary matters and answerable to the public through the court system and judicial review applications).

This dichotomy between the political and the non-political Executive was pronounced upon as far back as 1994 by a Full Bench of the Supreme Court led by late Hon. Rajsoomer Lallah, then CJ, and one of our leading judges on constitutional matters:

"A distinguishing feature of our Constitution, like that of some of the new Commonwealth countries, is the splitting of executive functions between what one might call the political Executive which remains answerable to Parliament and an independent non-political Executive, in specific matters, consisting of among others the Director of Public Prosecutions... which are not answerable to Parliament. The purpose of this device is, institutionally, to insulate certain areas in the conduct of public affairs from political responsibility and control, thus ensuring their autonomy and independence." **(Edath-Ally v Glover [1994 SCJ 409])**.

It flows naturally from this state of affairs that there ought to be no political contamination of these institutions, so as to ensure their autonomy and independence.

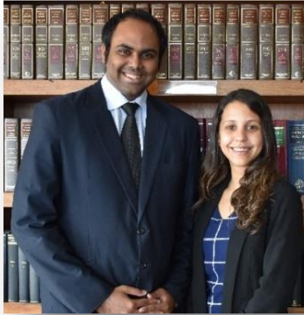
This is also why the Mauritian DPP cannot be compared to his counterpart in the UK. The UK Attorney General oversees the DPP's duties. In Mauritius, the DPP is independent. He acts himself, or through his officers to whom he delegates his powers – **Section 72(4)** of the **Constitution**. He is not subject to the direction or control of any other person or authority in the exercise of the powers given to him by **Section 72**.

He is part of the executive, yes, but let it be remembered that we are here talking of the non-political executive.

A nuance worth making......

Satyajit Boolell, SC
Director of Public Prosecutions

NOT SUCH A MINOR OFFENCE?



1. Can we sue a child below 14 years old for a reprehensible act ?

A. YES prosecution is possible based on a strict reading of the law.

There is nothing in law which prevents the prosecution of a child for a crime that the latter has committed. In this regard, **section 44** and **45** of the **Criminal Code** shed some light upon whether a child can be prosecuted or not. The law revolves around whether the child under 14 years old has acted with or without discernment when he has committed the offence.

B. Analysis of the law – section 44 and 45 of the criminal code

Section 44 deals with the situation where the child under 14 years old has acted without discernment, in which case the law provides that the child shall be acquitted, but depending on the circumstances of the case, he would either be remitted to his parents or sent to a reformatory to be detained and brought up for a period that the Court may determine. However, there is a blanket prohibition that the sentence meted out to the child cannot exceed the period when the accused will have reached 18 years old i.e. the legal age for majority.

A contrario, under **section 45** of the **Criminal Code**, should the court find that the child under 14 years old has acted with discernment, the child shall be condemned to imprisonment in a reformatory for such period of time to be determined by the Court. In this case, the Court's sentencing powers is not restricted up to the time that the child reaches 18 years old.

C. Definition of YCC/Reformatory

There is a youth correctional centre in Mauritius where child offenders are sent, one for girls and one for boys and it is currently located at Barkly.

D. The test is one of discernment

At trial stage, it is within the province of the Court to ascertain whether the child has acted with discernment or not. There is no legal definition of discernment, however our **Criminal Code** has been largely inspired and borrowed from the previous **Penal Code** which prevailed in France. It is interesting to note that both our law and the French law have not provided a definition of discernment, such that we are left with its literal meaning and our own legal interpretation of such a notion.

E. Such test is carried out at trial stage/Mens Rea (Analogy)

It is important to note that our law is quite clear that discernment is tested at trial stage so that the decision whether a minor under the age of 14 will be convicted or acquitted belongs to the sole province of the Judge. We are left with the conclusion as rightly pointed out by Jean-Jacques Yvorel in *"Le Discernement: construction et usage d'une catégorie juridique en droit penal des mineurs. Etude historique"* that the test is neither a psychological one nor a mental one. It clearly relies on the facts of the case which, if distinguished with the trial of an adult, goes to the Mens Rea i.e. the guilty.mind of the offender.

Hence, the test is a simple one, that is, whether the child offender acted with discernment i.e. whether the child had the guilty mind or not while committing the offence he/she is being tried for.

G. How it works in the Mauritian context

Each case is dealt with on its own merits inter alia the age of the offender, the seriousness of the offence, the background of the

offender etc. It is common practice to seek expert medical opinion on the question of whether the child has the discernment or not. In cases of violent deaths, a judicial inquiry is also often requested to clarify on the issue of discernment.

II. France

Sections 44 and **45** of our **Criminal Code** have been borrowed from **Article 66** of the previous French **penal code** which reads as follows: "*Si en raison des circonstances et de la personnalité du délinquant, il est décidé qu'un mineur âgé de plus de treize ans doit faire l'objet d'une condamnation pénale, les peines seront prononcées ainsi qu'il suit, sous réserve, le cas échéant, de la possibilité d'écarter l'excuse atténuante de minorité a l'égard d'un mineur âgé de plus de seize ans."* Therefore, it appears that the required age for prosecuting a child was 13 years old and that, under that age, there was no prospect for prosecution. It can be distinguished from Mauritius where there is a possibility of prosecution under the age of 14 years old where the latter has acted with discernment. *"En raison des circonstances et de la personnalité du délinquant…"* goes to the notion of discernment which we have added to our criminal code.

A. Evolution of law

The law has been amended in France regarding young offenders. **Article 122-8** of the **French Penal Code** has lowered the minimum required age for prosecution to 10 years old and different categories of young offenders are now liable to sanctions. Educational sanctions can be imposed on child offenders aged 10 to 18 years old. Both educational and penal sanctions can be imposed on child offenders aged 13 to 18 years old. However, child offenders aged 10 but less than 13 years old are only subject to educational sanctions. Before sanctions are imposed on the child, there will be a balancing exercise with regard to mitigating factors namely their age.

C. Definition of discernment, silent as in Mauritius

The notion of discernment has not been legally defined hence various authors have strived to properly define the notion of discernment. Just like in Mauritius, the test of discernment is carried out at trial stage as explained above. The Magistrate, when requested to conduct a judicial inquiry, will often make a finding as to whether the child who is subject to potential prosecution has discernment or not. However, the finding of the Magistrate at the Judicial Inquiry is not binding on the decision of the Director of Public Prosecution on whether to prosecute the child offender. The DPP can still make further inquiries to ascertain whether the appropriate test was conducted by the Magistrate and consequently decide to prosecute the child offender.

D. Public interest test

The test which has to be satisfied by the Prosecution before lodging a criminal case starts by establishing whether there is sufficient evidence to prove the offence beyond reasonable doubts. The second limb of the test is whether the evidence is credible. The third limb of the test is more delicate and requires a balancing exercise as to whether it is in the public interest to prosecute the offender.

In our situation, it is often the case that minors are not being prosecuted as the case does not satisfy the public interest test. There may be many reasons why it does not satisfy such test but one of the main reasons is that the future of the child is jeopardized and a second chance is given to start anew.

IV. Contradictions

Our law has remained the same since the introduction of our criminal code compared to France which has amended the law in order to reflect societal evolution. The law needs to be certain in regard to whether it is acquitting or convicting the minor and in light of the correct sanction which should be applied. For instance, **section 44** of our **Criminal Code** remains unclear in so far that it acquits the child offender but at the same time the child may be sent to reformatory which is in essence a sentence. Moreover, it is trite law that it is only when one is found guilty that all the surrounding circumstances of the offender are looked into in order to reach the appropriate sentence and not at the stage when one is acquitted.

V. Reforms

From a quick overview of the current state of affairs, it can safely be said that it is high time for reform. There are provisions which cater for the prosecution of child offenders but however there is not much regarding to a pre-established procedure as to how to deal with such prosecution.

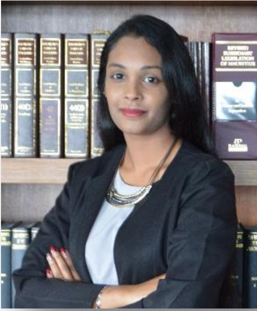
Firstly, as it is the case in France, should the law not provide for different age categories of child offenders such that a child below the age of 10 years old is immune from prosecution irrespective of whether he has acted with or without discernment? Secondly, is the youth correctional center the appropriate place to regroup all child offenders irrespective of their age? Also, would it be more appropriate for child offenders at the lower age spectrum to face individual educational sanctions instead of a one fit all type of sentence? Thirdly, in the light of societal evolution, is it not better to introduce a public interest test which would apply to minors specifically so that the decision whether or not to prosecute a minor is a well thought one. Fourthly, although in practice prosecutors usually request for expert medical opinion to ascertain whether there is discernment or not, would it not be a good starting point that the law provides for such opinion to be mandatory? Finally, another area which calls for reform is in regards to section 44 of the criminal code. It is one of those rare instances where despite the fact that an acquittal is pronounced against a child offender, a sentence is nevertheless imposed.

VI. Signal to be sent

Minors should be informed that they are not immune from prosecution and their age has never been a bar to same. Parents should also be reminded where their responsibility lies. Not only that their child can possibly be prosecuted, but that they can also be held civilly liable under article 1384 of the civil code and as a result of which they may have to compensate for such tort. A strong signal must also be sent to the society at large that minors do not have a blanket immunity to face prosecution. The duty starts at home. Each and every institution has a role to play in the upbringing of a child in order to safeguard against a young generation of young criminals.

Ms Celine Bellouard & Mr Kurshvin Ragavoodoo
Pupils

Sentencing in Involuntary Homicide Cases



Our society through its judiciary system finds it important to differentiate between a well-planned murder and the absent-minded driver. Consequently, involuntary homicide is the causing of someone's death through a careless act without the intent to kill and tends to carry a lighter sentence than other forms of homicide. Involuntary homicide is provided for in **Section 239** of the **Criminal Code**.

Under **Section 239 (1),** any person who involuntarily commits homicide by way of imprudence, negligence, unskillfulness or non-observance of regulations shall be punished by imprisonment and by a fine not exceeding Rs150, 000. **Section 239 (2)** further provides that where wounds or blows only have ensued, the punishment shall be a fine not exceeding Rs100,000 and imprisonment for a term not exceeding 1 year.

Judges always have discretion during sentencing since they will have to take into account a number of factors which vary widely depending on each case. In making their determination, judges will look at mitigating and aggravating factors which will subsequently influence the sentencing process. Mitigating factors tend to reduce the charge or lessen the sentence considering the defendant or the circumstances, based on the evidence and information presented to the court; inversely aggravating factors are more likely to increase the severity of the sentence based on the facts of the offence.

If we look at the judgment of the Supreme Court in **DPP v. Phillippe Jeremy Jordan Lennon [2016 SCJ 332]** the Respondent was charged with firstly *"involuntary homicide by imprudence"* in breach of **Section 239 (1)** of the **Criminal Code** together with **Sections 133** and **52** of the **Road Traffic Act** and secondly *"driving vehicle with alcohol concentration above the prescribed limit"* in breach of **Sections 123 (F) (1)(a)(3)** and **52** of the **Road Traffic Act**.

There is an interesting debate on the kind of sentences that should be imposed in involuntary homicide cases. The Appellant was convicted on both counts and had to pay a fine of Rs 50,000 and Rs 10,000 respectively. The Director of Public Prosecutions appealed against the decision stating that it was excessively indulgent. The appeal was however dismissed.

At this point, it is debatable that the learned magistrate could have imposed a penal sentence taking into consideration the fact that the driver was drunk driving and assumedly an inexperienced driver. Besides, the victim was a police officer presumably on duty. It can be noted that the Learned Magistrate took into account the following facts and circumstances of the case, namely that the Respondent pleaded guilty, which is in itself a strong mitigating factor, his young age and his clean record. She laid more emphasis on the mitigating factors, while referring to Descombes v. The State [2013 SCJ 195].

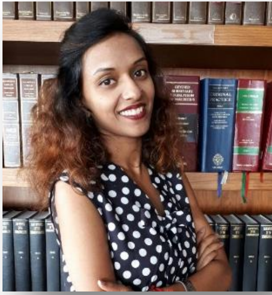
I am of the view that, where more than one offence is involved, the severity of the sentence must increase and penal servitude should be considered. By way of example, there are cases where the driver is drunk, he is driving dangerously, he has no licence, he has not respected the speed limit, and ends up causing death of an innocent road user or pedestrian. In such cases, whatever the mitigating factors put forward, our Courts should not be loathe to impose custodial sentences, so as to match the severity of the offence.

I agree that imprisonment can be a harsh sentence which can have a lifetime impact on someone. The best middle course is to reserve it for cases where safety has been consciously disregarded and where the risk of death has been maliciously created.

The power to sentence is in the hands of the Court and the ultimate decision will depend on the facts of the case. There should sentencing guidelines in relation to mitigating and aggravating circumstances so as to direct the judges while giving their sentencing and which would enable them to have a better and consistent interpretation of the law during sentencing.

Miss Moushmi Pallavee Ramsahye
(STM Intern)

An Insight on the Rule of Hearsay in Criminal Proceedings



"The rule of hearsay" is one of the most characteristic features of the common law system around the world. By definition, it is an out-of-court statement uttered by a person who is unavailable for questioning. According to Professor Sir Rupert Cross "*a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact stated*".

In **Teper v. R [1952] AC 480, 486**, Privy Council, Lord Normand stated that, "*it is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost*".

The classic common law formulation excludes hearsay in criminal proceedings "*when the object of the evidence is to establish the truth of what is contained in the statement*" (**Subramaniam v. Public Prosecutor [1956] 1W.L.R 956**). Thus, the rule can be seen as a reflection of English Law's positive ideological preference for live testimony. The reason for the exclusion was established as "*the fear that juries might give undue weight to evidence the truth of which could not be tested by cross-examination, and possibly also the risk of an account becoming distorted as it was passed from one person to another*" (**Sharp [1968] 1WLR 7**). Moreover our daily life experience teaches us that the further one moves away from the original source, the less reliable the information becomes. The risk lies in the assessment of the weight that should be given "*to a statement by a person whom the jury have not seen or heard and which has not been subject to any test of reliability by cross-examination.*" (**Blastland [1986] AC 41**)

In **Dzitse v. The State(2016 SCJ 236),** it was distinctly established that "*the evidence of a witness must be given publicly in open Court, on oath or affirmation, so that it may be adequately tested by way of cross-examination conducted on behalf of an accused party. This has always been considered as the 'best evidence' since the witness is seen and heard by the Court for the Court to be able to evaluate effectively his demeanour and credibility.*"

American scholar Edmund Morgan identified the "hearsay dangers":

1. Misperception

2. Faulty Memory

3. Insincerity

4. Communication Breakdown

However to mitigate the harshness of the rule, the European Court of Human Rights jurisprudence has laid principles about the conditions and safeguards for the admissibility of hearsay evidence, regulated by the common law and UK's legislation.

Section 181 of the **Courts Act** allows the Court to accept as adequate evidence a fact contained in a certificate under the hand of certain public officers listed in the section, without proof of handwriting of the person, without infringing the right of the accused under **Section 10(2) (e)** of the **Constitution** unless the Court deems that the presence of the officer is required. Thus, documentary evidence may amount to hearsay but not necessarily unreliable.

However, in **Dzitse (2016),** it was argued that the certificate made by Forensic Scientific Officer, Mr Ramtoolah amounted to inadmissible hearsay evidence because latter had passed away. The defence stated that "*each party must be afforded a reasonable opportunity to present his case and evidence by calling, examining and cross-examining witnesses [...] i.e in a manner which does not place him at a substantial disadvantage vis-à-vis his opponent*". The Court, therefore, faces a situation whereby it has to ensure that "*the accused party is not prejudiced by the admission of such evidence*". Thus, it was observed that the principles and safeguards applicable to the admissibility of the certificate were not taken.

Section 47 of our **District and Intermediate Courts (Criminal Jurisdiction) Act 1888** provides for exceptions for written and oral hearsay where the witness has already passed away, is ill or has left the country and is not reasonably practicable to secure his attendance for preliminary enquiry. If it is proved that such measures were taken in the presence of the accused and that his counsel had the opportunity to cross examine the witness; then the evidence shall be admissible unless the deposition has not been signed by the Magistrate.

Section 45 of the **Bank of Mauritius Act 2004** provides that when the genuineness of a currency note or coin that have allegedly been issued by the bank is in question, then a certificate issued by the Deputy Governor should be accepted as "conclusive evidence" and no cross-examination of the Deputy Governor is required.

Statement forming part of the res gestae should be contemporaneous with the act it concerns for it to be admissible. In **R. v Andrews [1987] AC 281**, the victim of a robbery was wounded. He told the police that he had been robbed by the accused and later died. His statement was admitted to prove the truth of the assertion under the res gestae exception to the rule.

The rationale for the exception of dying declarations was that no man "who is imminently going into the presence of his Maker, will do so with a lie on his lips" (Osman [1881] 15 Cox CC 1, 3).

Confession can be considered as the best piece of evidence of guilt in criminal cases. The basic principle of the admissibility of confessions is found in **R. v Ibrahim [1914] AC 599**:

"*it has long been established…that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have a voluntary statement, in the sense that it has not been detained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority*".

The exceptions might have been developed on a case-to-case basis; anomalies and overlaps have been created but as Lord Reid stated, "*in many cases there was no justification either in principle or logic for carrying the exception just so far and no farther. One might hazard a surmise that when the rule proved highly in convenient in a particular kind of case it was relaxed just sufficiently far to meet that case, and without regard to any question of principle.*" [**DPP v. Myers [1965] AC 1001**]

To conclude, the common law rule against hearsay is vulnerable on both sides. If it is abolished, it might benefit the prosecution more than the defence, thus infringing the rights of the accused but there is no obvious evidence that an oath or affirmation in itself promotes truthful testimony. The absence of cross examination might be considered as a valid justification for inadmissibility as second-hand hearsay carries higher risks of distortion and concoction than first hand. Nonetheless it is at the discretion of the court to decide whether the admission of such statement is in the interest of the justice.

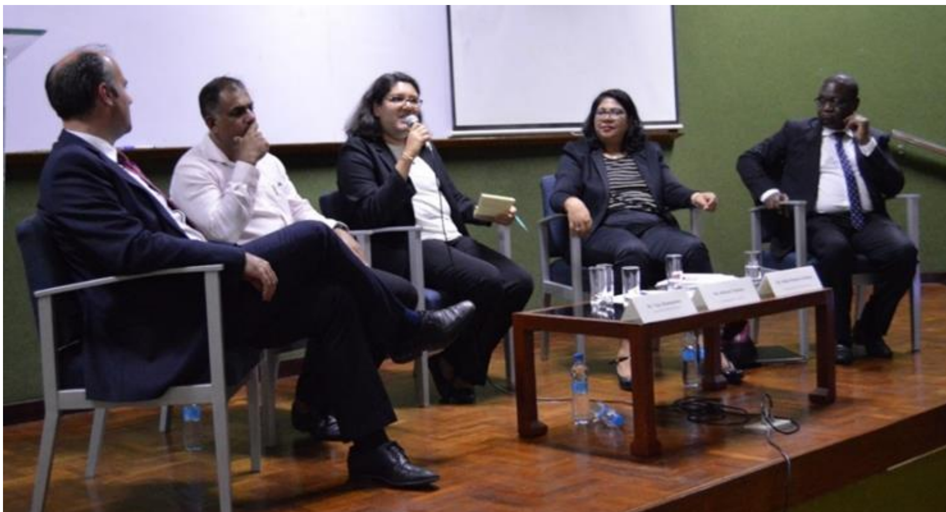
Miss Pravima Ramsurrun
STM Intern (Legal Research)

Workshop on Social Justice: Empowering the citizens to seek justice

The US Embassy has partnered with the University of Mauritius to organise a workshop on "Social Justice: Empowering the citizens to seek justice" on the 5th June 2017. The workshop which took place at the seat of the University was a part of the effort to reflect on the current state of how accessible is our judicial system to the Mauritian citizens and whether they can take advantage of the various legal provisions in order to obtain social justice and equality. The workshop was kicked off by a welcoming speech from Mr Matthew Gerdin, Foreign Affairs Officer at the US Department of State and it was thereafter led by Mrs Johan Moutou-Leckning, Senior Assistant DPP, Mr Richard Toulouse, Attorney from the Equal Opportunities Commission and Mr Vijay Ramanjooloo from the National Human Rights Commission (NHRC). The audience comprised mainly of people from various NGOs around the island and of students from the University of Mauritius.

During his presentation, Mr Richard Toulouse addressed the question of what is social justice. He observed that social justice is a very broad term encompassing not only equal justice before a Court of Law but it encompasses all aspects of the society. The principle of justice according to him demands that all people have equal rights and opportunities irrespective of their sex, age, colour, political opinion, amongst others.

On a second limb, his presentation covered the various Laws which exist in Mauritius and that empower the citizens with the right to equal opportunities and social justice. The presenter emphasised on **Article 1** of the **Universal Declaration of Human and People's Rights** and he also stressed on **Articles 16(1)** and **16(2)** of our **Constitution** that guarantee *"... no law shall make any provision that is discriminatory either of itself or in its effect*" and that *"... no person shall be treated in a discriminatory manner by any person acting in the performance of any public function conferred by any law or otherwise in the performance of the functions of any public office or any public authority."*



Mr Richard Toulouse's presentation also touched upon the **Equal Opportunity Act** that has given birth to two important institutions, namely, the Equal Opportunity Commission and the Equal Opportunity Tribunal. These institutions ensure that victims of discrimination can lodge a complaint and seek appropriate redress through either reconciliation or through the Tribunal.

The workshop was thereafter led by Mrs Moutou-Leckning. She first provided an overview of the provisions of the legal framework which confer access to justice for children, women, the elderly, the disabled and for the LGBT Community. With respect to children, the Ombudsperson for Children gives the possibility to a child or any other person on the child's behalf to lodge a complaint with the Ombudsperson where a child's fundamental right has been violated. As for access to justice for the elderly, **Section 9** of the **Protection of Elderly Persons Act** enables an elderly person to have recourse to an elderly persons' protection order where she/he has suffered an act of abuse.

With respect to access to justice for the disabled persons, the majority of them are constantly exposed to injustices. Despite the fact that Mauritius has signed and ratified **the United Nation Convention on the Rights of Persons with disabilities**, yet, we do not have a Disability Act in Mauritius. There is still a long way to go to ensure that disabled persons get full access to justice. However, we do have provisions in the **Training and Employment of Disabled Persons Act** which provide that each company should employ at least 3% of disabled persons as their workforce. Moreover **Section 13(3)** of the **Equal Opportunity Act** prohibits an employer to discriminate against a person with an impairment.

Mrs Moutou-Leckning then proceeded to explain some of the duties of the State vis-à-vis victims of social injustice. They include the duty to: treat victims with compassion and respect; enable victims to have access to the mechanisms of justice and to prompt redress; provide proper assistance to victims throughout the legal process; to take measures to minimise inconvenience to victims, protect their safety as well as that of their families and witnesses on their behalf, from intimidation and retaliation and avoid unnecessary delay in the disposition of cases.

Social justice is also seen to exist in Mauritius through the availability of legal aid under the **Constitution** and the **Legal Aid and Legal Assistance Act**. However, the Act comprises of certain shortcomings in relation to access to justice namely: although the legislator has increased the value in 2012, yet many people in the middle income group who are by no means wealthy have a disposable income which exceeds the maximum figure as laid down in **section 4 (b) (ii)** of the **Legal Aid and Legal Assistance Act**, that is monthly earnings of Rs 10,000. Moreover, there is no appeal against the refusal to grant legal aid as the Authority's decision is final. No legal aid is provided in Domestic Violence cases. However, the Ministry has a pool of Barristers to assist victims of domestic

violence. As for appeals to the Privy Council, no legal aid is available. Thus, if leave to apply to the Privy Council is not granted by our Courts, the matter stops there, unless the applicant finds the means to appeal which is in fact very costly.

Mr Ramanjooloo, the next presenter spoke about his personal experience with prisoners especially with respect to social justice. He also explained the functions of the Commission as provided for in the **Protection of Human Rights Act 1998**. *The Commission is mandated to visit police stations, prisons and other places of detention. Mauritius, having signed a number of Protocols with the United Nations, has engaged itself not only to punish offenders but to also protect the rights of these prisoners in order to prevent any kind of torture or degrading treatment. He also brushed on the statistics regarding the number of detainees in prisons and concluded by portraying the various offences committed by the prisoners, with the offence of larceny scaling up.*

Ms Komal Boodhun, Lecturer of Criminal Justice at the University of Mauritius closed the workshop by sharing her experience in the US after completion of the Mandela Washington Fellowship. Having worked for an NGO militating against domestic violence, she had the opportunity to work with survivors of domestic violence. She also acted as moderator for the question and answer session. The workshop proved to be successful and very interactive for all the participants.

Mrs Johan Moutou-Leckning, Senior Assistant DPP
Ms Pooja Domun, Legal Research Officer

DEDICATED TO MY LATE FATHER BENJAMIN MOUTOU, WHO PASSED AWAY ON THE 29TH JULY 2017 AND WHO WAS A GREAT ACTIVIST OF SOCIAL JUSTICE FOR ALL.

Mrs Johan Moutou-Leckning, Senior Assistant DPP

SUMMARY OF SUPREME COURT JUDGMENTS: July 2017

LAMTO J.S. & ANOR v THE STATE 2017 SCJ 275

By Hon. N. Devat Judge & Hon. R. Teelock Judge

Section 96(5) of DICA, serious irregularity, Counterfeit bank note

The appellants (accused nos. 1 and 2) were prosecuted before the Intermediate Court for the offences of:

(i) possession of counterfeit bank note in breach of **section 100 (2)(a)(iii), (b)** and **(4)** of the **Criminal Code** under counts 1 and 2;

(ii) having in their custody paper for making counterfeit bank note in breach of **section 100(3)(a)** and **(4)** of the **Criminal Code** under count 3; and

(iii) having in their custody instruments for producing counterfeit bank note in breach of **section 100(3)(b)** and **(4)** of the **Criminal Code** under count 4.

They pleaded not guilty to their respective counts and were assisted by Counsel. After hearing evidence, the learned Magistrate dismissed counts 3 and 4 of the information and convicted the appellants on counts 1 and 2 and exercising his discretion under **section 151** of the **Criminal Procedure Act**, sentenced each of them to undergo three months' imprisonment.

The appellants appealed against their conviction and sentence.

The crucial issues raised and argued before the Learned Judges were (1) the element of knowledge and (2) the provisions of **section 45(3)** of the **Bank of Mauritius Act 2004** (the Act).

After having heard a substantial part of this appeal on its merits on the grounds of appeal, learned Counsel for the State conceded that no bank certificate in conformity with **section 45(3)** of the **Act** was produced before the Magistrate. She also conceded that the Magistrate failed to analyse the evidence before him and pronounce himself on the issue of knowledge and moved that the conviction be quashed and the case remitted to the Intermediate Court to be tried anew before another Magistrate. Learned Counsel for the appellants has objected to the motion on the following grounds:

(i) This Court must be of the opinion that a serious irregularity has occurred thus justifying the exercise of its powers under **section 96(5)** of the **District and Intermediate Courts (Criminal Jurisdiction) Act** to order a new trial. Serious irregularity is accordingly the fundamental criterion which this Court must be satisfied of.

(ii) A misdirection in law by the Magistrate in equating knowledge with possession cannot constitute a serious irregularity. As there is no serious irregularity, this Court cannot therefore avail itself of **section 96(5)** of the **District and Intermediate Courts (Criminal Jurisdiction) Act** to order a fresh trial of counts 1 and 2 of the information against the appellants.

The constitutive elements of the offence of unlawful possession of counterfeit bank notes and which the prosecution had to prove are: (i) the identity of the accused, (ii) the spurious character of the bank notes, (iii) possession of the spurious notes by the accused; and (iv) knowledge by the accused that the notes are spurious

In enacting **section 45(3)** of the **Act**, the legislator has provided a specific mode of proof of the spurious character of bank notes which has to be a certificate from the Bank of Mauritius in the form specified in the Fourth Schedule. This certificate would have constituted conclusive proof that the 33 bank notes secured from the appellants were counterfeit notes. It was therefore incumbent on the prosecution to adduce as evidence the certificate.

The appeal court concluded that failure of the prosecution to produce a certificate issued by the Bank of Mauritius in accordance with **section 45(3)** of the **Act** to establish the spuriousness of the 33 notes of Rs 200 was in itself sufficient

for them to quash the conviction of the appellants. But there was more. The learned Magistrate erred in equating knowledge with physical possession of the counterfeit notes and seriously misdirected himself in finding that the appellants had the burden of establishing that they were in lawful possession of the impugned notes. Misdirection had gravely undermined the finding of the trial Court such that the convictions proceeding therefrom could not be safely allowed to stand.

The appeal court emphasized on **section 96(5)** *of the* **District and Intermediate Courts (Criminal Jurisdiction) Act** *and explained how it would be unfair whereby each time a trial Court either misapprehends or fails to analyse the evidence adduced before it or draws the wrong inference therefrom or misapplies or misinterprets the law thus rendering unsafe a conviction, the case would have to be remitted back to the lower Court for a fresh trial. It would also unfairly allow the prosecution to perfect its omission at trial stage by giving it a second opportunity.*

It is certainly not the function at appeal stage to substitute Learned Judges for the Magistrate and analyse the evidence and make findings of facts which the Magistrate ought to but has failed to do. To do so would be usurping the function of the trier of facts and calling upon us to rewrite the judgment in the place of the Magistrate – an exercise which is within latter's sole province.

For the above reasons, the appeal was allowed and conviction and sentence of the appellants quashed.

MOUTOUSAMY M.M. v THE STATE 2017 SCJ 267

By Hon. A. Chui Yew Cheong, Judge & Hon. A.D. Narain, Judge

Whether an even shorter period might be equally effective in protecting the interests of the public, and punishing and deterring the criminal?

This is an appeal against a sentence for a term of one year's imprisonment imposed by a learned Magistrate of the Intermediate Court under each of 35 counts of "embezzlement by person in service receiving wages" in breach of **section 333(1)** *and* **(2)** *of the* **Criminal Code**.

The appellant had initially pleaded not guilty to the 35 counts before the lower Court but had changed her plea to one of guilty under all counts on the day of the trial. In her three unsworn statements produced during the hearing, she had admitted that, while working as sales clerk in charge of the "Maison des Matelas" shop at Route Bassin, Quatre Bornes, she had committed the

offences between 2006 and 2007 by issuing a sale receipt to the purchaser for the sum paid in each case but entering a different sum in the Cash Book and pocketing the difference between the two sums.

No evidence was adduced on her behalf but she made a statement from the dock, begging for excuse for having been "weak" and promising that she would not reoffend. She also claimed that her husband was not working at the time, that she had a daughter and two grandchildren to care for and that she had had to steal from her employer in order to feed them. Her Counsel drew attention to the fact that she had pleaded guilty, collaborated with the police and apologised.

The learned Magistrate found the appellant guilty as charged. He took into account the status of the appellant as an employee at the time she committed the offences, the number of counts with which she was charged, the nature of the embezzlement and the sum of money involved, as well as her plea of guilty on the day of the trial, her apologies, her family constraints, her clean record and her collaboration during the police enquiry. He went on to find that a custodial sentence was "richly deserved" and no non-custodial sentence would be appropriate in the circumstances. He therefore sentenced her to one year's imprisonment under each of counts 1 to 35.

The sole ground of appeal was that the sentence passed was manifestly harsh and excessive. The respondent has

conceded that the sentence was manifestly harsh and excessive, after effecting a comparative analysis with sentences inflicted in similar cases (**Tourail v State [2014 SCJ 226], Joomun v State [2007 SCJ 41], Allymamode v State [2004 SCJ 85], Dinaram v State [2002 SCJ 34]** and **Meenowa v State [2001 SCJ 82]**) but maintains that a custodial sentence was warranted and has invited this Court to quash the sentence imposed and replace it by a lesser term or remit the case back to the trial Court for sentencing.

The learned Judges quoted Lord Bingham in the case **R v Howells [1999] 1 W.L.R 307**:

"*Where the court is of the opinion that an offence, or the combination of an offence and one or more offences associated with it, is so serious that only a custodial sentence can be justified and that such a sentence should be passed, the sentence imposed should be no longer than is necessary to meet the penal purpose which the court has in mind. We draw attention to the important observations of Rose L.J. giving the judgment of the court in* ***Reg. v Ollerenshaw, The Times, 6 May 1998****, where he said:*

"When a court is considering imposing a comparatively short period of custody, that is of about 12 months or less, it should generally ask itself, particularly where the defendant has not previously been sentenced to custody, whether an even shorter period might be equally effective in protecting the interests of the public, and punishing and deterring the criminal. For example, there will be cases where, for these purposes, six months may be just as effective as nine, or two months may be just as effective as fur. Such an approach is no less valid, in the light of today's prison overcrowding, than it was at the time of ***Reg. v Bibi [1980] 1 W.L.R. 1193***."

This principle was pithily summed up by Lord Woolf CJ in **Kefford [2002] 2 Cr App R(S) 495** as "*imprisonment only when necessary and for no longer than necessary*". Learned judged was of the view that this sentencing principle is also applicable in Mauritius although our statutes are silent on the matter.

In the light of the above, appeal was allowed, the sentence was quashed and the matter was remitted back to the Learned Magistrate for him to obtain a probation report on the appellant and sentence her anew in the light of that report.

RAMGOLAM B. v THE STATEc2017 SCJ 287

By Hon. N. Devat, Judge & Hon. P. Fekna, Judge

The test for imprudent driving, Wilkinson's Road Traffic Offences

The appellant stood charged, before the Intermediate Court, with the offence of involuntary homicide by imprudence in breach of **section 239(1)** of the **Criminal Code** coupled with **section 52** and **133** of the **Road Traffic Act**. He pleaded not guilty; however, the learned Magistrate found him guilty, sentenced him to pay a fine of Rs 75,000 and disqualified him from holding or obtaining a driving licence in respect of all types of vehicles for a period of 3 years. She further ordered that the licence of the appellant be cancelled and endorsed.

The appellant challenged his conviction and the sentence meted out against him.

The facts of the case can be summarised as follows: an accident occurred at between autocyle and private car which was being driven by the appellant. It is not disputed that the deceased was sitting on his autocycle which was stationary next to the pavement on the left side of the road when facing Flacq and was talking to a friend. The appellant was driving from the direction of Quartier Militaire on the left side of the road and motoring in the direction of Flacq. At some point in time an impact occurred between the autocylce of the deceased and the car driven by the appellant. The autocycle was projected forward and the deceased was injured. He was conveyed to hospital and passed away.

The appellant gave sworn evidence in court and his version was to the effect that the autocycle of the deceased was

stationary at a distance of about three feet from the edge of the pavement on the left side of the road. The deceased was sitting on the autocycle with his left foot on the pavement and his right foot on the right-side foot-rest of the autocycle. Suddenly, the deceased turned the handlebars of the autocycle to the right and started a manoeuvre to proceed across the road towards the right. The appellant tried to apply the brakes of his car but it was too late. There was an impact between the two vehicles which caused the deceased to be projected onto his car.

Amongst the grounds of appeal, the speed of the car was discussed in detail. Counsel for the appellant referred to Wilkinson's Road Traffic Offences Vol 1 wherein a table of stopping distances is given at Appendix 5. According to the Table, if a vehicle takes about 23 m to stop it would mean that the vehicle must have been travelling at a speed of about 30 mph or 48 kmph. The stopping distance in the present case was about 20 - 25 m. Counsel submitted that travelling at 48 kmph cannot be said to be an excessive speed, especially when we take into account the fact that no evidence was adduced to show that there was some kind of speed limit on the road where the accident occurred. The question under this ground is whether the learned Magistrate correctly applied the principles of law when considering the issue of imprudent driving.

It is established that the speed at which a vehicle is travelling is not in itself indicative of imprudence, the only qualification to this principle being that driving at an excessively high speed carries the inherent risk of accidents being caused. **Pokhun A v The State [2008 SCJ 337]:**

*"…. in relation to speed ….. more should not be read into **Cayeux v R [1961 MR 265]** and **Seetul v The State [2007 SCJ 135]** than good sense demands. Speed in driving is inherently risky and 'the higher the speed, the less significant other factors would become, there being an inherent risk of accident in driving at an excessive speed (see **Merill v Police, SC Sep, 5, 1996**)."*

The learned judges concluded that speed must be considered in the light of all the surrounding circumstances, more particularly, together with the other factors that led to the accident. If the circumstances are such that a driver was unable to keep proper control of his vehicle whilst proceeding at a certain speed, then that would be indicative of imprudence. This principle is illustrated in a rather extreme manner in the case of **Laurie v Reglan Building Co. Ltd [All. E. R. annotated vol. 3, 24 October 1941, CA]** where the driver of the defendant was driving a heavily loaded lorry in daylight on a broad and good road at a speed of about 10 to 12 mph. Snow had frozen on the surface of the road and the lorry skidded and hit against the plaintiff's husband on the pavement causing his death. In considering the issue of speed, the court held the following:

"*If roads are in such a condition that a motor car cannot safely proceed at all, it is the duty of the driver to stop. If the roads are in such a condition that it is not safe to go at more than a foot pace, his duty is to proceed at a foot pace. The evidence here, to my mind, quite clearly shows that the road was in such a condition that a prudent driver, even if he did not find it necessary to stop, would have proceeded at a very much slower speed when driving a vehicle of this kind*'.

In the present case, the learned Magistrate took into account the point of impact, the distance of 15.30 m over which the body was projected and the damages to both vehicles which, according to her, seemed to indicate a rather violent impact before concluding –'it can be inferred therefore that the car was not being driven at a low speed when it hit the autocycle which had been stationary at the edge of the road'.

The court also laid emphasis on "the test for imprudent driving", as explained in the case of **Mohamed v R [1998 MR 126]:**

'The duty of care which is owed by a driver of any vehicle cannot be looked at in isolation. This duty depends on a number of factors, namely the type of vehicle being driven, the state of the road, the time at which the driving takes

place, persons and vehicles using the road at the material time. By having regard to one or more of these factors the extent of the duty of care to be exercised by a prudent driver can be gauged.

In **R v Lawrence (198) 1 ALL ER 974**, the House of Lords laid down the test to be applied for reckless driving. At page 982 of the report, Lord Diplock had this to say –

"*In my view, an appropriate instruction to the jury on what is meant by driving recklessly would be that they must be satisfied of two things: first, that the defendant was in fact driving the vehcile in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road or of doing substantial damage to property; and, second, that in driving in that manner the defendant did so without having given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved, had nonetheless gone on to take it.*"

The appellant also challenged the sentence. As per the law, in regards to the fine that could be imposed, the Magistrate was entitled to imposed a maximum fine of Rs 50,000 for the offence committted by the appellant in 2007. The fine of Rs 75,000 imposed was wrong in principle. Therefore it was substitute by a fine of Rs 40,000.

The appeal was otherwise dismissed.

"It is by the goodness of God that in our country we have those three unspeakably precious things: freedom of speech, freedom of conscience, and the prudence never to practice either of them."

- **Mark Twain**