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'To No One Will We Sell, To No One
Deny or Delay Right or Justice'
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The views expressed in the articles are those of the particular authors and should under no account be considered as binding on the Office.

EDITORIAL



Dear Readers,

The Office of the Director of Public Prosecutions is pleased to present to you the 69th issue of its Newsletter. In the wake of the International Day Against Homophobia, Transphobia and Biphobia, celebrated annually on 17th May, the Director of Public Prosecutions, Mr Satyajit Boolell, SC, addresses, in this issue, a sensitive debate on Section 250 of our Criminal Code.

Furthermore, following a recent judgment, our readers will benefit from an interesting article on the hybrid nature of the Mauritian legal system. We also bring to you an insight into the activities carried out at the ODPP during the month as well as initiatives of our Office to provide trainings to officers of various Ministries. Moreover, readers will have an overview of the visit at our Office of members of the Board of the Anti-Corruption Commission of Zambia, during which information was exchanged on prosecution of corruption and money laundering offences in Mauritius.

In line with its monthly commitment to organise trainings and workshops on legal matters, in the month of April, the ODPP, in collaboration with the University of 3rd Age Mauritius, carried out a two-day training course with elderly persons to address legal issues faced by our seniors. Further training was carried out by the Office for the officers of the Labour and Industrial Relations Division. Additionally, for the benefit of its staff, the ODPP organised a First Aid Course for staff of the ODPP.

Finally, our usual rubric, the summary of recent Supreme Court judgments is found at pages 13 – 17.

We wish you a pleasant reading and would welcome your comments and suggestions on odpp@govmu.org

Anusha Rawoah
State Counsel

SECTION 250

As the LGBT community celebrates the International Day Against Homophobia, Transphobia and Biphobia, 'Collectif Arc-En-Ciel' appeals once again to our lawmakers to repeal **Section 250** of the **Mauritian Criminal Code** which criminalizes sodomy between two consenting adults.

Like most provisions of our Criminal Code, section 250 was adopted from the ancient French penal code, at a time when sexual relationship between two men was considered to be sinful and a curse. In 1791, after the French Revolution, the offence of sodomy was abolished in France. In England, the law was amended in 1967 to decriminalize consensual homosexual activity in private. A later attempt by the Thatcher government in 1988 to bring back similar provisions was met with resistance and struck down by the courts. In India, homosexuality is still a taboo subject. Attempts to abolish section 377 of the Indian Penal Code criminalising homosexual intercourse, is yet to be fulfilled.

Social attitudes and personal morality have since shifted at a remarkable rate in today's world of equal rights. The British High Commissioner to Mauritius is openly gay and attends official functions with his husband as his civil partner. In its issue of June 2007, the Law Reform Commission of Mauritius analysing the Sexual Offences Bill proposed by the then government, reminded us of **Article 17** of the **International Covenant on Civil and Political Rights** to which Mauritius is a signatory. It provides that everyone has the right to the "*protection of the law against unlawful interference with his privacy*" and that it requires every State party to the Covenant to ensure that the right is enjoyed by its citizens without any discrimination on the grounds of sex.

In an application made to the Human Rights Committee, an Australian citizen by the name of Toonen petitioned the Committee arguing that the Tasmanian Government was acting in breach of his right to privacy and the protection of the law by providing in its criminal code that the consensual act of homosexual activity amongst gay men was a crime. The Committee found in favour of Mr. Toonen holding that he was indeed a victim of discriminatory treatment and the laws criminalizing homosexual activities in Tasmania violated **Article 17** of the **Covenant**.

The same reasoning was adopted by the European Court of Human Rights in the case of **Dudgeon (October 1981)** and in **Norris (October 1988)**. The evolution of the law did not stop there. In the case of **Sutherland v the United Kingdom (March 2001)** before the European Court of Human Rights, the applicant complained that the fixing of the minimum age for lawful homosexual activities between men at 18 rather than 16 as for women violated his right to respect private life under **Article 8** of the **European Convention for Human Rights** and was discriminatory, contrary to **Article 14** of the **Covenant**. The Court held that no objective and reasonable justification exists for the maintenance of a higher minimum age of consent to male homosexual than to heterosexual acts. In addition, the application discloses discriminatory treatment in the exercise of applicant's right to respect private life, under **Article 8** of the **Convention**.

These authorities demonstrate that 'Collectif Arc-En-Ciel' makes an important and pertinent point as regard **section 250** of our **Criminal Code** and the likelihood that the section may not pass the test of constitutionality is a high one.

Satyajit Boolell, SC
Director of Public Prosecutions

MAURITIAN LAW: WALKING A MAZE



“There is a single legal order in Mauritius but its sources are French Law, English Law and Mauritian Statute and case law...,” Judicial Committee of the Privy Council in **Ahnee v DPP** [1999] MR 208.

The recent judgment of the Supreme Court (sitting on appeal from the Commercial Division) in **Maurilait Production Ltee v La Laiterie de Curepipe Ltee** [2017] SC] 125 comes to highlight a difficulty every Mauritian law practitioner grapples with – that of finding one’s way in the labyrinth of a hybrid legal system.

The blend of diverse legal traditions is a consequence of our history. Colonisation by both the French and the British, and subsequent independence, brought about a legal order where English Law, French Law and Mauritian Law interact in constant dynamics. Rich legal culture for some, a maze for most. It is far from simple, on a given set of facts, to decide which is the applicable law.

The law of passing off in Mauritius is such an example; the Supreme Court in **Maurilait** took a position contrary to the first instance judgment of the Commercial Court and held that passing off actions are governed by the **Civil Code** and specific legislation in the area (**Protection Against Unfair Practices Act and the Patents, Industrial Designs and Trademarks Act**). The Commercial Court had applied English law only.

The valuable guidance given by the Court (Balancy SPJ and Caunhye J) may be summed up as follows:

- (1) The first source of legal remedies in Mauritius remains the statutes enacted by the Mauritian Parliament.
- (2) Sources of law also extend to case law:- **DPP v Mootoocarp** [1988] MR 195.
- (3) In passing off actions, there is now in Mauritius express legislation to deal with the protection of intellectual property rights.
- (4) English law and authorities are of valuable assistance to interpret the application of our law, where the law in Mauritius is comparably similar to the English law on the subject.

The Court has also drawn an analogy with defamation law which can only have its source in **articles 1382 and 1383** of our **Civil Code**, whilst English cases on libel can only give guidance.

From one’s days as a Bar student in Mauritius, or as a pupil, or as a young practitioner, this amalgam of various traditions will not fail to intrigue, or challenge one’s legal acumen. Finding one’s way in this maze is neither easy, nor simple. The **Maurilait** judgment comes to help us in finding our way through this density of laws.

Mrs Sulakshna Beekarry-Sunassee
Ag. Assistant DPP

VISIT AT THE ODPP BY THE BOARD OF THE ANTI-CORRUPTION COMMISSION, ZAMBIA

On 27th April 2017, the ODPP was pleased to have the visit of four Commissioners forming part of the Board of the Anti-Corruption Commission (ACC) of Zambia. The ACC, established in 1982 in Zambia operates under a two-tier structure of a part-time Board of Commissioners on one hand, and a Directorate on the other hand. The Board, comprising of five Commissioners and headed by a Chairperson, is responsible for providing general policy guidelines and monitoring the performance of the Directorate. Recognising the need to interrelate and network as well as to share information with a view to enhance its capacity to fight corruption in Zambia, four Commissioners of the Board formed part of the said study tour in Mauritius. During the study tour, they visited institutions such as the ICAC and the Financial Services Commissions. The Zambian delegation was headed by Justice Timothy Aggrey Kabalata (Chairperson of the Board).



During their visit at the Office of the DPP, they were provided with an overview of the criminal justice system in Mauritius as well as the prosecution process with regard to corruption and money laundering offences. Discussions and exchange of information took place regarding the relevant legislative framework of both countries. The visit aimed at improving networking and collaboration.



Anusha Rawoah
State Counsel

**University of 3rd Age Mauritius: Legal Issues
faced by the elderly**

On the 24th and 25th of April 2017, the Office of the Director of Public Prosecutions ('ODPP'), in collaboration with the University of 3rd Age Mauritius ('U3AM'), carried out a 2-day training course for the students of U3AM. This was the third training course held with U3AM, following two successful trainings held in August 2015 and May 2016. The training saw the attendance of around 65 participants where the training was to address the legal issues faced by the elderly.

The first day started with a welcoming speech by Ms Poollay Mootien, Senior State Counsel, who encouraged the participants to make the most out of the training and be as interactive as possible. This was followed by a speech from Mr A. Parsuramen, G.O.S.K, Founder of U3AM who talked about his experiences with disabled people and what motivated him to set up the Global Rainbow Foundation. He also extended his heartfelt gratitude to the Director of Public Prosecutions and his whole team for their assistance in organising those trainings.

Ms Poollay Mootien then briefly introduced the ODPP to the participants explaining the roles and powers of the DPP. Mrs Dabeesing-Ramlugan then delivered a presentation on the Mauritian Legal System about the history and evolution of our judicial system as well as our different court structures.

Following that, Mrs Moutou-Leckning, Senior Assistant DPP, made a presentation on the legal framework for the protection of the elderly persons. She emphasised on the availability of a protection order for elderly people in cases of domestic violence. Explanation was also given to the audience on the nature of the protection order and the various offences which are criminalised under different acts.

The first day ended with a lecture from Mrs Jeewa, Senior State Counsel, on the different laws regulating domestic violence and the different protection orders afforded by court under the Protection for Domestic Violence Act 1997.

The second day started with an introduction from Mr Ponambalum, Attorney-at-law, who gave an in-depth explanation on 'Droit des successions'. This was a very interactive session which proved to be very fruitful for the participants.

Then followed a presentation from Mrs Soobagrah, State Counsel, on Road Traffic offences and their effects on senior citizens as well as the law regulating the use of public transport for the elderly people such as the duties of a bus conductor.

After the lunch break, Ms Aarthi Burthony, former trainee under the Service to Mauritius program, gave an inspirational talk about living with disability and how she copes with the working environment. She also

sensitised the audience on their treatment and perception of disabled people. All the participants were asked to carry out an exercise where they had to keep their eyes closed for a minute so they can put themselves in the shoes of a blind person. Finally, she gave an introduction of the work she does for the Global Rainbow Foundation and encouraged the participants to reach out to the organisation should they have any issues.

The second day ended with an interactive session by Mrs Jeewa and Mrs Soobagrah, where the participants were invited to ask any questions they might have had over those two days.





Pooja Domun & Neelam Nemchand
Legal Research Officers

**Training to Technical Officers of the Labour
and Industrial Relations Division**

A two day training was organised by the Office of the Director of Public Prosecutions (ODPP) for the officers of the Labour and Industrial Relations on the 26th and the 28th of April 2017 at the Rajsoomer Lallah Lecture Hall. The training was conducted by the law officers of the ODPP namely, Mr. Mootoo, Miss Rawoah, Mr. Bhoyroo, Mr. Bhatoo, Mrs. Dawreeawoo and Mrs. Veerabadran- Mudaliar.

The aims of the training were to provide:

- (a) a brief outlook of the rules of Criminal Procedure,
- (b) an insight of pre-trial issues and procedures,
- (c) an analysis of the possible criminal offences found under the Employment Rights Act 2008,
- (d) guidelines on drafting of an information and
- (e) possible solutions to the concerns of the officers when applying the provisions of the law pertaining to the offences under the Employment Rights Act 2008.

A welcoming address by Mr. Mootoo marked the start of the training.

Mrs. Dawreeawoo spoke about the Mauritian Legal System and its functions, the sources of law/Court Structure, criminal procedure and issues which may arise at the level of the enquiry when investigating an offence. An example was used for a more conducive approach.

Succeeding from the above, Miss Rawoah spoke on the powers of the DPP, the delegated power to conduct prosecution, pre-trial procedure and case presentation in Court.

Mrs Veerabadran-Mudaliar offered an analysis of the obligations upon employers to comply with the Employment Rights Act 2008, an overview of the various offences under the Act and its enforcement. Experiences as well as concrete examples from the officers were used in order to understand the interpretation of the sections of the law.

The Officers raised several concerns with regards of the law of natural justice and issues which usually arise during disciplinary committees and their roles as officers appearing for employees. These concerns were addressed lengthily by the Law Officers and that resulted into a very interactive training.

The training on drafting of information was led by Mr Bhoyroo and Mr Bhatoo. Mr Bhoyroo gave an introduction on the concept of provisional information. While explaining on the form of the information, he provided examples of situations where information will be defective and circumstances where defects will not

invalidate the information. He cited Section 36 of the Criminal Procedure Act 1853 to complement the explanations. He referred to the case of *State v Treebhoowon* [2012] SCJ 214, where it was held that the prosecution was not bound to furnish particulars over and above the details already set out in the information, so far as the information:

- is direct and certain;
- sets out the section of the statute and the words of the law creating the offence;
- identifies the party or parties charged unequivocally;
- gives a proper description of the offence with which the accused is charged;
- discloses all the elements of the offence; and
- sets out the material circumstances of the offence with which the accused stands charged.

The labour officers were provided with a short scenario and they were asked to draft the information. The session was highly interactive and the labour officers expressed the predicaments which they face while drafting information. The drafting exercise allowed them to take cognisance of effective ways to draft an information whilst avoiding repetition.

Mr Bhatoo elaborated on Section 44 of the Interpretation and General Clauses Act 1974, which deals with the liability of persons involved in the management of a company.

The sessions served as a platform for the labour officers and inspectors to grasp the relevant knowledge and drafting techniques which will enable them to perform their duties diligently.





Mrs Shaaheen Inshiraah Dawreeawoo, State Counsel
Ms Keshini Dhunnoo, Legal Research Officer

First Aid Training Course

From the 3rd to 7th April 2017, the ODPP organised a First Aid Course for staff of the ODPP and AGO. There was a total of 20 participants, 10 from each office.

The training was carried out over 5 half-days from Monday to Friday where participants learned the essentials of First Aid. On the first day, participants learned the basics such as:

- Meaning of First Aid
- Aims of First Aid
- The Role of a First Aider
- How to carry out a Primary Survey which is an initial rapid assessment of casualty to establish and treat conditions that are an immediate threat to life
- First Aid Priorities
- How to carry out a Secondary Survey (methodical process of checking for other injuries or illness by performing a head-to-toe survey)
- How to put the casualty in the recovery position while awaiting for medical help.

The second day of the training was focused on Cardio Pulmonary Resuscitation, also known as CPR, which should be carried out on an unconscious casualty who is not breathing. Participants learned the aims of CPR and how to carry out CPR for both adults and children.

The participants were also given a brief overview on how to use a portable Automated External Defibrillator. The second day ended with respiratory problems whereby the participants learned how to help a casualty who is choking or has any other respiratory problems.

The third day of training was about heart attack and cardiac arrest. The participants were taught the difference between the two as well as how to recognise a heart attack and how to help a casualty having a heart attack. The trainer also explained shock, which is a life threatening condition which occurs when the circulatory system fails and as a result, vital organs are deprived of oxygen. To conclude the third day, the participants were explained how to treat different types of injuries such as bleeding, dog bite, burn and nose bleed.

The fourth day was about the nervous system and medical problems. The participants were explained treatment for head injuries, such as concussions, cerebral compression and seizures.

The fifth and last day was about musculoskeletal injuries such as fractures, strains and sprains.

To conclude this training, all the participants had an examination on Monday the 10th April. The examination consisted of practical exercises, as well as theoretical questions. For those who passed this examination, a certificate of First Aider will be awarded which will be valid for two years'.



SUMMARY OF SUPREME COURT JUDGMENTS:**March 2017****ASHRAFI M M v THE STATE & 2 ORS 2017 SCJ 85****Hon. D. Chan Kan Cheong, Judge & Hon. N. F. Oh San-Bellepeau, Judge****Community service order, mitigating factors, degree of seriousness**

The appellant was convicted for the offence of treating of public official in breach of **section 14** of the **Prevention of Corruption Act** under 3 counts and he was sentenced to a term of imprisonment of 3 months under each count.

Appellant appealed against the sentence under all 3 counts on the ground that it was wrong in principle and manifestly harsh and excessive. Learned Counsel for the appellant submitted that the learned Magistrate failed to give due consideration to the various mitigating factors in favour of the appellant. Learned Counsel contended that the sentence was disproportionate and a community service order would have been the appropriate penalty in the circumstances. However, the learned Counsel for the respondents, submitted to the effect that the learned Magistrate duly considered all the circumstances of the offence and the mitigating factors in the appellant's favour.

Learned judges referred to the case of **Heerah v The State [2012 SCJ 71]**, it was held as follows:-

“[15] That a prison sentence is normally appropriate where an offender is convicted for serious offences, of that there is no doubt. But the level at which the offence should be placed on the scale of offences in terms of the degree of seriousness must not be ignored. Furthermore, not all candidates who fail the test of monetary penalties, or a Probation or Conditional Discharge Order become automatically candidates for prisons.

A custodial sentence used to be once the only option for offenders who failed such tests after the Court had ruled out a fine, a Probation or Conditional Discharge Order.

*However, for this category of offenders, Parliament, in its wisdom, has now added one invaluable and intermediate regime between the custodial option and the non-custodial option: that is a suspended prison sentence under the **Community Service Order Act**. [16] Courts should refrain from imposing custodial sentence as a matter of reflex and indiscriminately in all cases where fines and Probation Orders and Conditional Discharge Orders are not found appropriate. Serious consideration should be given to that intermediate option inasmuch as ‘the deprivation of liberty through a custodial sentence is the most severe penalty available to the courts and the proper punishment for the most serious crimes’....”.*

Hence, relying on **Heerah**, this appeal was allowed and case was remitted to the Learned Magistrate for her to proceed in accordance with the procedure set out under the **Community Service Order Act**, and, if the conditions set out in these sections are met, to suspend the custodial sentence passed under all 3 counts and make a community service order.

CALLYCHURN M K v THE STATE 2017 SCJ 72**Hon. A. F. Chui Yew Cheong, Judge & Hon. O. B. Madhub, Judge**

La préméditation est donc une forme de volonté, persistante et résolue, et dont le caractère est le calme et le sang-froid de l'agent.

The appellant was charged before the Intermediate Court with the offence of assault with premeditation causing incapacity for personal labour for more than 20 days, in breach of **section 228(1)** and **229** of the **Criminal Code**. He was found guilty as charged and was sentenced to undergo two years imprisonment. He appealed against the conviction and sentence on several grounds. The only ground which was dealt with was as follows:

“The Learned Magistrate erred in law when inferring that on the facts adduced there has been “préméditation” by the appellant.”

The evidence adduced before the trial Court in a gist was as follows: the appellant and the déclarant (one Luximon) were not on good terms as Mr Luximon contended that the appellant owed him a sum of money for work done for the latter. Mr Luximon had been asking to be paid on several occasions but the appellant could not be reached over the telephone. On 9 September 2008, Mr Luximon succeeded in talking to the appellant and he duly asked for the money which he alleged, was owed to him by the appellant. The appellant insulted him and uttered the following words to his address *“si to ene bon mal dire moi cotte to été.”* Mr Luximon who was then walking on his way to work, felt being hit from the back. It was the appellant’s car which had hit him, causing him incapacity for personal labour for more than twenty days.

Counsel for the appellant conceded that there was deliberate intention to assault but submitted there was not enough evidence to show that there was premeditation.

As per the evidence of the alleged victim, the vehicle of the accused hit against him whilst he was still on the phone with the accused, and the latter asking him where he was at the material time.

This aspect of premeditation was considered in the case of **Ratseezamat v The State [2010 SC] 439** and followed in **Boudan v The State [2012 SC] 427**. In both cases the court made reference to Notes 6 to 8 of **Garçon Code Pénal Annoté, Tome 1, Art 296-8. Notes 1891 and 1892 of Garraud, Droit Pénal Français, Tome Cinquième**, at page 209 and 210 were also referred. In essence what **Garçon** and **Garraud** suggested was that *“La préméditation exige un certain intervalle, un certain temps entre la détermination et la volonté.”* (vide note 1892 op. cit). *“Si l’acte est accompli aussitôt résolu, il ne sera pas possible à l’individu de réagir,*

à la volition complète et mûrie qu’est la préméditation de s’établir. La préméditation est donc une forme de volonté, persistante et résolue, et dont le caractéristique est le calme et le sang-froid de l’agent.” (Vide note 1891 op. cit.). *“Le malfaiteur, qui prend sa résolution après délibération mûrie et qui exécute froidement un projet dont il a pu combiner les moyens et calculer les suites, est plus coupable que celui qui agit brusquement, obéissant à une impulsion, immédiate et sous l’influence irraisonnée de quelque vive passion.”* (Note 6 op. cit.).

In the circumstances, the said ground of the appeal succeeded to the extent that the finding of premeditation by the learned Magistrate was based on a misapprehension of the evidence.

Hence, the matter was referred back to the learned Magistrate for sentencing, after the appellant has been given an opportunity to adduce evidence in mitigation on a charge of assault causing incapacity from personal labour for more than 20 days, simpliciter.

GOOJHA.M.S.v THE STATE 2017 SC] 77

Hon. P. Fekna, Judge & Hon. A. D. Narain, Judge

Grounds of appeal outside delay, responsibilities of legal representatives

This is an application by way of motion and affidavit for the Court to allow the addition of a new ground of appeal outside delay to the grounds which are the subject matter of the main appeal case. The applicant stood charged before the District Court of Pamplemousses with the offence of assault in breach of **section 230(1)** of the **Criminal Code**. He pleaded not guilty to the charge, but the learned Magistrate found him guilty and sentenced him to pay a fine of Rs 3,000 as well as the sum of Rs 100 as costs. He appealed against the decision of the learned Magistrate. However, before the appeal was heard on the merits, attorney for the applicant filed the present

application which the Learned Judges had to determine before the main appeal case is heard.

The position in law concerning grounds of appeal lodged outside delay was dealt with extensively by the Supreme Court in the case of **S Ramtohol v The State [1996 SC] 356** where the Court found that ‘as a matter of fact the situation in England is not very different to that pertaining in Mauritius. There too the approach of the Courts is that delays are to be strictly observed such that the Courts would exercise their discretion [to hear grounds of appeal lodged outside delay] only in exceptional cases, the categories of which are not however really closed.

The Court then went on to enunciate the following principles, the relevant parts of which are:

“[1] this court has a discretion to allow an appeal to proceed or not outside delay.

[2] the guiding principle, in procedures governing appeals is, as wisely summed up in **Lagesse v CIT [1991 MR 46]**, that “at some stage the finality of judicial decisions should be certain and procedural requirements governing appeals from those decisions should not be disregarded so as to prolong uncertainty and the holding up of the execution of a judgmentunless..... non-compliance is shown not to be due to acts or more frequently, the omissions of the appellant or his legal advisers.

[3] there are, however, no closed categories of cases for the exercise of the Court’s discretion, and the Court may exceptionally allow an applicant who has appealed outside delay due to his own laches or that of his attorney where there is, in the Court’s view, sufficient justification for such exercise of discretion. We totally endorse, in this connection, the wise words of the learned Judges (Glover AC) and Espitalier Noel J.) in **Carpenen v Lakhabhay [1986 MR 176]** that “Time limits prescribed in procedural matters are not always mandatory to the point of thwarting the course of justice’.

[4] the Court, in its discretion , may consider where appropriate the circumstances giving rise to the proposed grounds of appeal and consider whether, having regard to their arguability, it should allow the appeal to be entertained out of time, whilst guarding itself, of course, from making any pronouncements, in advance, on any ground of appeal’.

Section 69(3) of the Courts Act provides the following:

[3][a] Every appellant shall, not less than 45 days before the date of the hearing of the appeal, serve on the other parties to the appeal and lodge in the Registry, in such form and manner as may be prescribed by Rules of Court, skeleton arguments and submissions on the grounds of appeal.

[b] Every other party to an appeal shall, not less than 30 days before the date of the hearing of the appeal, serve on the other parties to the appeal and lodge in the Registry, in such form and manner as may be prescribed by Rules of Court, skeleton arguments and submissions on the grounds of appeal.

[c] Where any applicant or party to an appeal does not comply with any of the provisions of paragraph(a) or (b), the Court may make-

[i] such order as to costs as it thinks fit; or

[ii] a wasted costs order”.

The time limit for the filing of skeleton arguments is clearly set out as being 45 days for the appellant and 30 days for any other party to an appeal before the case is actually heard on the merits. However, when the skeleton arguments of the appellant are filed at the last moment, it can and in most cases does lead to an unfair result in the sense that the respondent is rushed in the preparation of its skeleton arguments by way of response. Similarly, the

filing of skeleton arguments by other parties outside the statutory delay may have the effect of depriving the appellant of the opportunity of giving a meaningful reply.

Hence, in the present case, the Learned Judges concluded that there was no circumstances upon this court to exercise their discretion to allow the new ground of appeal to be entertained outside delay. The motion was accordingly set aside with costs.

GUKHoola v THE STATE 2017 SCJ 113

Hon. A. Caunhye Judge & Hon. G. Jugessur-Manna Judge
Section 14(2)(a) of Child Protection Act, causing child to be sexually abused, own's gratification

The appellant was prosecuted under 2 counts of an information for the offence of "causing a child to be sexually abused" contrary to **section 14(1)(a)** and **section 18(5)(b)** of the **Child Protection Act**. Following his conviction, he was sentenced to 6 months' imprisonment under each of the two counts.

On appeal, there were several grounds of appeal. One of which, the appellant was challenging **section 14(1)(a)** of the **Child Protection Act**.

It was thus submitted by the Appellant that in the light of the decision in **Teeluck v The State [2014 SCJ 398]** there could be an offence in the present matter only where the appellant had subjected the complainant to sexual abuse for the gratification of another person i.e a third party. There would be no offence where the appellant had caused the complainant to be sexually abused for his own personal satisfaction since according to **Teeluck** (Supra), there would be no offence in law where the sexual abuse is only for the gratification of the "causer".

Learned Judges concluded that **Teeluck** (Supra) had been wrongly decided on that issue and cannot be of any assistance to the appellant for a number of reasons:

*"(1) In the first place, there is no reason that the term for "another person's gratification" under **section 14(2)(a)** to be given a legal meaning other than its normal and ordinary meaning. The words "for the purposes of another person's gratification", in the contextual scene envisaged by **section 14(2)(a)** for the purposes of an offence of sexual abuse under **section 14(1)(a)**, simply means for the gratification of another person in contradistinction from the child victim. In other words, there would be an offence where the impugned act is carried out for the gratification of any other person apart from the child himself. This would obviously include the person responsible for the sexual abuse.*

*(2) Furthermore, the Court in **Teeluck** (Supra) failed to consider that **section 14(2)(a)** contains only deeming provisions. In construing **section 14(2)(a)**, the significance of the use of the words "shall be deemed" has been missed and completely overlooked by the Court. Such an omission has led to a distortion of the interpretation placed on **section 14(2)(a)** by the Court.*

*(3) The legislator has created a complete offence under **section 14(1)(a)** by criminalising in broad terms any act of causing a child to be sexually abused.*

***Section 14(1)(a)** of the Act, on its own creates a complete offence. It is contained in a "free-standing" subsection which is not subject to any other law or any other provisions of the Act. The legislator went on to cast the net wider under **section 14(2)(a)**, by inserting a deeming clause to ensure that, over and above **section 14(1)(a)**, there would still be a presumption of sexual abuse in the added situations listed under **section 14(2)(a)**.*

*(4) In other words, a plain reading of **section 14(1)(a)**.*

shows that there would be an offence of sexual abuse completed whenever a person causes a child to be sexually abused whether by him or by another person. **Section 14(2)(a)** goes further by adding that there would still be an offence whether the child is an observer or participant and it is immaterial whether the child is consensual or non-consensual.

(5) **Section 14(2)(a)** therefore does not curtail the application of **section 14(1)(a)** by narrowing or reducing its effect as expounded by the equation in *Teeluck* (Supra). It does not import any limitation or restriction depending on who is “gratified”, but, on the contrary extends, by its presumptions, the scope of ‘sexual abuse’ for an offence to be established for the purposes of **section 14(1)(a)**.

(6) A literal reading of **section 14(1)(a)** shows that the offence may be committed in 2 possible ways, either by the appellant causing the child “to be sexually abused by him” or “by another person”. There is no further requirement under **section 14(1)(a)** to prove that such an act is being done “for another person’s gratification” which would only arise where **section 14(2)(a)** would find its application. Even then, as it has been seen above, that requirement would be met where the gratification is for any other person apart from the child himself.

(7) The purposes set out under **section 14(2)(a)(b)(c)** would obviously find their application only in the specific situations listed under **section 14(2)** where the prosecution chooses to rely upon any presumption in support of its charge under the deeming provisions of **section 14(2)(a)**. This is not the case in the present matter. The charge in the present matter was brought solely under **section 14(1)(a)** of the **Act** and the charge in the information did not include **section 14(2)(a)**. The prosecution is not relying in the present case on any of the presumptions which have been

created under **section 14(2)** of the **Act**.

(8) In order to understand the context in which the **Act** is set, it is also useful to refer to the **Explanatory Memorandum to the Child Protection Bill (No. XXIX of 1994)**. It clearly lays down that the object of introducing the legislation was to make better provision for the protection of children and to create a number of offences for the better protection of children. The enactment of **section 14(2)** is a striking manifestation of the clear intent of the legislator to improve the legal arsenal for curbing the mischief of child abuse by making better provision and creating new offences for the better protection of children.

(9) The legislature stepped in to bring new legislation to achieve a purpose which is in line with the obligations of Mauritius as a signatory of the **Convention on the Rights of the Child**.”

Hence, appeal was dismissed with costs

N.B. In relation to 68th issue of our newsletter (March 2017), at page 12, the words ‘the Appellate Court held’, in the beginning of paragraph 6, should instead be ‘the Respondent submitted’.

“The truth is, no one of us can be free until everybody is free.”

- Maya Angelou