Office of the Director of Public Prosecutions

E-Newsletter

Issue 72

July 2017

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

Chapter 40, Magna Carta 1215

July 2017 - Issue 72

IN THIS ISSUE:

	PAGE
Editorial	1
Crime & sexual infidelity	2 - 3
"The Art of Appealing"	4
Has Somali Piracy Returned?	5 - 6
The East Africa Regional Conference on Cybercrime and Electronic Evidence	7 - 9
Magistrates workshop on strengthening judicial response to cases of domestic violence	10 – 11
Gone Too Early …	12
Case Summary	13 - 15

EDITORIAL

Dear Readers,

It is with the same pleasure that we bring to you the 72nd issue of our monthly newsletter.

In this issue, the Director of Public Prosecutions, Mr Satyajit Boolell, SC addresses the concern surrounding crime and sexual infidelity. Furthermore, following the recently delivered judgment of **Ramgolam v The State [2017 SCJ 163]**, a riveting article is provided for our readers on 'the art of appealing'.

Moreover, our readers will benefit from an article which grapples with 'piracy' as well as recently reported incidents of armed robbery at sea in the African region.

On the other hand, in the wake of an upswing in cybercrime attacks faced by a number of countries, the East Africa Regional Conference on Cybercrime and Electronic Evidence was held in Mauritius in July 2017, whereby the Office of the DPP participated actively in discussing the legal framework governing such offences in the country. An overview of this three days' regional event is provided in this issue.

Also, a synopsis is provided on a one-day training workshop for Magistrates, organised by the Ministry of Gender Equality, Child Development and Family Welfare, in collaboration with the Australian High Commission and Mrs Justice Jayanthi McGrath, South Australian Magistrate. The said workshop, aimed at strengthening judicial response to domestic violence cases, was attended by various members of the judiciary.

This issue also includes a memorial eulogy to pay tribute to our dear colleague Shanawaz Namdarkhan whose recent demise left none of us untouched, and whose presence will be inevitably and tremendously missed.

Finally, in our usual endeavour to keep you abreast with latest case laws, we bring to you summaries of Supreme Court judgments.

We wish you a good read.

Miss Anusha Rawoah
State Counsel

CRIME & SEXUAL INFIDELITY

The breakdown of relationships whenever they occur, and for whatever reason, is always fraught with tension and difficulty with the possibility of misunderstanding and the potential for irrational fury. And when it becomes apparent that sexual infidelity is at the root of the breakdown, it has the potential to create a highly emotional situation, exacerbate the existing tension and produce a completely unpredictable, and sometimes violent, response.

This sense of betrayal and heartbreak very often triggers a desire for revenge, a loss of self- control, a sense of being seriously wronged, causing a person to do the unthinkable: callously taking the life of his or her spouse. Experience has taught us that very often within the four walls of a courtroom drama, the killer reduces his act to a one-line sentence " *if I can't have her, no one else should*".

This odious criminal act which constitutes either murder (intentional killing with premeditation) or manslaughter (intentional killing without premeditation) is visited by the highest of punishments of up to a maximum of 60 years. And rightly so. Last week the Assize court sentenced a man to 33 years for the killing of his wife who was allegedly unfaithful. Earlier in the year another man was convicted for cutting his wife with a grinder and disposing of her body in raffia bags as he suspected her of infidelity. He is serving a term of 35 years in prison.

Nevertheless, our **Criminal Code** still provides for an unjustifiable lenient approach for sexual infidelity in one specific case. **Section 242** provides that the killing of a spouse as well as his accomplice by the other spouse is excusable at the very moment he finds them in the act of adultery. A one-night stand would not qualify for the exception. The law does not define whether adultery actually meant in the middle sexual intercourse or simply exchanging kisses on a couch although it is more likely to be the former, but understood that the killing of both lovers when caught in flagrante delicto is excusable. This implies that the killer spouse would get a lesser sentence of imprisonment (anything between 10 days and 10 years). The situation remains untenable even if the maximum sentence is 10 years when it should have been 60 as envisaged in cases of intentional killing.

Section 242 which is based on roman law is a copy of **Article 324** of the **1810 French Penal Code,** save that the under French law there was the additional requirement that the adultery must have taken place "*dans la maison conjugale*". The Law Reform Commission has in its issue paper on **section 242** explained the origins of **Article 324**:

« *La loi romaine accordait au père, avant de l'accorder à l'époux, le droit de tuer sa fille et son complice surpris en adultère. Patri datur jus occidendi adullerum cum filiâ quam in poteslate habel. Ce droit était toutefois soumis à plusieurs conditions : il fallait que sa fille fût sous sa puissance, comme l'exprime la loi qu'on vient de*

elire ; car c'était un attribut de la puissance paternelle : nemo alius exparentibusidem jure faciat ... 11 fallait ensuite qu'il surprît sa fille en flagrant délit: in ipsâ turpitudine, in ipsis rébus Veneris. Et la loi exigeait de plus que le même coup frappât à la fois sa fille et son complice, iclu et uno impetu ulrumque débet occidere parce qu'elle supposait que le meurtre était commis dans le premier moment de l'indignation, et que la colère ne sait pas distinguer entre les coupables,. ... Enfin, une dernière condition était que l'adultère eût été commis dans la maison du père ou dans celle de son gendre : jus occidendi palri conceditur domi suoe, vel in dôtno generis : il fallait, pour constituer l'injure, que la maison paternelle eût été souillée ... La deuxième partie de ***l'article 324*** *n'a fait que reproduire cette doctrine."*

[Chauveau & Helie, Théorie du Code Pénal [Paris, 3e ed, 1852], Tome 4, pp. 134-138]

The French have since moved on and repealed **Article 324** in 1975. The Law Reform Commission has made similar recommendations for the repeal of **section 242**. The concept of fidelity may well involve mutual understanding and expressions of fidelity expressed at the time of marriage. It should nevertheless be clearly understood in the present context that no one (male or female) owns or possesses his or her spouse or partner.

Satyajit Boolell SC
Director of Public Prosecutions

"The Art of Appealing"

"In the early years of practice, you will rarely go to the Court of Appeal. However you will probably have some appearances, and they will terrify you. Don't be frightened. The Court of Appeal is fantastic. Their Lordships are extremely clever and the papers are always fully considered before you get to your feet..." (Extract from Iain Morley QC's 'Short polemic on how to be seriously good in court, 2nd edition, Sweet & Maxwell)

Two judgments delivered this year come to confirm that appealing to a court of appeal may well be no less than an art. An art which any barrister needs to perfect through knowledge, preparation and practice. There is no room for grounds of appeal which are shoddily drafted, or for points which are unjustifiably pursued to the detriment of more meritorious cases which are waiting to be heard. It is no longer a question of being able to lodge grounds of appeal within the 21 days limit, or to prosecute them within 15 days. It is all about being able to raise *"a real issue, whether in law or on the facts"*, **B Ramgolam v The State [2017 SCJ 163]**, 12 May 2017.

In **Ramgolam** (above), the Supreme Court (Honourable P. Fekna J and Honourable Devat J.) raised an issue as to the vagueness of the grounds of appeal before them. This led to debates on the manner in which grounds of appeal ought to be drafted – do grounds of appeal need to be shortly and simply stated or do they need to contain detail? The Court referred to Odgers' Principles of Pleading and Practice, 22nd edition:

"The broad issue to be raised should be stated and not the detailed reasons in support of them ... But it is not enough for the appellant merely to say, for example, that he complains of 'misdirection'; the notice must state in what manner the judge misdirected himself or the jury", and went further in adding that grounds of appeal must raise a real issue."

This means that vague and general grounds will often find themselves rejected by the Court. General grounds neither provide an indication of the real issue to the Court, nor allow a respondent to come prepared to address it. A well drafted ground of appeal, however, sets the parameters within which debates are to take place. The issue it raises is clear and apparent from the ground itself. The Court, and Counsel alike, are clear as to the issue under consideration.

Vague grounds fail to provide the least indication as to what issue exactly is being raised. They say everything, and nothing. A classic example would be "*Because the conviction ought not to stand in view of all the evidence on record*", or "*the trial court ought to have given the accused the benefit of the doubt having regard to all the circumstances of the case*". In such drafting there is a failure to specify the specific issue which an appellant wishes the court to consider. The **Ramgolam** judgment rejoins the guidance given by the Judicial Committee of the Privy Council earlier this year in **Sumodhee v The State of Mauritius [2017 UKPC 16]** on the duty of Counsel conducting an appeal:

"In advancing notices of appeal, as in the conduct of trials, the professional duty of counsel lies both to his client and to the court ... Part of the duty to the court is the duty not to advance grounds of appeal unless the point is properly arguable ..."

Both the drafting of grounds of appeal, and the conduct of an appeal, require skill and precision. As pointed out at **Paragraph 23** of **Sumodhee**, Appellate courts rely on the professional duty of counsel to ensure that time is not wasted in the consideration of the unmeritorious, to the expense of worthwhile cases.

Mrs S. Beekarry-Sunassee
Acting ADPP

Has Somali Piracy Returned?

According to Control Risks, between January and May 2017, there have been at least 17 reported incidents of piracy and armed robbery at sea in the Horn of Africa region, including five successful hijacks and crew kidnaps.

A dhow was hijacked off the coast of Eyl, Puntland on March 23 with 20 crew members being taken hostage. On April 1, a third hijacking took place off Bosaso, also in Puntland area, where 13 crew members were hijacked within Somali territorial waters. Somali forces managed to free the crew and escorted the vessel to its next port of call. On April 8, a tanker was boarded from a skiff in the Gulf of Aden.

The crew retreated to the citadel and when local authorities arrived the following day the pirates were gone. On April 14, a tanker came under fire off the eastern coast of Yemen and, the next day, another tanker was fired at in the Gulf of Aden just south of the central Yemeni coastline. On April 22, an attempted attack was made on a tanker in Somali waters, with the tanker being chased for two hours. A warship came to the vessel's assistance following a distress call.

Why now? The news reports of these attacks have been startling because there has not been a successful attack in the region by pirates for more than four years. The lack of attacks in the region has made it difficult for international forces to justify continued naval deployments in the Gulf of Aden. While this will be borne out by the official figures reported by the International Maritime Organisation and the International Maritime Bureau, it does not take into consideration the attacks perpetrated against regional shipping, which suggest that Somali piracy is not resurging – it never went away in the first place.

The increase in incidents in 2017 has demonstrated the renewed intent of Somali pirate groups to target ships operating in the region. The high point in Somali piracy came in 2010, both in terms of vessels hijacked and the number of seafarers taken prisoner for ransom. Soon after that, shipping companies began placing armed guards onboard who would "show weapons" to circling pirates and if necessary fire warning shots to ward them off. This effectively broke the pirates' business model as, until then, they had been able to approach a ship, often at dawn, open fire on the bridge to scare the captain into slowing down and stopping, and then they would board it using ladders. They would then hold the vessel, its crew and its cargo for ransoms of millions of dollars. After 2010 they were no longer able to do this with impunity. But now that news will have spread that many vessels are not carrying that armed protection there are concerns that the lucrative business of Somali maritime piracy may be set to return.

The conditions prompting pirates to head back out to sea and attempt further hijacks this year can be roughly divided into longstanding onshore "push" factors, and more recent offshore "pull" factors:

Push Factors

- Persistent, dire economic stagnation; drought and a major famine
- Local security forces busy with al-Shabab and an Islamic State affiliate present in Puntland; permissive onshore security environment
- Continued weak judiciary and governance issues in coastal areas and tolerant coastal communities

Pull Factors

- Real and perceived operator complacency encouraged by the previous decline in piracy events
- Phased naval drawdown resulting in fewer patrols and surveillance coverage of the Gulf of Aden and western Indian Ocean
- NATO's Operation Ocean Shield stood down in November 2016
- Emboldened illegal fishing fleets drawn closer to the Somali coast after years of low pirate activity, re-kindling the pirates' core grievance.

What next?

A lack of international, rather than local, victims had made it easy for the world's attention to move elsewhere. But until piracy ceases to be an attractive business opportunity it will remain a plague. Vessel operators still need to use precautionary measures for the safety of their crew and safe passage through the region while the international community needs to focus on the improvement of socio-economic conditions in Somalia.

Mrs Ashwina Jalloo
State Counsel

The East Africa Regional Conference on Cybercrime and Electronic Evidence

The East Africa Regional Conference on Cybercrime and Electronic Evidence was jointly organised by The Government of Mauritius, the International Association of Prosecutors (IAP) and the Council of Europe (CoE), in Mauritius from the 10th to the 12th of July 2017, gathering representatives of 12 countries in the region to improve international cooperation against cybercrime.

With more than half of the global population now online, governments also become responsible for their capacity to protect the rights of their citizens and to maintain the rule of law in cyberspace. The African continent currently has the highest number of Internet users in the world, after Asia. Increased access to digital tools has created a significant growth in terms of opportunities for development, as well as threats.

The Eastern African region is particularly vulnerable to the emerging threat of cybercrime, with countries such as Nigeria, Malawi or Uganda ranking among the top ten most exposed countries on the global level. The higher vulnerability in this region can be linked to multiple causes: the overall lag, compared to other African states, in the legislative response to cybercrime, low cybersecurity infrastructure investment or criminal justice authorities' limited experience in handling cybercrime cases and electronic evidence.

Mauritius is the first African country to join the Budapest Convention on Cybercrime. As a priority country under the GLACY+ project on Global Action on Cybercrime Extended, a joint initiative of the European Union and the CoE and as African hubs for regional capacity building on cybercrime, Mauritius hosted the East Africa Regional Conference on Cybercrime and Electronic Evidence which had three messages at the core of the event:

(1) Cybercrime undermine the social and economic development opportunities of information technologies, in Eastern Africa as in the rest of the world. Legislation on cybercrime and electronic evidence in line with

international standards is key to face the cross-border nature of cybercrime and enable a coordinated response on the global level.

(2) Electronic evidence is potentially part of any offence. Good practices to secure and analyse electronic evidence are available, should be shared and be used. Digital investigations and prosecutions are a collaborative effort of investigators, forensic investigators and prosecutors.

(3) A major capacity building effort is needed at all levels to improve criminal justice capability to effectively investigate, prosecute and adjudicate cybercrime cases and other offences involving electronic evidence.

The three days regional event for brought together around 70 representatives from 12 Eastern African countries as well as regional organisations such as the African Union Commission and UNAFRI and also International Organisations such as the UNODC.

In his opening address the Acting Director of Public Prosecutions, Mr Rashid Ahmine, firstly highlighted how the threat posed by Cybercrime has dramatically increased over the last decade and how criminals are exploiting the speed, convenience and anonymity of the internet to commit a diverse range of criminal activities that know no borders and secondly stressed on the need to have strong substantive and procedural laws, enhanced capacity building for investigation and prosecution and effective international cooperation in the fight against cybercrime.

During the three days the sessions focused on best practices sharing among participants, with a particular emphasis on improving the technical knowledge and capacity of investigators and prosecutors to deal with the emerging challenges posed by the use of Darknet, virtual/crypto currencies or online money laundering techniques.

At the close of the Conference, recommendations were made, inter alia, for:

(i) the African countries implementing and becoming parties to both the Budapest Convention of the CoE and the African Union's Malabo Convention (ii) introducing awareness campaigns and training for effective criminal justice response

(iii) further capacity building on Darknet, Virtual Currencies & Online Money Laundering and discussion towards the Regulations on Virtual Currencies (iv) Establishment of the EARCN – to bring together national focal points from the East African Region in a network to cooperate in the fight against Cybercrime.

(v) Improving capacities for international cooperation – establishment and/or improvement of 24/7 Point of Contact Network.

Mr Pravin Harrah,
Principal State Counsel

Magistrates workshop on strenghtening judicial response to cases of domestic violence

The Ministry of Gender Equality, Child Development and Family Welfare, together with the collaboration of the Australian High Commission and Mrs Justice Jayanthi McGrath, South Australian Magistrate held an intense one-day training workshop for the Court Magistrates of Mauritius on 26 May 2017. The workshop which took place at the seat of Henessy Park Hotel in Ebene was a part of the effort to exchange ideas on how to better assist victims of domestic violence attending to our Courts and how to strengthen our present legal framework on domestic violence. The workshop was attended by Mrs Aruna Narain, Puisne Judge of the Supreme Court and by Magistrates of the various Courts around Mauritius.

The workshop started by introductory speeches made from Ms Susan Coles, Australian High Commissioner, Mrs Aruna Narain and Mrs Fazila Daureeawoo, Minister of Gender Equality, Child Development and Family Welfare. The training was thereafter led by Mrs Justice Jayanthi McGrath, Mrs Johan Moutou-Leckning, Senior Assitant DPP and Magistrate Nadia Dauhoo.

The presentation was kicked off by that of Mrs Moutou-Leckning who provided an overview of the various Orders which exist in the Law in order to protect victims of domestic violence. In her discussion, she also provided a brief historic of the various amendments brought to the Protection from Domestic Violence Act (PDVA), together with changes in the penalties to be imposed on first, second, third and subsequent convictions. The audience was reminded that the PDVA is also buttressed by the Criminal Code and in her discussion, she invited the audience for reflection on how we can unite and strengthen our Criminal and Civil laws regulating domestic violence. Mrs Moutou-Leckning's presentation also included the various publications made by the Office of the Director of Public Prosecutions and she also triggered reflections on the need to criminalise marital rape under our Laws.

The next presentation, which was led by Magistrate Dauhoo, laid down the procedural aspects to be followed by Magistrates in cases of domestic violence. This was aimed to ensure standardisation of the procedures throughout the various Courts. Through the discussions, it was understood that certain cases of domestic violence were heard in chambers, some in the courtroom but in camera and some in the courtroom generally.

The participants, together with the facilitator, discussed the way in which Magistrates usually conduct cases of domestic violence. Mrs Najiyah also advanced that depending on the case, where Magistrates feel that there are risks of harm that could befall on the victim, they have the duty to emit protection orders. She, however, reminded the participants on the need to respect the rights of the respondent even if he is a perpetrator. During the exchange, there was a general consensus amongst the Magistrates that there would be value to restructure the cause lists to ensure that cases of domestic violence were listed separately in a designated list. This list would ensure that these cases are not mixed up with criminal matters and that with the reduced number of listings, Magistrates would be less pressurised to deal with them.

The rest of the Workshop was animated by Justice Mrs McGrath, where useful tips were given to the Magistrates present. At this stage, Magistrates were also invited to ask any advice from Mrs McGrath. During the discussions, there was a general agreement that there is a lack of waiting rooms to offer victims of domestic violence sufficient safety and privacy which could accentuate the re-traumatisation of the victims. It was thus recommended by Mrs Justice McGrath that this is not a matter requiring legislative changes but it rather requires a review in each court to see whether there is any available space to construct a simple waiting room to accommodate victims of domestic violence. On this point, Magistrate Mauree shared that Rodrigues has made some progress as arrangements could be made for a witness room where victims of domestic violence can depose by video link. Moreover, a Juvenile and Family Unit has been set up in Rodrigues.

Also discussed during the workshop was the power of South Australian Magistrates of the Family Violence Court to mandate the aggressor to undertake a Stopping Violence Program. This is included as a condition of their Domestic Violence Protection Order (DVPO). The aggressor is then brought back before the Court for reviews and Magistrates are empowered through the law to take into account their progress on the program when sentencing the defendant.

Following the presentations made by the above experts, the workshop was enriched with group discussions, observations and the sharing of experiences. It was a highly interactive and enriching session for all present.

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

Gone Too Early ...

The month of June saw the departure of our colleague Shahnawaz Namdarkhan, in circumstances which have left us all in shock and grief.

Born on 24 November 1979, Shahnawaz was known to one and all for his rapid intelligence and natural mastery of the law. Add to that his easy going and fun loving self. Laureate of the RCPL in 1998 (Economics Side) he also won a scholarship from the Cambridge Commonwealth Trust to read Law at Girton College, Cambridge. He graduated in 2001 and joined the Attorney General's Office on 1st April 2004 after qualifying as a barrister at Nottingham Law School.

The list of cases in which he appeared before the Supreme Court and other jurisdictions is long (**Narrain v The Electoral Supervisory Commission [2006 SCJ 214]**, **Durocher v Commissioner of Police [2008 SCJ 114]**, **Philibert v The State [2008 SCJ 289]**, **The State v Dig Dig [2008 SCJ 80]**, **Caterino v The State [2009 SCJ 332]**, to name a few). His mastery of drug cases, as well as maritime piracy, extradition and mutual legal assistance laws, was known to all.

Serious illness, against which he battled bravely, saw an early demise during the month of Ramadan. Fate has decided that it should be this way.

He will be missed and remembered.

Our thoughts go to his wife Arzeenah, his family and closest friends.

Shandrani Resort

Cambridge Commonwealth Trust, June 1999

Reshma

SUMMARY OF SUPREME COURT JUDGMENTS: June 2017

Arekin v The State [2017 SCJ 215]

By Hon. Mr. Matadeen, Chief Justice, Hon. A. Hamuth, Judge and Hon. Judge Mr. O.B.Madhub, Judge

Sentence – disproportionate – wrong in principle – manifestly harsh and excessive

The Appellant pleaded guilty for the charge of attempting to possess dangerous drugs, namely 452.33 grams of heroin for the purpose of distribution coupled with an averment of drug trafficking. After a hearing for the purpose of sentencing, the Appellant was sentenced to undergo 20 years' penal servitude from which he ordered that 938 days (he spent on remand) be deducted. He was also order to pay Rs 1,000 as costs.

The Appellant is now appealing against sentence on the following three grounds challenging the same for being:

(1) disproportionate,

(2) wrong in principle, and

(3) manifestly harsh and excessive.

The Appellate Court disposed of ground 2 on the basis that the sentence cannot be wrong in principle as it was within the penalty provided by law.

They held that the learned trial Judge did fully consider and analyse the Appellant's submissions relating to the principle of proportionality and they were unable to say that the learned Judge made a wrong analysis of the point raised or came to the wrong conclusion. Hence the ground of proportionality was therefore without merit.

As far as the third ground was concerned, the Appellate Court held that the trial Judge considered all the circumstances surrounding the offence, the significant amount of drugs, its percentage of purity, the fact that the role of the Appellant was an important one consisting in his being the necessary link between the courier who had imported the drugs into Mauritius and the ultimate local recipient in return for which he obtained the sum of Rs 100,000, also helping the ultimate recipient of the drugs by providing a cover to avoid him being caught. In addition all the material conditions relevant to the circumstances surrounding the offence including factors which weighed in the accused's favour were taken into consideration. They were hence of the opinion that the third ground cannot succeed because the sentence was neither harsh nor excessive.

Dassani V v The State [2017 SCJ 228]

By Hon. Mr. D.Chan Kan Cheong, Judge and Hon.Mrs. R. Teeluck, Judge

Sentence – second conviction – Section 123F(1)(A)(3)(5)

The Appellant was prosecuted for driving a motor vehicle with alcohol concentration above the prescribed limit in breach of **sections 123F (1)(A)(3)(5)** and **52** of the **Road Traffic Act** under Count 1 and for using an uninsured vehicle in breach of **Sections 55(1)(a)(2)** and **52** of the Act under Count II.

Under Count 1, after taking into account the Appellant's timely guilty plea and his previous conviction for a cognate offence, the Learned Magistrate sentenced the Appellant to pay a fine of Rs 20,000 together with a term of imprisonment of 6 months and further ordered him to be disqualified from holding or obtaining a driving licence in respect of all types of vehicles for a period of 12 months and his licence to be endorsed and cancelled.

The appeal was only against the sentence of 6 months' imprisonment passed under Count 1 on the ground that it was manifestly harsh and excessive.

It was agreed by both Counsel appearing before the Appellate Court that the Appellant should be considered as a first time offence given that his "previous conviction" for a similar offence post dated the date of the present offence under Count 1.

In the present case, the appellant committed the offence under Count 1 on 29th July 2014 while he was convicted

subsequently for a similar offence on 23 September 2014. In other words, he had not yet been convicted and sentenced for a similar offence when he committed the present offence.

The Appellate Court was agreeable to the fact that the previous conviction for a similar offence was therefore not "*A second or subsequent conviction*" and that it would not be wrong in principle to impose a custodial sentence on the appellant even as a first time offender, under Could 1, albeit for a shorter term than 6 months.

The Appellate Court also held that they cannot overlook the seriousness of the offence committed by the Appellant under Count 1 and that there was no special mitigating reason in his favour. Therefore he deserved a custodial sentence but a term of imprisonment of 6 weeks would be appropriate and would meet the ends of justice. The appeal was allowed to this extent only.

Lolochou M P B v The State [2017 SCJ 243]

By Hon. Mr. A. Caunhye, Judge and Hon.Mr. O.B. Madhub, Judge

Emergency vehicles – Section 8 of the Fire Services Act 1953

The Appellant was prosecuted before the Intermediate Court for the offence of involuntary homicide by imprudence in breach of **Section 239(1)** of the **Criminal Code** coupled with **sections 52 and 133** of the **Road Traffic Act**. He pleaded not guilty to the charge. He was thereafter found guilty and sentenced to pay a fine of Rs 75,000. He was disqualified from holding or obtaining any driving licence in respect of all types of vehicles for a period of one year. His driving licence was also endorsed and cancelled.

He appealed against the judgment and the appeal was based on the finding of facts.

On 30th September 2012 the appellant was driving a lorry of the Fire Services Department when it collided with a motorcycle whilst emerging from a side road onto a main road. The victim who was riding the motorcycle passed away as a result of the injuries sustained from the accident. At the time of the accident, the Appellant was on his way attending to an emergency fire call.

The issue was that the Appellant was guilty of imprudent driving in that he failed to observe the standard required of a prudent and reasonable driver.

The evidence which was before the Trial Court consisted of the plan, the vehicle examiner's reports, the testimony of the Appellant and that of Witness Thakoor who was an "aide chauffeur" to the Appellant.

Witness Thakoor's statement was rather similar to that of the Appellant in as much as he stated that the :

(a) lorry stopped at the white line before proceeding across the main road,

(b) the alarm and beacon lights of the lorry were on at the material time,

(c) the appellant engaged his vehicle very slowly onto the main road, and they

(d) were attending to a fire.

The fourth ground of the grounds of appeal, invoked the failure of the learned Magistrate to give due consideration to **Section 8** of the **Fire Services Act** which speaks of the right of way of fire services.

The Appellate Court held that the necessity to give right of way to fire services vehicles in not merely a "*moral right of precedence*". They held that this was expressly provided in the law that all vehicles are compelled to give priority to fire services vehicles "*notwithstanding any law or custom*". This meant that the need to give priority to dire services vehicles would prevail over any other provisions of the **Road Traffic Act**, as a result of which the vehicle driven by the Appellant had priority over the motorcyclist when proceeding at the junction of a main road and a subsidiary road.

The appellate Court further held that the learned Magistrate failed to give due consideration to the following facts, namely the motorcyclist:

(a) was riding his motorcycle at a high speed,

(b) had a very high concentration of alcohol in his blood,

(c) failed to stop in order to give priority to the fire engine which was attending an emergency call

(d) there was no evidence adduced which could establish that the appellant had failed to act as a prudent driver and was responsible for the death of the motorcyclist.

The appeal was allowed and the conviction and sentence imposed was quashed.

Narooa S v The State [2017 SCJ 209]

By Hon. Mr. D.Chan Kan Cheong, Judge and Hon.Mr. O.B.Madhub, Judge

Sentence – second conviction – Section 123F(1)(A)(3)(5)

The Appellant was convicted upon his plea of guilty for driving a motor vehicle with alcohol concentration above the prescribed limit in breach of **Sections 123 F(1)(a) and 23H(5)(6)** of the **Road Traffic Act** under Count 1 and for failing to procide a specimen of blood or urine or both for a laboratory test in breach of **section 123H(1)(b)(4)** and **163** of the **Act**.

There was only one ground of appeal as the other grounds were dropped. That ground was in relation to the sentence passed under Count 1 as being manifestly harsh and excessive.

The evidence on record revealed that PC Ramachandra stopped the appellant's car in the course of a traffic check. He found that the appellant was smelling of liquor and suspected that he was driving under the influence of alcohol. A preliminary breath test was performed on the appellant with his consent. The test proved to be positive. The appellant was informed of the result and required to provide specimens of his blood and urine for analysis after being duly cautioned. The appellant admitted having consumed alcohol but refused to provide any specimen as he had to go to work.

The Appellant challenged only the custodial sentence of 6 months' imprisonment and submitted that the Appellant should be treated as a first time offence, given that his previous conviction for a similar offence post dated the date of the present offence.

The Appellate Court came to the conclusion that the Appellant's previous conviction was not a second or subsequent conviction for the purposes of sentencing so that he should be treated as a first time offender.

In the circumtances, they were of the view that a heavy fine would be appropriate and would meet the ends of justice. The sentence of a fine of Rs 20,000 together with 6 months' imprisonment was quashed. He was instead sentenced to pay a fine of Rs 25,000 under Count 1.

"Être arrogant, c'est révéler sottement son infériorité en s'imaginant paraître supérieur."

- Edmond Thiaudière

The following is brought to the attention of our readers:

Following approval from the Honourable Chief Justice, bail applications of detainees remanded to police cell have now been decentralised. As such, as from 3rd July 2017, bail applications of detainees in police cell are being made and heard by the District Court which made the remand order. As for bail applications by or in respect of detainees remanded to jail, this is still being dealt with by the Bail and Remand Court.