Office of the Director of Public Prosecutions

E-Newsletter

Issue 68

March 2017

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

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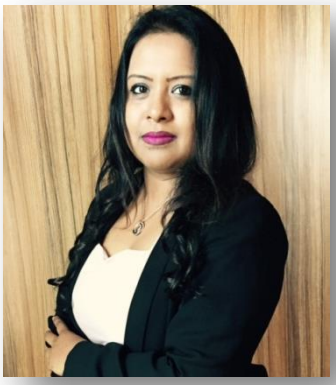
EDITORIAL



Dear Readers,

It is with the same immense dedication that we bring to you the 68th issue of our monthly newsletter. It has been the practice during the last few years to accept applications for pupillage and mini-pupillage at the ODPP. Accordingly, we hereby inform prospective barristers who are interested in undertaking pupillage at the ODPP that henceforth the period of pupillage at the office will be for a minimum of 3 months.

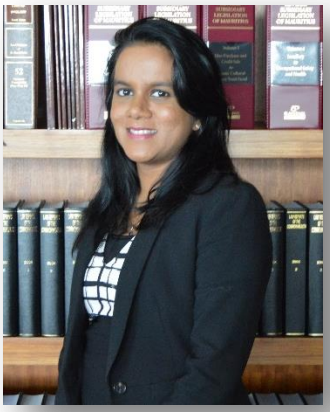
The current issue consists of articles written by pupil barristers of the ODPP. In the first one, the author makes an analysis of the constitutional right to the freedom of expression as well as the legitimate interference to the exercise thereof, as enshrined in the Constitution. In the second article, readers will get the opportunity to peruse through the discussion surrounding the use of CCTV evidence as a means of identification as well as its admissibility in court. Moreover, in the context of the 106th International Women's Day, we provide you with an overview on the origin of the said celebration. Our readers will also get an apercu of the two days' training course delivered by law officers to the officers of the Tourism Authority, which also involved carrying out of mock trials.

Finally, our usual rubric, the summary of recent Supreme Court judgments, is provided at pages 11-13.

We thank you for your usual support and wish you a good read.

Anusha Rawoah,
State Counsel

Freedom of expression



Everyone has the right to freedom of opinion and expression. The right to freedom of expression is imperative to vindicate democracy and is enshrined in our Constitution. This particular right is guaranteed under **sections 3(b)** and **12(1)** of the **Constitution of Mauritius**.

As it has been indicated in **Hosany I v The State [2016] SCJ 501**, **section 12** of the **Constitution** has been predominantly inspired by **Article 10** of the **European Convention on Human Rights (ECHR)**. The right to freedom of expression has been epitomized by the European Court of Human Rights (ECtHR) as one of the fundamental basis of an egalitarian society. Freedom of expression can emerge through various strata, characterising verbal, artistic, and physical expression. It includes the right to '*hold opinions and to receive and impart information and ideas.*'

The right to freedom of expression is, however, not an absolute right and **section 12(2)** of our **Constitution** provides limitations on same and reads as follows:

"*Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -*

(a) in the interests of defence, public safety, public order, public morality or public health;

(b) for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting, television, public exhibitions or public entertainments; or

(c) for the imposition of restrictions upon public officers, except so far as that provision or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society."

Therefore, any restriction on the conditional right to free speech and expression must be 'prescribed by law' to be admissible (**Gordon-Gentil A & Anor v Dayal J R [2012] SCJ 144**). The restriction must simultaneously preserve a legitimate aim and maintain the primordial concept of proportionality. The Court in **Hosany** (Supra), cited the case of **Handyside v UK (1976) 1 EHRR 737**, in which, the ECtHR while examining the provisions of **Article 10** of the **ECHR**, accentuated that forbearance, lenity, and multiculturalism are the structural requisites of a democratic society and thus freedom of expression is vital in a democratic society.

Hence, a restriction on this fundamental right must be based on societal necessity engendering a legitimate aim.

Accordingly, the indulgence in freedom of expression brings about obligations and accountability. Therefore, freedom of expression must be harmonised against other rights such as a person's confidentiality and several social interests such as public safety or public morality, as provided for in **section 12(2)** of the **Constitution**.

Hence, **section 12(2)** of the **Constitution** caters for the legitimate interference to the exercise of the right to freedom of expression where there is a law which has been legislated to make provision inter alia "*in the interest of public morality*" [**section 12(2)(a)**, **Constitution**], unless "*...that provision or, as the case may be, the thing done under its authority is shown not to be reasonable in a democratic society,*" [**section 12(2)(c), Constitution**], in which case the limitation would amount to an evident violation of the right to freedom of expression. In this context, the Court in **Hosany** (Supra), referred to the case of **Marper v the United Kingdom [2008] ECHR 1581**, in which the ECtHR evinced the following, at para. 101:

"*An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pressed and if the reason adduced by the national authorities to justify it are "relevant and sufficient.*"

Any restrictions on the right to freedom of expression must be well-founded and based on the provisions of the law, in the view of achieving a legitimate aim, thus guaranteeing that restrictions are imposed only to deal with an attributable and palpable harm, for the safeguard of "*the rights of others and freedom of others and for the public interest*" [**section 3, Constitution**]. Likewise, **Article 10(2)** of the **ECHR**, unequivocally recognises the '*rights and reputations of others as justifiable reasons for interference with the right to freedom of expression, and the European Court of Human Rights has consistently upheld this as a mitigation for restricting the right to freedom of expression*' (**Jersild v Denmark [1995] 19 EHRR 1**).

Section 12(1) of the **Constitution** and **Article 10** of the **ECHR** essentially preserve the freedom to hold opinions and to impart and receive information and ideas. The freedom to impart information and ideas is predominantly relevant to the press, which plays a vital role in a democratic society. The Court in **Hosany** (Supra) pointed out that although the press must respect certain parameters, particularly in relation to the protection of the reputation and rights of others, it is nevertheless under the significant obligation to impart consistently information and ideas pertaining to matters of public interest.

Furthermore, the Court indicated that "*not only does the press have the task of imparting such information and ideas, the public also has a right to receive them.*" Additionally, in relation to the safeguards afforded by **Article 10** of the **ECHR** to journalists, the Court in the case of **Bunwaree V K v La Sentinelle & 2 ORS [2012] SCJ 84**, quoted the following extract from the case of **Steel and Anor v The United Kingdom [ECHR Judgment of 15 February 2005]:**

"*The safeguard in relation to reporting on issues of general interest is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism and the same principle must apply to others who engage in public debate.*"

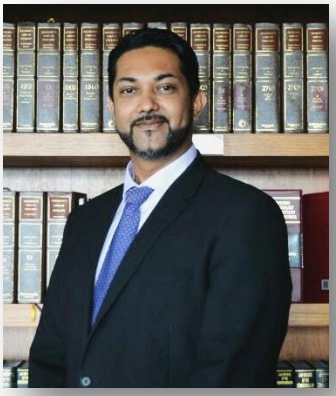
Thus, a court of law will always uphold the right freedom of expression in relation to the press inasmuch as the publication is made in good faith, pertaining to unprejudiced on matters of public interest based genuine facts (**Couldip Basanta Lallah v Le Mauricien Ltd. and Ors [2005 SCJ 42**]).

The questions which usually stem from cases involving the possible overlap of the protection of a fundamental right with that of the freedom of the press are whether there is an interference with the freedom of expression and, if so, whether such interference is justified (**Gordon-Gentil A & Anor v Dayal J R [2012 SCJ 144]**). Such interference will only be justifiable if it is prescribed by law and necessary in a democratic society in view of achieving a legitimate aim.

The right to freedom of expression constitutes an essential feature of a democratic society, like what we aim to be in Mauritius. To this effect, **section 12** of the **Constitution** unequivocally protects the right to freedom of expression. However, the same section contains a limitation to that freedom, which is reasonably legitimate in a democratic society, principally for the protection of the rights, reputations and freedoms of others.

Risha Hulman,
Pupil

CCTV Evidence & visual identification: Is there a need for statutory rules?



According to the report of the British Security Industry Association dated 1 July 2013, there are between 4 million and 5.9 million CCTV surveillance cameras in the United Kingdom (UK). It is not surprising therefore that debates on the efficiency of CCTV cameras and their disadvantages are prevalent in the UK. Whilst they can assist in detecting crimes, CCTV cameras also contribute to loss of privacy.

In his budget speech 2016/17, the Minister of Finance and Economic Development in Mauritius gave an overview of the 'Safe City Project' involving the installation of smart cameras with special focus on major public areas, along main roads and motorways, pedestrian walkways and principal traffic centers. The aim is to combat crimes and drug proliferation as well as, assist in more effective traffic and road safety management. It is indubitable that CCTV and other surveillance technologies facilitate the detection of crimes, and the use of digital images gathered from such sources are very relevant to criminal proceedings. As such, the question of the efficiency and reliability of such evidence is an important one.

CCTV arguably raises various issues surrounding civil liberties and the right to privacy. However, the primary focus of the present article is with regards to the issues that arise when identifying alleged criminals from CCTV footage – including quality, reliability and sufficiency of the evidence. A case where there has been wrongful conviction based on evidence gathered from CCTV will be considered. Thereafter the author will draw from the law and practice which exists in the UK to make suggestions as to how the law, as it stands in Mauritius at the time of writing, may be improved.

The case of William Mills

"*This was a prosecution that stood or fell by eyewitness identification alone. That is a form of proof that has been shown to be, in some cases, a dangerous basis for a prosecution.*"

Those were the words uttered by Lord Gill, the Lord Justice-Clerk during the appeal of William Mills – the man who was sentenced to nine years for robbing a bank in Glasgow's West End based on police identification from CCTV images. In May 2007, William Mills was arrested and held on remand for stealing £8,216 from the Royal Bank of Scotland. He was identified from CCTV stills by two police officers and was also picked out of an identity parade by two witnesses who were present on the premises at the time of the robbery. In 2008, he was found guilty and sentenced to nine years in prison based on the identification evidence. But six months into his sentence he was freed, when DNA evidence was found on a door stopper linking someone else to the crime. A

crucial part of the prosecution case was evidence given by the police officers, who were not eye-witnesses, but were adamant that the masked man on the CCTV stills was indeed William Mills. This case provides a good example of wrongful conviction based on visual identification/recognition – in fact both police officers had met him during the months preceding his arrest in the course of other unrelated matters.

The Law in the UK with regards to CCTV Evidence

In the UK, the **Police and Criminal Evidence Act 1984 (PACE), Code of Practice D** provides a safeguard and detailed procedural guidelines regarding identification procedures. In addition, the common law principles known as the Turnbull guidelines are also applicable as a safeguard against miscarriage of justice:

"where the case against the accused depends wholly or substantially on the correctness of one or more identifications which the defence allege to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken."

These safeguards exist to prevent potentially unreliable investigative methods creating unreliable and misleading evidence. One significant case in that respect is **R v Smith (Dean Martin) [2008] EWCA Crim 1342**.

During the morning of 20 November 2004, eleven men attempted to forcefully enter a nightclub in Birmingham via a fire door instead of the main entrance, but the doormen managed to prevent them from doing so. As the doormen were attempting to make them leave the area, one member of the group fired a shot. At that point, the group was divided with some of them walking off towards their cars and six remaining in the alleyway by the nightclub. Following that, several shots were fired and as a result, one doorman was killed and three others injured. The entire incident was caught on CCTV but during the appeal, issues arose pertaining to the fact that the identification evidence of two members of the group was of poor quality. In relation to one of the appellants, Carter, the evidence which identified him as present at the scene of the crime emerged in part from the evidence of police officers who purported to identify him from CCTV footage. However, they had difficulty explaining on what basis they had identified Carter.

In relation to another appellant in the case, Christie, there were also inadequacies in terms of identification. In his case, only one police officer purported to recognise him from viewing of the CCTV footage. The police officer had met Christie, for the purpose of supervision under licence, on seven separate occasions. When she viewed the CCTV footage, the police officer claimed that she could recognise him based on the shape of his face, nose, mouth, ears and eyes – but in fact, it was not possible to see his face because it was shaded by the cap he was wearing. Therefore, the evidence of recognition was insufficient and inadequate and was seen to be in breach of

PACE Code D insofar as a police officer is subject to the same principles and procedures as a civilian witness.

Accordingly, whether or not an identification is made, it is necessary to record (on forms provided for this purpose) the showing of photographs and anything said by the witness about any identification or the conduct of the procedure.

This shows that even with statutory rules in place, mistakes can be made and that was the reason why, in their judgment, their Lordships said that there was a need for such a procedure to be codified and for appropriate safeguards to be implemented. As a result, in 2011, the new Code D came into effect, adopting and expanding upon the safeguards recommended by the Court of Appeal in the above-mentioned case. The new Code D implements a procedure to be used for any person, including a police officer, when asked to view CCTV recording, video footage, photograph or any other visual medium with a view to recognising an individual. In addition, one important problem to be addressed with regards to identification procedures conducted under statutory rules, is the training of non-specialised staff in order to avoid breaches of the Code.

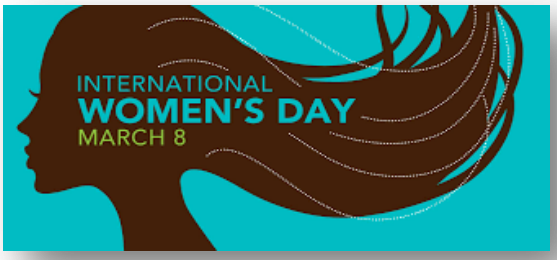
Suggestions for the Mauritian Law

Whilst courts of law in Mauritius usefully rely on the Turnbull Guidelines before convicting or acting on identification evidence in general , there are no statutory provisions on CCTV evidence specifically. It would seem necessary for this situation to be rectified urgently in light of the Government's proposal to increase exponentially the number of CCTV camera on the island. For more than five years now there have been discussions about introducing an equivalent of **PACE** in Mauritius and as such, in July 2012, two experts from the University of Kent and the University of Portsmouth did a workshop on the **Police and Criminal Evidence Bill**.

Following numerous debates, the draft **Police and Criminal Evidence Bill** was issued in 2013 and a working draft was presented on 2 December 2016 by Geoffrey Rivlin QC. It is suggested that in addition to introducing **PACE** and the **Codes of Practice** in Mauritius, it is imperative that police officers are given the proper training in order to avoid being in breach of the Code. This would help avoid identification evidence being excluded from criminal proceedings and miscarriages of justice.

Girish Kumar Prayag
Pupil

International Women's Day



"The story of women's struggle for equality belongs to no single feminist nor to any one organization but to the collective efforts of all who care about human rights"

Gloria Steinem (World-renowned feminist, journalist and social and political activist)

The year 2017 marks the 106th International Women's Day, which takes place on the 8th March, to celebrate the social, economic, cultural and political achievements of women from all over the world. It has been observed since the early 1900s, more precisely on the 28th February 1909, where the Socialist Party of America designated this day in honour of the 1908 garment workers' strike in New York, where women protested against working conditions.

This day is all about unity, celebration, reflection, advocacy and action. It was first proposed in 1910, by Clara Zetkin, leader of the 'women's office' for the Social Democratic Party in Germany, who suggested that every country should celebrate women on one day every year to push for their demands. It was first celebrated in 1911 (19 March), where more than one million women and men attended rallies advocating for women's right to work, to vocational training, to an end to discrimination on the job, to the right to vote and to hold public office. International Women's Day was transferred to March 8 in 1913 and it has been celebrated on that day ever since, although the day was only recognised by the United Nations in 1975.

International Women's Day also became a mechanism for protesting World War 1 where women held rallies to protest the war or to express solidarity with other activists. The Charter of the United Nations, signed in 1945, was the first international agreement to affirm the principle of equality between women and men.

The original aim of this day was to achieve full gender equality for women which has still not been realised . There is still a gender pay gap across the globe and women are still not present in equal numbers in business or politics.

According to the World Economic Forum, the gender gap won't close until 2186. It is worth noting that Mauritius is listed at rank 113 on the Global Gender Gap Index 2016, with a score of 0.652, meaning that we have closed between 60% to 70% of our gender gap.

To mark the celebration of the International Women's Day, the Office of the Director of Public Prosecutions, in collaboration with the American Embassy, dispensed CPD courses to Law Practitioners on Gender Based Violence ("GBV") and Human Trafficking on the 8th March 2017. The training was carried out by Mrs Moutou-Leckning, Senior Assistant DPP and Ms Poollay Mootien, Senior State Counsel. More information on the training can be found in Issue 67 of our Newsletter.

There is also an International Men's Day, which is celebrated on November 19 each year with the main focus being on men's and boy's health, improving gender relations, promoting gender equality, and highlighting positive male role models.

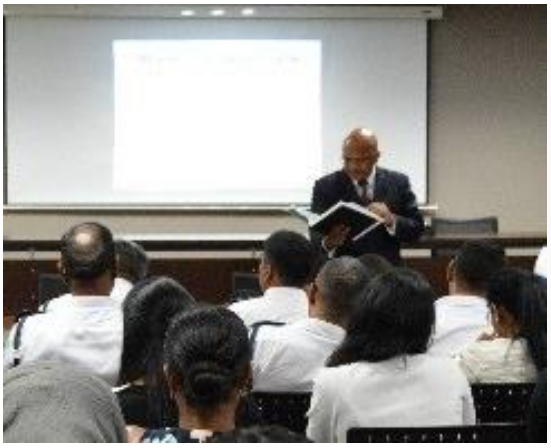
Neelam Nemchand
Legal Research Officer

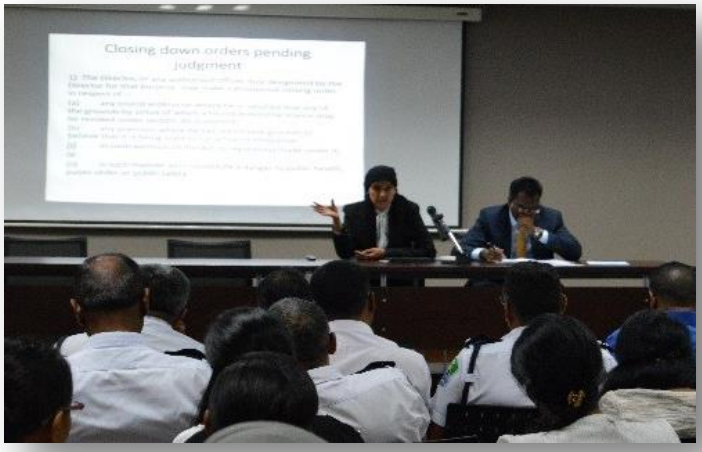
Training to Officers of the Tourism Authority

The Office of the Director of Public Prosecutions organised a two day training for the officers of the Tourism Authority and the National Coast Guard on the 30th and 31st of March 2017. This training was an extension to the previous training which was dispensed to them on the 16th and 17th February 2017. The specific objectives of the training were to provide an in-depth presentation of the provisions of the **Tourism Authority Act** (the "Act") for the officers to get the field experience in order to deepen their knowledge about the legal implications involved in their professional setting. The training concentrated mainly on mock trials. An interactive and participative format of the training was designed so as to provide the officers of the Tourism Authority hands-on learning experience in their day to day duties. The law officers of the ODPP who made presentations during the training were Mr. Mootoo, Mr. Armoogum, Mrs. Jeewa, Mr. Boyroo, Mr. Santokhee, Mr. Thomasoo, Mrs Veerabadran Mudaliar and Mrs Dawreeawoo.

The first day of the training covered issues pertaining to fixed penalty and a group of tourism enforcement officers were made to participate in a mock trial. Mr. Santokhee and Mr. Thomasoo gave some useful tips regarding how the officers can prepare their case and present same in court. While conducting the mock trial, the law officers gave the participants directions on how to conduct the case. The participants learnt methods for dealing with a hostile witness, overcoming objections to the phrasing of questions, dealing with arguments over the exclusion of evidence, refreshing memory, examination in chief, cross examination, re-examination and other skills of advocacy. There were some constructive debates between the officers of the ODPP and the officers of Tourism Authority with regards to the seaworthiness of a pleasure craft which is prescribed under **section 90** of the **Act** and, **Section 123** of the **Act** which provides for the offences. Mr. Santokhee, Mr. Thomasoo and Mr Bhoyroo explained that the offences under which the officers charge offenders should be clearly spelt out and that the conditions and guidelines should be published in the government gazette for it to have legal force.

The second day of the training started with a presentation by Mr. Armoogum and Mrs. Jeewa. They explained the differences between provisional closing down orders and closing down orders which are issued by the court. Participants were informed that since **Section 38** of the **Act** does not cater for provisional closing down orders as compared to closing down orders, a breach of the former does not attract any sanction.

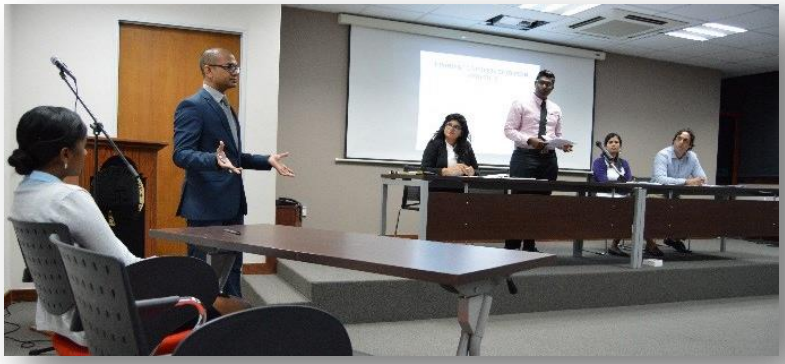


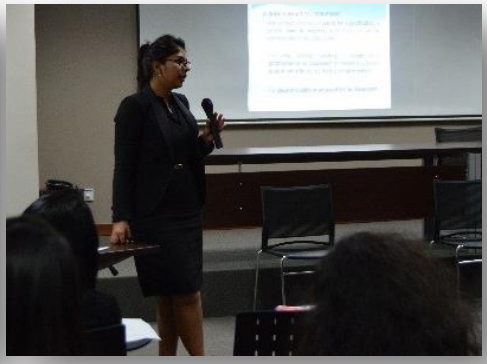


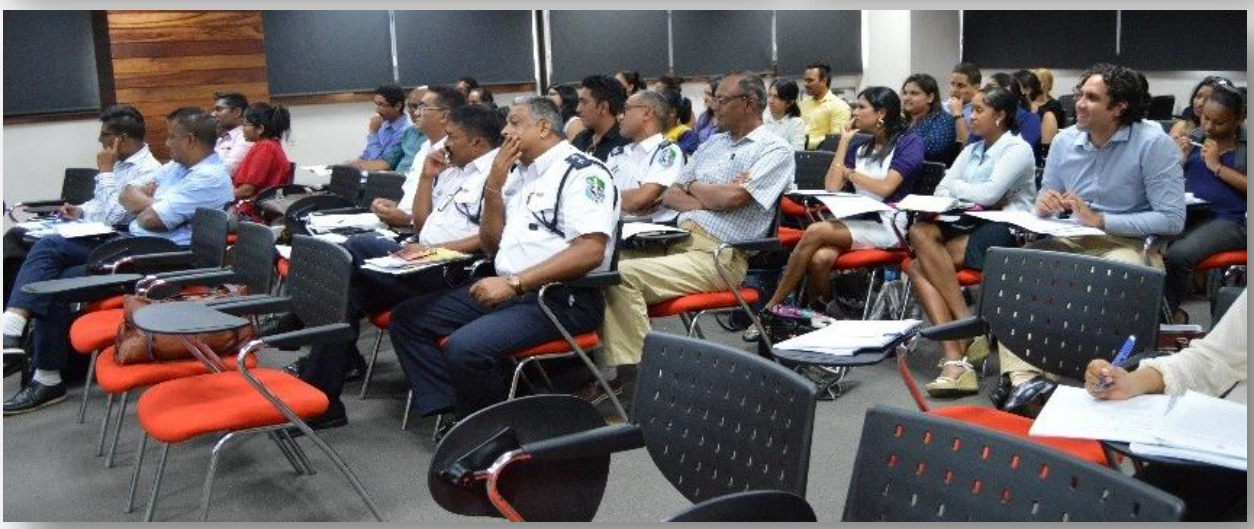
For the mock trial the officers recreated the scenario involving a tourist enterprise licence under the guidance of the law officers whereby they were asked to identify the elements that created the offence in the case study.

The last part of the training session was done by Mr. Mootoo, Mrs Veerabadran Mudaliar and Mrs Dawreeawoo. Another mock trial was carried out and officers of the Tourism Authority expressed themselves regarding the issues they face with canvassers and beach hawkers. Additionally, the officers of the ODPP made a presentation on "Liability of public officers" whereby Mrs Dawreeawoo spoke on how the enforcement officers should conduct themselves when dealing with hostile offenders. She mentioned that they should ensure that their conduct is motivated by public interest. She gave an overview of the "Guidelines on Gifts and Gratifications for Public Officials" which is prescribed by the Independent Commission Against Corruption (ICAC).

The training was much appreciated by the participants who were able to clear their doubts as to their powers concerning establishing fixed penalties, closing down orders and also liability of public officers.







Miss Artee Gunness & Miss Shruti Lallbeeharry
Legal Research Officers

SUMMARY OF SUPREME COURT JUDGMENTS: February 2017

Celidorfils O. J. M v The State [2017 SCJ 39]

By Hon. Judge Mrs N. Devat, Judge and Hon. Judge Mrs. R. Teelock, Judge

Plea in mitigation – rights of Accused – Court record needs to reflect the judicial exercise

This is an appeal against the custodial sentence imposed upon the appellant by the District Magistrate of Grand Port for the offences of knowingly receiving stolen property (count I) and possession of stolen property (count II) on the grounds that the appellant was not given a fair hearing at sentencing stage and that the sentence is manifestly harsh and excessive.

In accordance with the Court record, the Appellant was inops consili and pleaded guilty to the charges. The Court record also shows that after his statement was produced, the Accused was explained his constitutional rights and he begged for excuse from the dock. He was then convicted. A certificate showing his previous convictions was then produced and he admitted to its contents.

The court record then reads:

"[...]

Plea in mitigation

Accused begs for excuse and was not aware that it was stolen items.

[...]"

After his guilty plea and previous convictions were taken into consideration, he was sentenced to 9 months imprisonment under Count 1 and 6 months imprisonment under Count II.

The common stand of Counsel for the Appellant and the Respondent was that the matter should be remitted to the Magistrate for a fresh hearing for sentencing purposes.

The Appellate Court held that the words "plea in mitigation" do not unequivocally show that the appellant was explained his constitutional rights at sentence stage. There was also no clear indication whether the statement made by the Appellant was under oath or from the dock.

The sentence was quashed and the case was remitted for a fresh hearing in relation to sentencing and the Magistrate was to explain the Accused his rights and the court record was to reflect the judicial exercise.

Director of Public Prosecutions v Bizoire [2017 SCJ 67]

By Hon. Judge Mrs A.F.Chui Yew Chong and Hon. Judge Mr. N. F. Ohsan Bellepeau

Abuse of Process – Complaint to the NHRC- Voir Dire

This is an appeal by the Appellant for an order for the stay of proceedings in a case where the respondent was charged before the Intermediate Court with the following offences:

(1) wounds and blows causing death without intention to kill,

(2) larceny on a public road and

(3) unlawful possession of articles obtained by means of a crime.

After the Respondent pleaded guilty, Defence Counsel challenged the admissibility of the statements of Accused on the grounds that they were not given voluntarily and were obtained by threats, abuse and oppression exercised by police officers who were present before, during and after the recording of the statements.

Before the Voir Dire, the defence made an abuse of process motion in relation to the complaint made by the Respondent to the NHRC. Based on the arguments offered, the magistrate upheld the motion of abuse of process.

The findings were as follows:

"*The DPP has instituted proceedings that this Court has jurisdiction to try and I am fully conscious that the offences with which the accused is charged are serious, but this Court cannot be made to determine a complaint of violation of human rights through a voir-dire (or though a trial for that matter, as submitted by State Counsel).*

I find that in the circumstances, the voir-dire proceedings cannot be used to determine anything else than the admissibility of the statements of the accused, and certainly not an issue of complaint of violation of human rights made ab initio before another authority. Allowing the proceedings to go ahead would be putting the Court in an inextricable situation and be tantamount to abusing the process of the Court."

The grounds were argued under the following two headings:

1. The learned Magistrate misapprehended the factual background to the submission of the complaint of the respondent to the Director.

The learned Magistrate erred in law in departing from well established legal principles governing abuse of the process of the Court and in staying the proceedings against the respondent.

The Appellate Court held that the learned Magistrate misapprehended the factual background to the submission of the complaint to the DPP and erred in her appreciation of the inclusion of the complaint to the NHRC in the police file.

As regards to point 2 above, it is not disputed that the learned Magistrate correctly stated the well settled principle that where and when the prosecution of an accused party is oppressive and vexatious, resulting in the trial being unfair, the Court has a discretion to stay the proceedings on the ground of abuse of its process.

The Learned Magistrate also rightly recognized that there is a second category of cases where there may arise an abuse of process of the Court and this in situations where "*it offends the Court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.*"

In the submission of learned Counsel for the respondent, the proceedings against the latter should be stayed on the ground of the unfairness and prejudice that would be caused to the respondent whose complaint to the NHRC was still pending before and awaiting the decision of the DPP. The determination of the admissibility of the statements would, it was submitted, impact on the outcome of the complaint.

The Appellate Court held that the complaint of the respondent to the NHRC should have been decided upon before the voir dire on the admissibility of the statements.

The Court went on to state that the ultimate test whether a stay of proceedings should be granted on the ground of abuse of the process of the Court is whether the prosecution of an accused party was vexatious and oppressive and that the Accused would not benefit from a fair trial. The learned Magistrate made no finding whether this test had been satisfied. The possibility that the Director could take action and prosecute the offenders in the complaint did not in itself make it unreasonable and an abuse of the process of the Court to prosecute the Respondent.

The Appeal was thus allowed, the order of the trial court was quashed and the case was remitted back for it to proceed with.

Gontran J F v The State [2017 SCJ 68]

By Hon. Judge Mr. P. Fekna and Hon. Judge Mrs. G. Jugessur-Manna

Section 123 F(1)(a)(3) – Defective Information - Particulars

The appellant stood charged before the District Court of Rodrigues with the offence of driving a motor vehicle with the proportion of alcohol in his blood being in excess of the prescribed limit in breach of **sections 123F(1)(a)(3), 52** and the second schedule of the **Road Traffic Act.** He pleaded guilty to the charge and he was initially sentenced to undergo 6 months' imprisonment which was suspended provided the appellant performed 120 hours of Community Service.

The DPP appealed against the sentence. The Supreme Court allowed the appeal, quashed the sentence and remitted the matter back to the trial court '*for a fresh hearing for the purposes of sentencing to take place before another Magistrate*'.

The hearing was conducted before a different constituted bench and the learned Magistrate sentenced the Appellant to undergo 6 months' imprisonment and to pay a fine of Rs 20,000 together with Rs 100 costs. The licence of the appellant was cancelled and endorsed. Further, he was disqualified from holding or obtaining a driving license for all types of vehicles for a period of one year.

The Appellant's sole ground was in relation to the sentence being wrong in law and that the information was defective in that it failed to aver an essential element of the offence, namely that the offence was committed on a 'road'. Counsel for the Appellant referred to the case of **Ramodhin v The State of Mauritius [2014 SCJ 114].**

The Appellate Court stated that they had no qualms with the principle laid down in the case of Ramodhin but it however distinguished the case with the present one.

It thereafter held that it appeared clear from the information in the present case that the offence was alleged to have taken place 'on a road at Baie Lascar' and that if the defence wanted to have further details about the road in question – for instance its name – it was open to it to ask for particulars.

The appeal was set aside.

Joomyn M A A v The State [2017 SCJ 47]

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

Sentence harsh and excessive – possession of dangerous drugs for the purpose of distribution

This is an appeal on sentence following the conviction by the Intermediate Court of the appellant for two counts of drug dealing, namely possession of dangerous drugs for the purpose of distribution under **section 30(1)(f)(i)** of the **Dangerous Drugs Act.**

The Appellant pleaded not guilty to the two counts of possession of Valium and Rivotril respectively and was represented by Counsel.

It was agreed by both counsel for the Appellant and the Respondent that the case be remitted for a fresh hearing on sentence. Both Counsel also submitted on the two grounds of appeal which relate to sentence, but the Appellate Court did not agree with the above stand.

The Court found that in the present case, the Appellant was represented by Counsel at the time of the hearing and that he was afforded a fair hearing. He did not suffer any prejudice and this was not an appropriate case to remit to the trial magistrate for a fresh hearing on sentence.

In relation to the sentence being excessive, the Court held that they agreed with the learned Magistrate that a custodial sentence was warranted but the three years penal servitude was not proportional with the gravity of the offence. The sentence was quashed and substituted by a sentence of one year imprisonment.

Moykoo M v The State [2017 SCJ 56]

By Hon. Judge Mrs. R. Teelock and Hon. Judge Mr. O.B.Madhub

Sentence harsh and excessive – possession of dangerous drugs for the purpose of distribution

This is an appeal against the sentence of 2 years' imprisonment inflicted upon appellant, by the Intermediate Court, on a charge of possession of a total of 28.10 g of cannabis, for the purpose of distribution. The only ground of appeal reads as follows –

"*The sentence meted out to the appellant is unreasonable, manifestly harsh and excessive and wrong in principle.*"

Counsel for the Appellant conceded that a custodial sentence was warranted but submitted that the sentence imposed should have been less than two year's imprisonment.

The Appellate Court went on to rely on the case of **Volbert v The State [2016 SCJ 88]** and stated that the main factors to be taken into account when sentencing are as follows:.

"... each case has to be decided upon its own merits and the court will take into account a multiplicity of factors to come up with the appropriate sentence to be inflicted .... In addition the court will look at the proportionality of the sentence that is the need to individualize the sentence whilst bearing in mind that it should also reflect the seriousness of the offence and the trend of sentences being imposed by the court in similar situation."

The Court then held that the sentence passed was not harsh and excessive for the following reasons:

- the Appellant had 8 previous convictions out of which 4 were drug related;
- he was given a fine for his first drug offence which was followed by 3 months' imprisonment for his second drug offence as a consumer;
- in 2008 he was sentenced to 2 months' imprisonment on a charge of larceny 2 in number;
- in 2010 he was given high fines for account of drug dealing and a count of selling.

Based on the above, he did not take heed of opportunities to reform himself and his propensity to commit offences had not been abated.

The sentence of the trial Court was maintained and the appeal was dismissed.

"It is better to risk saving a guilty man than to condemn an innocent one."

- Voltaire