Office of the Director of Public Prosecutions

'To No One Will We Sell, To No One Deny or Delay Right or Justice'
Chapter 40, Magna Carta 1215

E-newsletter - Issue 90 **March 2019**

In this Issue

Editorial Team

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

Anusha Rawoah
Senior State Counsel

Dear Readers,

Welcome to the 90th issue of our e-newsletter.

In this issue, in the 'ODPP Video' section, Mr Vijay Appadoo, Assistant DPP, pontificates about the criminal offence of *'recel',* pursuant to a recent Supreme Court Judgment. You will also read an overview of the 'The first Middle East and North African Regional Conference' on *'Strengthening international cooperation to counter the evolving threat of financing terrorism and its nexus with money laundering'* hosted by the Office of Prosecutor General of the Arab Republic of Egypt this year.

On 8th March, the world celebrated the 'Women's Day', the theme for this year being 'Balance for Better'. In this context, we proudly celebrate the ladies of the ODPP, by bringing to you the thoughts of a few of them on the International Women's Day, at page 8. It is worth noting that more than 50 percent of the entire staff of the ODPP consists of women. On another note, on the 14th of March, Mr. John Wadham, Chair of the UK National Preventive Mechanism and Member of the UK Independent Advisory Panel on Deaths in Custody, carried out a talk on the overview of the UK Police and Criminal Evidence Act 1984 ('PACE') at the Rajsumer Lallah Hall of the ODPP. A summary of the talk is included in this issue. In the month of March, the ODPP celebrated the 51st independence anniversary of Mauritius, an insight of which is provided at page 15.

Moreover, in the Quick Facts section, we apprise our readers of the offences pertaining to the illegal affixing of posters and their penalty. Finally, our usual rubric, the summary of Supreme Court judgments, is provided at page 20.

We wish you a pleasant read and always welcome your comments on odppnewsletter@govmu.org.

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ODPP VIDEO

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ODPP VIDEO

The offence of 'recel' Section 40 of the Criminal Code

To view video, click on the 'Play' icon on picture below:

Mr M. Manrakhan (left)
Mr M.I.A. Neerooa (right)

Middle East and North African Regional conference

The first Middle East and North African Regional conference on 'Strengthening international cooperation to counter the evolving threat of financing terrorism and its nexus with money laundering' was hosted by the Office of Prosecutor General of the Arab Republic of Egypt from the 19th to 21st February 2019. The said conference was held in Cairo, Egypt, and was funded by European Union and sponsored by several other international organizations, including the United Nations office on Drugs and Crime (UNODC), the International Association of Prosecutors (IAP), amongst others. The national prosecuting agency of almost all the countries of the Middle East and North African region attended the conference. Other countries in the African continent such as Mauritius were also invited. The conference was attended by Mr Mehdi Manrakhan, Assistant DPP, and myself.

The aim of the conference was to bring together all the stakeholders in the region and to bridge the gap as well as to enhance their networks so as to better combat terrorism financing and its incestuous connection with money laundering.

Justice Nabeel Sadek, the Prosecutor General of the Arab Republic of Egypt, opened the conference by emphasizing on the need to work together so as to combat the identified problem. Other eminent interveners during the opening ceremony were Mr. Ivan Surkos, Head of the European Union Delegation in Cairo, Mr. Gerhard Jarosch, President of the IAP, as well as Ms. Cristina Albertin, regional representative of the UNODC for the Middle East and North Africa, amongst others. All of them emphasised on the need for collaboration in the region and beyond so as to achieve the common goal against terrorism financing.

Justice Nabeel Sadek chaired the first session of the conference which discussed the challenges and best practices in investigating financing terrorism and money laundering. The subjects which were debated during this session included the national legal framework for countering financing terrorism and money laundering; best practices and challenges in detecting and investigating financing terrorism and money laundering. Several experts such as Justice Benaissa Beniketir, General Prosecutor at the Supreme Judicial Council, Algeria, Mr. Osama Al Oofi, Head of the Judicial Inspection Department at the Prosecution Office of Bahrein, Dr. Elmajled, Head of the International Convention Unit from the Prosecution Office of the Kingdom of Saudi Arabia, amongst others, intervened to share their respective experience and knowledge in the field.

The next session concentrated on the international and regional instruments to counter financing terrorism and money laundering.

Middle East and North African Regional conference

The various United Nations Conventions and Resolutions as well as African and Arab Conventions on the subject were discussed by such speakers as Mr. Hatem Aly and Mr. Ali Younes from UNODC as well as General Advocate Tarek El Rashed of the Ajman Prosecution Office, United Arab Emirates.

The third session was chaired by Justice Mohamed Abdelnabawy, Head of the Public Prosecution and the General Deputy of the King of Morocco during which the precautionary and preventative measures implemented by the prosecuting authorities to combat terrorism financing were discussed. Justice Imad EL Darwish from Tunisia, German Gorn from the Prosecutor General's Office of Russia were amongst the speakers who explained the importance of freezing and confiscation orders in combatting the terrorism financing and its nexus with money laundering. The best practices and challenges related to these orders were also highlighted by other speakers such as Stephane Chassard, Deputy General Prosecutor at the Court of Appeal of Paris, France and Miguel Angel Carballo Cuervo, Assistant of Public Prosecutor, Spain.

Session four was devoted to the rising new challenges of crimes involving the use of internet by terrorists for financing terrorism and money laundering, during which such subjects as the use of dark and deep webs as well as the use of encrypted-currency by terrorist organisation were discussed.

The fifth session dealt with the co-operation between the prosecution agencies and financial investigation units in detecting and investigating terrorism financing and money laundering. The best practices and challenges in relation to such co-operation amongst various agencies were discussed so as to obtain admissible evidence. Justice Kumbirai Hodzi, General Prosecutor of Zimbabwe, was amongst the speakers.

The last session was chaired by the General Prosecutor of Bahrain, Justice Ali Al Buainain during which extradition and mutual legal assistance were discussed with particular emphasis on enhancing the co-operation between the various agencies.

The whole conference was a success in enhancing the co-operation between the prosecuting agencies of the countries in the region and to make the combat against terrorism financing and money laundering an active and effective one.

Mr Mohammad Isme Azam Neerooa
Assistant Director of Public Prosecutions

International Women's Day 2019

The International Women's day was celebrated on the 8th March to honour the role of women around the world, to secure their rights and to build a balanced society. On this occasion, the Office of the Director of Public Prosecutions proudly shares some thoughts of what the ' International Women's Day' signifies to some of our ladies at the office.

RAMANO-EGAN Asha
Senior Assistant DPP

Appearing and sounding 'right' and 'in' in matters of the fight for gender equality and human rights generally seem to be an obsession in our profession. We have witnessed it, especially in December 2018 on the occasion of the 70th anniversary of the Universal Declaration of Human Rights. Unfortunately, the gulf between appearance and reality remains. But there is hope. In that regard, I cannot help thinking about this great role model that was Simone Veil. She shone by walking the talk and was referred to as «femme de conviction et d'exception». She never claimed to be a feminist nor a women's rights activist. Yet, we all know her actual achievements. I thought I could best pay tribute to her by drawing on what others have said in tribute to her.

Geneviève Fraisse, Philosophe:

« *Elle n'avait pas besoin d'être militante (….) elle faisait les choses.*

Elle n'a pas besoin de dire ce qu'elle est. Elle incarne plutôt qu'elle représente. »

Bibia Pavard, historian :

« L'ex-ministre de la santé … n'adhérait pas aux revendications féministes de son temps. Son souci de l'égalité entre hommes et femmes est né de son expérience: celle d'une pionnière dans des milieux masculins. …

C'est par son expérience de femme et haut fonctionnaire, de magistrate, de femme au gouvernement, ayant connu toutes les discriminations au quotidien, qu'elle s'est forgée ses convictions en matière d'égalité entre les femmes et les hommes. C'est aussi parce que Simone Veil était, par son parcours personnel et son passé de déportée, très sensible à l'injustice, à la stigmatisation et aux inégalités.

…. En tant que femme qui exerce un métier majoritairement masculin, elle s'est heurtée à un certain nombres d'obstacles parce qu'elle était femme. Elle a souvent été une pionnière – première femme secrétaire du Conseil Supérieur de la magistrature, première femme ministre de plein exercice de la Vème République, première présidente du Parlement européen -, elle a expérimenté le sexisme et l'inégalité dans sa propre carrière, même si elle a aussi bénéficié d'être une femme à un moment de féminisation timide de la politique. "

Of course, prior to Simone Veil, it is difficult to forget the other 'femme d'action' that was Mother Teresa. Perhaps, one of her famous statements that she lived by and which is worth quoting in the present context of 'all talk' and 'no walk' is this:

"*Hands which help are holier than lips that pray*".

PURRYAG-RAMFUl Anuradha
Principal State Counsel

Women empowerment is a reality in Mauritius as a result of universal access to free secondary education which was introduced in 1977. This has indeed allowed many girls from the poor segment of the society to get access to education. As N. Mandela stated "*Education is the most powerful weapon which you can use to change the world*".

Today in the legal profession in Mauritius we are proud to see women occupying positions which are at the highest level. We have women Magistrates, Judges, and some even represent our country on International Committees. We also have women who have carried out their work as barristers with so much dedication, ability and have achieved so much success that they have been given the title of 'Senior Counsel'.

Legislature has also over time helped this empowerment by various amendments made to the law. In 1980 major amendments were made to the Mauritian Civil Code in regards to rights over children, sale and alienation of properties. Special legislation such as the Protection from Domestic Violence Act 1998, or Equal Opportunities Act 2008 have been passed in Mauritius to further strengthen the protection to be afforded to women in society. As at today "violence" is interpreted very widely to cover psychological violence as well as physical violence. The Equal Opportunities regime, too, ensures that there is no discrimination against women who often have to juggle their professional responsibilities with their responsibilities as mother or wife. Free education in the 1970s has opened the door for the path of progress. The Mauritian women continues on this path, steadily and surely. No horizon is closed, no goal unachievable.

SUNGLEE Sharon Audrey Sandra
Senior State Counsel

Our society being intrinsically patriarchal, women have had, through the ages, to voice out on all fronts their mere existence as human beings. Once treated the same as an object, then having the same status as a slave or a child, women have gone a long way in their fight to be treated as the equal of men. Not equal in physical aspect- no two men is equal! But equal in their rights.

In 1975, the United Nations declared the 8th of March as the World Women's Day in order bring worldwide awareness to the situation and call for measure to eradicate the disparity engrained in our society on the treatment of the two gender of the same species. It is sad, and a shame, that up to now the fight for the recognition of equal rights is still a live combat. True it is progress has been made, women are more and more present at top management levels, as professionals and as politicians. But the recognition is not yet an acquired right.

Interestingly, the 8th March was proclaimed World Day of Women and World Peace. Indeed, there can only be world peace if men and women are treated in the same manner. It is undeniable that women are essential, primordial, vital, in the development, progress and future of humanity.

Let's give the devil its due! As a professional and a woman, the 8th of March remind me of the long struggle and I cannot be but grateful to all those, wearing Prada or not, i.e. women and men, who have dedicated their lives to this cause. And it also acts as a wake-up call to maintain the fighting mode until the war is won.

Women have the willpower and creative energy to attain great heights. They must stand up for themselves. For their full potential to be realised, it is very important that they believe in themselves. Women must remember that the foundation of success is self-confidence.

VEERABADRAN Mudaliar Pamela
State Counsel

As we celebrate Women's Day, we also celebrate women of all ages and walks of life who are speaking out on the matters important to them. It is a sign of progress that women all over the world have taken on pressing issues such as the protection of the environment and harassment at the work place. This is meaningful change. The active participation of women in finding solutions to the problems which affect them is necessary and should be consistently encouraged. It is the responsibility of one and all to ensure that a voice raised is a voice heard.

BHAGWAN Bhavna
Temporary State Counsel

International Women's Day is celebrated across the world in order to recognise and appreciate their contribution and their amazing social, cultural, economic and political achievement while also campaigning for greater progress towards gender equality. It also appears as a celebration of respect, appreciation, love and care towards women. However, scope of celebration of women's day cannot be defined as the deeds done by women as it can never be summed up. There is no limit to the work and efforts a woman can put forward for her own progress as well as the progress of the people linked to her.

Did you know? Purple is the official color of International Women's Day because internationally, purple is a color for symbolizing women.

SEEBORUTH Sobha
Senior Human Resource Executive

Worldwide it has been recognised that women have not yet reached the status and positions they endeavor, as only a few ladies are at top positions. However, we should maintain the struggle to achieve what we want by breaking the barriers of traditions, culture and prejudice that have been imposed on us and empower other women on our way up. We should be proud of ourselves for our ability to manage both our familial and professional responsibilities.

RAMRACHEEA Devi
Senior Legal Assistant

Woman as a daughter, sister, wife and mother,

Stands unshakable as a rock no matter the weather,

To, any extent, achieve her goals,

Through her multiple roles,

Clad in her armour of strength and dignity,

She is always ready to brace any storm or calamity,

She fearlessly moves with her head held high,

To contribute to making life a smooth ride,

To her children, she is the first teacher ,

And there can be no better ,

To her man, she is the driving force in his path to success,

And always filling his home with happiness.

PEM Asha
Confidential Secretary to DPP

Let's raise a toast to her, Happy Women's Day

08 March, as International Women's Day has truly marked a start of a journey for women whereby our first victory was the right to vote. In this journey, we, women, constantly fight for our rights for respect and to develop a conducive environment within which our capabilities can bloom. We are capable of portraying different kinds of roles, be it, at home, social or professional, as a nurturer, giver, educator and the list could go on. What I wish to convey is that to achieve a level of completion, not only men have its importance, so do women.

BANARSEE Kalyanee
Temporary Assistant Financial Officer

Talk :An overview of the UK Police and Criminal Evidence Act 1984

On the 14th of March 2019, the Office of the Director of Public Prosecutions had the honor to welcome Mr. John Wadham, Chair of the UK National Preventive Mechanism and Member of the UK Independent Advisory Panel on Deaths in Custody, for an overview of **the UK Police and Criminal Evidence Act 1984 ('PACE').** The lecture started with a welcoming speech by Mr Seetulsingh, Chairperson of the **National Human Rights Commission ('NHRC'),** who welcomed Mr Wadham and gave the participants an overview of his credentials. Mr Wadham is the author to the **Blackstone's Guide** on **Human Rights Act 1998**; **Blackstone's Guide** to the **Freedom of Information Act 2000**; and **Blackstone's Guide** to the **Equality Act 2000**. Mr Seetulsingh encouraged the participants to ask questions in view of the fact that, very soon, Mauritius will have its own version of the **PACE**.

Mr Wadham started with an anecdote about how, when the **PACE Bill** was first introduced, he was amongst those who were opposed to it as the periods of detention of suspects had increased from 48 hours to 96 hours; police officers had more powers; and the rights of citizens were reduced. However, he has witnessed the differences which have occurred since **PACE** has been introduced and he encourages every country to adopt this legislation. He related problems that he encountered as a lawyer for Human Rights, especially dealing with suspects when they have been arrested by the police, such as the police saying that the suspect is not in custody or has already been released. Once he had access to the suspects, it was generally too late: the statement had been taken and the interview had already taken place. And when the trial takes place, there are endless arguments about whether the person was under pressure to confess, or how long they have been detained.

Mr D. Seetulsingh, Chairman of the NHRC *(left);*
Mr J. Wadham, Chairman of the UK NPM (*right*)

An overview of the Police and Criminal Evidence Act 1984

Mr Satyajit Boolell, SC
Director of Public Prosecutions

That position, according to Mr Wadham, changed very considerably with **PACE**. Firstly because there was a codification of the common law so people knew what their rights were; police officers knew what their powers were and prosecutors knew what was and was not legal. Secondly, **PACE** made the rights of police officers and defendants in police stations very clear, including the right of the defendant to see a lawyer. Access to lawyers in police station made a big difference because there was a witness as proof of what had occurred. Lastly, the audio recording of interviews was a very significant step because it cut out all of the issues of who said what and disputes about what was happening during the interview process.

Within the police station, the process was clear and the disputes were reduced. The introduction of **PACE** provided a fairer system for police officers, for defendants, for prosecutors and for the court.

As a side note, Mr Wadham also encouraged every country to have **Codes of Practice** to supplement **PACE** as they deal with much more details and it has to be adhered to unless there are good reasons to depart from it.

Mr Wadham referred to some of the jurisprudence that has taken place since **PACE** has been introduced in order to explain what **PACE** is about. First it codifies 'stop and search' so that suspicion must be genuine in the officer's own mind and must be reasonable. The courts have been very clear that the suspicion for stop and search has to be justified by what information the police officer had before the search. The courts have also been very interested in what information the person was given before they were searched, about why they are being searched, so as to establish the lawfulness of the search.

Mr Wadham then talked about 'Search with a warrant'. He stated that, when applying for a search warrant, the police officer has an obligation not just to state all the reasons why a search warrant is necessary but any possible reason why a search warrant is not justified.

Next, he dealt with arrest powers and the definition of an arrest. Whether someone has been arrested depends not on whether they have been legally arrested but physically arrested. In some situations, mere words are sufficient. Similar to the power of stop and search, reasonable suspicion is required before arrest. Also, the police officer carrying out the arrest has to provide factual and legal information to the person as to why he is being arrested. Failure to give information on fact and grounds of arrest renders the detention unlawful.

Mr Wadham then went on to explain the role of the custody officer, who is generally a Sergeant not involved in investigation, whose role is to protect the rights of the defendant.

An overview of the Police and Criminal Evidence Act 1984

They usually keep a custody record, which is a key document when there are disputes on whether there has been pressure by police officers. They also have duties to act expeditiously and ensure that the detainee is being given his rights as well as conduct reviews at different stages in time.

Finally, he gave an overview of the test for a confession to be excluded which is found under **section 76(2)** of **PACE** and the law relating to unfair evidence which is found under **section 78(1)** of **PACE**.

As a closing remark, Mr Wadham explained that every person who has been arrested in the UK has right to free legal aid. A list is provided by the Law Society containing contact details of any lawyer who wish to be retained for such services at any time of the day. Mr Wadham stressed on the importance of free legal aid in order for **PACE** to be effective.

The lecture was closed by the Director of Public Prosecutions (DPP), Mr Satyajit Boolell, SC, who thanked Mr Wadham for his time and insight into **PACE**. He stated that **PACE** will help to a large extent to prevent arbitrariness that is apparent at times in the legal system and to resolve the vacuums in investigations. He stressed that in order to best adapt **PACE** to the Mauritian system, it is imperative to draw on experiences elsewhere, such as Caribbean countries that have **PACE** or other advanced jurisdiction. He concluded by saying that **PACE** is most heartedly welcomed.

The lecture ended with a question and answer session where the participants had the opportunity to ask any question that they had on the legislation.

Neelam Nemchand
Legal Research Officer

Independence Day Celebration

Independence Day in Mauritius is celebrated on 12th of March every year. It was on this day that Mauritius got its Independence from the British in the year 1968, after many struggles and sacrifices. This day is celebrated to remind ourselves of all the sacrifices made by all the people who fought for freedom. Independence day celebrations are held with great zeal and enthusiasm all over the country. The Office of the DPP organized a flag raising ceremony on 11th March to commemorate this day with patriotism and happiness. Since independence our country has achieved a lot and has developed in many areas in these 51st years.

QUICK FACTS

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Quick Facts

DID YOU KNOW?

The Environment Protection (Affixing of Posters) Regulations 2008

Penalty for affixing a poster in contravention of the regulations

- **Fine not exceeding 50, 000 rupees on first conviction.**
- **Fine not exceeding 250,000 rupees and imprisonment not exceeding one year on a second or subsequent conviction.**

Examples of offences under the Regulations:

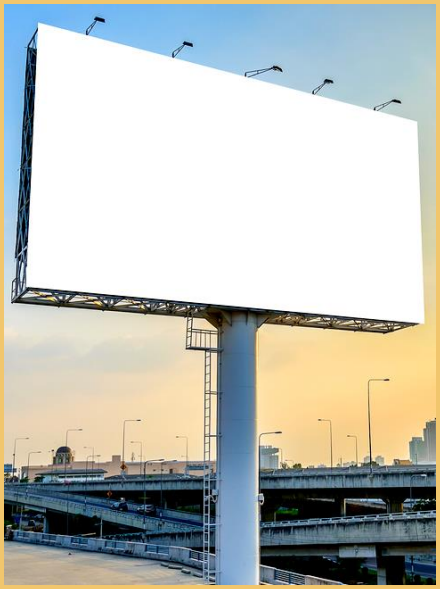
Affixing of posters in a public place other than at a site approved by a local authority or by the Road Development Authority.

Affixing a poster without the name of the printer / distributor / person who has commissioned the poster.

A printer not keeping a record of the printing works carried by him as well as the details of the person commissioning the work.

NOTE:

These regulations do not apply to the following:

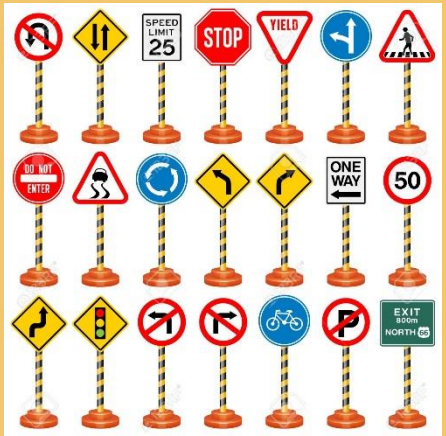


Billboards

Posters affixed inside a display window of a building

Posters affixed inside a commercial premise or building

Direction signs erected by or with the approval of a government authority



Traffic Signs

SUPREME COURT JUDGMENTS SUMMARY

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SUMMARY OF SUPREME COURT JUDGMENTS: March 2019

RUTTUN R. v THE STATE 2019 SCJ 68

By Hon. Senior Puisne Judge Mr. E. Balancy and Hon. Judge Mr. P. Fekna

Embezzlement – Evidence falls short of proving the specific act of embezzlement implicating the appellant – Conviction quashed

The appellant stood charged together with one Dharmanand Bappaya before the Intermediate Court on an information containing 17 counts. The appellant was concerned only with count 17 which charged him with the offence of embezzlement by person in service receiving wages in breach of **sections 333(1)** and **(2)** of the **Criminal Code**. He pleaded not guilty to the charge and was represented by Counsel. The lower Court found him guilty as charged and sentenced him to undergo 6 months' imprisonment and to pay Rs. 500 as costs.

He has appealed against his conviction and sentence based on two grounds.

In the first place, the Court dealt with Ground 2 challenging the conviction. The ground read as follows:

"The learned Magistrate was wrong to come to the conclusion that, because Appellant had affixed his signature to the salesman's account witnessing all the transactions of the shop of which he had charge, Appellant was guilty of embezzlement of goods for the value of Rs 178,561; especially as there was not any evidence of misappropriation of these goods by the Appellant."

The Appellate Court concluded that the evidence of the general nature that was adduced before the trial Court was not sufficient to establish that the appellant had embezzled the goods. The prosecution had to do more and had to prove, in a specific way, the acts and doings of the appellant which it averred amounted to embezzlement.

In particular, proof had to be ushered in to show how the goods had been diverted by the appellant and used by him in a way other than the one for which they had been delivered to him. The evidence fell short of establishing any specific acts of embezzlement which could be attributed to the appellant personally. Responsibility could not be attached to him based solely on the fact that he signed the Salesman Accounts, especially when considering that the Secretary had also signed those Accounts.

The Court supported its analysis by referring to the case of **R v Goatley [1884 GR 144]** reported in the New Mauritius Digest Vol. 2 at page 416 where it was held that:

"an averment of a general deficit in accounts and a general embezzlement is not sufficient; some specific delivery and embezzlement must be charged and proved …, the fact that money is found deficient on a balancing of accounts does not by itself constitute embezzlement".

The Court also referred to the case of **R v Latouche [1882 GR 147]** inasmuch as it was held therein that 'the manner in which the prisoner disposed of the money found to be deficient is immaterial, but the fact that he appropriated it must be proved' (emphasis added). Finally, reference was made to the case of **Bahadoor & Anor v The Queen [1959 MR 99]** which establishes that the fact that a person countersigned certain vouchers witnessing payments is not enough to find him jointly responsible for the expenditure of the money which was entrusted to him.

In the light of the above, the Appellate Court held that the appellant could not be held personally answerable for these acts and doings and the evidence before the trial Court was short of establishing the case of embezzlement against him.

The appeal was thus allowed and the conviction was quashed.

HERMINETTE J.K.B v THE STATE 2019 SCJ 77

By Hon. Judge Mrs. R. Teelock and Hon. Judge Mrs. S.B.A. Hamuth-Laulloo

Sentence – Manifestly harsh and excessive – Clean record at the time of commission of offence – Previous convictions - Custodial sentence – Balancing exercise

The appellant was convicted for the offence of knowingly receiving article obtained by means of a crime in breach of **sections 40, 301** and **305(1) (b)** of the **Criminal Code**. The Learned Magistrate convicted and sentenced him to undergo 18 months' imprisonment. The only ground of appeal insisted upon was the sentence being manifestly harsh and excessive.

The Appellate Court was of the view that a reading of the learned Magistrate's sentence showed that she placed much emphasis on the previous convictions of the appellant. Moreover, she quoted the case of **Toolsy M. N v The State [2012 SCJ 410]** wherein the **Supreme Court** cited an **extract of Queen [1981] 3 Cr App R at page 246** to the effect that "(..) *in deciding whether that sentence should be imposed (…) the court must have regard to those matters which tell in his favour; and equally to those matters which tell against him, in particular his record of previous convictions*."

As a matter of fact, the offence in question was committed in 2010 and the appellant was prosecuted in 2014 and sentenced in 2016. From the certificate of previous convictions of the appellant, the Court was apprised that he had been convicted in 2011, 2013 and 2014 for cognate offences.

The Appellate Court took into consideration the appellant's convictions which were post the commission of the present offence and it was evident that the appellant did not have a spotless behaviour but, for all intents and purposes, he had a clean record at the time of the commission of the present offence albeit one of the offences was committed in 2007. Hence, the Court concluded that the learned Magistrate was wrong to have based her sentence on the finding that the appellant had been unresponsive to the leniency shown to him by the courts and he thus deserved a much higher degree of severity.

The Court also highlighted that the record showed that the one who had committed the aggravated larceny was sentenced to one year imprisonment and in sentencing the appellant, an accomplice, the learned Magistrate failed to give any reason to justify the difference in sentence. Therefore, it could safely be presumed, from her sentence, that she over emphasized the issue of the antecedents of the appellant.

In the circumstances, the Appellate Court held that the approach taken by the Magistrate had resulted in the imposition of a harsher sentence than what she may have otherwise meted out had a balancing exercise been properly done. Nonetheless, the Court added that a custodial sentence was richly deserved in view of the appellant's plea of not guilty and in spite of his clean record at the time of the commission of the offence because "…the interests of justice as well as the protection of the public demand the imposition of a condign punishment to deter the appellant and other offenders from committing further offences of the like kind" (vide **Toolsy M. N v The State** [supra])

The Court accordingly held that the sentence passed was indeed harsh and excessive and reduced the sentence to one of nine months' imprisonment.

APPADOO J. C. v THE STATE 2019 SCJ 79

By Hon. Judge Mrs. N. Devat and Hon. Judge Mr. N. F. Oh San-Bellepeau

Appeal – Vagueness of grounds – Plea of guilty – Constitutional rights – Charge put to accused - Supervisory powers of the Supreme Court – Power to increase sentence on appeal

The appellant entered a plea of guilty to a charge of swindling before the Intermediate Court whereupon, the learned Magistrate convicted him and sentenced him to undergo 12 months' imprisonment.

The appellant challenged the sentence as being manifestly harsh and excessive, and appealed against his conviction, notwithstanding his plea of guilty, to the following effect - "inasmuch as the present case is on all fours with the case of **Mungrooa v The State 2005 SCJ 291"**. In that case, it was found that the statement of the appellant to the police "in no way disclosed the actual offence which the appellant had formally admitted by his

plea of guilty" and that no contract of agency and no embezzlement of money received from such a contract had been revealed in the statement.

The Appellate Court concluded that the circumstances were materially different in the case which was tried before the learned Magistrate of the Intermediate Court, subject-matter of this appeal. The appellant's defence statement to the police in fact revealed that he gave precise details regarding the way in which he met the complainant at the Registrar General's office and how, after she asked him for information, he made her follow him to another office to give her a receipt in order to take her money as he was facing financial difficulties at the time.

The appellant then asked the complainant to accompany him to another floor and after he made her wait on a bench, he asked her to give him the money to pay for the registration fees. The appellant also told the police that he then went into another office and used an old receipt on which he inserted initials and wrote the amount of "Rs. 7,000" to further convince the complainant that the fees were paid to the Registrar General before he gave her the fake receipt. It is not disputed that the constitutive elements of the offence of swindling are that the appellant should have –

(i) employed fraudulent pretences to establish the belief in the existence of a fictitious operation,

(ii) in order to obtain the remittance of funds,

(iii) and by such means,

(iv) swindled the person of her property.

One of the decisions on which learned counsel for the appellant relied in his arguments was **Hon Yin v The Queen [1956 MR 518],** where reference was made to **Garraud**, **paragraph 2549**, **Droit Pénal Français, Vol. 6, 3rd edition**, namely:

"Il faut d'abord des 'manoeuvres'. La loi veut marquer, par cette expression, qu'elle ne pretend pas punir le simple mensonge, les paroles trompeuses, artificieuses, les réticences. Le mensonge n'est pas un délit, parce qu'on ne doit pas croire facilement à la parole d'autrui, et qu'on ne peut s'imputer qu'à soit même le dommage qu'on a éprouvé par sa crédulité. Ce que la loi proscrit, c'est une ***machination****, c'est-à-dire la* ***combinaison de faits****,* ***l'arrangement de stratagèmes****,* ***l'organisation de ruses****, en un mot* ***une mise en scène*** *qui a pour but de donner crédit au mensonge et qui est destiné à tromper les tiers."*

The Court concluded that the learned Magistrate did not err when he convicted the appellant for the offence of swindling following his plea of guilty inasmuch as the material parts of the statement, as admitted by the appellant to the police, amounted to a carefully contrived *mise en scène* or *machination* plainly meant to support the lies told to the complainant to complete the swindling. All the requisite elements of the offence charged were therefore present in the confession the appellant gave to the police.

The Court also dealt with the issue of the complainant's version not being put to the appellant at the time that his statement was recorded since the recording officer did not specifically write it down. Referring to the case of **DPP v Gopaul [2010 SCJ 185]**, the Court concluded that such a proposition is untenable since what **section 10(2)(b)** of our **Constitution** requires "*is for an accused party to be informed in detail of the nature of the offence which is normally done by reading out to him in court all the elements of the charge under the enactment which are set out in the body of the information."*

The Appellate Court highlighted the fact that the appellant's written statement did not expressly mention that the complainant's version was recited to him at the time the statement was recorded cannot lead to the inescapable conclusion that the declarant's version was not put to the appellant and that the latter was consequently denied of the opportunity of giving his defence to the charge levelled against him, the more so the appellant confessed to the charge. The appellant cannot contend that he was not aware of the details of the complaint made against him and he was prejudiced in the preparation of his defence.

Therefore, in line with the provisions enacted under **sections 72(1)** and **(2)** of the **District and Intermediate Courts (Criminal Jurisdiction) Act**, once the appellant had entered an unambiguous plea of guilty, and in the light of his detailed confession to the police, the Magistrate had no other alternative than to convict him

and to proceed to sentence.

As regards the first ground of appeal challenging the sentence, the appellant's record of previous convictions showed that he was convicted for offences ranging from embezzlement (4 times) and swindling (3 times) to forgery (3 times), two of the convictions for forgery being under multiple counts. Albeit, some of the appellant's convictions dated back to more than 10 years prior to the commission of the present offence.

The Appellate Court concluded that the antecedents of the appellant undoubtedly revealed a steady propensity to relapse into criminal activities at the expense of many unsuspecting victims and past fines and sentences of imprisonment had done nothing to dissuade the appellant from offending again. The Court, whilst bearing in mind that the power to increase sentences on appeal is one which should be sparingly exercised, and that this is only usually done where the sentence imposed by the trial court is manifestly inadequate **(Kailaysur v The State [2004 MR 244])**, considered that in the circumstances of the present case, the learned Magistrate clearly erred on the side of undue leniency.

By virtue of its supervisory powers under **section 82** of the **Constitution**, together with its revising jurisdiction on appeal under **section 96** of the **District** and **Intermediate Courts (Criminal Jurisdiction) Act**, and for all the reasons outlined, the Appellate Court increased and substituted the sentence of 12 months' imprisonment imposed by the trial court to one of 3 years' penal servitude.

APPADOO D.V. v THE STATE 2019 SCJ 81

By Hon. Judge Mr. D. Chan Kan Cheong and By Hon. Judge Mrs. S.B.A. Hamuth- Laulloo

Receiving article by means of a crime – Tainted origin of the stolen property – Elements of the offence – No evidence adduced to prove tainted origin - Appeal allowed

The appellant appealed against the judgment of the learned Magistrate of the Intermediate Court convicting him on two counts of an information for knowingly receiving article obtained by means of a crime, namely a larceny by a person in receipt of wages, in breach of **sections 40, 301** and **309(1)(2)(a)** of the **Criminal code**. He was conditionally discharged under both counts.

The seven grounds of appeal were in essence to the effect that the learned Magistrate erred in finding that the prosecution had proved beyond reasonable doubt that the articles, subject-matter of the two counts, were of tainted origin and that the appellant had the necessary guilty knowledge.

Additionally, the respondent did not resist the appeal on the ground that the learned Magistrate was wrong to have concluded that the articles were stolen property inasmuch as there was no evidence of the tainted origin of the articles, subject matter of the charges and relied on the case of **Director of Public Prosecutions v Hinga A. [2014 SCJ 30**3]. The prosecution did not in fact call any witness to prove the allegation that the articles were stolen property.

The Appellate Court highlighted that the learned Magistrate adopted an erroneous approach since she accepted as undisputed that the articles mentioned in the information were of tainted origin when in fact no such evidence was adduced by the prosecution. Reference was made to **Garraud in Traité du Droit Pénal Tome 3** at **Note 943** which stated the following:

*"**943**. Il faut constater un délit principal et préalable servant de base à la complicité. L'objet du recel consiste dans des choses dont la possession a été obtenue par la voie d'une infraction, c'est-à-dire des choses enlevées, détournées ou obtenues à l'aide d'un crime ou d'un délit."*

The Appellate Court concluded that in the circumstances of the present case, an essential element of the present charges was not established, namely that the articles purchased by the appellant were of tainted origin. The learned Magistrate was, therefore, wrong to find that the prosecution had proved all the elements of the present offences beyond reasonable doubt.

The appeal was thus allowed and the conviction was quashed.

"Intelligence without ambition is a bird without wings."

– Salvador Dali

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MAURITIUS

"TO NO ONE WILL WE SELL,
TO NO ONE DENY,
OR DELAY RIGHT OR JUSTICE"

Chap 4, Magna Carta 1215