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
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The views expressed in the articles are those of the particular authors and should under no account be considered as binding on the Office.
Dear Readers,

Welcome to the 101st issue of our monthly e-newsletter. In this issue, we bring to you a video whereby our law officer explains the approach adopted by our courts in dealing with the offence of having ‘sexual intercourse with a minor under 16 years old’. Moreover, you will read an article on ‘violence at work’, addressing the relevant provisions under the Workers’ Rights Act.

We also provide you with an overview of workshops attended by our law officers recently, namely, the workshop on ‘Cybercrime’, organised by the Council of Europe, under the GLACY (Global Action on Cybercrime Extended) project, and that on ‘Human Trafficking’.

Readers will note that in our last issue, under the ‘Quick Facts’ section, we dealt with the duties of drivers in case of road accidents, as provided under section 140 of the Road Traffic Act. For this month, we address another set of important provisions under the said law, dealing with ‘Constat à l’amiable’. Finally, we have included, as usual, a summary of recent Supreme Court judgments.

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

Anusha Rawoah
Senior State Counsel
‘Sexual Intercourse with minor under 16’
An offence under section 249(4) of the Criminal Code

Click on the ‘Play’ icon below to view or view video on
https://youtu.be/A5g_X_TvuSg

Deepa D. BUCKTOWAR
State Counsel
In 2019, in a landmark decision given by a court in France, three former senior employees of France Telecom were found guilty of implementing policies which led to the suicide of several employees in the 2000s. This is an important decision because the court considered the idea of moral harassment at work.

**What do our laws have to say on bullying at work?**

At the outset, violence at work is recognised as an offence in our law. For a long time, it was the Employment Rights Act (‘ERA’) which criminalised both physical and verbal violence under section 54(1). The Employment Rights Act has since, been replaced by the Workers’ Rights Act (‘WRA’). In this piece of legislation, bullying is considered as a form of violence at work. Section 114(1) is a replica of section 54 and it reads as follows:

“No person shall –

(a) harass, sexually or otherwise;
(b) assault;
(c) verbally abuse, swear at or insult;
(d) express the intention to cause harm to;
(e) bully or use threatening behaviour towards;
(f) use aggressive gesture indicating intimidation, contempt or disdain towards;
(g) by words or act, hinder, a worker, in the course of or as a result of his work”.

Violence at work can be in different forms. It can be physical or verbal. The offender is a ‘person’ which means that the he may be an employee, employer or someone who is not a party to the contract of employment.

The ERA did not define ‘bullying’ but this lacuna is covered in section 114(7) of WRA which defines bullying as including “a pattern of offensive, intimidating, malicious, insulting or humiliating behaviour or an abuse or misuse of power or authority which attempts to undermine an individual or group of individuals, gradually eroding their confidence and capacity which may cause them to suffer stress”.

A number of observations can be made:

- First, bullying is not limited to a one-off act or behaviour. It is acknowledged as consisting of a pattern of behaviour which can be either short or long-term;
- Second, the category of potential offenders is wider and covers anyone who abuses or misuses a power. Both employers and employees fall within its purview. This may include senior employees and employees at the same hierarchy/level;
Third, the offence can be committed by an individual or a group of individuals. This is relevant in the age of social media and the fast spreading of messages on several platforms;

Fourth, the victim can be a person or a group of persons and,

Lastly, the definition recognizes the primary aim of bullying: an attempt to impact the victim’s confidence and abilities.

The sentence is a serious one. Any person who is found guilty of an offence under section 114(1) faces a fine not exceeding Rs.100,000 and imprisonment for a term not exceeding 5 years.

Every employee spends a major part of his or her time at the workplace. For this reason, the work environment holds considerable influence on the long-term wellbeing of workers. The idea of ‘well-being’ itself has evolved. It is not restricted to a decent pay. It includes the treatment that a worker receives at work and its impact on his or her health. Institutional structures to tackle violence at work, including bullying, are essential to ensure that dialogue between all stakeholders is maintained.
WORKSHOPS/CONFERENCES REVIEW
Le projet GLACY : une lutte constante contre la cybercriminalité

La cybercriminalité est un problème mondial qui prend de l’ampleur. Avec l’explosion du numérique et l’accès facile à l’informatique, nous sommes confrontés à une nouvelle catégorie de criminalité. Chaque personne, tout âge confondu, est vulnérable à plusieurs risques dans cet environnement digital. La lutte contre la cybercriminalité est devenue une nécessité et une priorité dans tous les pays. Cette lutte requiert une évolution constante et une harmonisation de la législation ainsi qu’une coopération internationale assidue. La cybercriminalité regroupe toutes les infractions pénales tentées ou commises à l’encontre ou au moyen d’un système d’information et de communication, principalement l’internet.

Le Conseil de l’Europe, à travers son projet GLACY (Global Action on Cybercrime Extended) mène une lutte constante contre la cybercriminalité ayant comme outil «La convention sur la cybercriminalité de 2001», plus connue comme la Convention de Budapest. L’objectif spécifique du projet GLACY est que chaque année, Le Conseil de l’Europe organise une conférence qui est connue pour être une des plus grandes plateformes d’échanges sur la cybercriminalité, regroupant plus de 300 experts de 80 pays. J’ai eu l’opportunité d’être parmi les participants de la dernière conférence du 19 Novembre au 22 Novembre 2019 au siège du Conseil de L’Europe à Strasbourg. Plusieurs ateliers de travail ont eu lieu sur différents thèmes notamment :

- L’Exploitation sexuelle et abus sexuels des enfants en ligne,
- Quels sont les enjeux s'agissant de la protection des données et la justice pénale,
- La coopération internationale en matière de cybercriminalité et cyber sécurité,
- Les preuves dans le cyberspace, l’état global de la législation sur la cybercriminalité,
- La coopération dans les situations d’urgence,
- L’évolution constante de l’environnement numérique, les défis à relever et comment répondre efficacement aux risques et défis spécifiques auxquels sont confrontés les enfants dans l’environnement numérique, comment une coopération entre les différents acteurs est essentielle pour garantir l’efficacité des enquêtes et des poursuites et l’importance d’encadrer et de soutenir les victimes, comment concilier les intérêts s’agissant des exigences en matière de protection des données tout en menant efficacement les enquêtes criminelles, comment améliorer la coopération entre les autorités de justice pénales et les acteurs de la cyber sécurité, les défis actuels et futurs à relever dans le cyberspace et que peut-on attendre de l’intelligence entre autres.
La cybercriminalité étant une nouvelle forme de criminalité qui se situe dans un espace virtuel, les autorités concernées font face à un véritable challenge s’agissant notamment de l’obtention des preuves entre autres. D’où la nécessité d’une législation efficace, de mesures de prévention et de sensibilisation et d’une formation continue des acteurs concernés.

Le projet GLACY : une lutte constante contre la cybercriminalité
Human Trafficking

From the 3rd to the 5th of December 2019, I had the opportunity to attend a Human Trafficking Workshop in Rwanda.

Human trafficking knows no geographical bounds. It occurs everywhere, not just in big countries, or in affluent cities, but locally and in small countries and in small towns. Victims can be of any age, gender, and racial demographics, as well as across any country, be it Asia, Africa and South America, even Europe, especially poorer countries or recently conflicted ones.

What are the characteristics of a victim of trafficking?

A victim of human trafficking can be trafficked within his/her own country, by his/her own parents. It would also be a misnomer to think that a person being smuggled is being trafficked. They can overlap, but the person being smuggled has given his consent and/or money to do so for his transportation to a chosen destination. A victim of human trafficking, on the other hand, is trafficked, without consent, for exploitation only, whether it is by force, fraud/deception or coercion, with no knowledge of where they will end up.

By identifying and exploiting their vulnerabilities, traffickers prey on their victims and keep them under control. The vulnerabilities on which traffickers prey are generally; poverty, domestic violence, substance dependence, past criminal record and failing reformatory criminal system, past sexual abuse victim, past child sexual abuse or simply those aspiring to a better life, among others. These vulnerabilities mean that anyone in the world can be a victim of human trafficking.

What does trafficking involve?

Trafficking itself can take many forms, ranging from either commercial sex provision; e.g., prostitution, pornography, live sex shows/text-based chats/phone sex chats, working in brothels and strip clubs, working in massage parlors, forced marriages (both for adults and children), domestic servitude, i.e., housekeeping, child rearing, forced labour, mules for other illegal transactions, or even organ harvesting.

How do traffickers control their victims?

Human traffickers use force, threats, psychological or other coercion to control their victims. Sometimes they simply fill the void in the victim’s life.

They use lies and deception by promising a high-paying job, a loving relationship, or new and exciting opportunities. Victims who have had to leave their homes because of poverty feel valued and safe when the trafficker gives them protection, food or a roof to sleep under, even if it is the worst possible accommodation.
Human Trafficking

Traffickers also use ‘coercive control’ by creating the illusion of ‘love’ towards their victims, thereby creating a ‘trauma bond’, so that the victim feels strong emotional attachment towards them.

Victims are also sexually abused since their captivity which, often, is at an early age. This new sexual feeling causes the victim to think that the trafficker cares about her. Indeed, some victims are allowed to walk the streets freely and unsupervised because the trafficker knows that they will come back at the end of the day.

The impact on the victim

Victims are scarred for life. The fact that they are often 17 years old or younger also empowers the traffickers in the eyes of their victims because they are easily impressionable. This combination makes it very difficult to find victims who are willing to testify against their ‘daddy’ (i.e., their handler), because, to the victim, the world revolves around that handler.

Building a case

The most important parts of the case are, firstly, the victim, and secondly, how to corroborate his/her story. The victim needs to feel empowered anew, because of the long period of trauma, with the use of very powerful techniques. She needs to hear how important she is to the prosecution case.

Victim-centered approach

The victim has to feel that her apprehensions, whether they are – fear, debt, threats to family members, unemployment, housing and financial arrangements, loss of a pet animal, healthcare or disabilities, body tattoo and/or facial branding removal, a child well-being, an unwanted pregnancy, disease, substance dependence, fear of arrest for her being a prostitute, shamelessness for having engaged in sexual activities, previous convictions or the need to return to their home country, will be acknowledged and addressed in a non-judgmental manner throughout the criminal justice process.

Of course, the limited resources, the institutional limitations and the time lapse are challenges. But these challenges may be alleviated with the help of NGOs, shelters and group homes, specialized departments with experience in trafficking, other governmental agencies (child services, etc), hospitals or police services in case the trafficker has located the victim, or specialized trauma organisations to help the victim face the world as it is and not as the trafficker depicted it, and to keep regular checks on the victim to make her feel valued again.

The first interview

The first interview is often primordial. The investigators have to be specially trained to record the version of the victim. Notes should be taken by another witnessing investigator, so that the lead investigator is focused on listening to the victim and her needs, whilst at the same time focused on the evidence which is needed.
Importance of evidence-based prosecution

Human trafficking is a well-organized business, where specific persons have specific role/s, and where money change hands. The link between these persons and the money has to be established through documentary evidence. Common denominators are devices used, phone numbers, phone instructions, transport facilities, identity of other victims and their cell-sites, dates, times and venues used to meet clients, method of payments by clients, money deposited into bank accounts, mobile money records (apps’ memos), social media, online ads, etc.

After having gathered this initial information, these need to be documented, from either CCTV camera, hotels, taxis, internet service providers, phone companies, banks, money exchangers, etc., so that the victim’s credibility is bolstered.

There are challenges to this process, of course. Apart from judicial procedure restraints, traffickers use the system to their advantage, they create fake online accounts using fake names and pictures, their bank accounts are in foreign jurisdictions, the phone numbers are registered in other persons’ names, their foot soldiers do not cooperate and this causes the victim to become uncooperative and refuse to testify.

The way forward

Every country around the world has some form of human trafficking occurring. Because it is well organized, well-planned and well hidden, it is hard to track. Therefore, national and international collaboration is fundamental to identify and track suspects and victims.

Regarding the victims, specialized departments, units and courts must be created to take charge of the victims more effectively, especially child victims. Experts must be enlisted to help with the process, especially at court to explain the ‘coercive control’, its trauma and impact on victims. Special counselling and special facilities must be provided to victims, especially where they are being trafficked by their own relatives.

As far as investigative agencies are concerned, jurisdictions must be extended to allow cross-border cooperation without any time consuming processes. Legal framework must be introduced so as to facilitate national and international processes to investigate and monitor suspects, i.e., fast-track mechanisms for orders to access, monitor and disclose electronic and/or digital evidence, or introducing summons instead of judge’s order in cases of sensitive nature. Technical and investigative capabilities must be increased.

Regarding the prosecutorial aspect, funds and resources must be increased. Procedures to enlist or encourage cooperation of parties must be introduced, e.g., effective process to reach out to the other victims, immunity against prostitution or drug charges for all victims, reduction in charge for foot-soldiers and plea/sentence bargaining in exchange for information, pleading guilty behind closed doors and sealed records of these reduced charges; sentence
Human Trafficking

held/suspended until end of cooperation; continuous handling of these foot-soldiers to prevent re-engaging with the organisation; consequences of breach of reduced charges/sentence. The corporate liability of advertising agencies or other corporate bodies has to be engaged. Furthermore, the ability to share information to other cross-border agencies has to be possible.

As far as other actors are concerned, other State departments, defence practitioners and judicial officers have to be trained to be able to understand the processes involved.

Interesting Reading:

- **People v Alfred & Jennifer Cotten** – sex tourism Florida; tropicaladultvacations.com
- **People v Michael Lamb** – evidence based conviction
- Backpage.com – 8 January 2013, manhattan
Quick Facts

‘Constat à l’amiable’

Applicable in cases of road traffic accidents between 2 motor vehicles which do not involve—

- bodily injury to persons travelling in the motor vehicles;
- injury or other prejudice to any other person;
- damage to other structure or property;
- a motor vehicle which does not have a valid insurance vignette;
- a motor vehicle being driven by a person not holding a valid driving licence;
- a motor vehicle being driven by a person under the influence of alcohol or drugs;
- a State-owned vehicle.

In case of an accident, where the drivers of the motor vehicles agree on the circumstances of the accident:

They shall record, in two originals, the facts of the accident on the Agreed State of Facts Form (pictured below), and sign the form.

They may call at the nearest police station where a police officer shall give all reasonable assistance in filling up the form after which they, and the police officer, shall sign such form.

Sections 68A and 68B of Road Traffic Act

‘Agreement between parties of accident’

(‘Constat à l’amiable’)

The Road Traffic Act 1962
Each driver shall keep one of the signed original Agreed Statement of Facts Form; and, as soon as possible, and not later than 5 days of the accident, notify the insurer of the motor vehicle driven by him as well as forward a copy of the Agreed Statement of Facts Form to the insurer.

Where an Agreed Statement of Facts Form has been filled in accordance with Section 68B, the drivers of the motor vehicles shall not be required to report the accident to the police as required by Section 140.

Under Section 68B (3), every driver of a motor vehicle shall carry in his vehicle an Agreed Statement of Facts Form.
SUMMARY OF SUPREME COURT JUDGMENTS: February 2020

CUNIAH K. v THE STATE OF MAURITIUS 2020 SCJ 26

By Hon. Judge Mrs. R. Teelock and Hon. Judge Mrs. R. D. Dabee

Drug dealing offences – Aggravating circumstances – Law provides for doubling of the penalty – Proportionality in sentencing

The Appellant pleaded guilty to the charge of possession of heroin for the purpose of distribution (6.21 g) in breach of the Dangerous Drugs Act (DDA). The aggravating circumstance of the offence was its commission in the compound of Victoria Hospital as provided under section 41(1)(i) of the DDA. The Intermediate Court convicted the Appellant and sentenced him to undergo 5 years’ penal servitude and to pay a fine of Rs 50,000 for the offence of drug dealing with aggravating circumstances.

The present appeal is grounded on the sentence being manifestly harsh and excessive.

Section 30(1)(f)(ii) of the DDA provides for “… a fine not exceeding one million rupees together with penal servitude for a term which shall not be less than 5 years and not more than 25 years” as penalty for possession of heroin for the purpose of distribution simpliciter. However, the aggravating circumstance as in the present case provides for a doubling of the penalties specified in respect of that offence. The Appellate Court concluded that the Learned Magistrate was alive to this aspect at sentencing stage.

Moreover, the Court held that the appeal had no merit since the Learned Magistrate had applied the principle of proportionality in her assessment [vide Pandoo v The State 2006 SCJ 225, and Aubeeluck v The State 2010 UKPC 13] and had halved the sentence provided for by the legislator. She also considered the mitigating factors as well as the seriousness of the offence. It was clear that she did, in fact, give a sentence lesser than the mandatory minimum sentence which is 10 years’ penal servitude, for the offence of “drug dealing with aggravating circumstances”.

In the circumstances, the Appellate Court highlighted that it would be sending the wrong signal if the sentence, which had already been halved by the Learned Magistrate, was to be further reduced. The more so, the legislator has provided for the doubling of the sentence where there are aggravating circumstances such as the offence occurring in a hospital, school or similar institution.

The appeal was thus dismissed with costs and the sentence of 5 years’ penal servitude was upheld.

BEEKHARRY N. v THE STATE 2020 SCJ 51

By Hon. Judge Mr. N.F. Oh San-Bellepeau and Hon. Judge Mrs. K.D. Gunesh-Balaghee

Charge not put to the accused at enquiry stage - Nature of writing in Forgery cases – Constitutive elements of the offence – Amendment of information on appeal

The Intermediate Court found the appellant guilty for the offences of “forgery of private writing” (count 1) and “making use of forged private writing” (count 2) in breach of the Criminal Code. She was sentenced to pay a fine of Rs 15,000 under each count and Rs 500 as costs.
She appealed against the conviction on no less than 17 grounds of appeal which, in a gist, were to the following effect:

“The learned Magistrate –

(1) was wrong to have concluded that the medical certificate was a private writing when in fact it was a public writing (grounds 1, 2, 4, 5 and 8);

(2) should have concluded that the charges on which the appellant was prosecuted were not put to her and therefore her constitutional right had been breached (ground 3);

(3) should, on the evidence on record, have found that the appellant had no mens rea to commit the offences (grounds 6 and 14);

(4) was wrong to have found the appellant guilty under count 2 (ground 9);

(5) was wrong to have found that the appellant committed the forgery because the report of the handwriting expert did not establish that the alterations to the medical certificate were authored by her (ground 7);

(6) was wrong to have found that the appellant knew that prejudice was caused or could have been caused as a result of the forgery (ground 10);

(7) should have concluded that the police enquiry was conducted in an unfair manner as there was no investigation as to whether the medical certificate could have been tampered with by a person other than the appellant (grounds 11, 12, 15, 16 and 17);

(8) was wrong, on the evidence on record, to have concluded that the appellant had forged the medical certificate (ground 13)."

The Appellate Court tackled ground 3 foremost by highlighting that the issue of not putting the charge to the appellant, or that her constitutional right had been breached, was never raised before the trial Court. However, given that it pertained to the appellant’s constitutional right, same was addressed by the Court.

On appeal, the Court held that after scrutiny of the court record, it was satisfied that there had been no breach of section 10(2) of the Constitution in the present case. Whilst section 10(2) of the Constitution provides for a catalogue of rights enjoyed by a person at the stage of hearing, it does not impose a duty on the police to put the charge to an accused party at the enquiry stage [The Director of Public Prosecutions v T P J M Lagesse & Ors 2018 SCJ 257]. Hence, ground 3 had no merit.

In relation to grounds 1, 2, 4, 5 and 8, the appellant sought to challenge the learned Magistrate’s finding that the medical certificate was a private writing when same was a public writing.

In order to determine the meaning of a public writing, the Appellate Court quoted the case of Ibrahim v/s The Queen 1965 MR 93 to conclude that a public writing is a writing made by a public officer in the exercise of powers delegated to during his functions.

In the present case, Dr. Buttoo had stated that he was a public officer and that the medical certificate was a public document. The evidence also showed that he was acting in his capacity as public officer in a public hospital pursuant to powers conferred upon him by the Ministry. In the circumstances, there was no doubt that the medical certificate was a public writing.
Hence, in the light of this material flaw in the case for the prosecution, the appeal was allowed under grounds 1, 2, 4, 5 and 8 and the appellant’s conviction under count 1 was quashed.

Under ground 9, the appellant challenged the Magistrate’s finding that she was guilty under count 2 under which she was charged with the offence of making use of a forged private writing. Given the forged document was held to be a public writing, the Appellate Court concluded that learned Magistrate was consequently wrong to find that the appellant made use of a forged private writing.

The Appellate Court relied on the case of Audio Warehouse Ltd and Anor v State 1993 MR 182 where the Court had this to say:

“In Bowanideen v R [1918 MR 83], which was followed in Seewooraj v R [1959 MR 391] and Khodabuksh v R [1962 MR 146], a conviction for making use of a forged private writing when the evidence disclosed that the incriminated document was a commercial writing was quashed, the Court holding that the “commercial nature of a writing is not an aggravating circumstance of the crime of forgery but is one of the constituent elements of a substantive offence, i.e, forgery in a commercial writing.’ [Quoted at page 153 of Khodabuksh]. The same applies to a forgery in a public and authenticated writing or a private writing which are elements of different substantive offences.”

Hence, the nature of the writing being one of the essential elements of the offence, it was held that the conviction for making use of a forged private writing cannot stand. The more so, it was open to the Learned Magistrate, pursuant to section 129 of the District and Intermediate Court (Criminal Jurisdiction) Act, to amend the information and to proceed on a charge of making use of a forged public writing.

Having failed to amend the information at trial stage, the Appellate Court, relying on Audio Warehouse (supra), held that although section 96(2) of the District and Intermediate Courts (Criminal Jurisdiction) Act sets out the powers of the Appellate Court, namely to ‘affirm or reverse, amend or alter the conviction’, it does not give the Appellate Court the power to amend the information, where the appellant had, as in this case, been convicted for a different offence than the one for which she ought to have been charged. [Vide Joomun v R 1981 MR 29]

The appellant’s conviction under Count 2 was thus quashed under ground 9.

“Don’t judge each day by the harvest you reap but by the seeds that you plant.”

–Robert Louis Stevenson
“TO NO ONE WILL WE SELL, TO NO ONE DENY, OR DELAY RIGHT OR JUSTICE”

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