Office of the Director of Public Prosecutions

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

Welcome to the 102nd issue of our monthly e-newsletter.

As conditions with the Coronavirus (COVID-19) pandemic evolve, the Director of Public Prosecutions, Mr. Satyajit Boolell, SC as well as the staff of the ODPP convey their wishes to our readers to stay safe and to ‘Stay at Home.’

As the whole country is going through a curfew order, we have not been able to produce any video for the month. However, in our usual endeavor to keep our readers abreast with the various topical legal issues, we have brought two interesting articles, relevant in this period of confinement. The first article addresses the issue of domestic violence and the challenges faced in dealing with it during a period of lockdown. The second article deals with the rise of e-court procedures amidst the pandemic. Moreover, in our ‘Quick Facts’ section, we analyse the offences under the Animal Welfare Act in order to create awareness on the need to protect animals.

Last but not least, we pay tribute to two great personalities of the legal profession, who passed away in the beginning of the year - Sir Victor Glover, Kt., G.O.S.K and Justice Oomeshwarnath Beny Madhub. The ODPP extends its immense sympathy to the close ones of the deceased.

Finally, we bring to you the usual rubric, the summary of Supreme Court judgments.

We wish you a pleasant read and always welcome your comments on odppnewsletter@govmu.org.
Domestic Violence – How safe is home?

Since the outbreak of COVID-19 in December 2019, the virus has spread to the world faster than any of us could have expected. Movement restriction is believed to be an effective measure to stop the spread of Coronavirus. Governments did not take long to set up confinement measures, in an endeavour to flatten the curve in their respective countries. However, while extreme emphasis is being laid upon the ‘Stay at Home’ slogan globally, one cannot be oblivious of this dark reality - while many of us are lucky enough to feel safe in a warm and secure environment, ‘home’ may not necessarily be safe for everyone. Ironically, for many women and girls, the threat looms most where they should be safest - in their own homes. This may be the worse place for them to be in, amidst this pandemic.

COVID19 is, no doubt, giving rise to a new crisis globally – increased domestic violence.

Reports of domestic violence have surged globally in the wake of the massive lockdowns imposed to contain the spread of the disease. One should note that according to the World Health Organization, 1 in 3 women will experience some sort of gender-based violence in her lifetime. Confinement measures surely worsens this situation. For women in already abusive relationships, confinement measures do no more than increasing the risk of domestic violence, as the most common perpetrator of such violence remains the male partner. Several countries around the world have reported double the usual number of domestic abuse cases in the first few weeks of nationwide movement restrictions, and this is no doubt increasing.

The United Nations Secretary General, Antonio Guterres, has recently, urged governments to include the protection of women in their response to the deadly novel coronavirus pandemic. Describing the rise in domestic violence as "horrifying," he urged all governments "to make the prevention and redress of violence against women a key part of their national response plans for COVID-19." Nonetheless, it would seem that governments are finding it challenging to grapple with domestic violence in the wake of the new public health measures, which are creating opportunities for abusers to terrorize their victims further. The pivotal question remains as to what recourse these women have when everyone is, under a curfew order, required to stay home. During the pandemic, victims of domestic violence may not be able to easily turn to associations to seek help since many of them are currently operating with far less staff.

Mauritius may not spared either. During this period of confinement, domestic violence is expected to rise, not only because of the conditions that confinement implicates, but also because the capacity to reach out for professional or personal help is strongly reduced. Social isolation means no more contact with friends, colleagues and neighbours, who usually represent persons who can play a critical role in dealing with these violent situations.
Responding to the rise in domestic violence is further complicated by the fact the institutions are already under a huge strain from the demands of dealing with the pandemic. As for police, there may be a risk that, in many instances, they may be less willing to arrest perpetrators of violence, limiting direct engagement during lockdowns.

This however does not mean that victims of domestic violence have no recourse during the curfew order in Mauritius. On the contrary, enforcement of the Protection from Domestic Violence Act (‘PDVA’) becomes, more than ever, urgent and crucial. Under the PDVA, “Domestic violence” is defined as including any of the following acts committed by a person against his spouse, a child of his spouse or another person living under the same roof:-

- wilfully causing or attempting to cause physical injury;
- wilfully or knowingly placing or attempting to place the spouse or the other person in fear of physical injury to himself or to one of his children;
- intimidation, harassment, ill-treatment, brutality or cruelty;
- compelling the spouse or the other person by force or threat to engage in any conduct or act, sexual or otherwise, from which the spouse or the other person has the right to abstain;
- confining or detaining the spouse or the other person, against his will;
- harming a child of the spouse; and
- causing or attempting to cause damage to the spouse’s or the other person’s property.

The PDVA provides that any person who has been the victim of an act of domestic violence and who reasonably believes that there is likely to commit any further act of domestic violence against him/her, may apply to the Court for a protection order restraining the respondent from engaging in any conduct which may constitute an act of domestic violence and ordering him to be of good behaviour towards the applicant. Victims of domestic violence should go to the nearest Police Station to report the matter. The PDVA was amended in June 2016 to empower police officers further to deal with domestic violence more efficiently. As such, section 11A of the PDVA imposes a duty on police officers to act ‘with diligence’ in relation to domestic violence cases reported under the Act. It provides in subsection (2) that:

“(2) Where a report is made to a police station—

(a) by a victim of an act of domestic violence, an Enforcement Officer or another person, that an act of domestic violence has been, is being or is likely to be committed against the victim; or

(b) by an aggrieved spouse, an Enforcement Officer or another person, that the respondent spouse has failed to comply with any domestic violence order,
the officer in charge of the police station shall cause the circumstances of the offence to be enquired into.”

Also, where such an offence is reported a police officer not below the rank of Assistant Superintendent may cause the person to be arrested and brought before a Magistrate at the earliest opportunity, in the following circumstances:

(a) where physical injury has ensued; or

(b) where he has reason to suspect that person has failed to comply with any domestic violence order (protection order, tenancy order or occupation order).

The judiciary is functioning, through the medium of technology such as WhatsApp to cater for all offences, including domestic violence, in this period of confinement.

It is worth noting that while the UN chief rightly urged all governments to make the prevention and redress of violence against women a key part of their national response plans for COVID-19, he further outlined several actions that can be taken to improve the situation, and they are as follows:

i. Increase investment in online services and civil society organizations,

ii. Make sure judicial systems continue to prosecute abusers,

iii. Set up emergency warning systems in pharmacies and groceries,

iv. Declare shelters as essential services,

v. Create safe ways for women to seek support, without alerting their abusers,

vi. Avoid releasing prisoners convicted of violence against women in any form,

vii. Scale up public awareness campaigns, particularly those targeted at men and boys.

One can have a look at the innovative measures taken in Spain, the second European country to be hard hit by COVID-19 after Italy, to combat domestic violence currently. Madrid has established an instant messaging service with a geolocation function and offers an online chat room that provides immediate psychological support to victims, which may be an interesting response to such cases.

Admittedly, a pandemic of this magnitude is something new to our modern history. It may be too early to discuss on the specific numbers on domestic violence cases reported in the country lately as we are in the middle of the crisis. It is however essential for governments to keep such kinds of violence at the heart of their policy-making, ensuring that victims of abusive relationships have resources to turn to in this time of quarantine. It is a challenging task, but more than ever crucial to protect human rights and dignity.

Anusha Rawoah
Senior State Counsel
The outbreak of COVID-19 has caused inevitable disruptions in all sectors all over the world. Businesses have been compelled to adapt to a new way of working, practically overnight. The Courts in Mauritius are no different. Despite the curfew order, it was imperative that Courts continue to operate with a view to preserve the rule of law. Our Courts are thus operating via video conferencing, WhatsApp or any other technological device as far as urgent matters are concerned.

These urgent matters include inter alia, bail matters. The right of accused parties to apply for bail has been embedded in Section 5(3) of the Constitution which provides that, “If the person who has been arrested upon a reasonable suspicion of having committed or being about to commit a criminal offence has not been tried within a reasonable time, he shall be released either conditionally or upon reasonable conditions.” Section 3 of the Bail Act re-affirms that, “Every defendant or detainee is entitled to be released on bail.”

There are some situations where the matter can be partly handled at the level of the police. For instance, according to Section 12 of the Bail Act, if a detainee cannot practically be brought before a Magistrate, he can be released on parole unless a police officer not below the rank of Assistant Superintendent certifies in writing that he has reasonable grounds to believe that the detainee, if released, is likely

a) To fail to surrender to police custody at the police station where he was detained on the 1st working day after his release,

b) To tamper with evidence or interfere with witnesses

c) To commit another offence or

d) To put his own security as risk.

Currently, during the confinement period, the police and the Magistrates are communicating via the Whatsapp video call system to handle bail matters. The prosecutors are exercising their discretion and releasing the detainees on parole mainly for cases where they have a clean record and have been arrested for simple offences.

As at present, bail hearings where the police are objecting to the release of detainees on bail are mostly not being conducted. In the event of a prolonged curfew, it may become necessary for Courts to start hearing such bail matters in order to safeguard the constitutional right of detainees. Nonetheless, during a crisis such as the Covid-19, there may be a threat to public safety should the Courts require the physical attendance of all parties involved in bail matters. With a view to strike an appropriate balance between individual rights and social responsibility, the bail hearings could be conducted with the help of technological means such as the Skype or Whatsapp video calling system.
As such, bail hearings do not require the attendance of many people: we have the magistrate, the prosecutor, the enquiring officer, the accused party and the defence lawyer. Therefore, it would not be impossible to conduct the hearings through group video calling with all these parties.

However, the situation could be more complex than meets the eye. Amongst the different issues that may arise, we may highlight the following: ‘Would the Magistrate be able to effectively assess the veracity and reliability of the witnesses’ testimony through video conferencing?’ Or ‘How would the production of documents be handled?’

As such, according to the rules of evidence, in order to ensure a fair trial, the evaluation of oral evidence depends not only upon what is said but how it is said. Here, reference can be made to the English authority of McGlinn v Waltham Contractors Ltd and others [2007] EWHC 149, where the Court held that:

“[Counsel] can cross-examine the claimant effectively over a video link. Whilst, of course, that is never quite as satisfactory as direct cross-examination, no real prejudice to the defendants has been or, in my judgment, could be identified as a consequence of this… [even when the defendant’s] credibility was directly in issue and where the circumstances of his cross-examination were therefore of the greatest significance. I accept that giving evidence at a video suite may be less stressful than being in the witness box but that, it seems to me, is a matter which the court can take into account when it comes to the evaluation of all of the witnesses in the case.”

The Dubai International Financial Centre (DIFC) Court has decided to follow the above principles of the English Courts during the crisis of the Covid-19. In order to hold a hearing through the use of a video link, the DIFC Court is assessing as to whether there is “a real, rather than a fanciful, risk” of prejudice to a detainee. If there is none, the use of video-conferencing for the deposition of witnesses is being considered. Our Courts in Mauritius could adopt the same approach. If a detainee would not be deprived of a fair hearing by having his bail hearing conducted through video-conferencing, there is no reason as to why this practice should not be followed.

As far as the issue of producing documents is concerned, the rules of evidence require that original documents should be produced in Court. Here, the solution could be, with the consent of all parties, to relax the rules of evidence to some extent-the documents could be scanned and sent via WhatsApp, Skype or even an Email system.

With the pandemic of the Covid-19, balancing safety with the need to keep the wheels of justice turning is incredibly difficult. The key to managing the Covid-19 crisis will boil down to innovation and compromise. Technology can be the key to this dilemma-As an e-court, our courts can still function to preserve the rule of law. However, for this system to work, the defense, the prosecution and the judiciary need to work together as one.
It was with great regret that the legal profession learned that Former Chief Justice and Chairman of the Commission on the Prerogative of Mercy, Sir Victor Glover, had passed away on Sunday the 02nd of February 2020, at the age of 87.

Sir Victor Glover was a man who rose to distinction. After having excelled as a student at secondary level, he read Jurisprudence at Jesus College at Oxford University as a scholar. A year later, in 1957, he was called to the Bar of England and Wales at the Honorable Society of Middle Temple. He then decided to join the Attorney General’s Office in Mauritius in 1962. He was successively appointed District Magistrate, Crown Counsel, Senior Crown Counsel, Principal Crown Counsel and Parliamentary Counsel before becoming Puisne Judge of the Supreme Court of Mauritius in 1976 and Senior Puisne Judge in 1982. From 1988 until his retirement from the judiciary in 1994, Sir Victor Glover served as the nation’s Chief Justice. After 1994, he continued to assist the Attorney General’s Office with the drafting of legislation. In 2010, he was made Chairman of the Commission on the Prerogative of Mercy. For his immense contribution to public life, he was appointed Grand Officer of the Order of the Star and Key of the Indian Ocean (GOSK).

All throughout his career, Sir Victor Glover was respected for his masterful command of the English language and his remarkably comprehensive understanding of the law and its intricacies. His reasoning powers, as put in the clearest light by the quality of the judgments he delivered, were of the very highest order.

On the 13th of February 2020, a ceremony was held by the Supreme Court to pay tribute to late Sir Victor Glover and was attended by many. His outstanding intellect was evoked, as were his humility and humanity.

He will be remembered by generations of lawyers and by the country for his sense of justice and heart of service.

Our thoughts are very much with his family and friends, especially with our confrères, Gavin Glover SC and Brian Glover, to whom we extend our deepest sympathies.
TRIBUTE TO JUSTICE BOBBY MADHUB (1966 – 2020)

The morning of 4th February 2020 started just like any other day and ended like no other day. The news of the demise of Justice Oomeshwarnath Beny Madhub, whilst in office, came as a terrible blow to his family, friends and the legal profession. Justice Bobby Madhub was only 54 years old. His passing was sudden, unexpected and no one can still believe the loss.

Justice Madhub’s rich career spanned over nearly 30 years. He read law at the University of Warwick in 1990. He was called at the Middle Temple in July 1991 and the Mauritian Bar in August 1991. He practised for a year at the Chambers of Madun Gujadhur QC and joined the Attorney General’s Office in 1992 as a State Counsel. After two years as a District Magistrate, he returned to the AGO as a Senior State Counsel. He subsequently became Principal State Counsel, Assistant Parliamentary Counsel, Assistant Solicitor General and finally, Deputy Solicitor General. His interests in law were varied and were reflected in his responsibilities. He was in charge of supervising advice on Intellectual Property Rights, Cyber Crime and Data Protection, amongst other areas of law. He remained a scholar at heart and pursued a specialisation in Intellectual Property Law through the University of Turin in 2001 and an LLM in International Economic Law from Warwick University in 2005. He appeared for the State of Mauritius in high profile cases, represented Mauritius in international negotiations and participated in the drafting of key trade agreements. In February 2014, he was appointed Puisne Judge. His judgments have further developed our jurisprudence and he shall always be remembered for his fine intellect.

In all of these roles, Justice Madhub left an indelible impression on his colleagues: senior, contemporary and junior. As counsel, he was known to be fair, sharp and of invariable assistance to the Court. He was a mentor to many junior law officers whom he encouraged in their professional endeavours. On the bench, Justice Madhub expected no less from those appearing before him that he would from himself. Punctuality and preparedness from counsel were of utmost importance. All who have appeared before him will remember him sitting on the bench, glasses perched on his nose, telling us to go straight to the issue and listening attentively to submissions. He was known to be strict but it was strictness steeped in principles and fairness.

Friend to many, Justice Madhub was also a member of the Rotary Club of Flacq and believed in giving back to those in need. To me, one of his qualities was his ability to bring people together. Many of my senior colleagues have shared stories of the unforgettable activities that he organised. A particular memory has remained with me. I was still in private practice when I had the privilege of appearing before him in the Supreme Court sitting in Rodrigues. Most counsels present were young members of the Bar but he took time out to speak to all of us and related stories of his time at the Bar and the many traditions that bind us as a profession.
Finally, Justice Madhub was dedicated to his family which was everything to him. His family time was sacred for him and he was a pillar of strength for his close ones. His kindness, good humour and support are missed. His legacy, forged from hard work and a humane approach to life, will live on.
Quick Facts

The Animal Welfare Act 2013

Penalty for breach of Section 3 of the Act

Fine not exceeding 15,000 rupees and imprisonment for a term not exceeding 6 months

Any person who tortures or treats an animal in such a manner as to cause it distress, pain or suffering, or permits an animal to be so treated shall commit an offence.

If the owner of an animal fails to provide the animal with sufficient food, drink, or shelter, he/she will commit an offence.
No person shall keep or confine an animal in a cage or other similar structure which is too small to provide the animal with a reasonable opportunity for its natural movement.

Any person who wilfully or negligently allows an animal to stray, or abandons an animal in circumstances which expose it to distress, pain, suffering or illness shall commit an offence.

No person shall administer an injurious drug or substance to an animal, or wilfully cause or permit any such drug or substance to be taken by an animal.
SUPREME COURT JUDGMENTS SUMMARY
SUMMARY OF SUPREME COURT JUDGMENTS:
March 2020

GENAVE A.Y.B. v THE STATE 2020 SCJ 66
By Hon. Judge Mrs. V. Kwok Yin Siong Yen and Hon. Judge Mrs. K.D. Gunesh-Balaghee

Counts in an Information – Sentence must be distinct for each count – Sentence quashed – Fresh hearing on sentence

The appellant was charged on two drug dealing counts in breach of the Dangerous Drugs Act in an information before the Intermediate Court. He pleaded guilty and was convicted on both counts 1 and 2. The Learned Magistrate had sentenced him as follows - “Under counts 1 & 2 – He is to undergo 4 years’ penal servitude and to pay a fine of Rs 75,000.”

The appeal was made against the sentence on the ground that it is manifestly harsh and excessive and is wrong in principle.

The Respondent’s stand was that the sentence was wrong given the sentence did not reflect that a distinction had been made between counts 1 and 2 of the information which charged the appellant with two distinct offences. Reference was made to the case of Moonesamy v The State [2018 SCJ 397] to support this proposition wherein the Supreme Court highlighted that-

“It is trite law that when an accused is convicted on more than one count in an information, a separate sentence should be passed in respect of each count on which the accused has been convicted:

a sentence should not be passed generally on the information as a whole - vide Archbold Criminal Pleading, Evidence and Practice 2017 para 5-66 and Blackstone Criminal Practice 1999 Ed. para E1.5 at page 1701. In addition, the Court has the duty to give reasons for deciding on the sentence passed to enable the appellate Court to decide whether or not its interference is warranted. We reiterate what this Court stated in Baxoo v The State [2010 SCJ 435] on the need for Magistrates, when sentencing an accused party on an information containing more than one count, to inform the accused in a precise and clear manner of the sentence or order imposed under each count and the reasons for imposing the sentence to dispel any doubt in the mind of the accused on the nature of his sentence.”

The Court quoted Sabapathee D v The State [1997 SCJ 337] where it was observed that “……it is trite law that each Count is an information by itself and that each Count must be proved separately and independently of any other Count.”

The failure of the Learned Magistrate to pass the appropriate sentence in respect of each count on which the accused had been convicted was thus held to be wrong.

Hence, the sentence was quashed and remitted back to the Learned Magistrate to conduct a fresh hearing on sentence and reasons to be given on the sentence to be passed under each count of the information.
SEETARAM A. v THE STATE 2020 SCJ 74

By Hon. Judge Mr. D. Chan Kan Cheong and Hon. Judge Mrs. R. Seetohul-Toolsee

**Drink-driving offences – Seriousness of the offence – Mandatory custodial sentence – Proportionality principle – Appeal dismissed**

The appellant was convicted, upon his own guilty plea, under count I pertaining to driving motor vehicle with alcohol concentration above prescribed limit in breach of the Road Traffic Act. He was sentenced under Count I to pay a fine and to undergo 1 year imprisonment coupled with the relevant disqualification proviso.

The sole ground of appeal was the sentence of one year not being proportionate to the seriousness of the offence.

With regard to the offence of drink-driving under count I, the law now provides for a penalty, in case of a second or subsequent conviction, of a fine of not less than Rs.50,000 nor more than Rs.75,000 together with imprisonment for a term of not less than 12 months and not exceeding 8 years. The learned Magistrate, therefore, imposed the mandatory minimum sentence, given that the appellant’s conviction under count I was a second one.

Indeed, the Appellate Court bore in mind that a trial Court is not bound to indiscriminately impose a minimum sentence prescribed by law but may, on the facts of a particular case, impose a lesser sentence where it is of the view that the imposition of the minimum sentence would be grossly disproportionate when there exist strong mitigating factors on the specific facts and imposing the minimum sentence would be tantamount to inflicting an inhuman or degrading treatment in breach of section 7 of the Constitution [Aubeeluck v The State 2010 UKPC 13]. However, the present case was not one of it.

The Court highlighted that drink-driving is indeed a serious offence with offenders representing a high security risk to other road users. There is public interest in curbing such offences and in protecting human life. It is clear that the legislator and the Courts have taken a very serious view of drink-driving offences - as per the cases of Curpen v The State 2010 SCJ 256, The Director of Public Prosecutions v Takooree 2019 SCJ 303 and Dassani v The State 2017 SCJ 228.

In the present case, the record showed that the learned Magistrate duly conducted a hearing for sentencing and the accused was allowed to put forward his mitigating circumstances. However, there was no evidence on record of special reasons or strong mitigating factors or exceptional circumstances warranting the imposition of a lesser sentence than the statutory minimum sentence in application of the principle of proportionality. On the contrary, the appellant’s first recent conviction was too lenient sentence and had clearly no deterrent effect on him.

In the circumstances of the case, the sentence of one year imprisonment was held to be commensurate and proportionate with the seriousness of the offence under count I.

The appeal was thus dismissed with costs.

“Attitude is a little thing that makes a big difference.”

–Winston Churchill
“TO NO ONE WILL WE SELL,
TO NO ONE DENY,
OR DELAY RIGHT OR JUSTICE”

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