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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Quick Facts

Case Summary
Dear Readers,

Welcome to the 105th issue of our e-newsletter. In this issue, you will read on an important aspect under the ‘Quarantine Act 2020’, namely, the law applicable to those who evade from the quarantine facilities. Furthermore, in the wake of the recent collision of the bulk carrier “MV Wakashio” against the reefs of the Mauritian territorial waters, we provide a legal perspective into the law of the sea.

In view of the unprecedented nature of the COVID-19 pandemic, human rights discussions have become, more than ever, important globally. You will hence, also read on the impact of COVID19 on human rights, as well as guidelines issued by international organisations.

As for the ‘Quick Facts’ section, we have brought to you a review of an offence against property, ‘larceny’, which is punishable by the Criminal Code. Finally, you will find a summary of recent Supreme Court judgments, as our usual rubric.

The Office of the DPP also wishes Mrs Asha Jankee Ramano-Egan, former Senior Assistant DPP, a happy and peaceful retirement. It has been a pleasure to work with Mrs Ramano-Egan. We also bring to the attention of our readers the e-inauguration of the new Supreme Court building held on 30th July 2020.

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

Anusha Rawoah
Senior State Counsel
The Mauritian government has ordered a mandatory 14-day quarantine period on arriving travellers. This is to prevent a devastating resurgence of the coronavirus as importing cases could begin to pose a larger and increased threat. In some nations, such measure has helped to reduce coronavirus infections.

Whilst Mauritius has only had a few cases of people running away from quarantine facilities, in other countries, this problem has been constantly on the rise.

A State-run media in Zimbabwe, reported on the 17th of May 2020 that close to two dozen people have escaped from coronavirus quarantine centres. In Philippines, two Filipina women evaded quarantine and caught a flight to Japan. They were being tested for the coronavirus when they escaped their quarantine facility in Sarangani, Philippines. In Kenya, the authorities concerned were on the lookout for dozens of Kenyans who were filmed escaping from a coronavirus quarantine centre. In Raipur, India, at least 22 migrant labourers escaped from a quarantine facility. The police in each of these countries have taken actions against these quarantine evaders and they are now most likely to face hefty fines and even jail terms.

However, it has come to the attention of authorities in the abovementioned countries, that people are, in effect, fleeing from quarantine centres as they have been struggling with unhygienic rooms and toilets, that they have been treated like untouchables, that they had to live in cramped rooms and have been fighting for food. Such sordid conditions and lack of facilities have caused many to flee.

As far as Mauritius is concerned, there have been very little complaints of such above mentioned conditions and some of these complaints have been taken into consideration to facilitate the smooth running of the quarantine centres. Irrespective, a small number of Mauritian citizens have still managed to escape from their quarantine facilities.

It is important thus to note that the law is not lenient on those who flee from quarantine centres.

**Section 8 of the Quarantine Act 2020** states as follows:

8. Entry into and departure from quarantine facility

No person shall enter or leave a quarantine facility without the authorisation of a quarantine officer.

1[https://apnews.com/0a79df43fac66bc2e9e5abc6ea30cf](https://apnews.com/0a79df43fac66bc2e9e5abc6ea30cf)


Section 12 of the Quarantine Act 2020 further states:

12. Offences

Any person who –

[...]

(h) otherwise contravenes this Act or any regulations, Order or notice under this Act,

shall commit an offence and shall, on conviction, be liable to a fine not exceeding 500,000 rupees and to imprisonment for a term not exceeding 5 years.

Hence, it is clear from the above that those who flee from quarantine facilities can face fines up to Rs. 500,000 and a term of imprisonment not exceeding 5 years.

Choosing to ignore mandatory quarantine orders is not only against the law, it’s also putting citizens, first responders, health professionals and the most vulnerable at risk of exposure to the virus. Collectively, everyone has a role to play to ensure compliance with the laws and measures taken to curb the covid-19 infection.
The right to Innocent Passage

The MV Wakashio which was underway from Singapore to Brazil ran aground in the territorial waters of Mauritius on 25th July 2020. According to official sources, the vessel was in innocent passage when the incident happened.

The different maritime zones are regulated by the United Nations Conventions on the law of the sea, hereinafter referred to as ‘UNCLOS.’ It is often regarded as a framework convention. It establishes institutions and balances the rights and obligations of States with the interests of the international community. It also specifies detailed nautical-mile (“nm”) limits for maritime zones and establishes ‘rules of the road’ for oceans management and operations at sea. As per section 3 of the Maritime Zones Act 2005, UNCLOS shall have force of law in Mauritius.

Section 7 of the Maritime Zones Act 2005 is in line with Article 3 of UNCLOS which states that every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles. Article 2 paragraph 1 The right to Innocent Passage

UNCLOS states that “The sovereignty of a coastal State extends beyond its land territory and internal waters and in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.”

As far as Mauritius is concerned, section 6(1)(a) of the Maritime Zones Act 2005 stipulates that its sovereignty extends to its territorial sea, internal waters, archipelagic waters and historic waters. Article 8 of UNCLOS defines internal waters as “waters on the landward side of the baselines of the territorial sea.”

The waters which are on the landward side of the territorial sea are internal waters but the waters which are on the seaward side of the territorial sea are territorial waters. Furthermore, section 6(1)(b) of the Maritime Zones Act 2005 states that the sovereignty of Mauritius extends to the air space over the archipelagic waters, the historic waters, the internal waters and the territorial sea as well as to their beds and subsoil, and the resources contained in them.

Sovereignty means that the coastal State exercises control over the above maritime zones, the seabed beneath and the airspace above same. No other State can exercise a concurrent control/sovereignty over its territorial sea, internal waters or archipelagic waters unless and until UNCLOS or other rules of international law so prescribe. The coastal State can therefore exercise the same powers in its territorial sea, internal waters or archipelagic waters as it has over its land territory.

The right of innocent passage afforded to foreign ships in the territorial sea is an exception to a coastal State’s sovereignty when compared to the absolute reign which the coastal State exercises over its land territory. Section 8 ,9 and 10 of the Maritime Zones Act 2005 cater for the right of innocent passage in Mauritius. Such right has two constitutive elements: (a) passage and (b) innocence.
The right to
Innocent Passage

**Article 18(1)** of **UNCLOS** considers only certain types of navigation as constituting passage. These are:

(a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or

(b) proceeding to or from internal waters or a call at such roadstead or port facility.

The ship can simply pass through a coastal State’s territorial sea without even stopping or anchoring. The faster the passage takes place the better: as **UNCLOS** puts it under **Article 18(2)**: “Passage shall be continuous and expeditious.” Strictly speaking, it is not permitted that a ship stops when traversing the coastal State’s territorial sea or carries out any activities once it is traversing the territorial sea. For instance, a ship cannot stop even though it might not be carrying out any activity in the territorial sea. Passage must be uninterrupted for navigational purposes. Unnecessary manoeuvring, hovering or engaging in any activity which does not constitute passage cannot be considered as ‘continuous’ passage.

The sooner the ship traverses the territorial sea of a coastal State, the better, because the least inconvenience is caused to the coastal State’s sovereignty. The longer a ship takes to traverse through a coastal State’s territorial sea, the more the coastal State will regard that passage as a security threat to its well-being. ‘Expeditious’ means fast. But fast does not mean a lack of regard to international sea traffic regulations.

**Article 18(2)** of **UNCLOS** does recognise instances where passage cannot be ‘continuous and expeditious.’ So there are cases where passage includes “stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.” There can therefore be cases where passage includes stopping or anchoring either because of some damage to the ship’s engine or because it is necessary to provide assistance to another ship. Salvage operations will also fall under this exception.

Once it is established that passage conforms with **Article 18** of **UNCLOS**, it is necessary to establish that such passage is innocent. **Article 19(1)** of **UNCLOS** states that “passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.”

The coastal State does not only have rights in its territorial sea. It also has duties as set out in **Article 24** of **UNCLOS**. Three negative and one positive. They are as follows:

(a) not hamper the innocent passage of foreign ships through the territorial sea except in accordance with **UNCLOS**;
The right to Innocent Passage

(b) not to impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage;

(c) not to discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State; and

(d) give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea.

In the fisheries Jurisdiction Case [1973] ICJ Rep 3, 27 n 8, Sir Gerald Fitzmaurice opined that coastal States have additional duties to perform with regard to foreign ships, “for example policing and maintaining order, buying and marking channels and reefs, sandbanks and other obstacles; keeping navigable channels clear and giving notice of danger of navigation; providing rescue services; lighthouses, lightships, bell-buoys…”

When a ship’s passage is not or no longer innocent, the coastal State may prevent passage as per Article 25(1) of UNCLOS. It may also take certain enforcement proceedings, varying from exercising criminal jurisdiction on board the foreign ship in accordance with Article 27 of UNCLOS, expelling such a foreign ship from the territorial sea as well as stopping, arresting and seizing the foreign ship. In these case, the action taken has to be commensurate to the infringement concerned. Otherwise the coastal State’s action risks being declared disproportionate and excessive.

In I’m Alone Case (Canada v United States) (1935) 3 RIAA 1609, the Commissioner held that the United States did not use “necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel.”

Section 10(5) of the Maritime Zones Act 2005 provides for such action as may be taken, including stopping and boarding of ships.

In terms of Article 25(3) of UNCLOS, a coastal State may “without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.”

Suspension of innocent passage by the Coastal State must, however, satisfy the following five conditions: -

(a) be essential for the protection of its security;

(b) be temporal;

(c) be limited to specific areas of its territorial sea;

(d) be without discrimination; and

(e) take effect only after having been duly published.
The right to Innocent Passage

Section 10(4) of the Maritime Zones Act 2005 provides that the Prime Minister may, by notice in the Gazette, suspend temporarily the innocent passage of foreign ships in a specified area of any archipelagic waters, internal waters or territorial sea where he is satisfied that the suspension is essential for the protection of the security of Mauritius.

As a matter of security, coastal States should ascertain that any ship which enters its territorial sea, traverses the said zone in a continuous and expeditious manner unless it falls under one of the exceptions discussed above.
COVID-19: Safeguarding Human Rights

As Covid-19 spreads like wildfire around the world, States have been struggling to protect their citizens by adopting emergency measures to contain its propagation and to minimize the growing mortality rate caused by it. These health measures included physical distancing, compulsory wearing of masks in public places, mandatory confinement and quarantines. Unfortunately these measures also have an impact on the enjoyment of our fundamental human rights. Many of these rights were restricted overnight by the authorities to achieve public health goals; the most common ones being the right to freedom of movement, the right to freedom of expression and the right to privacy. While this has been done in an effort to flatten the coronavirus curve, it is of vital importance to protect our human rights during these times; thus measures taken should be proportionate to the evaluated risk, necessary, and limited in time so that they do not outlast this pandemic, as recommended by the Office of the High Commissioner for Human Rights (OHCHR). Regulation 3 of the World Health Organisation (WHO) International Health Regulations provides for the implementation of global health policies with full respect for the dignity, human rights and fundamental freedoms of persons.

The OHCHR has in fact come up with guidelines to encourage States to maintain a human-rights based approach to regulating this virus. In Europe, the Secretary General of the Council of Europe has also issued a toolkit for Governments across Europe, addressing the need to respect human rights, democracy and the rule of law during the COVID-19 crisis.

So to what extent can we interfere with human rights? It is noteworthy that while some rights cannot be derogated from, for instance the right to life, freedom from torture and slavery, there are others which are non-absolute and can be restricted at certain times. However, there are certain requirements that must be fulfilled, as provided in the UN General Comments No. 29. Firstly, the situation must amount to a public emergency which threatens the life of the nation and secondly, the State must have officially proclaimed a state of emergency.

Article 4(1) of the International Covenant on Civil and Political Rights (ICCPR), allows States to take measures that temporarily restrict rights which do not enjoy absolute legal protection, in times of public emergency which threaten the life of a nation, to the extent strictly required by the exigencies of the situation and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. The WHO states in one of its publications that human rights can be interfered with only as a last resort to achieve a public health goal and this has to be in line with the following Siracusa Principles:
1. The restrictions are provided for and carried out in accordance with the law;
2. The restrictions are directed towards a legitimate objective of general interest;
3. The restrictions are strictly necessary in a democratic society to achieve the objective;
4. There are no less intrusive and restrictive means available to reach the same objective;
5. The restrictions imposed are based on scientific evidence are neither arbitrary nor discriminatory.

Freedom of movement is one of the first rights which was restricted to break the chain of infection resulting in many countries imposing compulsory national confinement and implementing travel restrictions. While Article 12 of the ICCPR guarantees the right to liberty of movement, it also provides for restrictions which are provided for by law and where they are necessary on grounds of national security, public order, public health or morals or the rights and freedoms of others. As stated by the WHO in one of its Health & Human Rights Publications Series, “interference with freedom of movement when instituting quarantine or isolation for a serious communicable disease are examples of restrictions on the rights that may, under certain circumstances be necessary for the public good and could thus be considered legitimate under international human rights law.” Hence, such interference should be necessary and legitimate.

During this pandemic, we have also witnessed the outbreak of fake news and misinformation on social media. Unverified news, alternative and untested cures for the virus created panic among the public and misled many people. While social media companies came up with new policies, restrictive measures were also taken by many countries with governments issuing warnings and increasing penalties for those spreading misinformation. However, to what extent does this violate the right to freedom of expression? While everyone shall have the right to freedom of expression and to hold opinions without interference, this is not an absolute right and may be subject to limitations for the protection of national security, public order, public health, or morals. Such limitations should however be necessary and provided for by law as stated in Article 19 of the ICCPR. According to the UN General Comment No.34, when invoking grounds to restrict the freedom of expression, governments must demonstrate the precise nature of the threat to public health as well as the necessity and proportionality of their chosen method for restricting this right. The Human Rights Council has recommended that States apply the test of legality, proportionality and necessity before limiting the freedom of expression. The right of access to information is a fundamental component of the right to freedom of expression. UN experts have reminded States that emergency powers should not be used to quash dissent.
Instead they should promote the free flow of accurate information and not suppress information from the public. This has been endorsed by the Human Rights Committee which urges governments to ensure that all relevant information about the virus reaches everyone without discrimination and in a manner which is understandable by the public.

Therefore the major challenge is in the way the world counters the pandemic while at the same time safeguarding human rights. The respect of our fundamental human rights is one of the essential features of a democratic society; however international human rights law recognize the need to limit these rights in certain circumstances as discussed in this article. But as also mentioned, interfering with those rights should be necessary, proportionate, non-discriminatory and limited in time. We are going through unprecedented times where emergency health measures have had to be adopted to curb the pandemic; these measures need to be such that, at the end of the day, both humanity and human rights can survive this virus.
Happy Retirement to Mrs Jankee Ramano

The Office of the Director of Public Prosecutions (‘ODPP’) would like to wish a happy retirement to Mrs Jankee Ramano.

Mrs Ramano joined service as Temporary District Magistrate on the 1st December 1998. On the 1st December 1999, she was confirmed as District Magistrate and was promoted to Senior District Magistrate on the 1st August 2001. She joined the Intermediate Court as Magistrate on the 5th November 2007. From the 4th June 2012 to the 4th June 2013, she was Magistrate in the Judiciary for the Seychelles.

Mrs Ramano joined the ODPP on the 26th June 2013 as Assistant Director of Public Prosecutions. She was consequently promoted to Senior Assistance DPP on the 13th November 2017.

The ODPP would like to wish her all the best in her future endeavours. All those who have had the pleasure of working with her can testify as to her kindness, irreproachable work ethic and professionalism.
E-Inauguration of the New Supreme Court Building

The new building of Supreme Court covering a surface area of around 4770 m², in Port Louis was inaugurated by the Prime Minister, Minister of Defence, Home Affairs and External Communications, Minister for Rodrigues, Outer Islands and Territorial Integrity, Mr. Pravind Kumar Jugnauth, and the Prime Minister of the Republic of India, H. E. Shri Narendra Modi, who intervened live from New Delhi via videoconference, on Thursday 30th July 2020. The new Supreme Court building is equipped with all modern amenities required for smooth and effective delivery of justice in the country and green features with a focus on the thermal and sound insulation and high energy efficiency. Its 12 floors will house under one roof the civil, criminal, commercial, family and mediation courts, the Chief Justice’s chambers, judges’ chambers and the administration staff.
QUICK FACTS
Quick Facts

The Criminal Code Act 1838

Penalty on conviction for the offence of larceny
[Section 301 (1)]

S 301 (1) - Any person who fraudulently abstracts anything not belonging to himself shall commit larceny.

S 301 (2) - The abstraction of property by the husband to the prejudice of the wife, or by the wife to the prejudice of the husband, shall not give rise to prosecution.

Penalty on conviction for other larcenies –
[Section 301A. (1)]

Any person who is convicted of an offence under section 303, 304, 305, 306 or 307 and who at the time of the commission of the offence was masked, made use of an offensive weapon which caused injury or had in his possession a firearm or a mock firearm shall be punished for a term not exceeding 30 years.

NB: The Probation of Offenders’ Act shall not apply to an offence punishable under subsection (1) except where the accused is under the age of 18 at the date of the sentence.
(1) The punishment of penal servitude shall be applied to any person convicted of the crime of larceny attended by any one of the following circumstances -

(a) where the offender, being armed with an offensive weapon or with any instrument has committed the larceny or assaulted any person with intent to rob him;

(b) where the larceny has been committed, or where the assault upon any person with intent to rob him, has been made by 2 or more individuals; ;
(c) where at the time of the larceny being committed, or immediately before or after, the larceny, the offender has beaten or struck any person, or used any violence whatever towards such person;

(d) where the larceny is committed in a dwelling house, and where the offender has by any menace, put in bodily fear any person in such house; or

(e) where the larceny has been committed upon any person on a public road.
SUPREME COURT JUDGMENTS SUMMARY
SUMMARY OF SUPREME COURT JUDGMENTS:
June 2020

KOOPLA A. v THE STATE 2020 SCJ 101

By Hon. Judge Mrs. N. Devat and Hon. Judge Mr. P. Kam Sing

Sentence – Custodial Sentence – Ample Reasons to be given – Previous Conviction – Mitigating Circumstances – Community Service Order

The appellant was convicted for the larceny of a breaker whilst being a person in receipt of wages and was sentenced to two weeks’ imprisonment. He pleaded guilty at the first available opportunity and he was inops consilio.

The appeal challenged the sentence as being wrong in principle and manifestly harsh and excessive. The appeal was not resisted by the Respondent.

The mitigating circumstances in the present case included the appellant’s out-of-court confession, his timely guilty plea, his young age at the time of commission of the offence (23 years old) and his now being in gainful employment. Nonetheless, he had a previous conviction for a simple larceny in August 2017, for which he was fined Rs. 5000.

The appellate Court highlighted that the court record did not reflect whether the lower Court took into account the appellant's relatively young age at the time of the commission of the offence. Moreover, there was no justification as to why a custodial sentence was warranted in the present case. In this respect, reference was made to the case of DPP v. Hinga A 2014 SCJ 303 where the Court had this to say:

“Firstly, it was incumbent upon the Magistrate in the discharge of her judicial function to come up with a judgment which “shall contain the point or points for determination, the decision and the reasons for the decision” [Section 197(2) of the Courts Act].

There is obviously no hard and fast rule nor any set formula as to how this mandatory requirement prescribed under Section 197(2) should be implemented. But what is important is that the judgment read as a whole must reflect that the Magistrate was fully alive and did address her mind to all the questions and issues which have to be determined in order to establish the guilt of the accused. The Magistrate must also set out the reasons, which motivate his or her decision and which must be sufficiently borne out in the judgment in order to permit an appellate jurisdiction to carry out an effective review of the correctness of the decision.”

Likewise, when it comes to sentencing, the same principle applies in as much as the reasons motivating a custodial sentence must be set out so that when reviewing the sentence, the appellate Court is in a position to decide on the appropriateness of such sentence.

The appellate Court noted that undue weight was given to the previous conviction of the appellant and in so doing, the lower Court failed to consider whether the imprisonment of two weeks imposed on the appellant could have been suspended for the purpose of making a community service order under section 3(1)(b) of the Community Service Order Act “…in order to give the appellant a last chance to redeem himself and mend his ways before sending him into custody.” (vide Idun M S v. The State of Mauritius 2018 SCJ 283).

The appeal was thus allowed and remitted to the lower Court to proceed in accordance with the Community Service Order Act, and, if the conditions therein are met, to suspend the custodial sentence and make a community service order.
NOORAH M. F. v THE STATE 2020 SCJ 130

By Hon. Judge Mr. D. Chan Kan Cheong and Hon. Judge R. D. Dabee

Road Traffic offences – Inops Consilii – Special Reasons – Heavily borne on record – Justified Sentence

The appellant was convicted, upon his own plea of guilty, under count I for using an unlicensed motor vehicle, under count II for using an uninsured motor vehicle and count III for driving a motor vehicle with a worn-out tyre, all in breach of the Road Traffic Act. He was fined under each count and was further disqualified from holding or obtaining a driving licence for all types of vehicles for a period of 6 months and his licence was cancelled and endorsed under count II.

The appellant challenged only count II to the effect that he was inops consilii and he was denied a fair hearing and the sentence under this count was manifestly harsh and excessive. It was further contended that he was not precisely and fully explained his rights. The more so, the appellant being a driver, great hardship would be caused to him.

The appellate Court deemed it fit to set out in detail the record of the proceedings before the lower Court to conclude that the appellant’s complaints were baseless. The learned Magistrate had duly conducted a hearing for sentencing purposes, wherein the appellant had the opportunity to put forward his case and any mitigating circumstances in his favour. At the end of the day, what was required was that the court record should show that an accused had understood his rights (Bholah v The State 2016 SCJ 398).

In the present case, the fact that the appellant chose to make a statement from the dock after he was explained his rights, was in itself indicative that he had understood his rights. Additionally, he never intimated to the learned Magistrate that he needed more time for his defence or that he had witnesses.

In relation to the mandatory disqualification, cancellation and endorsement of the appellant’s driving licence, the following extract from Jeetun v The State 2009 MR 145, was quoted:

“If there were special circumstances personal to the appellant, it was clearly up to him to bring these to the attention of the Court. The Magistrate’s role is not one of surmise or guess work.”

Hence, the onus of proof to establish special reasons was on a defendant and in the circumstances of the present offence under count II, there were no special reasons upon which the lower Court could have acted.

Held, dismissing the appeal, the appellant having a very heavy list of previous convictions for road traffic offences represented a real risk to other road users. Therefore, the disqualification and cancellation orders imposed on the appellant under count II, which were in any case obligatory, were amply justified and richly deserved.

SAVAN S. and PAYEN A. v THE STATE 2020 SCJ 135

By Hon. Judge Mrs. N. Devat and Hon. Judge R.D. Dabee

Custodial Sentence – Manifestly harsh and excessive – Clean Record – Community Service Order

The two appeals were argued together and a single judgment was delivered. The appellants were jointly prosecuted before the Intermediate Court in a single count for the offence of conspiracy to commit an unlawful act to wit: embezzlement by person in service receiving wages in breach of sections 109(1) of the Criminal Code (Supplementary) Act coupled with section 333(1)(2) of the Criminal Code. They pleaded guilty on the day of trial and were each sentenced to undergo three years’ penal servitude.
The appeal was to the effect that the sentence was manifestly harsh and excessive in the circumstances of the case. It is of note that the appellants were 32 and 55 years old respectively at the time they committed the offence and they both had a clean record.

True it is that a custodial sentence was warranted and the learned Magistrate rightly considered the following pertinent factors, namely the nature and seriousness of the offence, the substantial amount of money the appellants had embezzled to the prejudice of their employer and which had not been reimbursed, the appellants being in a position of trust and the cunning imagination displayed by the appellants in devising a method to defraud their employer.

However, in deciding whether the sentences were justified in the present case, the appellate Court referred to the case of Moutousamy M.M v. The State 2017 SCJ 267 wherein the Court cited with approval the following statement of Lord Bingham in R v Howells [1999] 1 W.L.R 307:

“Where the court is of the opinion that an offence, or the combination of an offence and one or more offences associated with it, is so serious that only a custodial sentence can be justified and that such a sentence should be passed, the sentence imposed should be no longer than is necessary to meet the penal purpose which the court has in mind…”

Furthermore, in Heerah Y.S v. The State 2012 SCJ 71, the Court took the view that a suspended prison sentence under the Community Service Order Act is an invaluable and intermediate régime between the custodial option and the non-custodial option and further held that:

“Serious consideration should be given to that intermediate option inasmuch as the deprivation of liberty through a custodial sentence is the most severe penalty available to the courts and the proper punishment for the most serious crimes:…”

The appellate Court further referred to Heerah (supra) to highlight that the myth that a Community Service Order is a let-off for any offender should be dispelled and quoted the following extract:

“A CSO imposes upon an offender “substantial restriction of liberty” and holds him to account to the community for his misdeeds whilst having the additional virtue, as compared to the other forms of punishment, of affording him an opportunity to mend his life in the open. Hence, the choice open to him between serving a prison sentence or avoiding it by doing some useful civic duty to the community and repaying his debt to society.”

In the circumstances of the present case, the appellate Court allowed the appeal in so far as three years’ penal servitude was manifestly harsh and excessive and substituted same by a sentence of one-year imprisonment by virtue of section 151 of the Criminal Procedure Act. In addition, the case was remitted back to the lower Court to proceed in accordance with the Community Service Order Act to assess the suitability of making a community service order.

“Hope is important because it can make the present moment less difficult to bear. If we believe that tomorrow will be better, we can bear a hardship today.”

–Thich Nhat Hanh
“TO NO ONE WILL WE SELL, TO NO ONE DENY, OR DELAY RIGHT OR JUSTICE”

Chap 4, Magna Carta 1215