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

Chapter 40, Magna Carta 1215
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**EDITORIAL TEAM**

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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,

First of all, we wish you a very happy new year 2016 and hope that it has been a great start for you. It is with the same immense pleasure and dedication that we bring to you the first issue of our office’s newsletter for 2016.

As has been the case during the previous years, we hope to kindle the interest of our readers this year as well, through riveting legal articles as well as by proffering an insight of the activities carried out by the office of the Director of Public Prosecutions during the month. Following some of our law officers’ participation in a training programme on Investigation of Economic offences and Cybercrimes, a synopsis is brought to you in this issue on the challenges posed by such offences to law enforcement agencies. You will also read a review of the legislative framework governing insider dealings and other market abuses in Mauritius. Moreover, you will get the opportunity to peruse an article on sound nuisance as well as the relevant laws in place to regulate same. Furthermore, you will read an article on electronic tagging as a condition of bail as well as its various benefits. In this issue we also bring to you an overview of the Certificate Award Ceremony of the University of 3rd Age (Mauritius) U3AM, held in December 2015 at Paul Octave Wiehe Auditorium.

Finally, in a bid to keep our readers abreast with Supreme Court judgments, a sylloge of recent court decisions for the month is, as always, included in this issue. In the same vein, a breviary of the recent judgment on ‘piracy,’ delivered by the Supreme Court, is also brought to you. We also seize this opportunity to extend our congratulations to Mr Raymond Marrier D’Unienville QC, who has been elected as Chairman of the Bar Council following the Annual General Meeting of the Mauritius Bar Association held on 15th January 2016.

We hope that your reading is enjoyable!

Miss Anusha Rawoah,  
State Counsel
From the 28th December 2015 to 3rd of January 2016, two officers from the Office of DPP attended the **Training Program on Investigation of Economic Offences and Cybercrimes** for Officers of African Nations under the aegis of the Indo-Africa Forum Summit at the Central Bureau of Investigation Academy, India.

Economic offences often referred to as White Collar crimes not only inflict pecuniary losses on individuals but also damage the national economy and have security implications as well. Economic crimes are becoming more complex, innovative, driven increasingly by technology and transcending geographical boundaries.

The challenges posed by such crimes require new initiatives and strategies which substantially upgrades the investigation and prosecution capacity in as much as the difficulties encountered by Law Enforcement Agencies are common across all our borders and can only be tackled through capacity building, better investigations, concerted efforts and international cooperation.

After the traditional Inaugural Address by the Director of the CBI, the training program was officially launched.

**Day 1** presentations were mainly on ‘Collection of Criminal Intelligence in Financial Frauds and Investigation, Forensic Accounting and its use in detecting Economic Crimes’. Participants were lectured on STRs, frauds prone areas, methods of committing such frauds, what makes investigation of such frauds different and how such frauds can be tackled through intelligence developing and sharing and multi-disciplinary approach. The importance of Forensic Accounting in investigating such frauds was also highlighted.
This was followed by another presentation on Investigation of Wildlife Crime whereby the focus was on the key challenges to tackling Wildlife and Forest Crimes as well as assistive instruments to improve international cooperation in the fight against Wildlife and Forest Crimes.

On Day 2, the topics of discussions were mainly ‘trafficking in person and special legislations related to children’, followed by an expose on ‘E-banking fraud and the concept of Dark Net and Crypto Currency’.

How to proceed with the ‘Examination of Counterfeit Currency and fraudulent travel documents, financial crimes and its impact on economy, Ponzi scheme and e-marketing frauds’ were the topic of discussions on Day 3 together with presentations on ‘Investigation of Money Laundering, the concept of Tax Havens and Shell Company and their use in Money Laundering’.

Computer Forensic as a tool to investigate, analyse and gather evidence from a computer device in a way that is suitable for presentation in a court of law was also practically demonstrated having regard to the various stages which need to be strictly followed, was on the agenda for Day 4. This was followed by a lecture on ‘CDR (Call Detail Report) analysis and CDAM (Call Data Analysis Management)’. It was also emphasised that for Law Enforcement Agencies, CDRs provide a wealth of information that can help to identify suspects, in that they can reveal details as to an individual’s relationships with associates, communication and behaviour patterns, and even location data that can establish the whereabouts of an individual during the entirety of the call.

Day 5 started with lectures on ‘Search and Seizure in Digital Environment in economic offences and the collection of volatile data and there was a presentation on Combating Drug Trafficking’. The day ended with a Valedictory address by the joint Director of the CBI followed by award of certificates to participants.

Day 6 and 7 culminated with a Study Visit to cultural heritages of Agra and Delhi.

Rajkumar Baungally, and
Pravin Harrah, Principal State Counsels.
Electronic tagging

A fundamental basic right of every defendant or detainee is that he/she shall be entitled to be released on bail. This is enshrined in section 3 of the Bail Act 1999.

For the purposes of the Bail Act, a Defendant is a person who is under arrest and is charged before a court with having committed an offence whereas a detainee is a person who is under arrest upon reasonable suspicion of having committed an offence.

Therefore, the defendant or detainee no matter how serious or minimal the offence is, the law affords them the right to enter a bail application before the court.

Of course, as history has witnessed, most defendants or detainees succeed in their bail application with conditions attached as laid down under Section 7 of the Bail Act 1999.

The conditions are that the defendant or detainee:-

• resides at a specified address and notifies the Court immediately of any change of address;
• Surrendering to custody or appears before a Court as and when required;
• does not commit an offence while on bail;
• does not interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person;
• makes the Court in dealing with him for the offence;
• reporting in person by the defendant or detainee at a specified time and place or to a specified person or authority;
• restriction of the places to which the defendant or detainee may go;
• restriction of the movement of the defendant or detainee after 6p.m;
• the prohibition of, or control over, communication by the defendant or detainee with witnesses for the prosecution or potential witnesses for the prosecution;
• Supervision of the defendant or detainee by a probation officer.

However, there are numerous occasions when bail has been granted with the conditions attached but the defendants or detainees once on bail go on and commit further offences or their acts and doings result in breaching the bail conditions. There is also a risk that if the defendant or detainee is a person of means and/or is a foreigner, he/she might flee.

Our law under section 7(4) of the Bail Act 1999 makes a special provision in cases where the defendant or detainee:-

a) Is not resident in Mauritius, or
b) Is liable, on conviction for an offence, with which he has been charged, to a penal servitude or to imprisonment for a term exceeding 2 years.

This special provision is the requirement of electronic tagging or monitoring which is available as a condition of bail. Electronic tagging works as a form of surveillance which uses an electronic device (a tag fitted to a person). Tagging is generally used as an alternative to a remand in custody and is often combined with curfew condition. The system does not enable the accused to be tracked, as it does not provide continuous information on the whereabouts of the accused. Rather, an alert is generated at a monitoring centre if the accused leaves the specified address or attempts to remove or tamper with the tag.
The Electronic monitoring requirement may be imposed only if the court is satisfied that, without the electronic monitoring requirement, the accused would not be granted bail.

Some of the positive points of the system are summarized as follows:-

- If the defendant or detainee is about to enter an excluded area, police will know immediately thus the former can be taken back into custody
- When the defendant or detainee knows that they are being monitored the probability that they will commit further offences is minimal
- Even if the defendant or detainee wish, it is practically impossible for them to flee the country
- Better management of the prison population
- Considered cheaper than keeping the accused in custody

In the United Kingdom, the **Bail Act 1976, section 3** makes it clear that a court can impose a condition of electronic monitoring of the defendant’s compliance with bail conditions. Electronic tagging can be used for juveniles as well as for adult defendants. It may also be imposed as part of a community order.

The system of monitoring has proved to be highly beneficial in the UK and other major countries. It has become an integral part of the criminal justice system in the UK. At various stages of criminal cases, electronic tagging is used to monitor compliance with a curfew.

This system also helps in cutting down costs. Obviously, our society is not unaware of the fact that every year during budgeting a consequential amount of money is spared to meet the costs of the rising amount of prisoners.

However, at this point it is worthwhile to note that although our law made this provision back in 2011, till date, that is nearly 5 years now, the Electronic Tagging requirement has not yet been enforced in Mauritius. The Bail Act has simply been amended by adding **section 7(4)** but no steps have been taken to make this section of our law enforceable.

The court may at the request of a prosecutor order a defendant or detainee to comply with a requirement imposed for the purpose of securing the electronic monitoring of his compliance with any other requirement imposed on him as a condition of bail.

However, since this provision only exists virtually in our society, prosecutors cannot make such a request to the court.

One question which can be advanced is who bears the costs of the electronic tagging. The cost should be met out of government funds. If the defendants or detainees are granted bail with the condition attached that they pay for the tag this would constitute in sending the wrong signal to the population. It would seem if the accused has the means, he or she can get bail.

The requirement of Electronic monitoring is highly technological. It will take our prison system and our judicial system at another level. If not for all defendants or detainees, then only for specific categories of offences such a provision can be imposed.

As of now, lets see how long it takes before such a provision becomes exercisable in the Mauritian Jurisdiction.

**Manesha Motee, Pupil**
Insider dealings and other Market abuses

Market abuse is defined as a type of behaviour in the financial market whereby the holder of a privileged information, regarding the plans and conditions of a publicly traded company, uses that information for the purpose of a financial advantage. Knowledge of such information creates an unfair advantage when buying or selling of shares. The information is commonly referred to as an ‘insider information’. Insider information is defined under the Securities Act 2005 (the “Act”) as “information that is not generally available or disclosed and if generally available or disclosed, would be likely to have a material effect on the price or the value of securities of the reporting issuer”.

The shares or stocks in the share capital of a company are ‘securities’ as defined by section 2 of the Act. Sections 111 to 119 list the different types of conduct amounting to market abuses. Even though the Act does not provide for any definition of Market abuse, Part IX of the Act entitled “Market Abuses” provides for a skeleton of types of conduct which give an indication of the nature of prohibited acts. Market abuse is an offence which covers a range of malpractices such as the misuse of information, the creation of a false or misleading appearance or the distortion of the market.

Market abuse harms the integrity of financial markets and public confidence in securities. As per the European Directive 2003/6/EC, “Market abuse may arise in circumstances where investors have been unreasonably disadvantaged, directly or indirectly, by others who have used information which is not publicly available (insider dealing); have distorted the price-setting mechanism of financial instruments; have disseminated false or misleading information.”

The criminal offence of “insider dealings” is currently set out in Part IX of the Act. This offence is defined under section 111(1)(a), as a malpractice where “an insider of a reporting issuer, who knows or ought to have known that he or she has inside information about a securities of a reporting issuer and who in reliance of such information, buy, sell or otherwise deal in securities of that reporting issuer”. The insider is referred to as any person within the public company (i.e. the issuer) who detains information unavailable to others. The “insider of a reporting issuer” under the Act extends to the reporting issuer itself; its subsidiaries, its officers and those of its subsidiaries. Insider dealing is legal once that information has been made public, at which time the insider has no direct advantage over other investors.

People are regularly trading on inside information not available to the rest of the market. Although our legislation criminalises insider dealings, there are always some ‘wrongdoers’ who continue to escape conviction as the offence is a complex one to detect.

Another aspect of insider dealings which constitutes an offence is the disclosure of inside information to another person. However, an insider is not guilty of such offence if he proves on a balance of probabilities that he disclosed the inside information in the proper performance of the functions of his employment, office or profession.

Nonetheless, when prosecuting an offence of insider dealing, it shall be a defence for the accused to establish that he reasonably believed that the information was generally known to the public.

Insider dealing is also prohibited by the Companies Act 2001 (“the CA”). The CA made insider dealings a criminal offence in certain specified circumstances. For instance, section 156 of the CA subjects disclosure of non-public inside information by the director of a public company to certain requirements, in the aim of discouraging misuse of such information. For example, a director who has a relevant interest in any shares issued by the company shall forthwith— disclose to the Board the number and class of shares in which the relevant interest is held and the nature of the relevant interest. According to section 154 of the CA, “a director of a company has a relevant interest in a share issued by a company if the director is a beneficial owner of the share; has the power to exercise any right to vote attached to the share; has the power to acquire or dispose of the share”.
Under section 90 of the Act, an insider of a reporting issuer or any of his associates, who has or acquires an interest in the securities of the reporting issuer, shall give written notice of the interest to the reporting issuer in such form as may be specified in the Financial Services Commission Rules.

Consequently, with regard to criminal penalties, the Act carries a minimum fine of 500,000 rupees and a maximum of one million rupees, or a fine of not more than 3 times the amount of any profit gained or loss avoided by any person as a result of the offence, whichever is higher, together with a maximum term of imprisonment of 10 years for insider dealings convictions.

Market rigging is another prohibited trading practice under section 114 of the Act. Rigging the market is a situation where the prices of a security are manipulated so as to lure unsuspecting buyers or sellers. It is the practice of artificially inflating stock prices, by a series of bids, so that the demand for those stocks appears to be high and investors will be enticed into buying the stocks.

Pursuant to section 116 of the Act, a person who makes a statement that is false or misleading or omits a material fact in relation to securities and is aware of the fact that the statement is misleading, commits the offence of market abuse. This criminal liability carries a fine exceeding 500,000 rupees together with imprisonment for a term of not less than one year.

Directors share the responsibility with the company to ensure the accuracy of statements that are published. A person could also be in contravention of the provisions of the Act if his negligence causes the misleading statement to be made. For example, a company director who signs off a trading statement for publication without taking reasonable steps to ensure its correctness could be committing an offence.

In addition, engaging in misleading practices which creates a false or misleading appearance on a securities exchange of active trading in securities, in relation to the market for securities or to the price of securities, by carrying out, directly or indirectly, a sale or purchase of securities and which does not involve a change in the beneficial ownership of the securities is criminalised under section 113 of the Act. It shall be a defence under section 113 where it is established that the person charged did not know, and could not reasonably have known, that the relevant act or omission has the effect, or is likely to have the effect of the above.

Last but not least, as per section 118, a person who is convicted of an offence under Part IX shall be liable to any person for any loss or damage incurred wholly or partly as a result of the offence. However, this shall not apply where the other person was a party to or knowingly concerned in the offence.

It is worthy to note that in Mauritius, the Financial Services Commission which regulates and supervises the conduct of business activities in the financial services sector, carries out investigations and takes measures to suppress illegal, improper practices, market abuse and financial fraud in relation to any activity in the financial services. Under Section 24 of the Act, the Stock Exchange of Mauritius also has regulatory functions and investigates possible market abuses, including insider dealing and fraudulent behaviour. It should also be pointed out that criminal prosecution on market abuse is rare in Mauritius. Regulatory authorities must provide effective and consistent oversight and enforcement of regulations to ensure the integrity of the financial market, and they need a broad range of enforcement tools to enforce compliance with the legislation. Moreover, these authorities should have adequate systems in place to detect, investigate and prosecute market manipulation.

Miss Toshika Bobeechurn,
STM Intern (Legal)
To what extent is sound a nuisance?

The damage caused to the environment during the industrial era and time of war has forced global economic actors to recognize that the protection of nature is vital to maintain healthy conditions of life. Living in a sound environment is now an established right covered under the scope of human rights.

The international concern to promote the environment gave life to numerous conventions and treaties governed through enforcing bodies. With time, each State enacted locally binding environmental laws specific to their geographical location.

Mauritius being among the vulnerable Small Island Development States (SIDS) is a party to around 36 environment-related conventions, protocols and other internationally binding and non-binding instruments. The Mauritian Parliament enacted the Environment Protection Act (EPA) 2002 which repealed the previous Environment Protection Act of 1991. In 2008, the EPA 2002 has been amended so as to meet certain policy objectives and make it more responsive and adaptable to the new emerging challenges of the economic order; and also to address a number of unattended issues and shortcomings in the 2002 Act.

One of the most common forms of pollution sensitively affecting human comfort is noise pollution. Section 41(1) (b) of the EPA 2002 has been amended to empower the Minister to make regulations for the prevention and control of noise from any source. The Control of Noise Regulations 2008 was made in accordance to section 41(1) (b) and section 96 of the Act. The Noise of Prevention Act 1938 and all regulations made under that Act thereunder were repealed.

Any noise classified as a nuisance is in contravention with section 3(1) of the Control of Noise Regulations 2008 (Regulations). The factors determining whether a noise is a nuisance listed under section 3(3) of the Regulations comprise of the intensity of the noise as perceived by the ears, the type of noise emitted, the manner in which the noise is produced and the potential level of interference. Since Mauritius is a multi-cultural society whereby different religions co-exist, the level of noise allowed in places of worship is of 55 decibels [dB(A) Leq] recorded at the boundary of the site as prescribed under section 41(2) of the EPA 2002.

In view to preserve a peaceful environment in residential areas, noisy activities in such areas related to construction works such as demolition of a building, excavation or filling of land and use of heavy machines require prior authorisation from the local authority if such activities are carried out before 7 a.m. or after 7 p.m. on any day as clearly set under section 3(3) of the Regulations. The keeping of animals on premises which make noise which disturbs the peace, comfort and convenience of another person constitutes an offence under section 3(4) of the Regulations.

Noise produced by loud-speakers, amplifier, musical instrument, electrical or mechanical device in a public place (including a road, a market place, a shopping area, a thoroughfare or a place where a trade fair or any other activity of a commercial nature is organized and to which the public has access) is not allowed unless permission from the Commissioner of Police is duly obtained as established at section 4(1) of the Regulations. Such permission is granted by the Commissioner of Police for a social, cultural, religious or electoral activity as laid down under section 4(3).

In addition, it should be noted that noise produced by any of the instruments mentioned under section 4(1) is prohibited within a radius of 100 meters of a vocational institution, place of worship, a health institution, a court of justice, municipal or district council and the Government House during their hours of activities as per section 5 of the Regulations. Any offence made under the Regulations on a first conviction shall be liable to a fine not exceeding Rs. 50,000 and on a a second or subsequent conviction is liable to a fine not exceeding Rs. 100,000 and to a term of imprisonment not exceeding 12 months as stipulated under section 7 of the Regulations.

Miss Aarti Burtony,
STM INTERN (Legal)
A Certificate Award Ceremony of the University of 3rd Age (Mauritius) U3AM was held on Tuesday, 1st December 2015 at Paul Octave Wiehe Auditorium, University of Mauritius, Reduit. Mrs Moutou - Leckning, Senior Assistant Director of Public Prosecution who was representing the Director of Public Prosecutions, Mr Satyajit Boolell, SC, addressed the audience during the ceremony.

In her speech, Mrs Moutou – Leckning mentioned that the office of the DPP takes pride in ensuring that our elders know their fundamental rights and are protected from any form of exploitation and abuse. The office was pleased to offer its support to the realization of the training programme held in August 2015, entitled “Training on legal issues facing the Elderly” at the Rajsoomer Lallah Lecture Hall. Furthermore, she gave a brief overview of the modules offered during the training, namely the legal framework for the protection of the elderly persons, Droits des successions, the Mauritian legal system, Domestic Violence in the home, Road Traffic offences, general Criminal Law offences against the person and the property and highlighted the key legislations related to Elderly persons.

In view of this fruitful experience, the Office of the Director of Public Prosecutions looks forward to any future collaboration with U3AM to provide further training courses.

Last but not least, she congratulated all the members present for their accomplishment and the speech was closed by the quotation of Andy Rooney “I’ve learned...That the best classroom in the world, is at the feet of an elderly person”.
SUMMARY OF SUPREME COURT JUDGMENTS:
December 2015

DIRECTOR OF PUBLIC PROSECUTIONS v ALI ABEOUKLADER MOHAMED & ORS [2015] SCJ 452

By Hon. A. F. Chui Yew Cheong, Judge & Hon. Judge A. A. Caunhye, Judge

Elements of Piracy, high seas

On 25th January 2013, twelve respondents, Somali nationals who were suspected of having committed an act of piracy off the coast of Somalia, were transferred to Mauritius. They were prosecuted before the Intermediate Court. They pleaded not guilty to an information which charged them with having "on or about the 5th day of January in the year 2013, on the high seas, around 240 nautical miles off the Somali coast………..willfully and unlawfully committed an act of piracy, to wit an illegal act of violence directed against the MSC Jasmine, a Panama flag merchant vessel which was proceeding from Salah/Oman to Mombasa/Kenya." They were defended by Counsels. After hearing evidence, the Intermediate Court magistrates found that the prosecution had failed to prove its case beyond reasonable doubt and dismissed the information against the twelve respondents.

The learned Director of Public Prosecutions appealed against the dismissal of the information. The 6 grounds of appeal and the 18 additional grounds were grouped under the following headings:

A. The requirement of "High Seas",
B. The issues of co-authorship and identification,
C. The appreciation of the evidence at the trial,
D. The information before the trial Court, and
E. The issue of the legality of the detention at sea.

The constituent elements of the offence of piracy are as follows:

(i) an illegal act of violence, detention or depredation,
(ii) on the high seas,
(iii) committed for private ends, and
(iv) by a private vessel against another vessel.

A. The requirement of "High Seas"

The learned Judges accepted the definition of the high seas in international law which includes the EEZ for the purposes of repressing and prosecuting piracy. Hence, the trial Court erred in dismissing the information on the ground that the prosecution has failed to prove that the alleged act of piracy took place on the high seas.

B. The issue of co-authorship and identification

In view of the nature of the operation on the high seas and the involvement of each member of the group, be it on board of the whaler or the skiff, in the perpetration of the alleged attack, the Learned Judges concluded that they could only be co-authors and not mere accomplices. The trial Court erred in concluding that the occupants of the whaler were "at best accomplices..." and that the prosecution should have led evidence as to the identity of the occupants of the skiff who were the only ones who perpetrated the attack.

C. The appreciation of the evidence at the trial

The trial Court omitted to consider the issues raised by the defence and to make a pronouncement as to whether the factual elements of the charge have been proved beyond reasonable doubt. To this extent therefore, the trial Court failed in its duty to assess the evidence and make a clear and definite finding as to whether on the evidence adduced, the act of violence against the MSC Jasmine was committed by the twelve respondents or whether the respondents had no involvement in the act of violence but were innocent fishermen on a fishing expedition.

D. The information before the trial Court

The “act of piracy” is defined as “an illegal act of violence or detention, or any act of depredation for private ends by the crew or passengers of a private ship or a private aircraft, and ….".

The Appeal court had to decide whether the non-averment of the words “for private ends” renders the information so bad that it disclosed no offence at all and that it could not form the basis of a criminal trial, let alone a criminal conviction. However, the defect was not such as to render the information so bad that the proceedings were a nullity.

The approach adopted by the trial Court in dismissing the information on account of the omission was clearly wrong and it committed a serious irregularity.

E. The issue of the legality of the detention at sea

The learned Judges also concluded that the trial Court erred in coming to the conclusion that the period of detention on board of the Surcouf and the failure to bring the respondents promptly before a judge would warrant a stay of proceedings when in fact the
relevant and material consideration was whether the respondents had a fair trial.

For all the reasons appeal was allowed and decision of Trial Court quashed. The case was ordered to be remitted back to the trial Court.

**BARDOTTIER S.J v THE STATE [2015] SC 434**

By Hon. N. Devat, Judge & Hon. J. Benjamin G. Marie Joseph, Judge

Section 53(5) of RTA, limitation

The appellant was charged under count III for the offence of driving whilst disqualified in breach of sections 53(7)(4)(b) and 163 of the Road Traffic Act, which offence was said to have been committed on 19 October 2009.

After initially pleading not guilty to count III, the appellant changed his plea to one of guilty on the day of trial. The learned Magistrate sentenced him to undergo two weeks imprisonment and to pay a fine of Rs 5000. The learned Magistrate further disqualified him from driving all types of vehicles for a period of one year.

The appellant appealed against his custodial sentence and the case was remitted to the learned Magistrate for a fresh hearing on sentence. At the second hearing, the learned Magistrate was of the view that the appellant deserved a short custodial sentence of one week which he ordered him to undergo and further disqualified him from driving all types of vehicles for a period of one year.

The appellant appealed against the one week imprisonment. The offence as averred in the information took place on 19 October 2009. The information was lodged on 16 May 2011, nearly more than 18 months of the date of the commission of the offence. The information having been laid more than six months after the commission of the offence, it would have been incumbent on the prosecution to indicate in the information or from the evidence, such particulars as to satisfy the requirements of paragraph (b) of section 53(3) of the Act, namely that the prosecution was being lodged both within three months from the date on which it came to the knowledge of the prosecutor and within one year from the date of the commission of the offence.

However, by bringing proceedings not only more than six months but more than a year after the commission of the offence, the question of satisfying the dual test propounded in the case of *Sohan v R [1985 MR 55] and Potigadoo v The State [2001 SC 99]* did not even arise. The information was clearly laid outside the one year limitation period and as such fell foul of section 53(5) of the Act.

Hence the Learned Judges quashed the conviction and sentence under count III of the information.

**VEERAPEN K.D. v THE STATE [2015] SC 439**

By Hon. A. Hamuth, Judge & Hon. A.D. Narain, Judge

Alcohol concentration above prescribed limit, taking blood specimen without consent

This is an appeal from a judgment of the learned Magistrate of the District Court of Pamplemousses convicting the appellant, under Count 1, of driving without due care and attention in breach of section 123C (i)(a) of the Road Traffic Act and, under count 2, of driving a motor vehicle with alcohol concentration above prescribed limit in breach of section 123F of The Road Traffic Act. He was sentenced under Count 1 to pay a fine of Rs 3,000 and under Count 2 to pay a fine of Rs 20,000, to undergo a sentence of 6 months’ imprisonment and to be disqualified from holding, obtaining or applying for driving licences for all types of vehicles for 8 months, and his driving licence was cancelled and endorsed. He was also ordered to pay Rs 100 as costs.

The appellant had pleaded guilty to both counts before the trial and he has now appealed against his conviction.

There was a discrepancy in the date of the offence, i.e. the offence as per the information was 30 October 2012 while the evidence adduced by the prosecution, in the form of the unsworn statements, the FSL report and the plan, indicates that the accident took place on 13 October 2012.

The learned Judges stated that “only most exceptionally” and where there was “clear injustice”, the Court would be prepared to intervene. However, the discrepancy in dates in the present case plainly does not warrant any intervention.

Another ground of appeal was that the blood sample taken from the appellant was “tainted with illegality” in that it had been taken without his consent. It appeared from the unsworn statement of the appellant that he was seriously injured in the course of the accident, in a coma and admitted in hospital for more than a month, and that no warning was given to him under section 123H (3) of the Road Traffic Act, nor did he consent to a specimen of blood being taken
from him for analysis purposes as he was not conscious at the time.

It is important to note that the legislator has provided that it is mandatory for a person to give his consent before a specimen of blood can be taken from him for the purpose of analysis under the Road Traffic Act.

After anxious consideration, the Learned Judges concluded that they cannot in the circumstances rely on the FSL report. They considered that the blood specimen was obtained in breach of the appellant’s fundamental right to privacy under the Constitution and in breach of the Road Traffic Act.

However they were satisfied that the conviction must be upheld in the present case in view of the appellant’s unambiguous plea of guilty. Hence, all the grounds having failed, the appeal was dismissed.

ROSSAN M A R v THE STATE [2015] SC 454

By Hon. K.P. Matadeen, Chief Justice & Hon. A.F. Chui Yew Cheong, Judge and Hon. A.D. Narain, Judge

Drugs, prima facie case of possession

This is an appeal from a judgment of the learned trial judge who found the appellant guilty of the offence of possession of 228.9 grammes of heroin contained in a parcel for the purpose of distribution in breach of section 30(1)(f)(ii) of the Dangerous Drugs Act and who, after making a finding that the appellant was a drug trafficker, sentenced her to undergo 20 years’ penal servitude and to pay a fine of Rs 75,000.

The appellant appealed against the judgment of the learned trial Judge on several grounds.

All the grounds failed, one of which was the issue of “possession”. Although the Dangerous Drugs Act does not contain a definition of “possession”, it is well-settled that this expression embraces both a factual element (that of physical control) and a mental element (that of knowledge).

Indeed, to establish a prima facie case of possession in “container cases”, like the present one, the prosecution has to prove that –

(a) the container and its contents were under the physical control of the accused;
(b) the accused knew that there was something in the container;
(c) the contents turned out to be dangerous drugs; and

(d) the “modes or events” by which the accused obtained custody of the container and its contents are such that it can be inferred that he has, or ought to have imputed to him, the intention to possess, or knowledge that he does possess, what is in fact a prohibited substance.

It is not necessary for the prosecution to prove that the accused knew that the contents were actually drugs.

The Learned Judges concluded that the prosecution had established physical control of the drugs and there was ample evidence on record from which knowledge may be inferred, that the appellant had failed to discharge the evidential burden of showing on a balance of probabilities that she neither knew nor suspected nor had reason to suspect that the bag contained drugs and that the learned trial Judge’s findings as to the appellant’s possession of the drugs in the parcel cannot be faulted.

The appeal was accordingly dismissed.

News from the Bar:

The Annual General Meeting of the Mauritius Bar Association was held on the 15th January 2013 and a newly constituted Bar Council has been selected.

Mr Raymond Marrier D’Unienville QC - Chairman
The Attorney General (ex officio) - Vice Chairman
Mrs Narghis Bundhun - Treasurer
Mr Yasha Nazroo - Secretary
Mr Moorari Gujadhur - Member
Mr Jacques Tsang Mang Kin - Member
Ms Anusha Rawoah (DPP’s office) - Co Opted Member

The ODPP wishes them best of luck for the challenges ahead.

“Success is not final, failure is not fatal: it is the courage to continue that counts.”

-Winston Churchill