'To No One will We Sell
To No One Deny or Delay Justice'

Chapter 40, Magna Carta 1215

Office of the Director Of Public Prosecutions

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EDITORIAL

Dear Readers,

The Office of the Director of Public Prosecutions met with Probation Officers at their headquarters in Beau-Bassin on last Friday. The meeting was cordial and instructive to both parties. After the welcoming speech, Mr Fareed made a presentation on restorative justice. According to him there is a need to strike a balance between retributive and restorative justice (more on the topic at pages 3 and 4).

In the month of July, the ODPP received the visit of Miss Carissa Phelps from the United States, once a victim of human trafficking. Today Miss Phelps, an attorney, is travelling around the world to sensitize law enforcement agencies on the issues relating to human trafficking. The DPP was invited by the US Embassy to take part in a round table where the question of human trafficking was discussed.

In this edition, we also publish an account of the conference on cybercrime attended by Mr N. Muneesamy at l'Ecole Nationale de la Magistrature in Paris. As usual, we also cover a number of interesting judgments, both at the Supreme and Intermediate Courts.

I wish you a pleasant reading.

Zaynah Essop
State Counsel

IN THIS ISSUE

Enjoy reading
'The Monthly Legal Update'

Please forward any comment to:

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Conference on Cybercrime in Paris at L'école Nationale de la Magistrature

"In France, figures show that the delinquency rate is diminishing. However, there is an increase in cybercrime..." The statement was made by General Marc Watin-Augouard of the French Army at a Conference on Cybercrime in Paris. The conference spanned over several days and dealt with the legal and technical ambit of cybercrime. Speakers included members of the judiciary, legal profession, police, gendarmerie and IT experts.

Cybercrime is a vast criminal concept. It is not restricted to child pornography but encompasses a wider range of criminal acts e.g. identity theft, hacking and cyber terrorism. The recent phone hacking scandal in the UK is a good example of its prevalence. The prevalence in cybercrime is further fuelled by the easy access to hacking tools. User friendly hacking software can be easily downloaded online for free.

It was observed during the Conference that the cybercriminal is atypical. He does belong to a particular socio-group and does not adhere to a particular stereotype. In contrast to mainstream criminals, cybercriminals do not always have a motive for their acts i.e. they hack into servers just because they can do it. For instance, in Poland, a fourteen year old caused the crash of a train by hacking into the traffic lights control.

The main legal obstacle to apprehending cybercriminals is that of 'jurisdiction'. A person who hacks into the bank account of a French national could be operating from an obscure village in Nigeria. It was also observed that even in cases where the cybercriminal resides locally, applications for orders disclosing internet addresses (internet protocol) can take months and therefore delay enquiries.

Nataraj J. Muneesamy
State Counsel

Visit to the Probation and After Care Centre
29th July 2011

Law officers from the office of the Director of Public Prosecutions paid a visit to the Probation officers at the Probation and After Care Centre in Beau-Bassin on Friday 29th July 2011. The purpose of such visit was to better understand the work carried out by probation officers and to determine how best both offices could improve their working relationships to provide a better service to the public. The Commissioner, Mr Serge Montille, during this welcoming speech, referred to a citation of Guy Gilbert where the latter questioned whether we have a justice system which heals or which punishes. He was of the view, that as probation officers, they firmly believed in a restorative justice system which is an approach to justice that focuses on the needs of victims, offenders, as well as the involved community, instead of satisfying abstract legal principles or punishing the offender.

Mr Satyajit Boolell SC, Director of Public Prosecutions, was of the view that crimes as defined in our statute book are regarded as wrongs committed against society and offenders should be punished for their crimes against society. Much emphasis is laid on putting right the wrong done and on the respect of the fundamental rights of the accused. However, it is equally important to bear in mind the rights of the victim. He went on to say that not every crime deserves to have a prison sentence and there are situations where accused parties are going to prison and used the prison gate as a revolving door. He referred to the situation in the Netherlands where a teenager is found smoking cannabis and that if he is a first-time offender, counseling is provided to the latter. After a certain period of time, a probation report is made to assess the situation and if it is favourable, then the case is struck out. The DPP also spoke of the importance of probation reports which are of great assistance to a law officer to enable him to reach the right decision.

During the course of our visit, Mr Fareed, Probation officer, made a presentation on restorative justice. He made reference to the speech of the Chief Justice, Honourable Bernard Sik Yuen, made at the opening of the Mediation Division of the Supreme Court, where the latter stated, *'the first time I heard of mediation within the judicial system was in my days as Master and Registrar of the Supreme Court. The then Chief Justice, late Sir Cassam Moollan had been impressed by what he saw in China during a visit to the Judiciary of that country. If your neighbor has stolen your chicken or smashed your TV set in rage, why do we send him to jail if he can be compelled instead to repair the harm done and compensate you, the victim. Why not mediate the terms of a settlement even if the background to the complaint is more akin to a criminal offence? What serves the community best? Sending the offender to jail or giving him the opportunity to atone for the wrong he has committed in a manner which is closest to the prejudice suffered.'* He made a comparison between restorative and retributive justice *(see table at page 3 for further details)*. According to him, a more realistic approach would be an integration of restorative justice within the retributive model. This is an approach which is being adopted by many European countries.

	RETRIBUTIVE JUSTICE	RESTORATIVE JUSTICE
CRIME	• Violation of law • State is the victim	• Harm to people and relationships
AIM OF JUSTICE	• Establish guilt • Inflict punishment	• Identify obligations (responsibilities) and promote healing
PROCESS OF JUSTICE	• Conflict between offender and State • Adversarial system	• Involvement of victims, offenders and the community to identify obligations and generate solutions through dialogue
OUTCOME	• Win/Lose	• Win/Win

The question which arises is whether there is restorative justice in Mauritius. In that respect, there are both legal and non-legal measures. The legal ones are to be found in: (a) our Supreme Court Rules which deals with mediation in civil matters; and (b) section 5 of the Probation of Offenders Act 1947 which provides for the placement of offenders on probation and also for additional orders for damages or compensation to victim. Concerning non-legal measures, they consists of the following: (a) voluntary (social workers, religious people); (b) Police (mediation with the new community approach); (c) Probation (mediation with families, neighbours, landlord and tenant); and (d) Magistrates (disputes dealt with in Chambers). One of the suggestions made by the Senior Probation Officers was that there should be more mediation process in criminal matters whereby a mediation report would be produced. Following such mediation report, a monitoring of extrajudicial measures could be conducted by probation officers and then a final mediation report would be made to include proof that the latter measures have effectively been executed.

As mentioned above, restorative justice is being applied in various jurisdictions. Feeling unhappy about the adversarial system, Canada is particularly interested in incorporating restorative justice to work with its younger members and help prevent future offences. A 2007 meta-study of all research projects by the University of Pennsylvania concerning restorative justice conferencing published in English between 1986 and 2005 found positive results, specifically for victims and which are as follows: (a) Greater ability to return to work and resume normal daily activities; (b) No cases of offenders verbally or violently abusing victims; (c) Reduced fear of the offender with an increased sense of security; (d) Reduced anger towards the offender; (e) Greater sympathy for the offender and the offender's supporters; (f) Greater feelings of trust in others; (g) Increased feelings of self-confidence; and (h) Reduced anxiety.

If we were therefore to start from scratch and build a completely different criminal justice system, should it resemble our current one? Presently, it is far from perfect. Bearing in mind that restorative justice is being applied more and more around the world and given that it has had many positive results, perhaps such system could be used as an alternative in a more efficient manner so that we can live in a safer community.

Human Trafficking in Mauritius

In July 2011, Miss Carissa Phelps from US, visited our Office in order to assess the current situation in Mauritius and to consider our legislative framework on human trafficking. According to the US Trafficking In Persons Report 2011, Mauritius is a source country for sex trafficking and whereby young girls are subjected to prostitution. Approximately 300 Malagasy women reportedly transited the country in 2010 where some were subjected to forced labour. As per the 2011 report, *'the Government of Mauritius fully complies with the minimum standards for the elimination of trafficking. Mauritius sustained its strong efforts to identify, investigate and prosecute incidences of trafficking during the reporting period. The Mauritius Police Force maintained its offerings of anti-trafficking training programs for police officers and continued its awareness campaign in schools and villages. The government's efforts to coordinate among all relevant ministries, however, remained lacking leading to inconsistent provision of protective and investigative services to trafficking victims.'* Between 2005 and 2006, Mauritius was classified as a Tier 2 country whereas it moved to Tier 1 between 2009 and 2010. The potential causes of trafficking in Mauritius are: (a) poverty and feminization of poverty; (b) lack of education and unemployment; and (c) domestic violence, amongst others. Victims generally come from broken families, early school drop-outs, substance users and sexually abused persons within the family itself. Traffickers can be tourists, drug addicts, pimps and intermediaries such as taxi drivers, boarding house owners and victims' relatives. It is to be noted that Mauritius acceded to the United Nations Protocol to Prevent, Suppress and Punish Trafficking In Persons, especially Women and Children on 23rd September 2003 and it enacted the Combating of Trafficking in Persons Act 2009 in order to give effect to the UN Protocol.

*[A copy of the **US Trafficking in Persons Report 2011** is available at the following address:*
***http://www.state.gov/g/tips/rls/tiprpt/2011/164232.thm**]*

Please find below a summary of Supreme Court Judgments for the month of July 2011

Beedasy and Anor V The State [2011 SCJ 274]
JJ Baukaurally & Cheong
Vague ground of appeal – Date averred in information – Issue raised at trial stage

The present appeal arose out of the same case whereby both appellants were prosecuted for assault causing sickness from personal labour for more than 20 days in breach of s228(1) CC. They pleaded not guilty and were represented by counsel. Both appellants were found guilty and they were each sentenced to pay a fine of Rs 6000 and Rs 100 costs.

The only ground of appeal was against conviction and which read as follows: '*The learned Magistrate erred in her appreciation of facts and evidence on record when she found both accused guilty as charged.'*

The respondent raised a preliminary objection to the effect that the above ground was very vague and uncertain and that it could not be considered by the Court of Appeal, a point which the Learned Judges agreed to. There is a long list of authorities where this Court has repeatedly held that grounds
of appeal must be drafted carefully so as to be clear and precise and to indicate to the other side what specific case he has to meet. A ground of appeal which is drafted in vague and general terms is not a proper ground of appeal and must be ignored. It in fact amounts to no ground at all. (vide **Bahadoor v The Queen [1952 MR 121]**, **Dubignon v The Queen [1984 MR 165]**, **Andoo v The Queen [1989 MR 241]**, **Nibert v The State [2005 SCJ 78]**, **Bageenauth v The State [2006 SCJ 250]**, **Moolchand v The State [2011 SCJ 3]**, **Baharay v The State [2011 SCJ 79]**).

Whilst conceding that the above ground of appeal was vague, Learned Counsel for the Appellant prayed that he nevertheless be allowed to address the Court as to the merits of the case. He was of the contention that there was a variance between the information and the evidence, namely the date of the offence as averred in the information (25 July 2006) is different from the date stated by the complainant (witness No. 2) in his testimony (25 June 2006). He relied on the case of **Yadally V The State [2010 SCJ 162]**.

Relying on the cases of **Mootooveeren v R [1919 MR 46]**, **Hurry v The Queen [1958 MR 274]** and **Marmarot v The Queen [1978 MR 177]**, learned Counsel for the State has submitted that:-

(a) the date averred in the information is not a material element of the offence;
(b) the variance in the dates is not material since there was sufficient proof that the incident as narrated by witness No. 2 in fact occurred on the 25 July 2006;
(c) the variance in the dates was never made an issue at trial stage; and
(d) the appellants, in the circumstances, have not been misled or deceived and prejudiced in their defence by such a variance in the dates.

The Appellate Court agreed with submission of Counsel for the State. In **Hurry V The Queen *(above)***, it was held as follows, '*The fact that the specific date averred in an information is at variance with the evidence is no ground for quashing a conviction, unless the date is an essential part of the offence.'*

From the evidence on record, including in particular the case which was put to the appellants in their written statements to the police and the medico-legal evidence in the form of the PF58 and PF58A of witness No. 2, it was clear that the date of the offence as averred in the information must have been the correct one. The circumstances of the offence as put to the appellants in their written statements tallied with the version of witness No. 2 for the prosecution. The latter was lengthily cross-examined as to these circumstances. All this showed that the appellants were fully aware of the charge they had to meet. Moreover, the date of the offence was never made an issue before the trial Court. It is well settled that an appellant will not be allowed to raise an objection to an information on a mere technical ground where he did not do so in the Court below (vide s97 of the Intermediate and District Courts (Criminal Jurisdiction) Act). In these circumstances, we are satisfied that the appellants have not been misled or deceived and prejudiced in their defence by the variance between the information and the evidence. The Learned Judges also distinguished the case of **Yadally** from the present one on the basis that in latter judgment, the prosecution had amended the information by replacing the month of June by February and by adding some words. The appellate Court had held that the amendments were of substance and material. The original information did not disclose an offence known to the law and had caused prejudice to the accused.

Appeal dismissed with costs.

Seewoo V The State [2011 SCJ 234]
JJ. Matadeen and Caunhye
Involuntary homicide

This is an appeal against a judgment of the learned Magistrate of the Intermediate Court finding the appellant guilty of the offence of involuntary homicide by imprudence. The only eye witness to the accident to give evidence before the learned Magistrate was the pillion rider on the autocycle. She was the wife of the deceased who, she admitted, held only a learner's licence for riding autocycles. She explained that the accident occurred just before 07.00 p.m. after the oncoming lorry driven by the appellant knocked against the deceased's autocycle on the deceased's side of the road some 30 metres after the lorry had overtaken a motorbus which

which had stopped to allow passengers to get down from the bus. The learned Magistrate found her testimony to be "*most straightforward and convincing*" and convicted the appellant who had not adduced any evidence but whose unsworn version was that it was the autocycle that came and knocked against the lorry, that the rider appeared to be drunk and that he had not overtaken any motorbus or other vehicle as there was none on that stretch of road.

Following a review of the evidence on record, the Appellate Court disagreed with the findings of the Learned Magistrate.

Appeal allowed. Conviction and sentence quashed.

Pittea V The State & Anor [2011 SCJ 257]
JJ. Balgobin and Cheong
Time limit for prosecuting appeal – FSL report as evidence of fact

The appellant was prosecuted before the District Court of Curepipe for the offence of driving a motor vehicle on a road after having consumed so much alcohol that the proportion of it in his blood exceeded the prescribed limit in breach of section 123F of the Road Traffic Act ('RTA'). He pleaded not guilty and was represented by Counsel. After hearing evidence, the learned Magistrate found the appellant guilty as charged and sentenced him to undergo six months' imprisonment and to pay a fine of Rs. 20,000. Furthermore the appellant was disqualified from holding or obtaining a driving licence for all types of vehicles for twelve months and his driving licence was endorsed and cancelled.

The Appellant did not press with his appeal against sentence, rightly so, in view of the provisions of s123F(4) RTA. The Respondents raised a preliminary objection to the effect that this appeal cannot be entertained as the Appellant had not complied with s93(3) of the District and Intermediate Courts (Criminal Jurisdiction) Act since the latter had failed to prosecute the appeal within 15 days of lodging the appeal with the clerk.

The Appellant had lodged the notice and initial grounds of appeal with the clerk on 10th July 2009 and, according to counsel for the Respondent, the 15 days period would expire on 24th July 2009. Instead, on that date, the Appellant served a further notice and additional grounds of appeal. The appeal was subsequently prosecuted before the Supreme Court on 28th July 2009.

On the other hand, it was the contention of Learned Counsel for the Appellant that this delay should start running as from the date on which the further notice and additional grounds of appeal were served, i.e. 24 July 2009, and not as from the date notice was first given, i.e. 10 July 2009. To hold otherwise would be to punish the more diligent appellant who gives an early notice of appeal since a less diligent appellant may choose to wait till the twenty first day to give notice of appeal under s93(1) of the Act and then benefit from 15 more days in order to prosecute the appeal under s93(3). In fact, subsection (1) of s93 is not subject to subs(3).

The Appellate Court disagreed with counsel for the Appellant and stated that since the latter had failed to prosecute the appeal on time, he should first have applied for leave to appeal outside the statutory delay by way of a written motion supported by affidavit (vide **Curpen v The State [2008 SCJ 305]** and **Hanumunthadu v The State [2010 SCJ 70]**). He has not done so. The Appellate Court can exceptionally allow an appellant to make a verbal motion for leave on the day of the appeal. No such verbal motion was made. In its reasoning, the Court referred to the following cases: **Oozeer V The State [2005 SCJ 143], Suneechara V The State [2007 SCJ 131], Lagesse V Commissioner of Income Tax [1991 MR 46] and Malloo V The State [2010 SCJ 13]**.

In light of the well settled case law, the Court ruled that the preliminary objection was rightly raised.

The Appellate Court nevertheless exceptionally went on to comment on the merits of the case but it laid emphasis on the fact that this should not be treated as authority that the proper procedure should not be followed in the future.

The grounds raised by the Appellant challenged the findings of the Learned Magistrate to the effect that the prosecution has proved beyond reasonable doubt that the blood analysed was that of the appellant. Learned Counsel for the appellant relied on the case of **Paterson v DPP [1990] RTR 329**. The case for the prosecution had rested on the testimony of PC Gobin and on a Forensic Science Laboratory (FSL) report from Mrs. Mohungoo, Forensic Scientist. The unchallenged FSL report was evidence of the facts stated therein (s181(2) of the Courts Act).

The learned Magistrate relied on the above prosecution evidence and the case of **Khatibi v Director of Public Prosecutions [2004] EWHC 83** to find proved beyond reasonable doubt that there was an unbroken chain of continuity in the taking, conveyance and analysis of the sample of blood. In **Khatibi**, it was held that the case of **Paterson v DPP** (above) could clearly be distinguished as there was an inconsistency as to where the sample had been taken. The label recorded one police station whereas the evidence noted another. This conflicting evidence undermined any attempt to close the gap in the prosecution case by the drawing of inferences. In the present matter, the findings of the Learned Magistrate were not perverse, erroneous or unreasonable.

Appeal dismissed with costs.

Gengadu V State [2011 SCJ 261]
JJ. Balgobin and Devat
Cannabis resin – Appropriate custodial sentence

The appellant, a 26 year old self employed young man, was prosecuted before the IC under two counts of an information for the offence of drug dealing to wit: selling 0.44 gram of Cannabis Resin (hashish) for personal consumption in breach of ss35(1), 47(5)(a) and 48 of the Dangerous Drugs Act ('DDA') and possession of 23.3 grams of Cannabis Resin (hashish) wrapped in 54 pieces of aluminium foil for the purpose of selling in breach of ss 30(1)(f)(ii), 45(1), 47(5)(a) and 48 of the DDA.

The appellant who was represented by Counsel and who had initially pleaded not guilty to the information pleaded guilty to both charges on the trial date. The Learned Magistrate imposed a fine of Rs 50,000 under count 1 and three years' *imprisonment* and a fine of Rs 30,000 under count 2.

The Appellant originally raised 6 grounds of appeal against count 2. On the day of the hearing, only the following grounds were pressed on and they were dealt with together:

- Because the sentence is manifestly harsh and excessive;
- *Because the learned Magistrate failed to consider mitigating factors namely:*
  - *Genuine remorse expressed by Appellant*
  - *Appellant's family responsibility*
  - *Appellant's young age*
  - *Timely guilty plea*
  - *Quantity of drugs secured.*

- *In the alternative the learned Magistrate was wrong to consider that this is not a fit case to inflict sentence under section 48 of Dangerous Drugs Act.*

It was the contention of counsel for the Appellant that the principle of a custodial sentence itself was not contested but the length of 3 years' imprisonment, in the light of the mitigating circumstances involved (ie timely plea, quantity of drugs secured, its value, only 1 previous conviction and his young age), was found to be excessive. It is the contention of learned Counsel that in determining an appropriate custodial sentence, a good starting point would be to consider what sentence would have been meted out to the appellant had he been found guilty and convicted after a full blown trial on a not guilty plea. He referred to the cases of **M. Toorabally v The State [2010 SCJ 437], A. Mosaheb v The State [2010 SCJ 150] and M. Beelontally v The State [2010 SCJ 193]**.

In reply, Mr Muneesamy, Learned Counsel for the Respondent, argued that having regard to the quantity and nature of the drug secured from the appellant, namely Cannabis Resin which unlike Cannabis is a type of drug classified in the same category as heroin and the penalty for offences relating to Cannabis Resin which is more severe than those involving Cannabis, the sentence inflicted on the appellant was neither harsh nor excessive. He referred to the cases of **Chukoury v The State [2009 SCJ 295]** and **Sunnotah v The State [2008 SCJ 277]**.

The Appellate Court iterated the facts of the present matter which was found in the unsworn statements of the Appellant whereby the latter was found at 7 at night in his van in possession of 54 pieces of aluminum foil each wrapping a piece of dark brown rectangular mass which forensic examination revealed to be 23.3 grams of Cannabis Resin of a street value of Rs 55,000. The evidence adduced before the learned Magistrate also revealed that prior to the search the appellant had sold two pieces of Cannabis Resin to a police officer, subject matter of the first charge, for the sum of Rs 1000. The manner in which the Cannabis Resin was individually wrapped clearly suggests that the appellant had it in his possession ready to be sold to potential buyers. The price at which he was selling the drugs is a clear indication that the appellant has found in drug dealing an easy and lucrative business. Taking all this into consideration coupled with the seriousness of the offence for which the appellant was charged and convicted and the penalty prescribed for such an offence, the Appellate Court was of the view of the sentence of 3 years was fully warranted. The Appellate Court will not unduly interfere with sentences imposed by the trial Courts particularly when they relate to drug offences unless they are patently wrong in principle necessitating our intervention.

Appeal dismissed with costs.

Ramadhin V The State [2011 SCJ 247]
JJ. Matadeen and Balancy
Arson – Mitigating factors - Sentence

The appellant was prosecuted before the Intermediate Court on two counts of arson of a motor vehicle in that on 19 August 2007 and 30 September 2007, whilst he was aged 21, he set fire to an autocycle and a private van respectively. He pleaded guilty to both counts. The learned Magistrate convicted him and on the same day sentenced him to twelve months' imprisonment under each count. The only ground of appeal was that the sentence imposed was manifestly harsh and excessive.

Learned Counsel for the State was of the view that, although a custodial sentence was warranted, the guilty plea of the appellant and his young age and clean record militated in favour of a short, sharp shock rather than a sentence of twelve months' imprisonment. The Appellate Court disagreed with such submission and contended that the Learned Magistrate was alive to all the mitigating factors when imposing sentence. First, the learned Magistrate had exercised her discretion under s151 of the Criminal Procedure Act and imposed a sentence which was not only less than the minimum

sentence as set out in s346(5) of the Criminal Code but also a sentence which was but one third of the minimum sentence. Second, although the appellant was only 21 years old at the time of both offences, the evidence adduced showed clearly that on each occasion the act of the appellant was not a mere prank by a young person who was in the company of other young persons but rather a well premeditated act by the appellant who after having been jilted during the day went out under the cover of darkness with all the necessary paraphernalia to commit arson. Indeed, the circumstances showed that the appellant was a real menace to society. And for these despicable crimes, the sentence of twelve months' imprisonment was richly deserved.

Appeal dismissed with costs.

Jeewootah V The State [2011 SCJ 241]
JJ. Balancy and Teelock
Rights of accused in relation to hearing - Plea

The appellant was prosecuted before the District Court Rempart, under s123 E(1)(a) of part VIIIA of the Road Traffic Act ('RTA'), for the offence of being, when driving a motor vehicle on a road, unfit to drive by reason of being under the influence of an intoxicating drink to such an extent as to be incapable of having proper control of the vehicle. Upon arraignment, the information was read over to him in creole and he pleaded guilty. He was sentenced to pay a fine of Rs 10,000 and his licence was endorsed. He was further disqualified from holding or obtaining a driving licence in respect of all types of motor vehicles for a period of 12 months.

There were 12 grounds of appeal and counsel for the Appellant conceded that only grounds 5, 6 and 11 were well taken. They were as follows:

Ground 5: The Learned Magistrate was wrong in not explaining to Appellant his rights after the case was closed for the prosecution.
Ground 6: The Learned Magistrate was wrong in failing to record the circumstances whereby Appellant allegedly begged for excuse and to record the exact words of Accused.
Ground 11: The Learned Magistrate was wrong in failing to give the Appellant an opportunity to be heard on sentencing after having found "Accused guilty as charged."

The Appellate Court agreed that the record failed to show that the accused was informed of his rights in relation to the hearing following his plea of guilty such that the accused must be taken to have been denied an opportunity to give evidence if he was inclined to do so. The situation is in fact similar to that in **Moholy v State [2010 SCJ 289]** where the appellate Court made the following pronouncement:

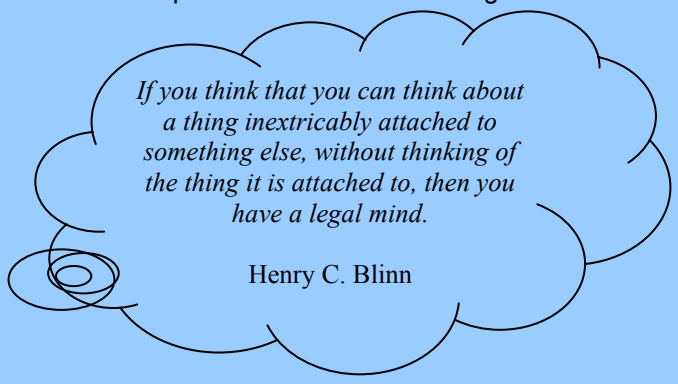
Ground 2 of the grounds of appeal, which is to the effect that the accused was not informed of his rights in relation to the hearing, appears to us to be well-taken as the record simply indicates that, after the close of the case for the prosecution, the accused begged for excuse, and it cannot in the circumstances be presumed that the accused was explained the different options open to him and chose to make a statement from the dock.

Grounds 5 and 11 were therefore well taken. In relation to ground 6, the Appellate Court was not prepared to act on it since it appeared to rest on mere presumptions as to the existence of circumstances, and the utterance of precise words by the accused, which the Magistrate allegedly failed to record.

The Appellate Court also disposed of grounds 3 and 4 which found fault with the learned Magistrate's approach upon the production of two documents (the FSL report and the accused's statement to the police) and the argumentation offered appeared to be essentially based on conjectures.

The outstanding grounds rested on the contention that there was an equivocal plea inasmuch as the accused, in his statement to the police, only admitted that he had consumed alcohol in accordance with the findings of the F.S.L. Such contention was, in the Court's view, far from being well-founded. The following passage from **Sookun v The Queen [1982 MR 230]**, was referred to: "*Magistrates should bear in mind, particularly when dealing with unrepresented persons, that they should not act on a guilty plea if there is any ground for believing that it is not unequivocal. At any time before conviction, an accused party may be allowed to change his plea and, if the Magistrate feels that the interests of justice so require, it is his duty to alter the plea and record one of not guilty*". The case of **Sookun** was distinguished from the present one on the basis that in **Sookun**, the statement of the accused, which contained the sole version placed before the Court following his plea of guilty, contained a complete defence to the charge whereas in the present case the plea of guilty offered by the accused was quite in line with the admission contained in his statement to the police and led to a reasonable inference that he was also prepared to admit that in consequence of his consumption of an undue amount of alcohol he did not have proper control of his vehicle. There was indeed no reason, in the present case, for the Magistrate to view the plea of the accused as an equivocal one.

In light of the earlier conclusion in relation to grounds 5 and 11, the Learned Judges remitted the case to the lower court for a fresh hearing in relation to sentence after a full explanation of the accused rights.



State V Motskau [2011 SCJ 272]
J. Peeroo
Drug importation

Following an amendment of the original information by the prosecution to delete the averment of trafficking in the information, the accused, a German national, pleaded guilty to the charge of having on 8 February 2010 wilfully, unlawfully and knowingly imported into Mauritius 499.3 grams of heroin dissimulated inside his shoes. He was, accordingly, found guilty of the offence of importation of dangerous drugs, in breach of sections 30(1)(b)(ii), 45(1), 47(2) and 47(5)(a) of the Dangerous Drugs Act 41/2000 as amended by Act 30 of 2008.

The prosecution adduced evidence to show the circumstances in which the accused was arrested at the SSR International Airport after he was profiled and suspected on account of his demeanour and his uncertainty as to his place of stay during his visit. A body search was carried out with his consent. The Customs Officer removed two parcels containing powder suspected of being heroin, one from each of the inner soles of his shoes. The accused then admitted that it was drugs given to him by one Mike Nyanga, a Kenyan, to be delivered to somebody who would call on him at the hotel in Mauritius. A control delivery exercise was set up by the police for the accused to deliver simulated drugs to the contact person. The latter made the accused travel by taxi on numerous occasions throughout the island without taking delivery from him. The control delivery exercise was finally called off on 15 February 2010 as the drug dealer in question told the accused that he knew that he had been arrested by the police.

The Learned Judge took into account the plea in mitigation made by Counsel appearing for the accused that the latter has cooperated with the police by participating in a control delivery Exercise and also considered the statement made by the accused from the dock admitting his guilt and praying the Court to show leniency. However, the accused has committed a very serious offence. The amount of drugs imported by the accused is no less than 499.3 grams of heroin with a purity of 54%. Evidence was adduced that its estimated value of approximately Rs 4.9m was calculated on the basis of a normal purity of 4 to 5 % found on the market, but that the value of the heroin secured from the
accused with a purity of 54% would be ten times more on the market.

In view of all the circumstances of this case as highlighted above, the accused has been sentenced to undergo 17 years penal servitude and to pay a fine of Rs 100,000. Half of the period the accused has spent on remand since 8 March 2010 is to be deducted from the custodial sentence imposed.

Nullatamby V DPP and Anor [2011 SCJ 258]
J. Cheong
Bail review

This was an application for review of the decision of the District Magistrate of Port-Louis (Respondent No 2) not to grant bail to the applicant. The latter is provisionally charged with the offence of attempt to possess heroin for the purpose of distribution with a further averment that he is a drug trafficker. The police had objected to the bail on the following grounds that the applicant was likely to: (a) fail to surrender; (b) commit an offence; and (c) interfere with witnesses and tamper with evidence. The Learned Magistrate had considered the evidence on record and the law and authorities on the matter. She concluded that the continued detention of the applicant was highly justifiable and the motion for bail was set aside.

In an application for review, such as the present one, the Supreme Court will be bound by the record of the subordinate Court and will not consider any new evidence (**Rangasamy v The DPP [2005 MR 140])** . Respondent No. 2 found that the police had substantiated all three grounds of objection to applicant's release on bail and, accordingly, refused bail.

Ground 1:

In the present case, if found to be a drug trafficker, the applicant faces a penalty of a fine not exceeding 2 million rupees **together with** penal servitude for a term not exceeding 60 years, with no possibility of remission. This is indeed a very severe penalty. As regards the "nature and strength" of the evidence, according to the police version, ADSU officers carried out a controlled delivery exercise with the help of the mule, following which the applicant was arrested. Furthermore, more than 300 grams of heroin were secured. The case for the prosecution is, therefore, not based on mere suspicion or allegations but on direct and real evidence. Suffice it to say that the prosecution evidence is not by its nature of the unreliable type which would have entailed the presumption of evidence to weigh more heavily in the balance in favour of the applicant's release on bail. The Learned Judge therefore disagreed with the contention of counsel for the applicant that the ruling was based on mere apprehension.

Ground 2:

With regard to ground 2, respondent No. 2 bore in mind that drug trafficking is a lucrative business. Taking into consideration the value of the drugs secured and the nature of the evidence against the applicant, she found that there was a high risk that the applicant be tempted to reoffend, the more so as he has previous convictions for drug offences.

Bearing in mind the factors as enunciated in **Deelchand V DPP and Ors [2005 SCJ 215]**, it cannot be disputed that drug trafficking is indeed a lucrative business. More

than 300 grams of heroin, estimated by the police at a value of Rs 5.8 million, were secured from the Malagasy mule. Respondent No.2, accordingly, rightly found that there was a high risk that the applicant might be tempted to reoffend, the more so that there was no evidence that he was working. As was held in **Korimbaccus v The District Magistrate of Port-Louis and anor [1988 SCJ 476]** , drug offences are a special type of serious offences:-"*One would not expect someone who has killed X for a particular reason to go and kill Y or Z the moment he is released. But if someone is suspected of having procured heroin once to a gang of presumed traffickers, it is reasonable to fear that he will do so again.*" Respondent No.2 had also noted that the applicant has previous convictions for drug offences. Admittedly these previous convictions were for possession of gandia, but they do indicate that the applicant is not at his first encounter with drugs and has seemingly moved on to dealing with "harder" drugs.

Ground 3:

Respondent No.2 found that the police had satisfied her that the release of the applicant would hinder the police in completing its enquiry taking into account the following factors:-

(a) the police enquiry was not over and there were other people at large;
(b) the police was awaiting phone records from telephone operators to know the names of other people involved;
(c) the police was awaiting the outcome of an application before the Supreme Court; and
(d) the present case had international ramifications.

The Learned Judge was of the view that the reasoning of the Magistrate could not be faulted and hence there was no reason to interfere with her decision.

State V Lefranc [2011 SCJ 264]
J. Peeroo
Manslaughter – Seriousness of circumstances

The accused was originally charged with murder. Through his Counsel, he expressed his intention of pleading guilty to Manslaughter, which he did after the prosecution agreed to amend the information to reduce the charge to one of manslaughter. The accused pleaded guilty to having on or about 16 December 2008 criminally and wilfully killed one Marie Geraldine Ermio, born Chellen, and was found guilty as charged, in breach of ss 215 and 223 (3) of the CC.

In his statements to the police the accused related the circumstances in which he committed the crime. He was then 27 years old. He admitted having stabbed the deceased to death at her place of work known as Space Games, in Curepipe. He related that at about 21.30 hrs on the day in question, he went into that place at a time when the deceased was alone, with the intention of stealing money as he had lost his job and was in financial difficulty. He had in his possession a knife which he intended to use if the deceased would show resistance. He pointed the knife at the deceased's face asking for the money. The deceased resisted and the accused started stabbing her. She parried the blows with her hand where she got injured. As he did not want her to denounce him to the police, he killed her by stabbing her several times on her body including the heart and finally at the throat. The accused then stole money from the safe.

In the Learned Judge's view, the circumstances of this case gave an insight of the danger that honest citizens who are toiling peacefully to earn a living may have to face from unscrupulous people like the accused who are prepared to kill for an insignificant gain. No doubt, the Court has a duty to protect society by imposing a penalty that is appropriate in the circumstances and commensurate with the gravity of the crime especially that following a drastic increase in the number of voluntary homicide, the legislator has deemed it necessary to prescribe higher penalties for offenders who indulge in such offences. The present offence carries a maximum penalty of 45 years' penal servitude, pursuant to **Act 6 of 2007** which came into force on 18 June 2007.

Bearing in mind all the circumstances of the present matter, the accused has been sentenced to undergo 30 years' penal servitude from which will be deducted half of the time he has spent on remand since 5 January 2009.

Domun V State [2011 SCJ 227]
JJ. Balgobin and Bhaukaurally
S93 of DICA – Revising powers of Appellate Court – Corroboration

The Appellant was prosecuted before the District Court for having committed the offence of insult in breach of s296(a) of the Criminal Code. The learned Magistrate found the appellant guilty of the offence charged and sentenced her to pay a fine of Rs 2,500 and to pay Rs 100 as costs. The gist of the 8 grounds of appeal was such that the Learned Magistrate has failed to take into account all the evidence on record.

The Learned Magistrate chose to believe that as true the testimony of the complainant in spite of the fact that Counsel attempted through cross-examination to show the bad character of the complainant and the disciplinary actions taken against him. After hearing the submissions of both Counsels, the Learned Judges came to the conclusion that in her appreciation of facts, the Learned Magistrate had insufficiently given consideration to the whole of the evidence before her in her final assessment. The Court pointed out that, in its appellate jurisdiction, it is exercising its revising powers under s96 of the District and Intermediate Court (Criminal Jurisdiction) Act. In the case of **Director of Public Prosecutions v. D. Sabapathee [1996 PRV 29]**, the Judicial

Committee of the Privy Council had the following to say in relation to these powers:

"Their Lordships consider that this section confers a full right of appeal by way of rehearing in the Supreme Court. That court will "revise", i.e. go over again, the "information, depositions and other evidence and conviction -before the Intermediate or District Court" and after such revision may "affirm or reverse, amend or alter" the conviction, order or sentence. The reference to affirming the conviction, rather than dismissing the appeal, shows that the Supreme Court is not concerned merely to decide whether the lower court acted within its powers. If it affirms the conviction after revising the evidence, it makes that verdict its own. This requires that the Supreme Court should itself be satisfied that the prosecution has proved the guilt of the accused beyond reasonable doubt."

There has been a misdirection in her conclusion when she stated that the evidence of the defence witness, the Financial Controller of the Council, did not materially assist the Court in the matter as it shows the complainant's "character after the relevant date". Secondly, the alleged insult was reported on the day following the utterance of the filthy words to the address of the complainant. His explanation for this late report of the case to the police is two-fold: he did not have the opportunity to go to the police station on the same day and he wanted to give his declaration "a tête reposée". The Appellate Court are of the view that the delay in reporting the matter promptly to the police and the reasons given for such delay should have alerted the Magistrate on the credibility of the complainant and the possibility that he may have concocted the words "a tête reposée" as he himself said. Thirdly, the police were told, in the course of the inquiry into this case, that there were other workers present in the store at the time of the alleged incident. Whilst it is true that the enquiring officer said that the appellant did not mention any names, a perusal of the record showed that the police did not seriously look for corroborative evidence to support the testimony of the complainant. Although this is not a case where corroboration is required as a matter of law or as a matter of practice, given the antecedents of the complainant, the admitted bad blood between the complainant and the appellant, the ease with which a charge of this nature may be laid against a person, the Appellate Court would have expected the investigating officer to look for independent evidence, which it appears could have been available, buttressing that of the complainant.

Appeal allowed and conviction quashed.

DPP V Oozeer [2011 SCJ 223]
JJ. Balgobin and Hajee Abdoula
Alibi – Amendment of information – s73 of DICA – Element of 'soustraction

The Respondent was prosecuted before the District Court on an information charging him under count 1 with larceny of 300 lbs of onions worth Rs 2,100, and alternatively under count 2 with unlawful possession of 300 lbs of stolen onion. He pleaded not guilty and was defended by counsel. After having heard evidence, the learned magistrate gave the respondent the benefit of doubt and dismissed both counts against him.

The grounds of appeal were as follows:

(a) The learned magistrate, having found that witness no.3 was "truthful", was wrong to have found that the prosecution had failed to disprove the alibi;
(b) The learned magistrate, having found the larceny to be to the value of Rs200, was wrong to conclude that she could not amend the information in the present case due to uncertainty;
(c) The learned magistrate, having found that witness no.3 was "truthful", was wrong to have found that it "has not been verified whether accused is the owner of a bicycle which he allegedly used";
(d) The learned magistrate was wrong in view of the evidence on record and her finding that the declarant was "truthful" not to have convicted the accused of attempt at larceny.

The declarant gave evidence that on 5 October 2006 at 01.00 hrs he was in a shed in his onion plantation when he saw the Respondent whom he knew by face with a bag and uprooting onions. He pursued the Respondent who took flight leaving the onions behind and then took a bicycle and rode in the direction of his mother's house. When he saw the declarant's nephews, he left the bicycle and ran off. The declarant deposed that he could see the Respondent's face by the street lightings and from the fog lights which were about five feet away. When he subsequently returned to his plantation, he noticed that the bag of onions was no longer there. He could not tell the weight of the onions that had been uprooted on that night but estimated its value at Rs 200 and he estimated the total value of the onions that had been stolen on previous occasions at Rs 2,100.

The Respondent did not adduce evidence. He denied the charge in his statement to the police and stated that at the material time he was at home sleeping and his wife was his witness and further stated that he did not own a bicycle. He, however, admitted that the declarant had identified him as being the person whom he saw in his plantation.

Under Ground 1, the Learned Magistrate had failed to take into consideration that in order to disprove the respondent's alibi, the prosecution had called the declarant, who she found truthful, to give evidence that the

person he saw stealing onions in his plantation on that night was the respondent. In fact, at this juncture, the evidential burden shifted on the respondent to sustain his alibi either by giving evidence or by any other available means for the purpose of rebutting the prosecution evidence of his alleged presence on the locus. The facts in **Ramtohul V The State [2008 SCJ 207]** on which the Learned Magistrate relied can be distinguished from the present one. In that case, it was held on appeal that the trial court was wrong to have found that the alibi had not been made "a live issue" since the accused gave evidence in court on his alibi and also called a witness in support. (Vide **Foollee v The State [2004 SCJ 251]**).

Under ground 2, the Learned Magistrate rightly pointed out the variance between the value of the stolen onions as averred in the information and in evidence but did not address her mind to the basic fact that the value and the weight of the stolen articles were immaterial to the merits of the case as they were merely particulars and did not constitute an element of the offence of larceny. Having found the larceny proved she could have amended the information by virtue of s73 of the District & Intermediate Courts (Criminal Jurisdiction) Act to make it tally with the evidence since such amendment was not of a nature to cause any prejudice to the respondent. (Vide **Banymandhub v The Queen [1998 SCJ 368]**).

Under ground 3, the learned magistrate was in presence of the version of the declarant, whom she believed, that at a certain point the respondent bolted away on a bicycle. It was immaterial, in the circumstances, whether the said bicycle belonged to him or not and there was therefore no requirement for the prosecution to prove ownership thereof.

Under ground 4, the evidence of the declarant was that the respondent had left the onions behind in the plantation whilst he was running away. It was only when he came back to his plantation after the Respondent had left his property that he found that the bag of onions was no longer there. Indeed, at what point in time the "soustraction" of the stolen article takes place will depend on the circumstances of the case (**DPP v Rivière [2008 SCJ 88]** and cases cited therein).

In the present case, the facts that were brought before the learned magistrate could establish that the respondent had already embarked on a "commencemcent d'execution" of the "soustraction" of the onions but which failed in its effect through circumstances independent of his will. The evidence, in fact, showed that the respondent could not complete the act of taking away the onions, which he had already uprooted, outside the declarant's plantation as he bolted away leaving behind the onions when he was spotted and
pursued by the respondent. In this regard, it is apt to quote from Garraud D.P.F tome 6 at note 2382 the following:

'Mais est-il certain que le vol soit consommé alors que l'enlèvement ne l'est pas? Sans doute, le délit est terminé dès que la soustraction est achevée; mais on peut se demander si la chose est complètement sortie de la possession du légitime propriétaire tant que le voleur qui l'a saisie et qui la tient, est dans la maison même où il l'est venu chercher ? Le coupable n'est-il pas en action de vol jusqu'au moment où l'enlèvement de la chose soustraite étant achevé, il n'a plus à défendre, contre le légitime propriétaire, la chose dérobée? C'est à cette période de l'opération seulement que l'exécution se trouvant complète l'agent passé de la tentative à la consommation du délit.'

In the light of the above proposition, it was open to the learned magistrate, given the facts of the case, to find the respondent guilty of attempt to commit larceny pursuant to s127 of the District and Intermediate Courts (Criminal Jurisdiction) Act (**DPP v Riviere [2008 SCJ 88]; Ghurburn & Ors v R [1990 MR 206]**).

Appeal allowed and case remitted to lower court to be heard anew.

Jugdoyal V State [2011 SCJ 225]
JJ. Caunhye and Teelock
Duty of care of driver

The Appellant was prosecuted before the Intermediate Court upon a charge of involuntary homicide by imprudence in breach of s239 (1) of the Criminal Code coupled with ss133 and 52 of the Road Traffic Act. He was found guilty of the offence and fined Rs. 30 000 and was disqualified from obtaining or holding a driving licence for all types of vehicles for three years. His driving licence was also endorsed and cancelled. He appealed against both the judgment and the sentence. The grounds of appeal challenged the inference drawn by the Learned Magistrate that there was any imprudence of the appellant causing the death of Mr Lucile proved during the trial; that the appellant reversed hastily and that the assessment of the appellant's version by the trial court was erroneous.

Learned Counsel for the appellant submitted that the circumstances of the accident could not be determined as there was no evidence except for the version of the appellant and that the act of imprudence of the appellant had not been proved. The evidence before the trial court consisted essentially of the real evidence and the evidence of the appellant. It is not contested that an accident did occur involving the lorry driven by the appellant and that the victim died as a result of the injuries sustained. Counsel for the Appellant submitted that it was wrong for the Learned Magistrate to find that the appellant should have been able to see the deceased in the rear view mirror when he checked his mirrors. The imprudence relied upon by the Learned Magistrate was that the appellant did not look in the rear view mirrors. The approach of the Magistrate in assessing the evidence was not correct. He submitted that the act of imprudence must be proved by the prosecution.

Learned Counsel for the Respondent submitted that the type of vehicle being driven by the appellant and the act of reversing in itself required a greater duty of care. He submitted that in these circumstances one should have a clear sight of the road before reversing and there was a duty upon the driver not to reverse until he had ensured that he could do so safely.

There was an imperative need on the part of the driver to exercise the degree of prudence that was required in view of the following circumstances:

1. He was reversing and not driving forward;
2. His vehicle was armoured and he could not have a clear and unobstructed view of the whole width of the road whilst he was reversing;
3. The appellant was reversing over a distance of 5 metres in a side road 4 metres wide, in a residential area on a Sunday morning in the village of Grand Gaube.

It is abundantly clear that the vehicle does not afford a clear view to the driver while reversing and that a reasonable driver would have to exercise the required degree of care while reversing such a vehicle.

There was no evidence as to where the victim was and what he was doing at the time of impact although it is clear that he was behind the Appellant's lorry at the time it was reversing and it knocked against him. The facts established before the Learned Magistrate clearly show that the appellant failed to exercise the degree of care required from an ordinarily prudent driver whilst reversing his lorry in such circumstances. It was incumbent before reversing the lorry in such a road and at such a time to ascertain that it was safe to do so, namely by ensuring he was not reversing his lorry to cause danger to any pedestrian. It was not enough for the appellant to rely on the view afforded by the rear view mirrors and to ignore blind spots while reversing such a vehicle over a distance of 5 metres in a narrow side road, being used by the pedestrians.

Appeal dismissed with costs.

Oozeer V State [2011 SCJ 218]
JJ. Domah and Angoh
Timely guilty plea – Reduction in sentence – s69B DICA

The Appellant was convicted by the Intermediate Court on the following two charges: possession in the course of trade articles knowing that they are to be used for making infringing copies of a work (count 1) and possession of copies of a sound recording made for commercial purposes without stamp of the society affixed to its label (count 2) in breach of ss44 (1) (c) (d), 3 and 4 of the Copyright Act. He was sentenced to pay a fine of Rs 300,000 under each of the two counts. The only ground of appeal was that the sentence was manifestly harsh and excessive in view of the timely guilty plea and and the clean record.

As the evidence on record, the Appellant had at the first opportunity pleaded guilty to both counts and asked for forgiveness. When sentencing the Appellant, the Learned Magistrate had taken into account the number of exhibits secured which clearly indicated that he was engaged in the business of infringed works and that only a severe fine would be appropriate despite his first encounter with the law.

The Appellate court however noted that the Learned Magistrate had failed to take into account the timely guilty plea. Section 69B of the District and Intermediate Courts (Criminal Jurisdiction) Act which provides that 'The District Court or the Intermediate Court may mitigate the sentence on an accused party who appears before it and makes, in the opinion of the Court, a timely plea of guilty to the offence with which
he stands charged.' However, in this case, she simply overlooked the statutory existence of this discretion which is well established in our case law (***vide* Tyack Louis Joseph Marie Gerard v The State [Privy Council Appeal No. 60 of 2005]**). The Appellant was entitled in the circumstances to an appropriate discount.

The appeal is allowed, the sentence imposed is quashed and substitute thereof a fine of Rs 200,000 under each of the two counts.

Pha V The State [2011 SCJ 214]
CJ Sik Yuen and SPJ Matadeen
Conspiracy – Mitigating circumstances – Timely plea of guilty

The appellant was charged before the Intermediate Court on two counts of conspiracy – one of conspiracy to do an unlawful act and one of conspiracy to do a wrongful act – and was, following his plea of guilty, convicted on both counts. The Learned Magistrate took into account the Appellant's timely plea of guilty, his clean record and also the fact that he was in a gainful employment as well as employing people to work in his printing business. She accordingly sentenced the appellant to pay a fine of Rs 1000 in respect of the first count. However, the learned Magistrate took a serious view of the offence under the other count inasmuch as the appellant had "agreed to tamper with an official document issued by the Government of Mauritius, namely, a National Identity Card" and sentenced him to undergo three months' imprisonment in respect of that count.

The only ground of appeal is that the sentence imposed for count 2 is manifestly harsh and excessive. Counsel for the Appellant was of the opinion that either the imposition of a fine or a conditional discharge or a community service order would have been more appropriate but the Court of Appeal disagreed. The facts of the case showed that the Appellant, who was not the young inexperienced man as portrayed in the appellant's skeleton argument but rather a man of the world who had

successively and for several years been a customs clerk, a police officer, a diving instructor and a businessman, had conspired to make two fake National Identity Cards by using a genuine and fraudulently obtained one with a view to helping a suspect in a criminal case to leave the country. All these circumstances were eminently relevant for sentencing purposes and weighed heavily against the mitigating factors highlighted by learned counsel for the appellant and to which the learned Magistrate was very much alive. A short custodial sentence was accordingly amply justified and richly deserved.

Appeal dismissed with costs.

Pinagapany and Anor V State [2011 SCJ 228]
JJ. Caunhye and Cheong
Keeping brothel - Sentence

Both appeals arose out of the same case which was heard and determined before the District Court of Curepipe and we shall deliver a single judgment which will be filed in each court record. Both appellants were prosecuted on a charge of brothel keeping in breach of section 90(1) of the Criminal Code (Supplementary) Act ("The Act"). They were found guilty and, following their conviction, each was sentenced to pay a fine of Rs 50,000 and to undergo 6 months imprisonment.

At the hearing, only 1 ground was argued on the basis that the sentence was manifestly harsh and excessive and wrong in principle. Counsel for the appellants submitted that the law was amended with effect from 6 December 2008 to provide for an increased penalty in respect of such an offence. The penalty, which can only be applicable to an offence committed after 6 December 2008, is now a fine not exceeding Rs 200,000 together with imprisonment for a term not exceeding 10 years. It was submitted that the offence took place on 20 May 2006 and, according to Counsel, the maximum penalty for any such offence committed on that date would be a fine of Rs 3,000 and a term of imprisonment not exceeding one year. What has been completely overlooked, however, by both Counsel for the appellant and Counsel for the State is the fact that s90(1) of the Act has also been amended in 1998 by Act 14 of 1998 prior to its amendment in 2008. As a result of the amendment brought to s90(1), which came into force on 22 August 1998 and which would be applicable to the Appellants in the present case, both appellants are liable to 'a fine not exceeding Rs 100,000 together with imprisonment for a term not exceeding 5 years' (emphasis added). It was, therefore, perfectly lawful and there is nothing wrong in principle for the learned Magistrate to have imposed a fine of Rs 50,000 and a term of 6 months imprisonment following a conviction for an offence in breach of s90(1) which was committed on 20 May 2006.

Before deciding upon the sentence, the Learned Magistrate took into consideration the circumstances surrounding the commission of the offence by the appellants. The Learned Magistrate had also taken into account the clean record of the Appellants. In view of the fact that both Appellants were making a lucrative business by engaging into such unlawful activity, the sentence imposed was just.

Both appeals dismissed with costs.

Sinnapen V State [2011 SCJ 224]
JJ. Balgobin and Hajee Abdoula
Appeal – Statutory delay – s93 DICA

The Appellant was convicted and sentenced by the Intermediate Court to undergo two years imprisonment on each of the two counts of an information charging him with the offence of swindling under count 1 and of fraudulently using an unsigned document under count 2. The record showed that on 29 June 2007 the very day judgment was handed down, the appellant lodged a written notice of appeal with the clerk of the Intermediate Court stating therein the only ground of appeal that the sentence was manifestly harsh and excessive. On 16 July 2007, additional grounds were lodged and served on the respondent. On 17 July, the appellant prosecuted his appeal and the appeal was accordingly set down on the General Cause List of Criminal Appeals. On 19 July, the respondent gave notice to resist the appeal.

A preliminary objection was raised by the Respondent to the effect that "the appeal cannot be entertained inasmuch as it has not been prosecuted within the statutory delay, as prescribed in s93 of the DICA. It was the contention of Learned Counsel for the Respondent that the appellant had failed
to prosecute his appeal within the delay of 15 days from the date he lodged his appeal containing the two grounds of appeal on sentence, in which case both his initial grounds as well as the additional grounds of appeal are outside the statutory delay.

Learned counsel for the appellant submitted that the fact that the notice of appeal must also contain the grounds works unfairly towards an appellant who has been given a custodial sentence and wishes to exercise his right of appeal on the very day judgment is handed down so that he may be released upon a stay of execution order by the court pursuant to s94 DICA. For this purpose, in practice the notice of appeal is lodged on the day of judgment containing a ground of appeal to comply with section 93 and additional grounds are then filed and the appeal is then prosecuted. The end result is that the appellant cannot avail himself of the 21 days' statutory delay to file the grounds of appeal.

The Appellate Court agreed that practical difficulties may arise in certain cases but there should be compliance with statutory requirements to prosecute an appeal within delay. In the present matter, the appellant lodged his appeal on 29 June, filed additional grounds on 16

July and finally presented his appeal on 17 July which was well after the prescribed delay of 15 days from the date he lodged his appeal. He has therefore failed to comply with s93 of DICA. The Appellate court also pointed out that it is open to legal advisers to apply to the Court for additional grounds of appeal to be put in outside delay and evidently such an application will only be favourably entertained if, inter alia, the proposed additional grounds are of substance and do not constitute an abuse.

Appeal set aside with costs.

State V Lionnet and Anor [2011 SCJ 233]
J. Lam Shang Leen
Attempt at possession – Knowledge – Use of camera for recording of evidence

Both accused were charged together for having, wilfully, unlawfully and knowingly attempted to possess dangerous drugs for the purpose of distribution, to wit: heroin contained in 232.8 grams of light brown powder from one Patience Vuyiswa Makinana, which attempt was manifested by a commencement of execution which has failed in its effect through circumstances independent of the will of the two accused through the intervention of the police. It was also averred that having regard to all the circumstances of the case, the quantity of heroin and its street value which exceeded Rs1m, it could be inferred that the accused were drug traffickers in breach of ss 30(1)(f)(ii), 41(3)(4), 45(1), 47 (2)(5)(a) of the DDA as amended coupled with ss 2(c) and 45 of the Interpretation and General Clauses Act.

The main issue in the present case was whether the said Ms. Makinana had on the 27th February at about 10.15 hrs handed over the handbag with the simulated parcel in it to accused no. 1 who was then in the company of accused no.2 at Villa Rose Hotel. If this is proved then whether (i) the two accused knew that the handbag contained drugs and (ii) the two accused attempted to take possession of the handbag containing drug as coauthors for the purpose of distribution as averred in the information.

After referring to the salient facts of the case, learned counsel for the prosecution submitted that the two accused had been charged jointly as coauthors. He agreed that there was no evidence that accused no. 2 had been in possession of the handbag and that despite that, he could still be found guilty for joint possession. Reference was made to the case of **Benjamin v The Queen [1986 MR 219]** and especially to the passage which reads as follows: *"A number of authorities have been quoted to establish the proposition that short of actual physical 'assistance réciproque' in the act perpetrating and constituting the offence, any other type of help and assistance indirectly to the person actually committing an offence would only constitute an aiding and abetting as an accomplice and not a participation as co-author. We are afraid we cannot subscribe to this proposition. As in the facts of the present case, irrespective of whether there had been prior concertation between the two accused to commit an assault upon the Magistrate and were it even upon the spur of the moment that the two accused decided to help each other in pursuit of what each one realized was the common objective of their individual action and which culminated in the assault perpetrated by only one of them while the other was holding at bay any help which was forthcoming to liberate the victim from the hold of the actual aggressor, it cannot be denied that they both acted in concert for a common purpose and that the participation of the appellant, in the particular circumstances, both in time and manner, on the very spot of the aggression, was of such a degree and assistance as to make him a co-author".* It was argued that if the evidence of the prosecution was to be believed, there was a common objective on the part of the two accused namely to take possession of the handbag albeit that the actual physical perpetration of the act of possession was done by accused no. 1. As regards the issue of distribution, he referred to the case of **The State v Jean Laval Palmyre [2008 SCJ 231]**. Regarding the movement of accused no. 2, it was said that there was no dispute that he left the hotel to come back after a short while. He argued that according to the list of calls in both SIM cards, the swapping of the cards was effected the eve of the offence.

The Learned Judge also considered the legal aspect of the charge raised by the defence. He did not share the reasoning put forward by learned counsel. The accused have been correctly charged with attempt at possession of heroin for what was in the parcel was not drug. The drug which was originally in the handbag had been substituted by the police for the controlled delivery exercise as authorized by law. Hence the accused could never be found guilty of the complete offence even if they had succeeded in leaving the hotel with the parcel. The intention was to retrieve drugs but it was not drugs that were retrieved and that failure was due to the intervention of the police in substituting the drug with another substance.

With regards to the issue of knowledge, the Court referred to **The State v Banda and Ors [2009 SCJ 101]** and which had been applied recently in **James Robert Chelin v The State [2011 SCJ 120]**, where the following was stated that:-

"Knowledge per se is not sufficient on a charge of unlawful possession of drug. There must also be some overt acts to connect the accused to the drug. (vide **Chung Po v Q [1970 SCJ 191] Ginger v R [1973 SCJ 55], Chamroo v Q [1984 MR 15], M. S. Curpenen v The State [2000 SCJ 245], Salarun v Q [1984 SCJ 194], Emambux v R [1988 SCJ 440], Rayapoulle v R [1990 MR 286], Sheriff v The State [1993 SCJ 31], Lam Cham Kee v The State [1994 SCJ 74], J.J.S.F.K.Yow Ok Cheung v The State [1997 MR 117], J.T. Nanak v The State [1998 SCJ 357], State v G. Ariyatrishnan [1998 SCJ 350], State v Diouman**

and Anor [2004 SCJ 77] and Mestry v The State [2007 SCJ 309]). *If on a charge of possession, the prosecution must not only prove that there must be knowledge and overt acts connecting the accused to the drug, on a charge of attempt, those facts must also be established before it failed through circumstances independent of the will of the accused. Those facts must be those linked with the "commencement d'exécution" and passed the stage of "acte préparatoire". They must be acts linked directly with the offence charged and effected with the intention of committing the said offence.* (vide **State v N. Ahmed and 2 Ors [2000 SCJ 107], State v Diouman and Anor (supra), State v Islam Siddick [2007 SCJ 158]**). *The prosecution must therefore prove that the two accused had attempted to take possession of the drug and for the purpose specified in the information namely for distribution."* In **Valaydon v The State [2010 SCJ 283]** reference was made to the case of **Yow Ok Cheung V The State [1997 MR 117]** where it was held that 'Proximity of a person to the place where drug is found may be relevant to the issue of possession. The mere presence of a person at the place of another wherein drug is found will not therefore necessarily be sufficient to prove joint possession.'

After a thorough analysis of the evidence adduced before the Court, the Learned Judge had much doubt as to the version of the prosecution in the light of so many disturbing features, the charge against the two accused was accordingly dismissed.

In The **State v Michel Gugan [2008 SCJ 150]**, reference was made to the use of camera and/or video camera in order to freeze damning evidence against any suspect and which would not only save precious court time but which would certainly have facilitated the prosecution in establishing its case. In the present case as well, the use of a camera and/or a video camera would have put an end to all sorts of speculations and more specially to truncated and contradictory versions. This was what was stated:-

"As a final word, I find it indeed a loss of precious court time to have the witnesses to depose in details as to what had happened at the time of surveillance and which with the passage of time had led to faded recollection, truncated version at times and contradictory versions by the witnesses called, when the surveillance exercise could have been captured so easily by mechanical or electronic means in the present technological age. I still find it incomprehensible why the ADSU at the time of surveillance or during the exchange controlled exercise could not be equipped with cameras or video cameras or if they have those equipment why not make use of them, and which would easily give to the Court the true picture of the turns of events leading to the arrest of the suspect. I would venture to say that no suspect, properly advised, would dare to deny the obvious except in contesting and showing that there had been a falsification of the truth which would be a very high hurdle to stride over. This simple means of gathering evidence would have led to less dispute and less dispute and less challenge regarding the credibility of the officers who at times deposed like a parrot reciting well rehearsed lessons and who when questioned on collateral issues to test their credibility would become less eloquent and lose their poise and assurance."

State V Mpopoya M [2011 SCJ 232]
Ruling
J. Peeroo
Striking out of averment of trafficking

The accused was being prosecuted for having imported 517.1 grams of heroin contained in 54 cylindrical parcels concealed in her body, in breach of ss 30(1)(f)(ii) of the DDA. There was also an averment that having regard to all the circumstances of the case, the accused was a drug trafficker within the meaning of s41 (3) & (4) of DDA.

Counsel for the accused moved that the averment of trafficking in the information be struck out on the ground of abuse of process. This motion was made following the refusal of the Director of Public Prosecutions to accede to the request made by Counsel for the accused to drop the averment of trafficking, as was recently done in the case of **The State v G.I. Strimbu**. She was of the view that there had been no consistency in the policy of the DPP in cases having more or less similar evidence, when exercising his discretion to drop the averment of trafficking, a contention which was contested by counsel for the state.

Counsel for the accused submitted that the Director of Public Prosecutions must exercise his discretion judiciously when deciding to drop the averment of trafficking in an information in order to prevent great disparity in the sentences that are imposed on an accused who benefits from such a discretion and one who does not, especially that there is the deeming provision of section 41 (4) of the Act that the person is a drug trafficker where the street value of the drugs exceeds one million rupees. Counsel referred to the fact that the maximum custodial penalty for importation of heroin is 25 years' penal servitude whereas importation as trafficker carries a maximum penalty of 60 years' penal servitude. She referred to **The State v Maureen Mukuta [2008 SCJ 62]**, **The State v A.E. Erasmus [2008 SCJ 87]**, **The State v Lionel Christian Leon Chambolle [2008 SCJ 156]**, and **State v Chrisella Schuster [2008 SCJ 193]** where the Director of Public Prosecutions amended the information to delete the averment of trafficking.

On the other hand, the prosecution put in an affidavit to resist the motion on the ground that this Court has no power to delete the averment of trafficking in the information as lodged by the Director of Public Prosecutions. It is averred in the affidavit that a decision is taken in each case on the basis of the evidence, and that to delve into the reasons for accepting or refusing a request "would involve opening up instructions and privileged information before the Court". While submitting

that this Court cannot accede to the motion of Counsel for the accused, Counsel for the prosecution made reference to the case of **Mohit v Director of Public Prosecutions of Mauritius [2005 PRV 31]** and conceded that in certain circumstances, there may be judicial review of the prosecutorial decision or discretion, notably, where there is bad faith or dishonesty, where the DPP could be shown to have acted under the direction or control of another person or authority or where the prosecution is in excess of the DPP's constitutional powers. Indeed in that case, at paragraph 20, the Judicial Committee cited the observation made by Lloyd LJ in **R v Panel on Take-overs and Mergers, ex parte Datafin plc [1987] QB 815** that:

"If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review".

The law lords then said the following:

"It is unnecessary to discuss what exceptions there may be to this rule, which now represents the ordinary if not the invariable rule. Thus the Board should approach the present issue on the assumption that the powers conferred on the DPP by section 72(3) of the Constitution are subject to judicial review, whatever the standard of review may be, unless there is some compelling reason to infer that such an assumption is excluded. ..."

At paragraph 21 the Law Lords stated that:

"...It cannot, in the Mauritian context, be accepted that the extreme possibility of removal under s93 of the Constitution provides an adequate safeguard against unlawfulness, impropriety or irrationality. There is here nothing to displace the ordinary assumption that a public officer exercising statutory functions is amenable to judicial review on grounds such as those listed in Matalulu. The Board would respectfully endorse the cited passage from the Supreme Court of Fiji's judgment in that case as an accurate and helpful summary of the law as applicable in Mauritius."

Such a summary is reproduced in paragraph 17 of **Mohit v Director of Public Prosecutions of Mauritius (supra)** which reads as follows:

"[17] The decision of the Supreme Court of Fiji in **Matalulu v DPP**, above, which the Supreme Court chose not to adopt was given by Von Doussa, Keith and French JJ and was made (unlike Maxwell and Keung Siu Wah) with reference to constitutional provisions indistinguishable in substance from those in Mauritius. At pp 735-736 the court said:

'It is not necessary for present purposes to explore exhaustively the circumstances in which the occasions for judicial review of a prosecutorial decision may arise. It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. This approach subsumes concerns about separation of powers. The decisions of the DPP challenged in this case were made under powers conferred by the 1990 Constitution. Springing directly from a written constitution they are not to be treated as a modern formulation of ancient prerogative authority. They must be exercised within constitutional limits. It is not necessary for present purpose to explore those limits in full under either the 1990 or 1997 Constitutions. It may be accepted, however, that a purported exercise of power would be reviewable if it were made:

- *In excess of the DPP's constitutional or statutory grants of power - such as an attempt to institute proceedings in a court established by a disciplinary law.*
- *When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion— if the DPP were to act upon a political instruction the decision could be amenable to review.*
- *In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.*
- *In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.*
- *Where the DPP has fettered his or her discretion by a rigid policy - eg one that precludes prosecution of a specific class of offences.*

There may be other circumstances not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice.'"

Counsel for the prosecution submitted that the situation in the present case was not a judicial review or in a situation where the whole prosecution was being put in issue and there was no allegation of any form of impropriety or bad faith on the part of the prosecuting authority.

The Court was of the view that the present ought to be distinguished from the cases referred to by Learned Counsel for the accused since no evidence had been adduced. In any case, in **The State v Francis Igudo Tukei & Anor [2008 SCJ 74]** where a submission along the same line was made, the Court had this to say:

"In the first place, it is not for this Court to question the decision of the DPP to strike out the element of trafficking in respect of some accused parties and to maintain that averment in respect of other cases despite the fact that on a closer reading of the facts of the case where the element of trafficking had been struck out, the prosecution could have established the element of trafficking in view of the presumption created under s41(4) of the DDA. Be that as it may, the DPP may have his reasons and it is not the duty of the Court to enquire."

In the present matter, since no evidence had been forthcoming to show that there had been an abuse of process, in the light of the decision of **Mohit V DPP**, the motion was set aside.

State V Sheriff [2011 SCJ 236]
J. Balgobin
S55 DDA – Controlled delivery – Complicity - Attempt

The charge against the accused read as follows: 'That on about the 15th March two thousand and six, at Plaine Magnien, in the District of Grand Port, one Farhad Elias Hajee Sheriff, then aged 45 years, Electrician, residing at Morcellement Manick, Le Hochet, Terre Rouge, did willfully, unlawfully and knowingly aid and abet the author of a crime in the means of facilitating the said crime, to wit: he did aid and abet one Siddick Islam to attempt to possess dangerous drugs for the purpose of distribution, to wit:- Heroin (Diacetyl Morphine) contained in 1894.8 grams of light brown powder. Further the Director of Public Prosecutions in and for the Republic of Mauritius informs the Court here, in the name and on behalf of the State, that by acting as aforesaid the said Farhad Elias Hajee Sheriff did become an accomplice in the said crime", in breach of section 38(3) of the Criminal Code.' It also contained an averment of trafficking pursuant to ss 41(4), 45(1) and 47(5)(a) of the DDA. He pleaded not guilty.

Following a thorough analysis of the facts and evidence of the case, the Learned Judge found, first of all, proved beyond reasonable doubt that the parcel found in the aircraft contained heroin as found by Mr. Beeharry. Second, she believed without the slightest hesitation the evidence of the ADSU officers as they related what took place on that night and about their own participation during the operation and about the accused's movements, reaction and active participation to assist Siddick Islam taking possession of the drug.

Learned counsel for the accused submitted, in substance, that the manner in which the ADSU officers proceeded was "in violation" of s55 (1) and (2) of the DDA which deals with controlled delivery. It was his contention that the purpose of s55(1) was to empower the police to supervise the drug consignment until its final destination and to apprehend the recipient of the drug whereas, in the present case, the police already knew the identity of the person who was to be the recipient. With regard to s55(2), he submitted that the evidence shows that the police changed the direction and destination of the drug consignment so as to bring it to the recipient chosen by themselves and in so doing, they ascribed themselves the role of controllers and deliverers which, he considered, was a dangerous practice.

The Learned Judge disagreed with such submission. The identity of the recipient and his involvement could only be ascertained or confirmed or any arrest effected when the drug consignment had reached its destination and the recipient was about or does take possession thereof. In the present case, although the police already had information that the recipient of the drug was going to be Siddick Islam, at that point in time, Islam could only be considered as a strong suspect until the time they had evidence which positively identified him as the recipient. Further, s 55(2) does not prevent an ADSU officer in the course of a controlled delivery exercise to step into the shoes of the deliverer.

Could it be said that the accused's acts and doings as proved by the prosecution were such as to facilitate Islam in obtaining possession of the drug? In this regard, the Court referred to s38(3) of the Criminal Code which provides that "any person who knowingly aids and abets the author of any crime or misdemeanor in the means of ... facilitating … the crime or misdemeanor shall be deemed to be an accomplice." One can further read that complicity punishable by law is constitutive of 4 elements which have been enumerated in **Garçon's Code Penal – Livre II Art. 60** are as follows:

Note 78 : "1o Qu'il existe un fait principal punissable;
2o Que ce fait soit qualifié crime ou délit;
3o Que la coopération du complice se fait manifestée par l'un des moyens spécifiés par la loi;
4o Que cette coopération ait été intentionnelle."

With regard to the effect of an attempt to facilitate the commission of a crime, we read at Note 84:

«Mais une simple tentative constitue un fait principal pouvant servir de base à la complicité: point certain que les arrêts ont toujours admis sans même le discuter. … Il est clair qu'il en serait autrement si la tentative n'était pas punissable.»

In other words, to put these four elements into context, the question was whether the accused intentionally aided and abetted by facilitating the task of Islam (the author) to be in unlawful possession of the drug. Indeed, this can only be determined from the facts and

circumstances of the case and the nature of the assistance the accused is supposed to have given.

In this regard, we also read at **Note 229**: *«Cette forme de complicité est certainement la plus fréquente et pratique: les expressions aide et assistance laissent au juge un large pouvoir d'appréciation. Elles ne permettraient pas pourtant de punir come complice celui qui n'avait pas participé activement et personnellement au délit – (Cass. 14 Mai 1847 (B 102 D Vol 891 et 852).»*

Here, by his acts and doings, the accused has shown beyond reasonable doubt that his intention right from the beginning had been to actively participate and facilitate the taking possession of parcels which he knew contained drug by Islam.

Next, the Learned Judge had no difficulty in finding that in view of the large quantity of drug involved and the professional manner in which the transaction took place, the said Siddick Islam was to take possession of the drugs for the purpose of distribution. In view of the large quantity of drugs secured and its value which exceeds Rs1m and the manner in which the transaction was planned, it is clear that that he was a drug trafficker. The accused was therefore found guilty. He has been sentenced to undergo 30 years' penal servitude from which should be deducted the period he has been on detention.

State V Sidy and Ors [2011 SCJ 237]
J. Balgobin
Sample of drugs for analysis – Knowledge of content - Trafficking

The five accused stood charged with having on 8 December 2007 at Aurélie Perrine Passenger Terminal, Port Area, Harbour, willfully, unlawfully and knowingly imported into Mauritius dangerous drugs, namely cannabis and brown mass. Each count contained an averment that the accused is a drug trafficker having regard to the circumstances of the case, the quantity of drug imported and since the street value exceeds Rs 1m. The accused pleaded not guilty and they were represented.

All the accused denied knowing the presence of drugs in their luggage in their respective statements and evidence in Court. Each of them gave a similar version regarding the circumstances in which they arrived in Mauritius with their luggage which, in substance, is to the effect that Bernadette proposed to them individually to accompany her to Mauritius and to bring items of furniture which she was going to sell.

When deposing in court, each one of the accused had, of her own accord, admitted having registered the suitcase given by Bernadette as well as the items of furniture, no matter how these items had been described, in her own name at Tamatave port, and having personally retrieved both pieces of luggage upon reaching Mauritius, and having taken charge of them up to the Customs hall where they were intercepted. They equally did not dispute the fact that the drugs were found in their luggage in their presence, that these were secured, photographed and sealed. There was also not the slightest evidence to suggest that their luggage had been tampered with whilst they transited in Reunion Island. The Learned Judge, therefore, found that the prosecution had established beyond reasonable doubt that: (i) the exhibits secured had been concealed in their luggage in Madagascar; (ii) they were the very ones brought to the FSL for analysis by the very officer who found them; and (iii) they are the very ones that have been produced in court in respect of each accused. In this regard, it is of no significant importance that the luggage tags on accused no.3's suitcase and furniture did not bear consecutive numbers or that the identifying stickers on the luggage were missing.

Next, the reports of Mr Ramtoolah were challenged on the basis that he had examined only samples picked up from the parcels. The Learned Judge commented that she has had the opportunity to have a look at the parcels of drugs secured and that they all looked similar. Furthermore, Mr Ramtoolah is by profession a scientific officer and he had the opportunity to weigh all the parcels and pick up samples for analysis. The Learned Judge found that he has established the identity of the drugs as per his reports with sufficient certainty and that beyond reasonable doubt his analysis and findings are correct and that all the parcels contained hashish and that the leaf matter was gandia (Vide **Stephen Robert Hill (1993) 96 Cr. App. R**). Therefore it has been proved that the accused had physical knowledge of the drugs and furniture in which the drugs were secured.

The next issue was whether the accused knew of the contents of their luggage. This could only be determined by their conduct in the light of the surrounding circumstances. In this respect, the principles set out in **Warner v Metropolitan Police Commissioner [1969 2 AC 256]** have been followed in a string of cases and are still being followed. Lord Wilberforce's propositions as often quoted are, inter alia, to the effect that the jury, *"… must consider the manner and circumstances in which the substance, or something which contains it, has been received, what knowledge or means of knowledge or guilty knowledge as to the presence of the substance, or as to the nature of what has been received, the accused had at the time of receipt or thereafter up to the moment when he is found with it; his legal relation to the substance or package (including his right of access to it). On such matters as those (not exhaustively stated) they must make the decision whether, in addition to physical control, 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. If he has this intention or knowledge, it is not additionally necessary that he should know the nature of the substance."* (Vide also **The State v Kanojia Pauralall**

[1992 SCJ 381; The State v Shaikh [1998 SCJ 145]; The State v Bissessur [2009 SCJ 278]; The State v Veeren [2010 SCJ 123]). After a thorough analysis of the surrounding circumstances, the Learned Judge was of the view that from the accused' own conduct and surrounding circumstances that they knew or certainly ought to have known from Bernadette's glaringly suspicious démarches that they were carrying drugs in their registered suitcases and furniture into Mauritius.

With regards to the issue of trafficking, the Learned Judge found no difficulty in concluding that the accused were traffickers in view of the street value of the drugs which exceeded by far Rs 1m.

All accused were found guilty as charged and they were sentenced to 34 years' penal servitude from which shall be deducted the period they have spent on remand.

Appadoo V The State [2011 SCJ 229]
JJ. Balancy and Bhaukaurally
Supervisory powers – S96 DICA – Swindling v/s Embezzlement

The Appellant appealed against the judgment of a Learned Magistrate who, after convicting the appellant on a charge of embezzlement, sentenced him to undergo 3 years imprisonment.

The sole ground of appeal contained in the notice of appeal challenges the sentence imposed as being manifestly harsh and excessive. However, at the hearing of this appeal, Counsel for the appellant, after intimating his intention in his skeleton arguments, invited this appellate Court to intervene in the exercise of its supervisory jurisdiction to cure a serious irregularity which, in his contention, had occurred upon a conviction for embezzlement when, again in his contention, the evidence, if it could reveal a case of swindling, was not capable of establishing the charge of embezzlement. He reiterated what he had disclosed in his skeleton arguments, namely that the appellant had unsuccessfully applied to the Supreme Court by way of motion and affidavit for leave to raise this point as an additional ground of appeal outside delay. Counsel for the respondent initially maintained, at the hearing of the appeal, the stand taken in her skeleton arguments that the prayer of the appellant to the Appellate Court to exercise its supervisory jurisdiction to entertain the contention in question amounted to an abuse of process. She, however, conceded that in the circumstances of the present case, where the application was not decided by this Appellate Court but was decided summarily, without the hearing of argument, at mention stage, on the sole ground of excessive delay in making the application, the Appellate Court still retained its supervisory jurisdiction which it could exercise "proprio motu" upon finding by itself that there had been a serious irregularity or upon its attention being drawn to such irregularity. It followed from the refusal of the application at mention stage, which still hold good, that the appellant was debarred from raising the point as a ground of appeal but that he could still invite the appellate Court hearing the appeal to consider the point in the exercise of its supervisory jurisdiction under s96 of DICA. That enactment provides for the specific supervisory jurisdiction by the Supreme Court, in its appellate formation, over subordinate courts in the context of the wider supervisory jurisdiction of the Supreme Court, under s82 of the Constitution, over subordinate courts more generally, that is, even outside the ambit of an appeal. If the appellate Court hearing the appeal considers the prayer as frivolous, notably where the serious irregularity complained of is manifestly a sham, taking into account the circumstances of any previous decision of the Supreme Court that the point was not seriously arguable, the Appellate Court will refuse to entertain the point in the purported exercise of its supervisory jurisdiction. Otherwise, the appellate Bench of the Supreme Court hearing the appeal is not debarred in the exercise of its discretion, from considering the alleged irregularity said to justify its intervention.

The contention of Counsel for the appellant was to the effect that, having regard to the distinction between embezzlement and swindling under the French substantive law, from which our law has been borrowed, the evidence in the present case could only have warranted a prosecution for swindling but could not establish a case of embezzlement. He referred, in this connection, to **Jurisclasseur Pénal, Edition 2004 Vo Abus de Confiance, note 4 entitled "Comparaison avec l'escroquerie" and Encyclopédie Dalloz, Vo Escroquerie, note 15** dealing equally with the difference between swindling and embezzlement. The contention of Counsel for the respondent, on the other hand, was to the effect that the conviction of the appellant was based on the latter's confession which satisfied all the elements of the offence charged. She referred us to the case of **Chaumun v The Queen [1981 MR 12]** where the learned Judges stated that in certain circumstances one set of facts may constitute the offence of swindling as well as that of embezzlement and in such cases the prosecution is fully entitled to decide which of the two charges should be brought against a suspect. In response to the submission of Counsel for the appellant that the evidence adduced in the case could not establish that the money which the accused stood charged of having embezzled had been delivered to him "for a work", she referred, to **Encyclopédie Dalloz, Vo Abus de Confiance, note 69** which points out that all types of work ("travaux") are included in the corresponding expression "pour un travail" in Article 408 of the French Code Pénal. Counsel for the appellant could not enlighten us on the precise meaning of the expression "for a work" in section 333 of our Criminal Code. On the other hand, Counsel for the respondent referred us, as already indicated above, to **note 69 of Vo Abus de Confiance, Encyclopédie Dalloz**, which makes it clear that that the "travaux" in question include all types of works including **"ceux consistant, par exemple, en démarches ou études diverses"**.

In the course of his submissions Counsel for the

appellant pointed out to us that the offence of swindling is distinct from, and viewed as more serious than, the offence of embezzlement. The relevant passage cited by him in that connection is extracted from **note 4 of Jurisclasseur Pénal, Édition 2004, Vo Abus de Confiance** and reads as follows:

"Dans l'abus de confiance la remise est antérieure à la fraude. Dans l'escroquerie, la remise est postérieure à la fraude, elle est causée par elle. La comparaison tourne à nouveau ici à l'avantage de l'auteur d'un abus de confiance. Celui qui profite d'un rapport de confiance est considéré comme moins nocif que celui qui gagne la confiance d'autrui au moyen d'artifices. Aussi l'escroquerie a-t-elle toujours été réprimée plus sévèrement que l'abus de confiance, du moins en ce qui concerne la peine privative de liberté."

Counsel for the appellant relied on this passage to submit that embezzlement and swindling are mutually exclusive offences.

The Learned Judges look at the basic definition of swindling as per **note 34 of Encyclopédie Dalloz, Vo escroquerie**:

34. Le délit d'escroquerie consiste matériellement dans l'obtention de la remise d'une chose appartenant à autrui, au moyen de procédés frauduleux.

The offence of swindling is therefore complete when the remittance has been obtained as a result of the fraudulent means. Counsel for the appellant rightly conceded that the information in the present case disclosed the offence of embezzlement in the very terms of section 333(1) of our Criminal Code creating that offence. He also agreed with the proposition that where all the elements averred in such an information are proved beyond reasonable doubt, a conviction must ensue. But he submitted that the element that the money had been delivered to the accused "for a work" was not established. He was unable to answer the question as to why, having regard to the wide definition of "travaux" as including "demarches" (vide **Encyclopédie Dalloz, Vo Abus de Confiance, note 69** cited by Counsel for the respondent) and the purpose for which the complainant remitted the money to the accused, that averment in the information should not be considered as proved.

Indeed, the general rule, derived from s125 of DICA is that a conviction should ensue upon proof of all the averments made in an information which reproduces the wording of the law creating the offence, a rule applied in **Baba v R [1888 MR 46]**. An exception to that rule exists when the statute is couched in such infelicitous language that a mere repetition of it would be likely to mislead unless clearer language is used in the information. In such a case the information may be held not to disclose the offence in the first place. This exception is exemplified in **Cheekoree v The Queen [1982 MR 124]** but does not apply in the circumstances of the present case where under section 333 of our Criminal Code, the remittance of money etc. "for any work with or without a promise of remuneration with the condition that same be returned or produced or be used or employed for a specific purpose" is the basis of one of the forms of embezzlement. Counsel for the appellant pointed out to us that, whereas in a case of larceny the accused may be convicted of embezzlement and vice-versa by virtue of section 123 of the Criminal Procedure Act, there is no similar provision in our law in respect of the offences of embezzlement and swindling. He contended that this is probably due to the mutually exclusive nature of these two offences.

The Court disagreed with such submission. Whatever may be the reasons which may explain the absence in our law of a similar provision, in respect of the offences of embezzlement and swindling, to that contained in s123 of the Criminal Procedure Act, that cannot justify a conclusion that the offences of embezzlement and swindling are mutually exclusive as such. The same set of facts may reveal the commission of the offence of swindling followed by the commission of embezzlement. As pointed out by the learned Judges (Rault C.J. and Ahmed J.) in **Chaumun v The Queen [1981 MR 12]**:

"In certain instances one set of facts may constitute the offence of swindling as well as that of embezzlement as illustrated in Garçon C.P.A. Art. 405 notes 497, 498 and in such cases the prosecution is fully entitled to decide which of the two charges should be brought against a suspect."

The actual relevant passages from the notes referred to in the above passage are not reproduced in the judgment but we have found them in the **1901-1906 edition of Garçon, Code Pénal Annoté under Article 405, under the sub-heading "Escroquerie au mandat fictif ou par un mandataire réel"**. They read as follows:

497. Les mandataires réels, qui sont investis d'un mandat régulier, peuvent aussi se rendre coupables d'escroquerie. La fraude consiste alors ordinairement à tromper le mandant pour obtenir de lui des remises de fonds, en employant des manoeuvres qui, d'ailleurs, ne varient guère.
498. Lorsque les fonds, ainsi obtenus par le mandataire au moyen de la fraude, lui auront été remis pour en faire un usage ou un emploi déterminé, on se trouvera en présence d'un cumul idéal d'infractions. C'est une escroquerie de se faire remettre des fonds par des manoeuvres frauduleuses; et c'est un abus de confiance de détourner des fonds confiés pour un usage déterminé. Ce fait pourra donc être poursuivi sous ces deux qualifications […]

However whilst the Court agreed with the Learned Judges in **Chaumun** (supra) that the above passages show that the same set of facts may reveal that both the offences of swindling and embezzlement have been committed, and that those offences are not mutually exclusive, we are of the view that the above passages

also apply in the case of "mandataires réels, qui sont investis d'un mandat régulier". In their pronouncement to the effect that the same set of facts may reveal the offence of swindling as well as that of embezzlement, the Learned Judges in **Chaumun** were however only concerned with the propriety of a ruling of the learned Magistrates of the Intermediate Court rejecting the objection taken by the defence to oral evidence sought to be adduced by the defence (at a time when the law contained a prohibition against proving, in a case of embezzlement, a contract exceeding Rs 60 in value by oral evidence). The Court pointed out too, that ex facie the information the two counts contained charges of swindling.

The Appellate Court were of the view that **Chaumun** did not deal with another important question which has arisen in the present case, namely whether there can be a "remise volontaire" which is a fundamental element of the offence of embezzlement, when that "remise" has been obtained by fraud. In our considered view the answer to that question must be in the negative. Under the wording of section 333 of our Criminal Code, the remittance of money etc. "for any work with or without a promise of remuneration with the condition that same be returned or produced or be used or employed for a specific purpose" assimilates such remittance to others effected following other regular consensual agreements listed, namely "lease or hiring (louage), deposit (dépot), agency (mandat), pledge (nantissement)" and "loan for use (prêt à usage)". We read in **Encyclopédie Dalloz, Vo Abus de Confiance, at note 1**:

"Sous la qualification d'abus de confiance, le code pénal punit […] le détournement d'objets confiés en vertu des contrats spécifiés à l'article 408 […]."

This reference to the "contrats" forming the basis of the offence of embezzlement can be found in several of our local judgments throughout the ages, and drafters of information often use, commendably, the terminology "which was delivered to him merely in pursuance of a contract" of agency, or hiring or deposit etc. as may be the case: a very commendable practice, in the Court's view.

In the present matter the evidence failed to reveal a remise in the context of a contract for work as specified in the law but a remise following the employment of fraudulent pretences. Indeed, as not disputed by Counsel on either side, the evidence did reveal an employment of fraudulent pretences as a result of which the remittance of a total sum of money was made. In the case of a mandataire régulier who employs fraudulent means to obtain funds etc., the offences of embezzlement and swindling are both committed because, precisely, the mandat, one of the contracts at the basis of the offence of embezzlement, was regular, not having been obtained by fraud. Where however, as in the present case, the agreement to remit the funds appears to have been the result of the employment of fraudulent pretences, such agreement was in our view tainted with nullity for fraud and could not be relied upon as the basis for an offence of embezzlement.

In the circumstances, the Court concluded that there had been a fundamental irregularity resulting in the improper conviction of the appellant for the offence of embezzlement when the proper charge, as submitted by Counsel for the appellant himself, would have been one of swindling.

The conviction was accordingly quashed and it was at the discretion of the DPP whether an information charging swindling should now be lodged against the appellant. The sole ground of appeal relating to sentence therefore did not call for consideration.

State V Kinoo [2011 SCJ 238]
J. Balgobin
Unlawful possession of heroin - Trafficking

The accused was charged with unlawful possession of heroin contained in 175.7 grams of brown powder enclosed in 45 white cylindrical capsules, all in a white plastic sachet labelled "SANI-TOWEL DISPOSAL BAG" for the purpose of delivery - in breach of s30(1) (f) (ii) of the Dangerous Drugs Act ('DDA'). The information also contained an averment that, having regard to all the circumstances of the case and since the street value of the heroin exceeds Rs 1m, it could reasonably be inferred that the accused is a drug trafficker within the meaning of s41 (3) and (4) of DDA. After hearing all the evidence, the Learned Judge found that the prosecution had proved its case beyond reasonable doubt. In view of the seriousness of the drug offence committed by the accused, he has been sentenced to pay a fine of Rs 500,000 and to undergo 24 years' penal servitude from which shall be deducted the period he had been on detention.

Thought of the Month

Obstacles don't have to stop you. If you run into a wall, don't turn around and give up. Figure out how to climb it, go through it or work around it.

Micheal Jordan

Please see below an Intermediate Court judgment

Police V Dhunnooa & Others
[2011 INT 159]
Her Honour Phoolchund-Bhadain
Sequestration

Accused No 1 ('A1') stood charged with the following three counts:

(a) Count 1: Sequestration of Mr Rajaram Naraya, together with Accused No 2 ('A2');
(b) Count 2: Larceny whilst being more than two in number together with A2 and Accused No 3 ('A3'); and
(c) Count 3: Sequestration of Mrs Rajni Narayya.

He pleaded not guilty to all three counts.

A2 stood charged under the following three counts:

(a) Count 1: Sequestration of Mr Rajaram Narayya;
(b) Count 2: Larceny whilst being more than two in number; and
(c) Count 4: Unlawfully and knowingly letting his place for effecting sequestration.

He pleaded not guilty to all three counts.

A3 stood charged under count 2 of the information for larceny whilst being more than two in number. He pleaded not guilty to the charge.

The enquiring officer, whilst deposing in court, stated that when A1 was cautioned and questioned, his reply was that the sum of money secured from him was an amount remitted to him by Mrs Narayya. He went on to say that A2 had voluntarily produced certain items to the police, namely, a TV set, a DVD player, a mobile phone, a driving licence in the name of Rajaram Narayya and a national identity card in the name of Rajni Narayya, a title deed in the name of witness No 7.

In his cross-examination, it came out that the words used by the complainant Rajaram Narayya were to the effect that he had been 'held and put in a car.' It was the police officers who drew the plan and took photographs who used the work 'sequestration' when putting the charge to the accused.

It also appeared that the version of A1 was that Mr Rajaram Narayya (W6) had taken the sum of Rs 213,000 from him. A1 had even given a declaration to that effect and the police was enquiring into the matter. Their version was that Mr Narayya had entered their car and stayed at their place voluntarily until witness No 7 could make arrangements for the money.

The only evidence adduced by Mrs Narayya was that she did not wish to proceed with the case and that she did not know the whereabouts of her husband. She added in cross-examination that she was having problems because her husband had swindled many people.

In establishing his defence, A1 confirmed that he knew Mr and Mrs Narayya. Mr Narayya had spoken to A1's wife and the sum of Rs 215,000 was requested in order to procure a job to her. He had remitted such sum to Mr Narayya for this purpose. On the material date, he had been to see Mr Narayya with a view to look for his money as the latter had given no sign of life after he had taken the money. When he met Mr Narayya, the latter requested him to take some of his belongings which included the TV set and the DVD player.

A2 confirmed the version of A1 and A3 adduced no evidence.

The Learned Magistrate was of the view that no evidence had been adduced by the prosecution to establish any element of larceny having been committed by more than two in number. In such circumstances, count 2 of the information was therefore dismissed.

With regards to the charges of sequestration and that of knowingly letting premises for sequestration, the Court turned to the versions given by the accused parties, being given that none of the material witnesses in respect of those charges deposed in court. Questions arose as to whether the version of A1 and A2 on the fact that Mr Narayya had 'accompanied them voluntarily' in the van and Mrs Narayya had 'stayed' voluntarily, were to be believed. The Learned Magistrate was of the view that the mere fact that Mrs Narayya had opted to stay in lieu of her husband indicates the coercion that existed on her husband in the first instance and on her subsequently. Had there been no such coercion, both Mr and Mrs Narayya would have been able to go to arrange for the money that they needed to refund to A1.

Whatever be the justification for A1 and A2 to 'keep' Mr and Mrs Narayya with them, those persons had been deprived of their liberty to leave at their convenience. It was true that the word 'sequestration' was put to the accused parties. Nonetheless, by their act of forcing someone to enter their van and be taken to a house and kept until payment was made, this amounted to depriving them of their liberty. Such acts fall within the dictionary definition of 'sequester' which is 'seclude', 'isolate', or 'set apart.' The involvement of A2 in the sequestration of Mr Narayya came out from his own statement.

In light of all the evidence on record, the Learned Magistrate was of the view that the charge against A1 and A2 in respect of count 1 had been proved beyond reasonable doubt. Count 3 and 4 were also proved.

A1 was found guilty under counts 1 and 3.
A2 was found guilty under counts 1 and 4.
Count 2 was dismissed against all three accused parties.