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THE MONTHLY LEGAL UPDATE NEWSLETTER OCTOBER 2013

"To No One Will We Sell

To No One Deny Or Delay Justice"

Chapter 40, Magna Carta 1215

TABLE OF CONTENTS

Inside this issue:

Editorial

Dear Readers,

In this month's issue, Mr Satyajit Boolell SC, DPP, comments on two subjects of interests, namely whether a trial can take place, from its commencement, in the absence of an accused party and secondly, whether there is a need to introduce a Sexual Risk Order in child abuse cases.

In September 2013, the DPP, together with Mr Ram Rammaya, Acting Senior State Counsel, attended the 18th International Association of Prosecutors annual conference and general meeting in Moscow. Mr Boolell SC delivered a speech on *'The Rule of Law and International Cooperation between Prosecutors.'* Various working sessions were held between him and other high ranking officers from overseas jurisdictions on matters of piracy and asset recovery. During his visit, Mr Boolell SC also signed a Memorandum of Understanding with the Office of the Prosecutor General of the Russian Federation with a view to provide cooperation for extradition, mutual legal assistance in criminal matters and to cater for an exchange of information between both offices on legal matters. The Russian office was represented by Mr Yuri Chayka, Prosecutor General of the Russian Federation.

Mr Satyajit Boolell, SC was also the special guest at the launching ceremony of the training session for investigative journalists organized by Transparency Mauritius. This issue also highlights the visit of the DPP in Rodrigues.

On 27th September 2013, the Office of the Director of Public Prosecutions hosted the seminar on *'International Law and Contemporary Trials of Pirates'* organized by the Lancashire Law School at the Rajsoomer Lallah Lecture Hall. An update is given to you at page 9.

Finally, Mr Nitish Bissessur, law research officer, provides an interesting insight of *'La responsabilité du fait des animaux domestiques ratrappée par le droit pénal'*. This issue also includes the usual summary of cases from our Courts.

I wish you a pleasant reading.

Zaynah Essop

State Counsel

Two comments

By: Mr Satyajit Boolell, SC DPP

Can a trial take place in the absence, from its commencement, of an accused party?

This question was addressed by the House of Lords, now UK Supreme Court, in the case of ***Regina v Jones 2002 UKHL 5***. The answer was in the affirmative, subject to the discretion being exercised by the trial court with the utmost care and caution and with close regard to the overall fairness of the proceedings. If the absence of the defendant is attributable to involuntary illness or incapacity it would very rarely, if ever, be right to exercise the discretion in favour of commencing the trial, at any rate unless the defendant is represented and asks that the trial should begin. If the absence of an accused party is attributed to self-induced illness or to a case where he has voluntarily chosen to abscond, the court would be more willing to hold that proceedings should take place in absence of the accused.

The court considered the hypothesis of a multi-defendant trial where on the eve of the commencement of the trial, one defendant absconds. If the court has no discretion to begin the trial against that defendant in his absence, it faces an acute dilemma: either the whole trial must be delayed until the absent defendant is apprehended, an event which may cause real anguish to witnesses and victims; or the trial must be commenced against the defendants who appear and not the defendant who has absconded. This may confer a wholly unjustified advantage on that defendant. The danger is that an accused party can manipulate the criminal justice system.

The European Court of Human Rights has repeatedly made clear that it regards the appearance of a criminal defendant at his trial as a matter of capital importance. But it has never found a breach of Article 6 of the Convention *(equivalent to our Section 10 of the Constitution)* where a defendant, fully informed of a forthcoming trial, has voluntarily chosen not to attend and the trial has continued.

Why not introduce a Sexual Risk Order?

The cases of child sexual abuse show no sign of decreasing. The time may now be right to introduce a Sexual Risk Order similar to a protection order issued in cases of domestic violence. The idea of a Sexual Risk Order is to protect a sexual predator from coming into physical contact with a child or to communicate with the child online. Such an order can only be issued by a Magistrate after he is satisfied that there is sufficient evidence to show the serious risks involved and that children ought to be protected. The Order is issued soon after a police enquiry has started and is extended up to the time judgment against the suspected predator is delivered which can take years. We have often seen that child victims abandon their cases before court because of delay in the criminal justice process. By the time the case reaches court they may have started a new life and do not want to live through the traumatic experience of the abuse once again. In the meantime they need protection.

The 18th IAP Annual Conference and General Meeting

By: Mr Ram Rammaya, Ag. Senior State Counsel

The Office of the Prosecutor General of the Russian Federation hosted this year's International Association of Prosecutor's ('IAP') annual conference. It was held at the Congress Centre, Crown Plaza Hotel in Moscow from the 8th to the 12th September 2013. More than 800 delegates from more than 148 countries attended the conference. The theme of the conference was *" The Prosecutor and the Rule of Law"*

Several renowned speakers including Yuri Chayka, the Prosecutor General of the Russian Federation, James Hamilton, the President of the IAP, Dominic Grieve AG for England and Wales, Bala Reddy, Chief Prosecutor of Singapore, Viktor Pshonka, Prosecutor General of Ukraine, Francois Falletti, Prosecutor General of the Court of Appeal of Paris, among others addressed the audience on various issues relating to the Rule of Law. The DPP, Satyajit Boolell, SC delivered a speech on *"The Rule of Law and International Cooperation Between Prosecutors"*. He also chaired the meeting of the Head of Prosecution services following which two recommendations were submitted to the IAP. The papers and speeches will be made available on the website of the IAP.

The DPP, Satyajit Boolell SC, in his speech on the *"Rule of law and International legal Cooperation between Prosecutors"* highlighted that prosecutors play the crucial role of guardians of the rule of law. In view of the transnational nature of certain serious crimes, international cooperation has become a vital tool in the effective discharge of the duty of prosecutors to end impunity and to uphold the rule of law.

For the DPP, the essence of the role of prosecutors in upholding the rule of law is encapsulated in the UN Guidelines on the Role of Prosecutors of 1990. He emphasised that prosecutors by reason of their place and role in the criminal justice system are in a particularly powerful position to ensure that the aim of producing a trial that is fair, in line with the constitution and international law is achieved. Prosecutors must be able to perform their professional functions without intimidation, hindrance, harassment or undue interference.

The creation of the WTO and the global war on terrorism had both put to test the rule of law. At present, the proliferation of transnational crimes such as investment fraud, money laundering, human trafficking and terrorist financing pose serious challenges to the rule of law causing prosecutors to resort more and more to a concerted international effort to tackle these crimes.

The DPP elaborated on the numerous obstacles both procedural and substantive on the road to an effective international cooperation including the rules protecting sovereignty, rules on extradition, the principles of dual criminality and specialty, legal and jurisdictional problems and linguistic and cultural hurdles. He highlighted the need to overcome these challenges.

For the DPP, the time is right for the international community of prosecutors to look beyond the existing legal framework of agreements, treaties and conventions for international cooperation to take place. He mentioned the instances of successful International Cooperation in the combat of piracy. He also cited the Eurojust and the FATF as successful instances of international cooperation to fight transnational criminality.

The DPP made the interesting suggestion for the creation of a hybrid multilateral regime which incorporates both elements of a "vertical" supranational structure and a horizontal State-centric framework as advocated by the former Attorney General of Singapore, Sundaresh Menon, as a way of facilitating international cooperation on a more permanent and comprehensive scale.

Miss Weh-Chi Chen, the head of the International Division of the Ministry of Justice of Chinese Taipei was designated as Prosecutor of the Year for her contribution in preventing large scale food poisoning in her country, thus succeeding Mr Rashid Ahmine, Senior Assistant DPP, who was the prosecutor of the Year 2012.

Beyond the discussions on Rule of law, the role of the prosecutor and legal cooperation, the conference posed itself once again as an important networking event allowing prosecutors to exchange contacts, share experiences, learn on developments in other jurisdictions and even discuss issues on mutual legal assistance informally. The conference was marked by the franking of stamps on the logo of the IAP by the Russian authorities. At the end of the conference, several recommendations have been voted and approved. They include the update of the IAP Manual on Mutual Legal Assistance and the Office of the DPP, Mauritius will be responsible for coordinating such compilation.

MOU signed between the Office of the DPP and the Prosecutor General's Office of the Russian Federation

By: Mr Ram Rammaya, Ag. Senior State Counsel

On 12th September 2013 the Office of the DPP entered into a memorandum of Understanding with the Office of the Prosecutor General of the Russian federation. The MOU was executed by the DPP, Satyajit Boolell SC and Yuri Chayka, the Prosecutor General of the Russian Federation, in presence of Mrs Indira Sidaya, the Mauritian ambassador in Russia, Alexander Zvyagintsev, the Deputy Prosecutor General of the Russian Federation and Vladimir Zimin, the First Deputy Head of the General Department International Legal Cooperation.

The Memorandum of Understanding provides for cooperation in the areas of extradition and mutual legal assistance in criminal matters, exchange of information on the legal system and legislation of our two countries, law making and law enforcement activities on issues of professional interest and also for joint scientific research, the organization of conferences and workshops on issues relating to the activities of the two prosecutorial agencies.

During the work session preceding the signature of the MOU, both parties acknowledged that many Russian tourists are coming to the island. Investments from Russia into our financial and global business sectors have increased substantially and more and more commercial activities are taking place between our two countries. According to Yuri Chayka, his office is very keen in cooperating with the Office of the DPP in order to strengthen the special relationship between Mauritius and the Russian Federation and to protect the rights of the citizens of our two countries.

The DPP highlighted the willingness of the Mauritian and Russian governments and of the Prime Minister of Mauritius for the MOU to be entered into. The MOU will be an important tool to combat crimes which may have roots in our two countries, money laundering being one example. In this way, the MOU will certainly be useful in regulating the transfer of funds into our global business and financial services sectors.

The meeting ended with an exchange of gifts between the Prosecutor General's Office and the Office of the DPP.

Meeting with the Attorney General of England and Wales in Moscow

The DPP, Satyajit Booolell SC had a work session with the Dominic Grieve QC, the Attorney General for England and Wales and with Mr Patrick Stevens, the Director International of the Crown Prosecution Service on the 10th September 2013 during the IAP 18th Annual Conference in Moscow. At the outset, Mr Grieve observed that many changes are being brought to the Mauritian legal system and expressed the interest of the British prosecution services to cooperate with the Mauritian prosecution authorities.

The DPP highlighted that the fight against piracy was one example of good international cooperation and emphasised that his office has benefitted a lot from the training in the conduct of piracy cases from Michael Mulkerrins and from the CPS. The DPP stated that he was looking forward to the forthcoming lectures of Keir Starmer, the current DPP of England and Wales, on Human Rights in Mauritius this year.

Dominic Grieve expressed his keen interest on finalising placement programs for officers of the Office of the DPP with the CPS. The DPP pointed out that such exposure will be very beneficial to the officers and will enable them to better their skills in the conduct of criminal and jury trials. Among the other issues discussed are mutual legal assistance and cooperation in the field of asset recovery and in relation to the implementation of PACE in Mauritius. The meeting ended with an exchange of gifts and a photographic session.

The DPP also had an important work session with Alun Milford, General Counsel of the UK Serious Fraud Office. Cooperation between our Asset Recovery Unit and the Serious Fraud Office as well as placements of the officers of the Office of the DPP at the Serious Fraud Office were among the main issues discussed.

International conference on "International Law and contemporary Trials of Pirates" organized by Lancashire Law School

By: Bundhun Toshan Rai, Legal Research Officer

The ODPP had the pleasure to host an International Conference set up by the Lancashire Law School at the Rajsoomer Lallah lecture hall 16th floor, Garden tower. The event was held on 27th September 2013.

The guest speakers were Lynne Livesey, Dean of Lancashire Law School, Associate Professor R.P Gunputh, Head of Law, University of Mauritius as well as Associate Professor Helen Codd, Reader in Criminal Law and Justice and Alan Taylor associate lecturer and PhD researcher of Lancashire Law School.

Associate Professor Helen Codd gave a presentation on the following title: *Prosecuting the Lost Boys?: Children, Piracy and Criminal Justice*. She attached special importance to involvement of children and young people in maritime piracy. She also revealed in her presentation that children are neglected as far as prosecutions arises and it is only recently that due attention were given to them by media coverage. The presentation also put emphasis on criminological perspectives suggesting how states and the international community may respond to child pirates in the future.

Charles Brown, Senior State Counsel from the Office of the Attorney General, Republic of Seychelles gave a presentation on *Post-Trial Prisoner Transfers: The Need, the Requirement and the Problems*. The emphasis of his presentation was that prosecuting states, particularly small island states, have limited resources to spend on long term incarceration. There is also the weight of Human rights considerations. The transfer of a person detained by one state, or international coalition, prosecuted by a second state to a third state is fraught with legal, diplomatic and political hurdles. The presentation delivered by him explored some of these obstacles and how successful Seychelles has proven to be in this exercise.

Alan Taylor Associate Lecturer and PhD Researcher, Lancashire Law School delivered a presentation on the *Universal Jurisdiction and the Role of Domestic Legislation in Piracy Trials*. Alan Taylor explains that the principle of Universal Jurisdiction is well established in international law. It allows states to meet their commitments under international treaties to bring those accused of maritime piracy to trial regardless of where the offence took place. Unfortunately the framework of international law governing piracy is complex. He suggests that states should consider their own domestic piracy legislation in order to ensure that trials conducted are effective and can proceed without raising legal issues.

R.P Gunputh presentation's title was: *Pirates of Aden v Government of Eden: Myth or Reality?* The Head of Law of the University of Mauritius brings the discussion on whether Somalia is a "failed state" or whether Somali pirates are a new scourge in the Indian Ocean. A topic indeed debatable but the question remains how far is it a myth or a reality. The importance of this discussion lies in the challenge that will affect the economy of small island such as illegal fishing, violence while those small islands rely on tourism and exploitation of their blue economy for their socio economic developments.

« UNE VENDETTA » où Guy de Maupassant décrit le récit d'un chien qui est dressé pour tuer le tueur de son maître est une fiction mais à l'aube du 21ème siècle, cette fiction est rattrapée par la réalité. Si l'animal n'est pas devenu un sujet de droit à part entière, il n'en est pas moins l'objet d'une importante législation tant au niveau local (Animal Welfare Act 2013,publié mais en attente de promulgation) qu'au niveau international (Dangerous Dog Act 1991,U.K). Le but visé par ces législations se dédouble en deux objectifs: celui de la sûreté des personnes et celui de la protection des animaux.

Force est de constater que même si la responsabilité civile du maître pour le dommage causé par leurs animaux est régie par l'article 1385 du code civil mauricien, il faut prendre en considération certains phénomènes nouveaux telle que la prolifération des animaux domestiques potentiellement dangereux méritant une réponse pénale urgente. Autrement dit, le critère de la gravité étant une « pierre angulaire » pour la détermination de la sanction en droit pénal, la législation locale doit donc s'adapter à la gravité du dommage. Or, même si la loi locale prévoit l'énumération des chiens dangereux (2nd Schedule, Animal Welfare Act 2013), il faut toutefois noter qu'en cas d'attaque, la section 34 de ladite loi prévoit une peine de 6 mois d'emprisonnement. Néanmoins,cette peine paraît inadaptée en cas d'attaque d'un chien dangereux car l'attaque peut s'avèrer mortelle. Plus grave encore serait une personne munie d'une intention criminelle réelle qui utilise son chien dangereux comme «arme de crime » pour subvenir à ses fins (la mort d'autrui). Dans cette hypothèse, il serait difficile de poursuivre sur le terrain de violences aggravées car la difficulté se résume en matières de preuves, les animaux ne pouvant temoigner devant les tribunaux.

Pour une analyse approfondie de cette nouvelle forme de criminalité, il faut considérer les réponses pénales envisageables(I) avant d'énumérer les réponses pénales souhaitables(II).

I. Qualifications pénales envisageables: absence de l'intention criminelle du maître

Les qualifications pénales envisageables comprennent textes à portée preventive(A) et repressive(B).

A) Mesures préventives abondantes

Dans un élan de protection contre des troubles à l'ordre public, la loi nationale *(Section 33 de Animal Welfare Act 2013)* sanctionne le fait pour un propriétaire de ne pas faire museler son chien (considéré comme dangereux selon ladite loi) à une peine de six mois d'emprisonnement et 10 000 roupies d'amende. Puis, il faut toutefois noter que les dispositions de la section 34 de ladite loi peuvent être calquées sur celles de l'article R623-3 du Nouveau Code Pénal français dans la mesure où les deux textes répriment le fait pour un gardien(maître) «*d'exciter ou de ne pas retenir un animal potentiellement dangereux lorsqu'il attaque une personne ou un autre animal même qu'il n'en est resulté aucun dommage*.» Cependant, le texte national est plus répressif que le texte français car l'infraction est punie de 6 mois d'emprisonnement nationalement alors qu'en France il s'agit d'une matière contraventionelle.

B) Mesures répressives restrictives

D'un point de vue purement pénal, les sections 33 et 34 de «Animal Welfare Act 2013» ont doublement un volet préventif et répressif car les peines sont identiques même si la victime a subi un préjudice ou pas. Cumulativement,la jurisprudence mauricienne opte pour une responsabilité civile du propriétaire ou gardien de l'animal en cas de dommage (physique ou moral) subi par la victime (Saufhaus v Martin,1998 SCJ 146).

Cependant d'autres qualifications pénales sont envisageables telle que la mise en danger de la vie d'autrui. A titre d'exemple, l'article 223-1 du Code Pénal Français(1994) incrimine *«le fait d'exposer directement autrui à un risque immédiat de mort ou de blessure de nature à entrainer une incapacité permanente par la violation manifestement délibérée d'une obligation de prudence imposée par la loi ou le règlement sera puni d'un an d'emprisonnement».* En ce sens, le Tribunal Correctionel d'Evry (Novembre 1995), France, a condamné à 8 mois de prison un propriétaire d'un Rottweiler ayant attaqué des lycéens sous le chef de la mise en danger de la personne d'autrui.

II. Qualifications pénales souhaitables : présence de l'intention criminelle du maître

En présence d'une intention criminelle du gardien, il existe une réelle nécessité d'une réponse pénale adaptée (A) dans la mesure où l'animal dangereux est utilisé pour faciliter la commission de l'infraction (B).

A. Nécessité d'une réponse pénale proportionnée

Le dispositif existant s'avère lacunaire face à l'avènement des « chiens dangereux ». En fait, ces chiens dangereux ont de nombreuses caractéristiques morphologiques et comportementales qui les distinguent de leur congénères (agressivité avérée, puissance exceptionnelle à la machoire,..). De surcroit, ces chiens sont devenus une mode, une source de revenus faciles et importants, un moyen d'intimidation voire une « arme par destination » ainsi profitant à l'essor de cette nouvelle forme de criminalité.

B. Animal utilisé comme «arme du crime»

L'utilisation d'un animal pour tuer, blesser ou menacer est-elle assimilée à l'usage d'une arme? *L'article 132-75 al. 4 du Code Pénal français(1994)* introduit par la loi du 22 juillet 1996 dite loi Toubon assimile explicitement l'utilisation d'un chien dangereux à l'usage d'une arme. Ainsi, l'utilisation d'un chien d'attaque pour faciliter l'infraction est néanmoins considérée comme une circonstance aggravante. En ce sens, un jugement du Tribunal Correctionnel de Rouen datant du 24 juin 1997 a condamné 2 personnes qui dévalisaient frauduleusement des badauds avec la circonstance aggravante de l'utilisation d'un berger allemand.

Peut-on dire que le fait d'un homme qui tue un autre homme par l'intermédiaire d'un chien dangereux est assimilé à un meurtre? La loi française répond par l'infirmatif car elle refuse de condamner le 'mauvais maître' sur le terrain ***d'homicide volontaire***, le fait matériel de l'homme faisant défaut. Néanmoins la qualification ***d'homicide involontaire*** reste souhaitable. Ainsi, l'article 221-6-2 du code pénal dispose qu' *« en cas d'homicide involontaire commis par un chien ,le propriétaire du chien est puni de 5 ans d'emprisonnement et 75000euros d'amende.. ».* L'utilisation d'un chien dangereux est une circonstance aggravante qui aggrave la peine à 7 ans d'emprisonnement.

En conclusion, on pourrait dire que l'inclusion d'une telle législation au niveau local serait vivement envisageable comme le véritable malfaiteur n'est pas le chien mais le mauvais maître.

The DPP invited as special guest in the launching of a training session for investigative journalists

By: Ashley Victor, Public Relations Officer

Transparency Mauritius, affiliated with Transparency International, organised a training session for investigative journalists at the Media Trust in Port Louis from the 23rd to 27th September 2013. The Director of Public Prosecutions, Mr Satyajit Boolell, SC, was the special guest of the launching ceremony and he was invited to deliver a speech.

"Freedom of speech is the lifeblood of democracy." The DPP said in his speech that no one could deny the importance of the press in any society. He explained that the role of the press is to support the full expression of the society by being a counter power of the three powers but also to explain to the public the decisions made by these powers.

The Mauritian society has to recognise that the local press, most of the publications and radios, fairly report the facts. "*We must agree that we are well off compared to many other countries in terms of reporting".* However, he added that journalists should be made aware of their responsibilities towards society, their sources of information and the persons in their articles. He urged journalist to think about those who are the subject of their article and how these person feel when the allegations against them are not true.

Talking about the judgment of **Turkington And Others v Times Newspapers**, the DPP quoted Lord Bingham on the freedom of the press. "*The proper functioning of a modern participatory democracy requires that the media be free, active, professional and enquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction."*

Mr Satyajit Boolell, SC, explained that corruption and white-collar crimes have been considerably increasing. He said that: "*We picture criminals as being murderers... But criminals also include those who evade the payment of taxes. This money could have been used to build hospitals for example and save the lives of many people".*

Transparency Mauritius is an independent non-political and non-partisan body corporate incorporated in 1998. Since that period, they have been working to raise awareness about corruption matters across the country.

Official Visit of the DPP to Rodrigues

By: Kevina Mootien Poullay, Ag. Senior State Counsel

In September 2013, The Director of Public Prosecutions, Mr. Satyajit Boolell, SC effected an official visit to Rodrigues. It has been almost two years since the opening of the Sub-Office of the DPP in Rodrigues.

The DPP has seized this opportunity to host a meeting with prosecuting authorities of the island; Participants included members of the Police Prosecutors Office, Probation Services, Consumer Protection Unit, Labour and Industrial Relations Office, Fisheries and Marine Resources Office, Occupational Safety and Health Office, Commission for Public Infrastructure, Police Family Protection Unit, Brigade pour La Protection des Mineurs, Commission for Agriculture, Veterinary Department, Rodrigues Prison Authorities, Public Health and Food Safety Office, Tourism Enforcement Office, National Transport Authority, Environment Protection Office and the various Commissions involved in Law Enforcement.

Rodrigues is unfortunately not spared from contemporary social problems and the need to offer Rodrigues with professional and efficient prosecutorial services remains a priority for the Office of the DPP. The DPP has expressed his satisfaction at the pace matters are being disposed of in Court since the Opening of our Sub-Office and the presence of Law Officers in the Island on a quasi-permanent basis.

In this respect, the need and importance for training of investigators and prosecutors of the different law enforcement agencies have been emphasized and the DPP has undertaken to provide training to all those involved in the criminal prosecution process.

Further, the DPP met with students of form 1 to form 3 of Terre Rouge College, Rodrigues College and Grande Montagne College; the children were explained the process of investigation and prosecution in cases where children are victims are sexual assaults and the various methods adopted by authorities and the Court to ascertain that children are not further victimised in the process. Copies of *"Tanya so zistwar"* were distributed in the three schools.

GOKOOL v THE STATE [2013 SCJ 380]

By Hon. Y. K. J. Yeung Sik Yuen, Chief Justice; Hon. R. Mungly-Gulbul, Judge & Hon.P. Fekna, Judge

Appeal – manifestly harsh and excessive sentence

The appellant was prosecuted on the charge of importation of heroin. He pleaded not guilty to the charge and was represented by counsel. He was accordingly sentenced to undergo 25 years' penal servitude with the period of 688 days which he had spent on remand to be deducted from the sentence.

There were initially three grounds of appeal but the first two grounds were dropped and only the third one was taken into consideration which was that the sentence meted out was manifestly harsh and excessive.

All the authorities submitted by learned counsel for the appellant did not indicate how it could be persuasively argued that the sentence of 25 years' penal servitude for importation of the amount of drugs involved as a trafficker, albeit as a courier, on a plea of not guilty could be considered as being manifestly harsh and excessive and wrong in principle. In the light of the jurisprudence of the Court, The judges found no reason to interfere with the sentence passed on the ground invoked. The appeal was accordingly dismissed.

HOSSEN F M v STATE [2013 SCJ 367]

By Hon. S. Bhaukaurally, Judge & Hon. J. Benjamin. G. MARIE JOSEPH, Judge

Appeal – manifestly harsh and excessive sentence

The appellant was prosecuted on two counts of an information charging him with drug dealing offences, namely, (1) selling of cannabis and (2) possession of cannabis for the purpose of selling. He was convicted and sentenced to undergo three years penal servitude in respect of each count and to pay Rs 500 as costs.

The appellant made an appeal against the sentence under both counts on the ground that it was manifestly harsh and excessive in the circumstances of the case.

The Judges, therefore, observed that the principle alluded to by the lower court that "each case depends on its own facts and the sentence must be proportionate to the facts of the case" has been properly applied in the present case. As a matter of fact, there was nothing in particular in the circumstances of the present case calling for lesser severity than shown, which the learned Magistrate overlooked or failed to give proper consideration.

The appeal was dismissed. With costs.

MOHIT R v THE STATE [2013 SCJ 383]

By Hon. S. Peeroo, Judge & N. Matadeen, Judge

Appeal– issuing cheques without provision

This appeal is against a judgment of the District Court of Port Louis (North) finding the appellant guilty of issuing cheques without provision under three counts of the information, in breach of section 330B (1) of the Criminal Code. Two of the three cheques were in the sum of Rs 50,000 and one in the sum of Rs 30,000. The appellant pleaded not guilty and was represented by Counsel.

One of the four grounds of appeal was as follows:

Because the Learned Magistrate erred when she failed to take into consideration the testimony of a Witness when he stated that a cheque would not be valid if it were presented for payment undated and without a name thereby confirming that in law the documents were not cheques which had been issued for consideration.

A point was made, by Counsel for the appellant to the effect that that the documents relied on by the prosecution as being cheques did not satisfy the requirements of the Bills of Exchange Act and were therefore not cheques

Counsel for the State, submitted that when deciding what is a cheque for the purpose of an offence under section 330B of the Criminal Code the provisions of the then Bills of Exchange Ordinance (Cap. 393) had to be taken into consideration; and that since each of those cheques was, by agreement of the drawer and receiver, made payable at a date later than its date of issue, they were not cheques under that Ordinance. The Court rejected the proposition.

The other grounds of appeal having failed, the appeal was dismissed, with costs.

RICHARD J. M. F v STATE [2013 SCJ 372]

By Hon.S.B. Domah & R. Mungly-Gulbul, Judge

Appeal– Incoherence and inconsistencies in proceedings

The appellant was prosecuted before the District Court of Port Louis for assault in breach of section 230(1) of the Criminal Code Act. He had pleaded Not Guilty and was represented by counsel. After hearing the prosecution as well as the defence evidence, the learned magistrate found the appellant guilty as charged and sentenced him to pay a fine of Rs1,000 with Rs100 costs.

The appellant appealed against the conviction one of the grounds being:

Because the record shows incoherence and inconsistencies and should the proceedings have been properly recorded, the Learned Magistrate should have reached the conclusion that the said witness no. 2 was neither truthful nor credible.

The Court had an opportunity to assess the demeanour of the Accused; and records shows that was bad blood between the two parties. Those matters were enough to satisfy the Court that the prosecution had proved the case beyond reasonable doubt.

The Court also asked the following question: Are our courts' duty to ensure law as well as order scared of the public? If a prosecution witness comes to testify in court that they are, the least the prosecution needs to do, is to adduce evidence on the issue

The court found that the Prosecution was under a duty to clear many doubts which were reasonable in the circumstances of the case before a Court could be satisfied that the case was proved beyond reasonable doubt.

The appeal was allowed and conviction and sentence imposed quashed.

STATE v VEERANAH Y [2013 SCJ 384]

By Hon. J. Benjamin G. MARIE JOSEPH, Judge

Sentencing- Wounds and Blows

The accused has been found guilty of the offence of wounds and blows without intention to kill in breach of **section 228 (3) of the Criminal Code.** The offence was committed on of his wife. The evidence on record reveals that the cause of death was compression of the neck, which the accused inflicted by sitting on deceased neck and pressing on it. At the time of the incident the accused and the deceased were engaged in a heated argument about his conduct.

The Court sentenced the accused to undergo 8 years penal servitude, from which shall be deducted the 48 days spent on remand, and to pay Rs 1,000 as costs.

JHOOTOO M.E v STATE [2013 SCJ 373]

By Hon. S.B. Domah, Judge & Hon. R. Mungly-Gulbul, Judge

Appeal—Drug trafficking

The appellant stood charged before the criminal division of the Intermediate Court under 3 counts of information for offences under the Dangerous Drugs Act. Count 1 was for a drug dealing offence in that he was in possession of 50 packets of cannabis for the purposes of distribution, in breach of section 30(1)(f)(i), 41(1)(i)(2), 45(1), 47(5)(a) and 48 of the Dangerous Drugs Act 41 of 2000 as amended by Act 29 of 2003 ("the Act"); and, under counts 2 and 3 for giving false statements in relation to the drug dealing offence, in breach of sections 42(1)(a)(4) of the Act.

The argument of learned counsel for the appellant has been that the learned magistrate used a stereotype language when he stated that the prosecution has proved the case beyond reasonable doubt.

The argument of learned counsel for the respondent is that it was all a question of the sovereign appreciation of evidence of the trial court and an appellate jurisdiction would be ill-placed to disturb its findings of fact unless they were shown to be erroneous, constituted a manifest miscarriage of justice, or inferentially illogical. A number of cases were cited.

Conviction under counts 2 & 3 were quashed but conviction under count1 maintained.

Thought of the Month

'A fool thinks himself to be wise, but a wise man knows himself to be a fool'

William Shakespeare

Team Building Activities of Support Staff
28th September 2013 – Crystals Beach Resort and Spa