
CRIMINAL JUSTICE REVIEW

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Commentary on the Criminal Procedure Act

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Editorial Note

The period under review has seen judgment handed down in one of the most closely followed murder trials in legal history. The trial of Oscar Pistorius dominated the consciousness of South African—and many foreign—readers and television viewers in a manner and to a degree that is without precedent. The accused was convicted of culpable homicide, a decision that has not met with unanimous approval among legal commentators. The first feature article in this edition of the *Review* contains a close critical analysis of one aspect of the judgment: the decision by Masipa J that the state had not proved the requisite element of *dolus eventualis* that would have been necessary to sustain a conviction for murder.

The second feature article deals with rhino-related crimes and the question is asked: to what extent is deterrence—both individual and general—allowed to dictate the severity of a sentence in crimes that provoke strong public outrage. The article cautions that moderation is important, and that unscientific claims to deterrence must be viewed with suspicion.

The cases under review raise important and interesting questions: the Western Cape High Court held that s 77(6)(a)(i) and (ii) of the Criminal Procedure Act were, as they stood, unconstitutional; the Supreme Court of Appeal considered the meaning of ‘premeditated murder’ for the purpose of Part 1 of Schedule 2 to the Criminal Law Amendment Act 105 of 1997; and the same court explained the duty of a

sentencing court to ensure that the cumulative effect of sentences imposed does not result in excessive punishment. The Supreme Court of Appeal considered, too, the duties of a prosecutor where he or she adduces evidence of a confession which is likely to be ruled inadmissible; the scope of a judicial officer’s duties to inform and explain properly to an unrepresented accused his rights to legal representation and to cross-examine witnesses; and the circumstances in which a prosecutor (as opposed to a judicial officer) should recuse himself or herself on grounds of an apprehension of bias.

The Constitutional Court considered the extent of the duty of the South African Police Service to investigate crimes against humanity committed beyond South Africa’s borders, and, in a particularly interesting case, the Western Cape High Court examined the role played by legal professional privilege in protecting privileged communications obtained when an attorney’s offices are searched under warrant.

On a personal and very sad note, Professor van der Merwe and I would like to pay tribute to the late Aneesa Latief who passed away earlier this year. Aneesa was a valuable member of the team that produces this *Review*, and her excellent typing, admirable helpfulness and generosity of spirit will be greatly missed. We are grateful for her many kindnesses, and extend our heartfelt sympathies to her family and friends at Juba.

Andrew Paizes

(A) FEATURE ARTICLES

The trial of Oscar Pistorius—*dolus eventualis* once again

Few, if any, murder trials have gripped the global imagination with anything like the force of the trial of Oscar Pistorius, a disabled Olympic athlete with an enormous international following. The decision in *S v Pistorius* (unreported, GP case no CC 113/2013, 11 September 2014) has, as a result, elicited a level of interest that is without precedent in the history of our system of criminal justice.

The facts of the case are so well known that I will be very brief in setting them out: the accused was charged with, inter alia, the murder of his celebrity girlfriend, whom he had shot and killed by firing four shots, three of which struck the deceased, with a firearm through the door of the toilet into which she had locked herself.

The accused denied that he had killed the deceased intentionally. The ‘essence of the explanation of plea as well as the evidence of the accused was’, said the court, ‘that when he armed himself with his firearm and fired through the toilet door he was acting in the mistaken belief that the deceased, who was then unknown to him in the toilet, was an intruder who posed a threat to his life and to that of the deceased’. He ‘believed that the intruder or intruders had come in through an open bathroom window’ which was not protected by burglar bars, as he ‘had earlier heard the window slide open’, and was ‘unaware that the deceased had left the bedroom to go to the toilet’.

On a closer examination of the accused’s evidence and the nature of the defence raised on his behalf, however, Masipa J came to the conclusion that the court was faced with ‘a plethora of defences’ (at p 3311). These included temporary non-pathological criminal incapacity and involuntary conduct. But since the court correctly rejected the other defences, I will restrict my discussion to the one on which the court’s focus fell—that of putative private defence. In short, said Masipa J, the ‘essence of the accused’s defence [was] that he had no intention to shoot at anyone but if it was found that there was such an intention then he shot at what he . . . “perceived as an intruder coming out to attack [him]”’.

Masipa J found that the accused was ‘not candid with the court when he said that he had no intention to shoot at anyone’. She found the accused to have been a ‘very poor’ and ‘evasive’ witness, who argued with the prosecutor instead of answering questions and blamed his legal team when contradictions were pointed out to him. She found that he ‘clearly wanted

to use the firearm and the only way he could have used it was to shoot at the perceived danger’.

The intention to shoot did not, however, said the court, necessarily include the intention to kill. There was, thus, ‘only one essential point of dispute’: did the accused ‘have the intention to kill the deceased when he pulled the trigger?’ (at p 3317).

The court turned to the facts in order to determine whether the state had discharged the onus of proving intent to kill, whether in the form of *dolus directus* or *dolus eventualis*. Masipa J found that *dolus directus* had not been proved, but seemed to equate that notion with ‘premeditated murder’. That these two are not the same may be shown by example: if A shoots and kills B on the spur of the moment in a violent rage, he has *dolus directus* if it was his aim or object to kill B, even if that act was not, in any meaningful sense, ‘premeditated’. The court accepted that the accused’s version was that ‘he genuinely, though erroneously believed that his life and that of the deceased was in danger’ and concluded that there was ‘nothing in the evidence to suggest that this belief was not honestly entertained’.

The court turned, next, to *dolus eventualis*. In this regard Masipa J had this to say (at p 3327):

The question is:

- (1) Did the accused subjectively foresee that it could be the deceased behind the toilet door and
- (2) Notwithstanding the foresight did he then fire the shots, thereby reconciling himself to the possibility that it could be the deceased in the toilet.

She answered these questions by maintaining that the evidence did ‘not support the state’s contention that this could be a case of *dolus eventualis*’. ‘On the contrary’, she continued, ‘the evidence show[ed] that from the outset the accused believed that, at the time he fired the shots into the toilet door, the deceased was in the bedroom while the intruders were in the toilet’. She went on (at p 3328): ‘How could the accused reasonably have foreseen that the shots he fired would kill the deceased? Clearly he did not foresee this as a possibility that he would kill the person behind the door, let alone the deceased, as he thought she was in the bedroom at the time.’ It followed, in her view, ‘that the accused’s erroneous belief that his life was in danger exclude[d] *dolus*’, so that he could not be found ‘guilty of murder *dolus eventualis*’.

It is respectfully submitted that the court's reasoning was flawed in a number of important respects.

- (1) The test for *dolus eventualis* is not whether the accused could reasonably have foreseen the possibility in question, but whether he did actually foresee it. This error did not, however, signify, since the correct test was, in fact, applied.
- (2) It is not necessary for the state to prove that he foresaw the death of the actual victim. As Masipa J herself observed earlier in her judgment, error in persona will not avail an accused, so that if A intentionally kills B in the belief that the person he is killing is, in fact, C, he will still be liable for the murder of B. Thus, in her own words (at p 3325), the 'fact that the person behind the door turned out to be the deceased and not an intruder, is irrelevant', since the 'blow was meant for the person behind the toilet door, who the accused believed was an intruder', and the blow did, in fact, strike and kill the 'person behind the door'. The principle that error in persona does not negate fault applies irrespective of whether the fault in question is *dolus directus* or *dolus eventualis*, and should have been invoked in the latter context as well.
- (3) The crucial question, given the accused's defence of putative self-defence, is not simply whether the accused foresaw the possibility that his conduct might cause the death of the 'person behind the door', whoever that person was, but whether he foresaw that it might cause his or her death *unlawfully*. It is trite that *dolus* has to apply to every element of the *actus reus*, including the element of unlawfulness, and since putative self-defence rests on the assertion that the accused genuinely believed that he was acting within the borders of lawful self-defence, it is necessary, in such cases, for the state to prove, beyond a reasonable doubt, that he intended to kill *unlawfully*. In the case of *dolus eventualis*, this means that the state in this case had to prove that the accused foresaw the possibility that, in firing four shots through the toilet door, the 'person behind the door' might *unlawfully* be killed.
- (4) If we accept, as the court did, that the accused believed that the person in the toilet was an intruder, does this mean that we are necessarily precluded from finding, too, that the accused did foresee the possibility that, in firing the four

shots, he might unlawfully bring about the death of another human being? The answer, I submit, is no. You may, with some confidence, believe that your team will win a rugby match and yet, at the same time, foresee the real possibility that it may not. Believing something does not necessarily stop you from foreseeing the opposite of what you believe. Beliefs, in other words, are seldom absolute. They are often accompanied by doubts, big or small. So it was clearly possible, as a matter of logic, for the accused to believe that he was entitled, in law, to use the force he did because there was an intruder behind the door and yet, at the same time, to foresee the possibility that he was not, for one or other reason, entitled to do so. The accused in this case knew (and, indeed, could know) nothing about the identity or purpose of the imagined intruder. He may well, as the accused claimed to have feared, have been an armed and dangerous person, intent on causing death or serious bodily harm to the occupants of the house. But he may, just as easily, have been someone who would not pose an imminent threat to life or limb, such as an unarmed burglar, a frightened child, an armed intruder more concerned (if confronted) with escape than attack, or a housebreaker whose sole *modus operandi* was stealth rather than violence.

It is, of course, open to an accused in such a position to claim that his 'belief' did not go beyond imagining the first kind of intruder. But, given that he could not have had *any* information at all about the identity or qualities of the intruder, could a court accept that he did not at least foresee the possibility that he or she was of the second kind? I submit not. Even foresight of a slight possibility, a possibility 'however remote', has been held by the Appellate Division to suffice for *dolus eventualis* (see, for instance, *S v De Bruyn* 1968 (4) SA 498 (A), *S v Shaik* 1983 (4) SA 57 (A), *S v Ngubane* 1985 (3) SA 677 (A) and *S v Sethoga* 1990 (1) SA 270 (A)). The better view, however, is expressed in cases that insist on foresight of a real or a reasonable possibility (see, for instance, *S v Beukes* 1988 (1) SA 511 (A) at [126] and *S v Van Wyk* 1992 (1) SACR 147 (NmS); see, too, RC Whiting (1988) SACJ 440 and AP Paizes (1988) 105 SALJ 636). Even on the stricter test, it would be difficult to imagine

that he did not foresee the real possibility that the ‘intruder’ behind the door was not presenting an imminent threat to life or limb, particularly in view of the fact that he had the only exit from the toilet (other than the window) covered by the pointed firearm.

- (5) It is true that Masipa J made a finding of fact that the accused ‘[c]learly . . . did not foresee . . . as a possibility that he would kill the person behind the door, let alone the deceased’ (at p 3328). It is submitted, nevertheless, that it must be remembered that the learned judge directed her attention almost exclusively to the question she had asked *prior* to this, the question she clearly considered as being pivotal to her judgment on the issue of *dolus eventualis*: ‘Did the accused subjectively foresee that it could be the deceased behind the toilet door?’ This question, it has already been submitted, was the wrong question since, as Masipa J had herself earlier recognised, error in persona cannot save an accused in these circumstances. The broader question, whether he foresaw that he might kill the ‘person behind the door’ whoever he or she may have been, was not considered at any length at all apart from this terse remark, since she obviously considered it unnecessary to explore that question in view of her finding that the accused did not foresee that he might kill his girlfriend who was, he believed, in the bedroom at the time.

Had the court addressed the broader question at any length, it is submitted that it would almost certainly have come to a different answer. It is very difficult to resist drawing an inference that the accused, by firing four shots with a very powerful firearm into the small toilet which he knew to be occupied by someone, must have foreseen, and therefore did foresee, that the occupant might be fatally injured by one or more of these shots.

- (6) Because Masipa J held that the first part of the test for *dolus eventualis* had not been satisfied, she did not go on to consider the second. If, as I have argued, she was wrong in respect of the first element, it would be necessary to consider the second. The second part of the test, which contains the so-called ‘volitional’ element, requires that the accused ‘consents’ to the consequences foreseen as a possibility, ‘reconciles’ himself to it’, or ‘takes it into the bargain’. Much has been said about this element in recent

cases such as *S v Humphreys* 2013 (2) SACR 1 (SCA) (discussed in *CJR* 1 of 2013), *S v Tonkin* 2014 (1) SACR 583 (SCA) and *S v Ndlanzi* 2014 (2) SACR 256 (SCA) (both discussed in 2014 (1) *CJR*). These cases have been criticised by me (in the *CJR* articles cited) and others as seeking unjustifiably to add ballast to what is a tautologous inquiry. My argument is, in short, that an accused who goes ahead with an act that he foresees might bring about an unlawful consequence, must necessarily have taken the risk of causing that consequence into the bargain. He must have reconciled himself to that risk, or consented to it. But the Supreme Court of Appeal has spoken and has decided otherwise. As a result, it is easy to imagine how these cases could be used by the defence in cases such as *Pistorius*. One argument might be that the accused in that case did not take into the bargain that his girlfriend would be killed since she was, he believed, in the bedroom. Another might be that it was clearly not ‘immaterial’ to him whether she was killed or not, given his outpouring of grief and distress once he had discovered what he had done. Such arguments could not, however, succeed if the second leg of the test is properly articulated. The only question is whether the accused reconciled himself to the possibility *actually* foreseen by him—that of unlawfully killing the *person behind the door*, not his girlfriend. And, by going ahead with the shooting in spite of an appreciation of that very risk, he must, necessarily, have done so.

- (7) After finding that *dolus* had not been established by the state, Masipa J turned to consider whether negligence (or culpa) had been proved. She found that it had, and convicted the accused of culpable homicide. The first element of the test for culpa in the circumstances of the case required and received from the court an affirmative answer to *this* question (at p 3334): ‘Would a reasonable person in the same circumstances as the accused, have foreseen the reasonable possibility that, if he fired four shots at the door of the toilet, whoever was behind the door might be struck by a bullet and die as a result?’

Two things stand out about the court’s approach. First, the court changed its focus from whether the death of the actual deceased (the accused’s girlfriend) was foreseen (in the

inquiry into *dolus eventualis*) to whether the death of ‘whoever was behind the door’ was reasonably foreseeable (in the culpa inquiry). Had the latter approach (which, it is submitted, is the correct one) been applied, too (with the necessary adaptation), to *dolus eventualis*, the result might well have been different in respect of that inquiry.

Second, given that the accused’s defence was one of putative self-defence, which negates fault in respect of unlawfulness, the court *should* have asked whether a reasonable person in the accused’s posi-

tion would have foreseen the reasonable possibility that whoever was behind the door, not only might be killed as a result of the conduct, but might be killed *unlawfully*. This inquiry would require a court to consider whether a reasonable person in the position of the accused would have foreseen that the ‘person behind the door’ might have been someone other than one presenting an imminent threat to the accused’s life. This question, too, would probably have received an affirmative answer. It was, however, not asked.

Andrew Paizes

Rhino-related crimes, sentencing and deterrence

The appellant in *S v Lemtongthai* 2014 (1) SACR 495 (GJ) and *Lemthongthai v S* [2014] ZASCA 131 (unreported, SCA case no 849/2013, 25 September 2014) was a Thai national. Should he eventually return to Thailand, he would have a strange but true story to tell, namely that in South Africa a trial court had sentenced him to an effective 40 years’ imprisonment for rhino-related crimes, which was reduced to an effective 30 years’ imprisonment on appeal to the South Gauteng High Court and which was, in turn, on appeal to the Supreme Court of Appeal, reduced to 13 years’ imprisonment plus a further 5 years or one million rands. One can forgive an ignorant cynic if he were to suggest that the appellant’s success in getting his sentences reduced really calls for one more appeal, if only to see whether detention until the rising of the court, as provided for in s 284 of the Criminal Procedure Act, would perhaps be the final sentence.

The regional court had convicted the appellant on 26 contraventions of s 80(1)(i) of the Customs and Excise Act 91 of 1964 (illegal use of documents to export rhino horn). He was also convicted of 26 further contraventions of s 57(1) of the National Environmental Management: Biodiversity Act 10 of 2004 (unlawfully trading in rhino horn). The appellant was not a conventional poacher. The 26 rhinos in this case were shot legally on the basis of legal hunting permits obtained by the appellant. The rhino were hunted as trophies. But the appellant also manipulated the permit system and deceived the authorities so that the rhino horns could be exported in contravention of existing legislation. His actions, said the High Court at [17], were akin to those of

poachers; and the ‘killing of rhinos, solely to trade their horns, is a serious crime’ (at [30]).

In dealing with the appellant’s effective 40 years’ direct imprisonment imposed by the regional magistrate, Tsoka J (Levenberg AJ concurring) found that the sentencing court had misdirected itself by exceeding certain maximum years’ imprisonment prescribed in the relevant legislation (at [11] to [13]). It was accordingly concluded that the High Court was ‘at liberty to interfere with the discretion that the trial court had in imposing the sentences’ (at [13]).

In considering sentence afresh, it was noted that rhino-related crimes are prevalent in South Africa (at [17]) and that there is ‘a public outcry for harsher sentences to be imposed by the courts on . . . persons convicted of rhino-related crimes’ (at [18]). At [31] Tsoka J stated that whilst the object of sentencing is not to satisfy public opinion but to serve the public interest, ‘public opinion and indignation’ concerning the killing of rhinos must be taken into account in arriving at an appropriate sentence: ‘The personal interests of the accused must not prevail above those of the public. The two must, as far as humanly possible, be weighed against each other’ in determining what a fit and proper sentence should be.

There can be no doubt that the High Court’s assessment of South African public opinion on the killing of rhino and illegal trading in rhino horn is accurate. A more difficult matter is the extent to which this public opinion, or even public outrage, could perhaps inadvertently or indirectly have played a role when the High Court, having set aside the trial court’s sentence of 40 years’ imprisonment, imposed its own sentence of an effective 30 years’ imprisonment. The High Court, it would seem, relied too

heavily on deterrence to justify this sentence. At [31] Tsoka J stated (emphasis added):

In my view, *deterrence cries out in this matter. The sentence to be imposed must not only act as a deterrent to the appellant, but must also serve as a deterrent to all those who intend to embark on the illegal activity of dealing in rhino horn.* Potential poachers must know that, in the event that they are caught, they will be prosecuted and a proper and fitting sentence would be imposed on them. Courts should not shirk their responsibilities in meting out the appropriate sentence in appropriate cases. They must protect these ancient and magnificent animals.

It is, of course, entirely true that deterrence is one of the important purposes of punishment. See Terblanche *Guide to Sentencing in South Africa* 2 ed (2007) at 138. Terblanche at 156–157 also points out that deterrence has two forms: individual (or specific) deterrence and general deterrence. Spohn *How do Judges Decide? The Search for Fairness and Justice in Punishment* 2 ed (2009) at 7 explains that the purpose of punishment ‘is to prevent those who are punished from committing additional crimes in the future (specific deterrence) or to deter others from committing similar crimes (general deterrence)’. At 18 the author adds an important qualification, namely that ‘the amount of punishment should be enough (*and no more*) to dissuade the offender from reoffending and to discourage potential criminals’ (emphasis added). In *Lemtongthai* the regional court and the High Court both imposed prison terms which exceeded what could reasonably be justified to meet the demands of deterrence, be it individual or general deterrence.

In imposing a sentence with the two forms of deterrence in mind, there is—from a penal philosophy point of view—a further and rather subtle consideration which is very often simply overlooked by a sentencing court: for as long as we remain ignorant of the true deterrent effect of a sentence, there is a risk that the individual can be sentenced for crimes not yet committed by him (individual deterrence) and for crimes other people may or may not commit (general deterrence). Hogarth *Sentencing as a Human Process* (1971) explains as follows (at 4, emphasis added):

Estimating the likely impact of the sentence on the offender, or on potential offenders, is a most complex task. It is difficult to know with any degree of certainty whether an offender before the court is likely to pose the risk of further

crime, and even more difficult to know whether that risk can be in any way altered by choosing one form of sentence over another. Still more difficult is estimating whether the imposition of a deterrent penalty is likely to prevent potential offenders from committing crime. *Finally, there is the thorny problem of deciding to what extent it is morally justified to punish individuals for crimes they have not yet committed or for the potential crimes of others.*

It is important that an individual should not be sacrificed on the altar of deterrence. See also the cases as discussed in the notes on s 276 in *Commentary*, sv *Accused not to be sacrificed on the altar of deterrence*.

There is a further problem that arises when a court relies on general deterrence as one of the main considerations for imposing a severe sentence: it is not the severity of the punishment that deters, but its certainty. See Ezorsky (ed) *Philosophical Perspectives on Punishment* (1972) 293. In terms of general deterrence, an unjust sentence cannot hope to achieve what effective law enforcement would. And if there is no effective law enforcement (proper policing which results in successful prosecutions), a court should take care not to rely on general deterrence as justification for imposing a very severe sentence on the occasional individual who does get caught, prosecuted and convicted.

It was pointed out above that the High Court had noted (at [17]) that rhino-related crimes are prevalent in South Africa. Prevalence, too, calls for careful consideration. Sentencing courts cannot keep on imposing more and more severe sentences simply because the particular crime is prevalent or on the increase. In *R v Makaza* 1969 (2) SA 209 (R) Beadle CJ noted at 211B: ‘If such an approach were justified the theft of a cycle would by now attract something like a life sentence’. As far as prevalence is concerned, it is also unfair to make an individual pay for the crimes of others. In *S v Qamata* 1997 (1) SACR 479 (E) at 482c–d Jones J pointed out that the ‘two accused alone should not have to pay the price of the increased numbers of robberies on farms and smallholdings throughout South Africa’.

In dealing with the appeal against the High Court’s sentence, the Supreme Court of Appeal noted at [15] that the High Court had taken the view that the case called out for a sentence that would act as a deterrent. Navsa ADP (Wallis and Swain JJA concurring) viewed the offences in a serious light and also pointed out that ‘illegal activities such as those

engaged in by the appellant are fuel to the fire of the illicit international trade in rhino horn' (at [20]). But at [21] it was concluded that the effective sentence of 30 years' imprisonment was 'too severe', induced 'a sense of shock' and was, furthermore, 'disproportionate when compared with the minimum sentences statutorily prescribed for other serious offences'. In

reducing the sentence to an effective 13 years' imprisonment, with a further one million rand fine or 5 years' imprisonment, the Supreme Court of Appeal ensured that the sentences were in the public interest and were effective enough to protect our wildlife without inflating the penalty for the purpose of deterrence.

Steph van der Merwe

(B) LEGISLATION

There was no legislation of significance in the period under review.

(C) CASE LAW

(a) Criminal Law

Assault with intent to cause grievous bodily harm: By administration of noxious substance

S v Helm (unreported, WCC case no A119/2012, 17 September 2014)

Can the administration of a noxious substance constitute the *actus reus* of an assault? This was considered by the court in *S v Helm* (unreported WCC case no A119/2012, 17 September 2014), where the accused was charged with assault with intent to cause grievous bodily harm by administering to children at a crèche, run by her, certain noxious substances so that they would sleep during the day and not make a noise to disturb her other activities.

The court referred to *S v Marx* 1962 (1) SA 848 (N), where the accused had given two children intoxicating liquor to consume, and where it was held that the *indirect* application of force could suffice and that the causing of *internal* harm to the person of the victim by invading the integrity of his body by means of a noxious substance would constitute an assault. The fact, too, that the application of harm to the body of the victim was brought about by the voluntary act of the victim in drinking unwittingly from a glass with a noxious substance in it did not derogate from this proposition (see, too, *R v Sophi* 1961 R & N 358 at 361).

The court in *Helm* referred, too, to *S v A en 'n ander* 1993 (1) SACR 600 (A), where police officers had caused detainees to drink their own urine. The trial court had not regarded this as an assault, since the liquid did not present any adverse consequences for the victims. The Appellate Division disagreed: the mere act of *forcing* someone to drink something, whether toxic or not, was sufficient, in its view, to render it an assault, subject only to the *de minimis* principle.

In *Helm* the prosecution was unable to prove the administration of anything more harmful than a mixture of Panado, ginger and honey. This was done, apparently, with the consent of the parents in some cases, but, the court held, even if consent had been absent, the *de minimus* principle would exclude criminal liability, since Panado was known to be a relatively harmless, over-the-counter drug generally available for administration to young children. The appellant's appeal was, accordingly, upheld.

Contempt of court

S v Motaung (unreported, FB case no 29/2014, 7 August 2014)

Section 108 of the Magistrates' Courts Act 32 of 1944 makes provision for a summary procedure for contempt of court where a person 'wilfully insults a judicial officer during his sitting or a clerk or a messenger or any other officer during his attendance at such sitting, or wilfully interrupts the proceedings of the Court or otherwise misbehaves himself in the place where such Court is held'.

In *S v Motaung* (unreported FB case no 29/2014, 7 August 2014), it was clear that the accused had interrupted the court proceedings and interfered with the proper functioning of the court and that he had done so wilfully. They were not isolated incidents; the accused was described as having 'a history of swearing and threatening both the presiding officer and the prosecutor, and on occasion spitting at the legal aid officer'. In *S v Nel* 1991 (1) SA 730 (A) at 749–50 the court warned that the presiding officer should first consider whether it was both necessary and desirable for him to take action when he was of the opinion that someone had acted in contempt of court since '[v]ery often conduct which strictly speaking constitutes contempt of court can quite fittingly merely be ignored without really impairing the dignity or the authority of the Court or the orderly conduct of the proceedings'.

In *Motaung* the conduct of the accused was not such that the court could have ignored it further without impairing the dignity or authority of the court or the orderly conduct of the proceedings. The judicial officer had explained to him the provisions of s 108 beforehand and he showed flagrant disobedience *in facie curiae* so that an immediate response was necessary to restore order and to deter him from repeating his misconduct.

Fraud—misrepresentation to the world

In *S v Malan* 2013 (2) SACR 655 (WCC), a case discussed in 2013 (2) *CJR*, it was held that fraud had not been committed when the appellant had failed to apply to SARS to register a close corporation for the purpose of VAT. It was held that the state had not proved a criminal fraudulent non-disclosure since 'misrepresentation' involved a bilateral and not a unilateral act, and, since SARS did not even know about the appellant's existence, she could have made no misrepresentation to SARS.

In considering whether to grant the applicant leave to appeal to the Supreme Court of Appeal, the court acknowledged (at [24]) that there was ‘authority for the proposition that a representation “to the world” may constitute criminal fraud’. In *S v Mdantile* 2011 (2) SACR 142 (FB) the accused went to a train station but did not purchase a train ticket. He walked past the ticket office and proceeded straight to the platform security gate, which was manned by a security guard. At that check-point only passengers with tickets were allowed to go through onto the platform, but the accused gave the security guard R20 to allow him onto the platform. Then, as if he were the holder of a valid ticket, he boarded the train.

It was held (at [34]) by Rampai J that ‘if the deceiver candidly intended to defraud . . . and his behaviour or actions are consistent with his pervasive design, it becomes immaterial whether the false representation was manifested to a specific representee by way of an explicit or implicit distortion of the truth sometimes called positive misrepresentation, or negative misrepresentation, respectively. In giving the R20 to the security guard and in causing the security gate to be opened, the accused represented *to the world* that he had a valid ticket, knowing, at the time, that that representation was a false representation which he made with the intention of inducing the company or Transnet Ltd to act upon, through its employees, by conveying him to his destination at its expense, to his detriment.’

On the strength of this authority, Schippers J (Ndita J concurring) came to the view that there *was* a reasonable prospect of success on appeal.

(b) Criminal Procedure and Evidence

(i) Pre-sentence

Duty of the South African Police Service to investigate crimes against humanity committed beyond South Africa’s borders

National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre & another [2014] ZACC 30 (unreported, Constitutional Court case no CCT 02/14, 30 October 2014)

In the above matter the Constitutional Court stated that consideration of the following question raises a constitutional issue: what is the extent, if any, to

which s 205(3) of the Constitution places a duty on the South African Police Service (SAPS) to investigate allegations of torture—as a crime against humanity—committed in Zimbabwe by Zimbabwean officials against victims who were citizens of, or residents in, Zimbabwe at the time of the torture as alleged? Section 205(3) of the Constitution provides as follows: ‘The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law’.

Prior to this decision, the North Gauteng High Court and the Supreme Court of Appeal had held that an investigation by the SAPS into the torture as alleged, was indeed required by the Constitution, certain provisions in the South African Police Services Act 68 of 1995 (SAPS Act) and the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (ICC Act). See *Southern African Litigation Centre & another v National Director of Public Prosecutions & others* 2012 (10) BCLR 1089 (GNP) and *National Commissioner, South African Police Service & another v Southern African Human Rights Litigation Centre & another* 2014 (2) SA 42 (SCA). Both these cases are summarised in the discussion of s 110A in *Commentary, sv Extra-territorial and universal jurisdiction: Some statutory developments*. For a detailed and useful discussion of some of the issues decided in these two cases, see Woolaver (2014) 131 *SALJ* 253.

On appeal by the National Commissioner of the SAPS against the decision of the Supreme Court of Appeal, it was argued that the SAPS was unable to initiate an investigation because of international law principles pertaining to state sovereignty. It was also submitted that the presence of the alleged perpetrators in South Africa was necessary for the initiation of the investigation.

At [38] Majiedt AJ, writing for a unanimous Constitutional Court, noted that there was a legal obligation, arising out of international treaty, to prosecute torture. See the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations on 10 December 1984 and ratified by South Africa on 10 December 1998. The Prevention and Combating of Torture of Persons Act 13 of 2013, which came into operation on 29 July 2013, gave effect to South Africa’s obligations in terms of this Convention. It was pointed out that torture as a crime against humanity was criminalised under s 232 of

the Constitution, Act 13 of 2013 and the ICC Act. Section 232 of the Constitution states that customary international law is law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament.

It was accordingly concluded that South Africa 'is required, where appropriate, to exercise universal jurisdiction in relation to [torture] . . .' (at [40]). For purposes of determining the ambit of universal jurisdiction, Majiedt AJ distinguished between presence when being tried and absence during the investigation (at [47]). Presence at trial is a constitutional imperative, whereas the exercise of universal jurisdiction for purposes of the investigation of an international crime committed outside South African territory may take place even if the suspect is not in South Africa. At [48] Majiedt AJ explained as follows:

This approach is to be followed for several valid reasons. Requiring presence for an investigation would render nugatory the object of combating crimes against humanity. If a suspect were to enter and remain briefly in the territory of a state party, without a certain level of prior investigation, it would not be practicable to initiate charges and prosecution. An anticipatory investigation does not violate fair trial rights of the suspect or accused person. A determination of presence or anticipated presence requires an investigation in the first instance. Ascertaining a current or anticipated location of a suspect could not occur otherwise. Furthermore, any possible next step that could arise as a result of an investigation such as a prosecution or an extradition request, requires an assessment of information which can only be attained through an investigation. By way of example, it is only once a docket has been completed and handed to a prosecutor that there can be an assessment as to whether or not to prosecute.

The contention by the SAPS that it could not investigate without a suspect's presence was therefore dismissed (at [49]). It was also held that South Africa's international law commitments to investigate crimes against humanity, like torture, had to be discharged through South Africa's law-enforcement agencies, as required by s 205(3) of the Constitution (at [50]). This would include prosecutorial assistance as regulated by, for example, s 17D(3) of the

National Prosecuting Authority Act 32 of 1998 (at [57]–[60]).

Having come to the conclusion that there is 'not just a power but also a duty' to investigate (at [55]), the court noted that this universal jurisdiction to investigate international crimes is not absolute but subject to two limitations.

First, the investigation is permissible only if the country with jurisdiction is unwilling or unable to prosecute and only if the investigation is confined to the territory of the investigating state (at [61]). In this regard it was found that there was no evidence that Zimbabwe was willing or able to pursue the investigation concerned (at [62]).

Second, practicability is a limitation; embarking on an investigation of crimes committed elsewhere must be reasonable having regard to all the circumstances of the particular case (at [63]).

Applying the above limitations to the facts of the case, Majiedt AJ concluded (at [78]):

Given the international and heinous nature of the crime, South Africa has a substantial connection to it. An investigation within the South African territory does not offend against the principle of non-intervention and there is no evidence that Zimbabwe has launched any investigation or has indicated that it is willing to do so, given the period of time since the alleged commission of the crimes. Furthermore, the threshold for the SAPS to decline to investigate, bearing in mind the particular facts and circumstances, has not been met in this case. There is a reasonable possibility that the SAPS will gather evidence that may satisfy the elements of the crime of torture allegedly committed in Zimbabwe.

The decision of the National Commissioner to decline to investigate the relevant complaint was accordingly set aside; and an order was made that the SAPS had to investigate the complaint (at [84]).

In dealing with possible orders as to costs, the telling observation was made that the court's decision has 'far-reaching consequences' not only for the application of the ICC Act in South Africa, but also for the manner in which the SAPS, the Directorate for Priority Crime Investigation (the 'Hawks'), the Priority Crimes Litigation Unit and the National Prosecuting Authority will in future 'discharge their constitutional, international and domestic law obligations' (at [83]).

Role of prosecutor: Special relationship with the court

The role of the prosecutor was examined critically by the Supreme Court of Appeal in *S v Mulula* [2014] ZASCA 103 (unreported, SCA case no 074/2014, 29 August 2014). The prosecutor in that case had failed to request a blood test that would have shown conclusively that the appellant in a rape had *not* had a disease that *was* transmitted to the child victim by the actual rapist in the course of the sexual encounter that constituted the rape. The court insisted that the prosecutor's role was 'different from that of counsel or an attorney representing a client'. It added (at [12]) that prosecutors stood 'in a special relationship' to the court, since their 'primary duty [was] not to procure a conviction at all costs, but to assist the court in ascertaining the truth'.

It fell to the court to criticise another practice—that of drawing an inference against the accused for not being able to explain, when asked by the prosecution, why the complainant should falsely have blamed him. Such a practice was, said the court (at [5]), wrong since it 'wrongly supposes an obligation on the part of the accused persons to explain the motives of false accusations by their accusers'. An 'adverse credibility finding against an accused person based solely on a failure to offer an acceptable motive for false incrimination, [could], therefore, not be sustained': see, too, *S v Lotter* 2008 (2) SACR 595 (C) at [38] and *S v BM* 2014 (2) SACR 23 (SCA).

Recusal: Test to be applied in respect of prosecutor

Porritt & another v National Director of Public Prosecutions & others [2014] ZASCA 168 (unreported, SCA case no 978/2013, 21 October 2014)

The test to be applied where the recusal of a presiding judicial officer (judge or magistrate) is sought on grounds of an apprehension of bias, was formulated as follows by the Constitutional Court in *President of the Republic of South Africa & others v South African Rugby Football Union & others* 1999 (4) SA 147 (CC) at [48]: 'The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.' In *Porritt* (supra) the court *a quo* had applied the above test ('the SARFU test') for the

removal of two prosecutors. This, held the Supreme Court of Appeal, was an error (at [21]).

Tshiqi JA, writing for a unanimous full bench, noted that in our adversarial system the role of the prosecutor makes it inevitable that he or she would be perceived as biased (at [13]). Referring to cases such as *S v Du Toit en andere* 2004 (1) SACR 47 (T) and *S v Van der Westhuizen* 2011 (2) SACR 26 (SCA), it was noted that prosecutors are required to present the case for the state firmly, but fairly and dispassionately. However, the fact that prosecutorial functions are carried out 'vigorously and zealously', that a prosecutor is 'partisan' and might hold a very strong view that an accused is guilty, cannot provide grounds for recusal (at [13]). It follows that the SARFU test is quite inappropriate. The roles of presiding judicial officer and prosecutor cannot be equated (at [11]).

However, recusal of a prosecutor on grounds of bias or apprehension of bias arises where the bias of the prosecutor affects the accused's right to a fair trial. At [17] Tshiqi JA referred to *Smyth v Ushewokunze* 1998 (3) SA 1125 (ZS) where removal of the prosecutor was necessary because the accused's fair trial right was placed in jeopardy by the vindictive manner of the prosecutor and his dishonesty in deliberately misleading the court.

In *Porritt* there were two prosecutors, C and F. At no stage was it alleged that they had conducted themselves in a manner not becoming a prosecutor. The allegation of an apprehension of bias was based on subtle and rather remote grounds. C was a senior counsel in private practice at the Pretoria bar, appointed as prosecutor in terms of s 138(1) of the National Prosecuting Authority Act 32 of 1998. The allegations of bias against him were based largely on the fact that the South African Receiver of Revenue (SARS) had proposed his appointment and paid his fees; and he had previously represented SARS in investigations conducted and litigation contemplated or instituted against the appellants. In respect of the other prosecutor, F, the objection was based mainly on his prior involvement in the drafting of an affidavit in the process of the liquidation of one of the companies in which the first appellant had an interest; and he had, furthermore, supported the SARS proposal regarding the appointment of C as prosecutor. It was uncontroverted that F had at all times performed his normal duties as a prosecutor and senior official employed by the National Prosecuting Authority (NPA). Despite this, it was argued that an official in the employ of the NPA should not

be allocated a matter in which he had previously been involved (at [20]).

Responding to the above arguments and facts, Tshiqi JA said that in the South African criminal justice system there are ‘sufficient structural guarantees . . . to ensure that an accused’s right to a fair trial is protected, irrespective of whether the prosecutor concerned is an employee of the NPA or an outside counsel funded by SARS, or any other entity’ (at [19]). The mere fact that C and F each played, to some extent, a dual role (as initial investigator and later prosecutor) could not give rise to unfairness. At [18] Tshiqi JA quoted, with clear approval, the following statement in *Director of Public Prosecutions, Western Cape v Killian* 2008 (1) SACR 247 (SCA) at [28]: ‘Unfairness does not flow axiomatically from a prosecutor’s having a dual role’. The High Court’s order for the removal of C and F was set aside.

It should be noted that further support for the approach adopted in *Porritt* can be found in *S v Tshotshoza & others* 2010 (2) SACR 274 (GNP). Both *Porritt* and *Tshotshoza* should, in turn, be distinguished from *Bonugli & another v Deputy National Director of Public Prosecutions & others* 2010 (2) SACR 134 (T). For a discussion of and comparison between *Tshotshoza* and *Bonugli*, see Chapter 1 in *Commentary, sv Professional independence and the fair trial risk where there is private funding of prosecutions*.

s 1(1)(b): The meaning of ‘aggravating circumstances’ in relation to robbery or attempted robbery

S v Hlongwane 2014 (2) SACR 397 (GP) and *S v Mdaka* 2014 (2) SACR 393 (KZP)

Section 1(1)(b) of the Criminal Procedure Act provides that in this Act, unless the context otherwise indicates, ‘aggravating circumstances’ in relation to robbery or attempted robbery, means:

- (i) the wielding of a fire-arm or any other dangerous weapon;
- (ii) the infliction of grievous bodily harm; or
- (iii) a threat to inflict grievous bodily harm,
 - by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence;

In *S v Hlongwane* 2014 (2) SACR 397 (GP) at [18] Spilg J pointed out that each of the three situations

identified in s 1(b)(i)–(iii) ‘does not require the presence of the other to amount to aggravating circumstances’ and ‘each . . . cannot be understood to impose an internal limitation on the other’.

In terms of s 1(b) at least one of the situations identified or described in paragraphs (i), (ii) or (iii) must be present ‘on the occasion when the offence is committed, whether before, during or after the commission of the offence’. The exact role of each robber (perpetrator, co-perpetrator or accomplice) need not be determined before he can be held guilty of robbery or attempted robbery with aggravating circumstances. See *S v Mofokeng* 2014 (1) SACR 229 (GNP) as well as *Minister of Justice and Constitutional Development & another v Masingili & another* 2014 (1) SACR 437 (CC).

In terms of s 1(b)(i) the wielding of a firearm or other dangerous weapon will constitute aggravating circumstances. In *S v Hlongwane* (supra) Spilg J concluded as follows (at [32]):

In short “wielding” a dangerous weapon will *per se* constitute aggravating circumstances whereas other forms of holding, carrying or possessing the weapon will not amount to aggravating circumstances unless, having regard to the circumstances, they constitute a threat to inflict grievous bodily harm for the purposes of sub-paragraph (iii).

It follows that for purposes of paragraph (i) mere possession of a weapon would be insufficient, whereas the ‘wielding’ of even an unloaded firearm would constitute aggravating circumstances. See *S v Mbele* 1963 (1) SA 257 (N).

A toy ‘firearm’ is not included in paragraph (i), because an objective approach is required. See *S v Anthony* 2002 (2) SACR 453 (C) at 454j–455b and 456c–d. However, in these circumstances, paragraph (iii) (the ‘threat’ requirement) would be satisfied if the victim concerned subjectively experienced the conduct of the robber as a threat to inflict bodily harm. ‘[A] subjective element’, said Steyn J in *S v Mdaka* 2014 (2) SACR 393 (KZP) at [5], ‘is introduced by considering what . . . [the] . . . complainant believed’. Where a robber acted as if he was drawing a firearm, paragraph (iii) would be satisfied. See *Mdaka* at [6]. Use of a large stone would meet the requirement of paragraph (i). It is a dangerous weapon. See *Mdaka* (supra) at [4].

In terms of paragraph (iii) a ‘threat to inflict grievous bodily harm’ would suffice. Such a threat could be uttered expressly or through conduct. See *S v Loate*

& others 1962 (1) SA 312 (A) at 320C–F. In *S v Hlongwane* (supra) at [33] Spilg J said:

Accordingly, holding a high calibre assault rifle such as an AK47 with its muzzle facing the ground, whether by one person or every member of a gang during the course of a robbery at say a fast-food outlet, may not amount to ‘wielding’ in the default type situation contemplated by sub-paragraph (i) but it fits comfortably within the definition of a threat to inflict grievous bodily harm under sub-paragraph (iii).

s 7(1)(a): Constitutionality of excluding juristic persons from the right to institute a private prosecution

National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & another (unreported, GNP case no 29677/2013, 8 October 2014)

In this case the applicant (NSPCA) sought an order declaring s 7(1)(a) of the Criminal Procedure Act unconstitutional insofar as it does not permit juristic persons also to institute private prosecutions. In terms of s 7(1)(a) only private persons (natural persons) are allowed to institute a private prosecution—and then only in limited circumstances and after having obtained a certificate *nolle prosequi*. See the discussion of s 7 in *Commentary*, sv *General*. On the history, purpose and nature of a private prosecution, see also the notes in Chapter 1 of *Commentary*, sv *Public and private prosecutions*.

The NSPCA, as a statutory body created by s 2 of the Societies for the Prevention of Cruelty to Animals Act 169 of 1993, serves to prevent ill-treatment of animals and may defend or institute legal proceedings connected with its functions. But given the limits of s 7(1)(a), it cannot institute a private prosecution. The constitutional challenge to s 7(1)(a) was premised on the absence of any real rational basis why juristic persons, unlike individuals, are denied the right to a private prosecution and, therefore, do not enjoy the equal protection and benefit of the law as provided for in s 9(1) of the Constitution (at [4] and [9]). Furthermore, in terms of s 8(4) of the Constitution, a juristic person ‘is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person’ (at [8]).

In dealing with the constitutional challenge, Fourie J noted that s 179(1) of the Constitution provides for a single National Prosecuting Authority structured in

terms of an Act of Parliament (which, of course, is the National Prosecuting Authority Act 32 of 1998); and in terms of s 179(2) the prosecuting authority has the power to institute criminal proceedings on behalf of the state and to carry out any necessary functions incidental thereto (at [12]). All this, observed Fourie J at [13], ‘indicates that the general point of departure in terms of our Constitution is that all prosecutions are to be public prosecutions in the name and on behalf of the State’ (at [13]). Fourie J identified two exceptions in this regard: first, the case of a private person referred to in s 7 and, second, where the law expressly confers a right of private prosecution upon a particular body or person as referred to in s 8 (at [14]).

As far as s 7 was concerned, it was pointed out that allowing all persons to institute private prosecutions would be contrary to the constitutional imperative of a single National Prosecuting Authority (at [27]) and ‘would effectively create an alternative prosecuting system’ (at [25]).

At [26] it was noted that the right to institute a private prosecution is determined by a limitation clause distinguishing not only between juristic and natural persons, but also between natural persons. This limitation, held Fourie J at [28], was a constitutionally permissible limitation:

The differentiation as well as the discrimination is not unfair, but is designed to serve a legitimate governmental purpose. It also appears that there is a rational relationship between this purpose and the differentiation. The legitimate governmental purpose is to allow a private prosecution only where private or personal interests are at stake, but to prevent other natural persons, as well as juristic persons, not having such interests, from doing so. This is why section 7(1) specifically refers to “some injury . . . individually suffered” in consequence of the commission of an offence. This is a purposeful and rational limitation to serve the general policy of the Legislature and the constitutional imperative as far as public prosecutions are concerned. In short, the requirement of “some injury . . . individually suffered” cannot sensibly be applied to a juristic person as that requirement relates to human existence, something which a juristic person does not possess. It should therefore follow that a differentiation and discrimination premised on this requirement cannot be said to be unfair. I therefore

conclude that the differentiation is not unconstitutional.

In conclusion, Fourie J observed that it was perhaps appropriate to point out that if the s 8 right of a public body to institute a private prosecution could by legislation be conferred upon the NSPCA, this public body would be able more effectively to perform its functions.

s 79: Constitution of the panel to assess accused's mental condition

S v Pedro [2014] 4 All SA 114 (WCC)

One of the purposes of s 79 of the Criminal Procedure Act is to regulate the constitution of the panel tasked with inquiring into and reporting on the mental condition of the accused for purposes of s 77 (triability) and s 78 (criminal capacity). In practice it has generally been accepted that in the circumstances as provided for in s 79(1)(b)(ii), the court was required to appoint a private psychiatrist only upon application of the prosecutor in accordance with directives issued under s 79(13) by the National Director of Public Prosecutions (NDPP). In fact, the relevant directives as referred to in s 79(1)(b)(ii) and issued under s 79(13) are also based on the premise that appointing a court-appointed psychiatrist not in the full-time service of the state (referred to as the 'third psychiatrist' in the directives) was only possible upon application by the prosecutor. Paragraph 2 of the directives issued by the NDPP provides, for example, that prosecutors 'may only apply for the appointment of a third psychiatrist in accordance with s 79(1)(b)(ii), in terms of a written authority or directive from the relevant [Director of Public Prosecutions]'.

The approach as set out above was reversed by Rogers J (Binns-Ward J concurring) in *S v Pedro* (supra). At [45] it was pointed out that the NDPP had 'quite obviously' framed the directives in the belief that s 79 had the effect 'that there would only be two psychiatrists unless the prosecutor applied for a third'. But according to the court s 79(1)(b)(ii) is the 'dominant section', and s 79(13) is 'ancillary' (at [59]). According to Rogers J, s 79(1)(b)(ii) should be interpreted to mean that 'three psychiatrists, including a private psychiatrist, must be appointed when the case falls within s 79(1)(b) unless the court, upon application by the prosecutor, directs that a private psychiatrist need not be appointed' (at [68] and [116(v)]); and s 79(1)(b)(ii) cannot be interpreted with reference to the directives issued by the NDPP—in much the same way as a statute cannot be

interpreted with reference to regulations promulgated thereunder (at [67]).

The net result was stated as follows by Rogers J (at [116(vii)]):

Pending the revision of the directives already issued by the NDPP pursuant to s 79(13), the directives currently in existence should be construed as determining the circumstances in which there should be a private psychiatrist and thus as defining by necessary implication the reverse cases and circumstances in which the prosecutor should apply to the court to dispense with the appointment of a private psychiatrist. It is, however, desirable, to avoid confusion, that the directives issued by the NDPP be revised to conform with the declared meaning of s 79(1)(b)(ii) as soon as may be expedient.

s 166: The scope of the judicial officer's duties to inform an accused of his rights to legal representation and to cross-examination and to explain these rights properly

These issues divided the court in the decision of the Supreme Court of Appeal in *S v Ramaite* [2014] ZASCA 144 (unreported, SCA case no 958/13, 26 September 2014). The appeal in that case was based on three alleged irregularities in the conduct of the trial. It was argued that the regional court magistrate had failed:

- (1) to apprise the appellant of his right to legal representation before the commencement of the trial;
- (2) properly to explain his right to cross-examination; and
- (3) to assist the appellant when it became clear that he did not know how to cross-examine the witnesses.

In respect of the right to legal representation, it appeared that, when the right was first explained to him, the appellant had said that he did want legal representation. When the trial commenced, however, he seemed to have changed his mind. There was no indication, however, as to why or when he had changed his mind or waived his right to representation. The trial magistrate did not conduct any inquiry to determine the circumstances leading to the waiver of rights and he 'neither informed the appellant what the consequences of proceeding with the trial without the assistance of a legal representative were, nor

encouraged him to obtain the services of a legal representative before he was made to plead to the charge' (at [7]). He *was* told, after he had pleaded, that since it was a case of rape, that the matter would be transferred to the high court and he could face a sentence of life imprisonment, the prescribed minimum sentence.

Schoeman AJA (with whom Cachalia JA agreed) gave the majority judgment. She considered that the warning of a possible sentence of life imprisonment was done 'as a matter of fact, . . . not with a view to encourage him to obtain legal representation owing to the seriousness of the charge', but solely to comply with the specific duty to inform an unrepresented accused that he faced a minimum sentence. She insisted that the explanation of the right to legal assistance, now entrenched in s 35(3)(f) and (g) of the Constitution, had, in order to be effective, to be done prior to the commencement of the trial, which meant 'prior to an accused pleading to the charges' (at [10]).

For a waiver of the right to be established, it had to be shown, said Schoeman AJA, 'that the appellant had waived his right in the full knowledge of what he was doing' (at [12]). She relied, for this proposition, on *S v Gasa & others* 1998 (1) SACR 446 (D) at 448B–C (which, she conceded, dealt with an extrajudicial pointing out, but which was relevant, too, in the present context) and *S v Manuel* 2001 (4) SA 1351 (W) at 1355–6. In this case no reliance could be placed on the mere say-so of the prosecutor, and there was nothing on the record or in an affidavit made by the trial magistrate to reflect that he had full knowledge of the right and wished to waive it.

There was, thus, no waiver. The magistrate had failed in his duty, had not encouraged the appellant to make use of legal representation, and had, the majority decided, committed a material irregularity. This did not, *per se*, however, render the trial unfair. To do so, it had to be shown, further, that the irregularity had tainted the conviction and that the appellant had been prejudiced by it. It was thus necessary, said Schoeman AJA, to evaluate how the trial was conducted in the absence of legal representation for the defence.

This exercise brought into play the second and third objections. The majority found, in this regard, that although the magistrate had explained to the appellant the purpose and function of cross-examination, it soon became clear, when he sought to exercise the right, that 'he did not have the slightest idea how to cross-examine or the import of putting his version to

the complainant' (at [19]). He initially said he had no questions to ask; then he asked one disjointed question and indicated he had no others; and finally asked a few desultory questions after the magistrate had ineffectively intervened on his behalf.

In spite of the obvious incompetence of the appellant, who was an unsophisticated person, the prosecutor, in cross-examining the appellant, centred on the reasons why he did not dispute the complainant's evidence on key issues and was even allowed to cross-examine him on evidence he was erroneously claimed to have given. The majority considered that it was 'unfair to allow cross-examination of an undefended, unsophisticated accused on his failure to cross-examine and that should not have been held against him' (at [24]). A judicial officer was not merely an observer, but had a duty to prevent unfair questioning of an accused. The magistrate should have stopped the prosecutor from asking unfair questions and from putting incorrect statements to the appellant.

There were, too, in the majority's view, other incongruities where proper legal representation would have made a difference to the appellant in the presentation of his defence. Apart from far more searching cross-examination of the complainant on the alleged rape itself, there was, too, the medical report on the complainant's condition which had, with the consent of the appellant, been read into the record without the doctor testifying. Schoeman AJA, relying on *S v Daniëls en 'n ander* 1983 (3) SA 275 (A), considered that the magistrate had not exercised the extra caution insisted on in that case when an accused offers to admit a fact that is unlikely to be within his own knowledge.

All these factors led the majority to conclude that the trial was unfair. Willis JA, however, disagreed. He could not agree that the magistrate should have inquired why the appellant had elected not to have legal representation, nor that he should have encouraged him to do so. The decision in *Manuel* he distinguished on the grounds of its specific potential for substantial injustice, and he did not regard the magistrate as failing in his duty by 'merely' informing the appellant of the minimum sentence he faced since that, as he understood the position to be, was 'precisely what the magistrate [was] meant to do' (at [48]).

There was, moreover, in his view, nothing to indicate that the consequences to the appellant would have been any different had he proceeded with legal assistance. His poor cross-examination of the com-

plainant was not surprising, but it was not the fault of the administration of justice that it was a 'poor imitation of that of a brilliant lawyer'. Even if he had had the benefit of legal representation, 'his version, being a denial, could not have been materially different' (at [57]) and the complainant's version, although terse, was 'unequivocal' on the fact of penetration. She had testified that he had 'inserted his penis into [her] vagina', and there was, said Willis JA, 'not much else one can say about the rudimentary mechanics of the consummate sexual act between a male and a female' (at [52]).

The fact remained that he *did* have his rights explained to him and *was* warned that he faced life imprisonment if convicted, albeit short of the standard one would prefer in respect of the first, and imperfectly in respect of the second. Both, said Willis JA, 'could have been given more frequently and more forcefully', but it had to be remembered that lawyers could not concoct a version and could only present a client's case in the best possible way. There was, too, the fact that there was a high awareness of the seriousness of rape in South Africa. That he might have been advised of his rights better and more forcefully, and might have been warned *earlier* and more compellingly that he faced the risk of life imprisonment was, Willis JA concluded, 'of no real importance in this particular case', (at [61]): in his view, 'even if [he] had enjoyed the services of one of the finest advocates in the world, he would have been convicted' (at [67]).

There was, in his view, no unfair trial.

s 166: Questioning by court; discourtesy to witnesses; treatment of child victim in rape cases by prosecution and court

In *S v Mthethwa* (unreported, GP case no A17/2013, 11 July 2014) Makgoka J was strongly critical of the way the child victim in a rape case had been treated both in and out of court. Extra-curially, it was clear that the child was in need of care after the rape, but neither the police nor the prosecutor nor the judicial officer at trial had taken any steps in this regard. Inquiries should have been conducted immediately after the rape had been reported. The Constitutional Court in *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) had explicitly insisted that 'foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma' (at [24]).

In court, the magistrate did not fare any better. When the child hesitated in answering questions, he had barked at her: 'Talk! Do not die, please talk!' It was clear, said Makgoka J (at [29]), that the magistrate 'lacked the necessary sensitivity and empathy for the child complainant'. He 'also demonstrated complete lack of appreciation for the constitutional dictate of s 28(2), which decrees the paramountcy of the children's interests under all circumstances'. He was 'brash, abrasive and over-bearing towards the child', told her that the court would 'punish' her, and intimidated her to the extent that it may have contributed to the incoherence and inconsistency of her evidence. It was imperative for judicial officers, said the court (at [30]), to 'exhibit the necessary patience, empathy and sensitivity when dealing with victims of alleged sexual violations'. This, the magistrate had conspicuously lacked.

The magistrate had also passed sarcastic comments about defence counsel's conduct and the long-winded testimony of a defence witness ('Here, we are going to talk until tomorrow'). He also spoke to a witness 'off the record' in his own language which the accused's legal representative did not understand. All this earned the ire of the High Court. Makgoka J, after describing the lower courts as the 'coalface of the judiciary', had this to say at [35]:

For the majority of the citizens of our land, their first experience of the judicial system is in those courts. It is absolutely vital therefore that those who are charged with the responsibility to preside in those courts should show the necessary respect to those who appear before them, either as witnesses or legal representatives. There is no room for impatience, abrasiveness or sarcasm, such as represented by the presiding officer in this case. Such conduct does not redound to the dignity and decorum of the court. It distracts from the diligence and courage with which the lower courts have, in the main, discharged their responsibilities, despite their tremendous workload, often coupled with less than ideal working conditions.

He stressed, further, that it was undesirable that a judicial officer should say anything concerning the case to a witness 'off the record' whatever that might mean. Everything mentioned in court concerning the case should be on record for all concerned to understand and follow. If anything was said in the language not understood by all concerned, it should be translated for the benefit of those who did not understand that language.

s 168: Adjudgment of court *sine die*

S v Cotenberg (unreported, WCC case no A404/2004, 30 May 2014)

Section 168 provides that a court, before which criminal proceedings are pending, ‘may from time to time during such proceedings, if the court deems it necessary or expedient, adjourn the proceedings to any date on the terms which to the court may seem proper and which are not inconsistent with any provision of [the] Act’. The question before the court in *S v Cotenberg* (unreported, WCC case no A404/2004, 30 May 2014) was whether it was ever appropriate to postpone an appeal *sine die*. The full bench decided that to do so where the circumstances did not justify such a step may, in certain cases, lead to a failure in the administration of justice and may infringe an appellant’s right to a speedy trial (at [15]).

A criminal *appeal*, which is an extension of the trial, could not, said the court, be dealt with differently unless the circumstances of a particular case called for a different approach. To postpone an appeal *sine die* might lead to inordinate delays, as had happened in this case, where the appeal court had postponed the matter *sine die* pending a correctional supervision report on the circumstances of the appellant. After a lengthy delay, allegedly due to changes in the Department of Correctional Services, a report was finally made available. But the matter was not re-enrolled because of an ‘administrative oversight’ in the office of the Director of Public Prosecutions. In the interim the one permanent judge of the appeal court retired, and the other member of that court, an acting judge, never returned to act.

For these reasons the Judge President constituted a full bench to ‘deal with the unusual circumstances of the case, and, if appropriate, to dispose of the matter’ (at [5]). The court found that there [was] authority to the effect that a criminal appeal *could* be postponed *sine die* (see *S v Mazongolo* 2013 (1) SACR 564 (WCC) and *Brossy v Brossy* [2012] ZASCA 151 (unreported, SCA case no 602/2011, 28 September 2012)). It concluded, however, that although there was no prohibition against postponing a criminal appeal *sine die*, the process had to be ‘properly managed and monitored to ensure that the matter [was] not lost in the system’. Further, ‘[e]ven where, as in this case, it was not clear when a particular step which necessitated the postponement would be taken, it would be proper to postpone the matter to a specific date so as to enable the court to have judicial

oversight on progress made, or the lack thereof, and to take appropriate steps where there is any undue delay’.

s 170A: Intermediary—absence of a report and allegation that no factual basis laid for intermediary to act

S v Peyani 2014 (2) SACR 127 (GP)

Is it irregular to allow an intermediary to be appointed where he or she has not made a formal report or where no clear factual basis has been made out to the court for such appointment? No, said the court in *S v Peyani* 2014 (2) SACR 127 (GP). In that case, where the charges involved either rape, indecent assault or sexual assault, and the case rested on the testimony of three children aged 10, 14 and 16 years, the intermediary was a social worker, employed by the Department of Social Development, who had been employed as an intermediary for a period of three years. She had seen the children before the commencement of the proceedings and was sworn in by the magistrate. There was no objection by the appellant’s legal representative who admitted that the young witnesses would suffer undue stress without the intermediary’s assistance.

It could be inferred that she found it necessary to take part in the proceedings for the benefit of the complainants (the witnesses) and it would be absurd for the court to ask whether she was desired or not. It would further be inferred from the children’s ages and the nature of the charges, that undue stress would arise in the absence of the intermediary. Where a child will be exposed to undue mental stress or suffering, a court has a discretion, said Potterill J (at [2.2]), to appoint an intermediary where the accused does not dispute this, and no prejudice was caused to the appellant in this case by the granting of the application by the court *a quo* to allow the intermediary to assist the witnesses.

The objection by the appellant that the intermediaries had acted as interpreters during the trial was dismissed on the ground that they had not been used as interpreters, but merely as conduits who relayed the answers to the court in the children’s own language.

s 170A: Duties of court in respect of allowing a child to testify through an intermediary

In *Director of Public Prosecutions, North Gauteng, Pretoria v Makhubela* (unreported, GP case no

A91/2014, 6 August 2014) the respondent had been charged with two counts of rape. The case had been postponed on several occasions and, eventually, when the prosecution was unable to proceed with the trial, the magistrate deemed the State's case to have been closed even though the prosecutor refused to close his case. The reason for the prosecution's inability to proceed was that the complainant, a minor, was due to testify via an intermediary in terms of s 170A but, when the intermediary came to court, she said that her initial report in an affidavit was now, because of the delays, over a year old. She wished to interview the complainant and her mother again to make an updated report.

Having deemed the State's case to be closed, and since the respondent had pleaded not guilty in circumstances where no evidence had been led, the magistrate found the respondent not guilty and discharged him. In an appeal against that decision, it was held that a court is obligated to invoke the provisions of s 170A *mero motu* if it appeared that the child might be exposed to undue mental stress or suffering. A court was thus required to play 'a more emphatic role in ascertaining that . . . a report is available and deal with the officials of the Department decisively, however not by way of compromising the interest of justice'. And 'compliance with s 170A should not be seen as part of the state's case but assistance to the court' (at [14]).

The right of the child, said Khumalo J (Ratshibvumo AJ concurring), was very important in this content, even displacing the right of the accused to see and hear witnesses as part of his right to a fair trial. The court was thus under a *duty* to consider or hear an application for a child to testify through an intermediary even though the trial may be delayed by a further postponement.

The magistrate's decision to refuse a further postponement thus 'compromised the fair administration of justice' (at [15]). He should have invoked the provisions of s 342A of the Criminal Procedure Act (which require a court to investigate any delay in proceedings which appears to the court to be unreasonable and which 'could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, state or witness'). In this case the trial court had been 'more concerned . . . about the accused's rights that stem from s 35(3)(d) of the Constitution . . . that entitles the respondent to a speedy trial . . . without due regard to the sexual offence child victim who was present at court and the prosecution' (at [17]). It was relevant, too, that it was not the fault of

the prosecution that the report of the intermediary was not ready, and that the respondent was on bail, so that a further postponement would not have been prejudicial to him.

s 179: Securing the attendance of witnesses: Duty of prosecution and court to assist accused

S v Sodede (unreported, ECG case no A4656/2013, 24 July 2014)

If an unrepresented accused wishes to call a witness in his defence and that witness is indisposed or otherwise unable to attend without some assistance by the state or the court, can the prosecution or the judicial officer remain supine and refuse to assist the accused? The answer supplied in *S v Sodede* (unreported, ECG case no A4656/2013, 24 July 2014) by Goosen J (Plasket J concurring) was an emphatic no. The accused, who was unrepresented and in custody, wished to call a witness, his grandmother, who was indisposed and unable to walk properly. He asked the magistrate if someone could bring her to court in a motor car. The magistrate said that he could not be assisted and the prosecutor did the same, even though both knew that the accused was in custody and that the prospective witness was indisposed.

By adopting this attitude, said the court (at [11]), the trial court had 'effectively precluded the accused from calling a witness', and this constituted a gross irregularity which vitiated the fairness of the trial. In *S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO & another* 1989 (3) SA 368 (E) the court set out in considerable detail, said Goosen J, the rules of judicial practice which had evolved to ensure that an unrepresented accused was afforded a fair trial. The effect of these was that the 'presiding judicial officer in the trial of an undefended accused [was] required to take a more active part than a judicial officer [was] permitted in the orthodox accusatorial system, thereby, in some measure, redressing the disadvantage the undefended accused may suffer from the lack of legal representation' (see *Rudman* at 379).

Rudman was, Goosen J pointed out, decided before the enactment of the Constitution. It was important, then, to observe the provisions of s 35 of the Constitution which embodied the rights to a fair trial and created an overriding obligation on the courts to protect and secure that right. This obligation required 'that an unrepresented accused person be afforded proper assistance in the conduct of his or her defence' and included 'where circumstances require it, that he or she be *materially* assisted to procure the

attendance of a witness whom he or she wishes to call' (at [10]; emphasis added).

s186: The avoidance of undue partiality towards the state

S v Helm (unreported, WCC case no A119/2012, 17 September 2014)

It is crucial, when a judicial officer invokes s 186 to call a witness to prop up the case of the State, for him or her to avoid any perception of undue partiality towards the state. In *S v Helm* (unreported, WCC case no A119/2012, 17 September 2014), the magistrate had called witnesses to bolster the State's case after the conclusion of argument. Counsel suggested undue partisanship in favour of the State, but the magistrate justified her actions by maintaining that a judicial officer is an administrator of justice, not merely an umpire, whose task it was to see that justice is done in the quest for truth. She was, in her view, duty bound to call the witnesses because of what she viewed as overwhelming circumstances 'damaging to the accused'.

Gamble J (with whom Smit AJ agreed) considered the meaning of the phrase 'essential to the just decision of the case' which, in s 186, makes it *mandatory* for a court to call a witness when it is so essential. He cited what Heher AJA said in *S v Gabaatholwe & another* 2003 (1) SACR 313 (SCA) at 316. He construed that phrase to mean 'that the Court, upon an assessment of the evidence before it, considers that unless it hears a particular witness it is bound to conclude that justice will not be done in the end result. That does not mean that a conviction or acquittal (as the case may be) will not follow, but rather that such conviction or acquittal as will follow will have been arrived at without reliance on available evidence that would *probably* (not possibly) affect the result and there is no explanation before the court which justifies the failure to call that witness. If the statement of the proposed witness is not unequivocal or is non-specific in relation to relevant issues, it is difficult to justify the witness as essential rather than of potential value' (emphasis added).

In *S v Gerbers* 1997 (2) SACR 601 (SCA) at 609 *e-f* Marais JA warned that it remained incumbent on judicial officers constantly to bear in mind that the *bona fide* efforts to do justice could be misconstrued by one or other of the parties as undue partisanship, and that the right balance had to be found between undue judicial passivity and undue judicial intervention. He observed that to recall an accused to the

witness-box for further questioning after the conclusion of argument was rare and 'should not lightly be resorted to', since to fill gaps in the state case at that belated stage would likely be seen as indicative of undue partiality towards the cause of the State.

In *Helm* the court found (at [10] that the additional evidence of the witnesses called in terms of s 186 really took the State's case no further. And yet the magistrate 'sought to rely on that evidence in an obvious attempt to fill the gaps in the state's case', exposing her conduct 'for what in truth it was: undue intervention prompted by undue partiality towards the cause of the state'. It was a perception confirmed by other actions of the magistrate: her precluding the defence from obtaining access to the raw data to evaluate properly the scientific test results relied on by the State as well as a failure to evaluate properly the 'compelling testimony' of an expert witness called by the defence.

s 201: Legal professional privilege: Extra-curial application of privilege where attorney's office searched; preservation order appropriate

The facts of *Craig Smith and Associates v The Minister of Home Affairs & others* (unreported, WCC case no 12756/2014, 4 August 2014) arose out of the search for and seizure of documents and electronic data from the offices of an attorney (the applicant) by officials of the Department of Home Affairs after it received information that the applicant would obtain work permits from his clients on the basis of false and fraudulent documentation which he would prepare and submit to the Department. The applicant made an urgent application for the setting aside of the two warrants, issued by the magistrate in terms of s 35(5) of the Immigration Act 13 of 2002, and for the return of files and computers seized during the raid on the applicant's offices. It was argued that the search and seizure, as well as the warrants justifying the operation, were unlawful under the Constitution.

Davis J observed that the matter inevitably raised the question of the legal professional privilege and the privileged status of some of the seized material. He pointed out, too, that our courts have held that the privilege is not merely an evidential rule, but a fundamental right derived from the requirements of procedural justice: see *S v Safatsa & others* 1988 (1) SA 868 (A) and *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing & others* 1979 (1) SA 637 (C) (both

discussed in *Commentary* in the notes to s 201). In the cases of *Mahomed v National Director of Public Prosecutors & others* 2006 (1) SACR 495 (W) at [7] and *Thint (Pty) Ltd v National Director of Public Prosecutions & others; Zuma v National Director of Public Prosecutions & others* 2008 (2) SACR 421 (CC) (discussed at length in *Commentary* on s 201) there was, said Davis J, ‘emphasis placed on the importance of this privilege in upholding the right to a fair trial, as guaranteed in terms of section 35 of the Constitution’.

The Immigration Act, in s 33(11), contained a provision similar to that in s 29(11) of the Criminal Procedure Act (see *Commentary* on s 29), which, it was held in *Thint*, requires that an item in respect of which privilege is claimed be taken to the office of the Registrar of the High Court before a court can decide if it *is* privileged or not. The purpose of this section (s 29(11)), said the court in *Thint*, was to provide the state with a mechanism, where privilege is claimed during a search, to have that claim speedily determined by a court without the state running the risk of attaching documents subsequently declared to be privileged.

In the *Craig Smith* case, said Davis J, the warrants had failed to protect the privilege. The issuing magistrate had not deposed to an affidavit ‘explaining why . . . there was no consideration given to the consequences of a search that was to take place at an attorney’s office and why there was no recourse to the clear implications of s 33(11) of the [Immigration] Act when it was common cause that the search would take place at an attorney’s office and it was obvious that there were dangers of breach of legal privilege’. Any conduct of the attorney could *not* be tantamount to a *waiver* of the privilege because the right was that of the *client* and not the attorney. It was, said Davis J, ‘manifestly clear that legal privilege was compromised as a result of the search’. For this and other reasons, the raid on the attorney’s office was in violation of his constitutional rights and was thus unlawful and invalid.

What, then, to do with the seized files and computers? The court considered that it could not condone the improper conduct of the investigators and that it had to set an example for adherence to constitutional values. The constitution created an ‘ethos of accountability’, and the rule of law and the principle of legality dictated that executive action could not be arbitrary. The applicant’s rights to privacy and dignity had been breached. So, too, had the legal professional privilege. Davis J felt compelled, how-

ever, to balance the ‘crime control’ and ‘due process’ elements of criminal procedure as set out by Herbert Packer in 1964 (113) *University of Pennsylvania LR* 1. The former emphasises the greater protection which society requires from criminals and mandates swifter and greater punishment to promote the greater good of society; the latter demands that each accused receives the best opportunity to prove his innocence and calls for greater accountability of the police and the entire criminal justice system to achieve due process and to preserve the basic rights of the accused even if this outcome might jeopardise the ultimate objectives of crime control. The serious allegations made against the applicant could not be ignored in striking an appropriate balance between these two elements, especially in ‘a country where the scourge of crime threatens the very fabric of our Constitutional ambitions’.

That balance could be achieved, said Davis J, by granting a preservation order of the kind described by the Constitutional Court in *Thint*. Such an order ‘would require the state to hand over to the Registrar of the High Court all the items seized and require the Registrar to make and retain copies of all such items, to return the originals to the applicant and to keep the copies accessible, safe and intact under seal until the state permitted their return, the conclusion of criminal proceedings against the applicants as envisaged, or the date the state decided not to investigate such proceedings’. It was only in the exceptional circumstances set out by Langa CJ in *Thint* (and discussed in *Commentary supra*) that such an order should not be granted. It was argued that the conduct of the investigators was so egregious a violation of the applicant’s rights that the *Craig Smith* case was such an instance, but Davis J was unable to agree. He conceded that proportionality was a difficult exercise for courts but endorsed a ‘balancing formula’ articulated by Aharon Barak in *Proportionality: Constitutional Rights and their Limitation* at 543 which ‘compares the marginal social importance of the benefit gained by the limiting law and the marginal social importance preventing the harm to the Constitutional right’.

The result was a lengthy and detailed preservation order designed to ensure that all files and electronic data seized be returned to the applicant after being copied and sent for preservation to the Registrar of the High Court. Material for which privilege was claimed was, however, exempted from this order, and an order was issued that, if the claim of privilege

were challenged, the matter be set down on the urgent roll for resolution by the court.

s 212: Experts and scientific evidence

In *S v Helm* (unreported, WCC case no A119/2012, 17 September 2014) the expert scientific evidence of witnesses called by both the state and the court itself (under s 186) did ‘not measure up to the requisite standard which our courts have, over the decades, demanded’ (at [103]). In *S v Mthimkulu* 1975 (4) SA 759 (A) Corbett JA, referring to the views of Wigmore, held that, in order to justify testimony based on scientific instruments or processes, professional testimony was required ‘as to the trustworthiness of the process, or to the instrument, and in addition, to the correctness of the particular instrument’ (at [104] in *Helm*).

Judicial notice could be taken of some processes, such as a scale for weighing, a tape for distance or a watch for timing, and no hard and fast rule could be laid down, since much depended on the facts of a particular case. Important factors might be the nature of the process and instrument in question, the extent to which the evidence was challenged, the nature of the inquiry and the *facta probanda* of the case.

In *S v Strydom* 1978 (4) SA 748 (E) at 751–3 the court refused to take judicial notice of the accuracy of a gas chromatograph to measure blood alcohol limits (see *Commentary* on s 212(4) and see, too, *S v Van der Sandt* 1997 (2) SACR 116 (W) discussed there). It insisted on expert technical evidence by a person able to describe the process in the machine and to vouch for its accuracy, *or* able to test the machine against another, unrelated method of analysis which, if not already the subject of judicial notice, would not require proof of accuracy.

In *Helm* the machine in question was a ‘gas chromatographic mass spectrometry’ testing machine, which separated compounds into gases and characterised them to identify the chemical composition of those compounds. The necessary evidence was not adduced; the information was not made available to a defence expert who expressly called into question the accuracy of the machine used; and there were serious anomalies in the laboratory results presented. The scientific evidence was, concluded the court, ‘flawed’, and there were ‘serious doubts about the accuracy of the testing equipment, the competence of the laboratory staff, and the reliability of the analysis of the samples’ tested.

s 217: Role of the prosecutor in respect of a confession likely to be inadmissible

The prosecutor was severely criticised for a breach of his duty to the court in *S v Maliga* [2014] ZASCA 161 (unreported, SCA case no 543/13, 1 October 2014). The appellant in that case had, said the court, been lured into testifying after he was wrongly refused a discharge following the reception into evidence of a plainly inadmissible confession.

Pillay JA stressed that the court had a duty to raise the question *mero motu* even in the absence of an application for a discharge. It was a duty that was not dependent on whether or not the accused was legally represented (see *R v Hepworth* 1928 AD 265 at 277). Section 35 (3) of the Constitution, said Pillay JA at [19], ‘compels presiding officers and indeed all officers of the court to play a role during the course of the trial in order to achieve a fair and just outcome’. He agreed with what was said in *Hepworth* (at 277) that ‘a criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge’s position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed’. A judge’s role is to see that justice is done. But if the trial judge had made a mistake in failing to rule the accused’s statements inadmissible, there were ‘others who could and should have “reminded” him of the dangers involved in admitting certain evidence’. That, said Pillay JA, was ‘what was expected of both the prosecutor and the defence representative’.

The court found it ‘perplexing’ that the appellant’s representative did not object to the evidence, but found, ‘even more important [was] the role of the prosecutor’. This role was described (at [20]) as follows:

A prosecutor stands in a special position in relation to the court. The paramount duty of a prosecutor is not to procure a conviction but to assist the court in ascertaining the truth (*S v Jija* 1991 (2) SA 52 (E) at 67J–68A). Implicit herein is the prosecutor’s role in assisting a court to ascertain the truth and dispense with justice. This, not surprisingly, gels with the stringent ethical rules by which all legal representatives have to conduct themselves in their professional lives.

In this case the prosecutor was ‘duty bound to alert the presiding officer of the possible dangers which were lurking in admitting the warning statement’ (at

[21]). Since he was the only person likely to have known what evidence he was about to place before the court, he ought at least to have sought a *ruling* on its admissibility or have requested a trial within a trial to determine admissibility, although it was ‘difficult to understand how anyone could mistake what is clearly a confession for a warning statement’.

The court concluded that the prosecutor had failed in his duty. But for the inadmissible statements there would have been no case for the appellant to answer. ‘Faced with this evidence, the appellant was clearly lured into testifying and consequently he did not receive a fair trial as enshrined by s 35 of the Constitution’.

(ii) Sentencing

s 280(2): Ordering sentences to run concurrently

S v Nemutandani [2014] ZASCA 128 (unreported, SCA case no 944/13, 22 September 2014) and *S v Nthabalala* [2014] ZASCA 28 (unreported, SCA case no 829/13, 28 March 2014)

These two Supreme Court of Appeal decisions once again emphasise the duty of a sentencing court to ensure that the cumulative effect of sentences imposed does not result in excessive punishment. See the notes on s 280 in *Commentary, sv Cumulative sentences*.

In *Nemutandani* (supra) the trial court had sentenced the appellant—who was 21 years old at the time—to 20 years’ imprisonment for murder and 18 years for robbery with aggravating circumstances. No order was made that these two sentences were to run concurrently. This meant that the effective sentence was 38 years’ imprisonment.

On appeal it was submitted that the trial court had committed a misdirection in not ordering the two sentences to run concurrently (at [2]). Indeed, Mbha JA (Brand JA and Mathopo AJA concurring) readily concluded that by not ordering the sentences to run concurrently, the trial court had committed an irregularity (at [11]). The appeal succeeded to the extent that the sentences were ordered to run concurrently, resulting in an effective 20 years’ imprisonment (at [12]). Mbha JA advanced at least six reasons in support of this conclusion:

First, the effective sentence of 38 years’ imprisonment imposed on a 21-year-old was ‘unduly harsh’ (at [7]). *Second*, a sentencing court should not

impose sentences of imprisonment which are open to the interpretation that they have been imposed ‘for public consumption’ (at [8]). *Third*, referring to *S v Senatsi & another* 2006 (2) SACR 291 (SCA) at [6], it was noted that one way of accommodating mercy in the sentencing process is to order that sentences be served concurrently (at [10]). *Fourth*, the trial court omitted to furnish reasons for the decision not to order the sentences to run concurrently (at [11]). *Fifth*, the trial court did not even consider the cumulative effect of the sentences (at [11]). *Sixth*, referring to *S v Mokela* 2012 (1) SACR 431 (SCA), Mbha JA also stated as follows (at [9]):

[T]he murder committed by the appellant was inextricably linked to the robbery of the deceased during which the deceased’s canvas shoes were removed and taken. It is trite law that an order for sentences to run concurrently is always called for where the evidence shows that the relevant offences are inextricably linked in terms of locality, time, protagonists and, importantly, the fact that they were committed with one common intent.

It is in the context of the sixth reason above that reference to *Nthabalala* (supra) must also be made. *Nthabalala* emanated, like *Nemutandani* (supra), from the Limpopo High Court and, like *Nemutandani*, involved an appeal on sentence. It required the Supreme Court of Appeal to consider once again the appropriateness of two sentences imposed in a situation where two serious offences were committed in the course of one incident. In *Nthabalala* the trial court had sentenced the appellant to 16 years for culpable homicide and 45 years for rape. The deceased was killed whilst trying to resist: ‘To overcome her resistance the appellant throttled . . . [her] . . . so that he could engage in sexual intercourse with her in circumstances where it was quite clear to him that she was not consenting’ (at [8]).

Legodi AJA (Ponnan and Petse JJA concurring) was satisfied that the trial court had in several respects misdirected itself in the exercise of its sentencing discretion, most notably by overemphasising irrelevant previous convictions for theft and by speculating, despite the culpable homicide finding, that the appellant might have killed the deceased to prevent her from reporting him. After having given careful consideration to rape as a repulsive crime violating the personhood and dignity of the victim, Legodi AJA noted that society, apart from expecting serious offences to be punished, also expects mitigating

circumstances to be afforded consideration in the determination of sentence (at [8]–[9]).

The appellant was sentenced to 10 years' imprisonment for the culpable homicide and 20 years for the rape. But Legodi AJA, after having noted at [11] that 'the offences were part of the same transaction', ordered that five of the ten years' imprisonment imposed on the appellant in respect of culpable homicide had to run concurrently with the 20 years imposed for the rape charge. This meant an effective sentence of 25 years' imprisonment.

It should be pointed out that *Nthabalala* is not in conflict with *Nemutandani* (supra), where the robbery sentence as a whole was ordered to run concurrently with the murder sentence. The ultimate test remains the appropriateness of the sentence(s); and circumstances such as 'an inextricable link between the offences', 'the same transaction' or 'overall criminal conduct' is an aid, and at times a forceful guideline, to determine the appropriate sentence. On the one hand, where the effective term of imprisonment is so excessive as to be inappropriate, the court is required to take into account that there was 'a single transaction' calling for concurrence of sentences—as was the case in *Nemutandani* (supra). On the other hand, where a court finds that non-concurrence of the sentences would result in too long a period of imprisonment whilst complete concurrence would, in turn, yield an inappropriately short period, the court can order only a portion of a sentence to run concurrently. It is submitted that this is the position in which the Supreme Court of Appeal found itself in *Nthabalala*; and finding the *via media* of imposing an effective 25 years' imprisonment, was an eminently sensible solution. To put the matter differently: the effective sentence of 25 years is not excessive, even though there was an inextricable link between the rape and the culpable homicide and, furthermore, no complete concurrence of the two sentences. The abominable conduct of the appellant in *Nthabalala* called for 25 years in prison.

Sentencing: The meaning of 'premeditated' murder for purposes of Part 1 of Schedule 2 to the Criminal Law Amendment Act 105 of 1997

S v Kekana [2014] ZASCA 158 (unreported, SCA case no 629/13, 1 October 2014)

In *Kekana* (supra) it was argued that the trial judge and a full bench of the South Gauteng High Court

had incorrectly convicted the appellant of 'premeditated' murder of his wife. In the absence of substantial and compelling circumstances, this conviction resulted in a sentence of imprisonment for life as provided for in s 51(1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997.

It was submitted on behalf of the appellant that premeditation was absent because he had acted 'on the spur of the moment and was incandescent with rage when he killed the deceased by setting fire to the house' (at [10]).

Mathopo AJA (Lewis JA and Gorven AJA concurring) rejected this submission, given the uncontroverted facts (or 'factual matrix') contained in the s 112(2) statement that the appellant had submitted, and the prosecution had accepted, at the trial: after an initial argument with his wife, the appellant left the house briefly; upon his return, he found that she had packed his clothes; after a further argument, he *decided* to kill her; he then went outside to fetch petrol bought earlier by him for an innocent purpose; he poured the petrol on the bed of the deceased, set it alight and locked her in the room; he also poured petrol in the passage, kitchen and dining room. In assessing these facts, Mathopo AJA observed (at [14]): 'The locking of the door and further pouring of petrol show that he was carefully implementing a plan to prevent her escape and to ensure that she died in the blaze. To my mind this is proof of premeditation on his part . . . [T]he appellant was correctly convicted of premeditated murder.'

During the course of the judgment, reference was made to *S v Raath* 2009 (2) SACR 46 (C) where Bozalek J, writing for a full bench, interpreted the words 'planned or premeditated' as used in Part 1 of Schedule 2 of Act 105 of 1997. Having noted that there is no statutory definition of the concept 'premeditation' and that the dictionary meaning must prevail, Bozalek J took the view that only an examination of all the circumstances pertaining to a specific murder, including the accused's state of mind, can determine the presence of premeditation. At [16] he said:

In such an evaluation the period of time between the accused forming the intent to commit the murder and carrying out this intention is obviously of cardinal importance but, equally, does not at some arbitrary point, provide a ready-made answer to the question of whether the murder was "planned or premeditated".

In *Raath* (supra) no premeditation was found. Even

though there was ample evidence of the accused's violent behaviour towards his wife in the months preceding the night he shot her, there was nothing to suggest a prior intention or plan to kill her. Premeditation was absent because the accused's anger, triggered by the absence of his wife, turned into rage and, after having forced his son to open the safe, he took a firearm, crossed the road and shot his wife as she emerged from the neighbours' house (at [17]). Bozalek J accepted that all this happened in no more than a matter of minutes and, even though the accused had conceived the idea to kill his wife and had armed himself for this purpose, 'the deadly, but spur-of-the-moment act or acts of . . . [the accused] . . . in an emotional rage' did not constitute 'a planned or premeditated murder' (at [18]).

In *S v Mgibelo* 2013 (2) SACR 559 (GSJ) there was no doubt that premeditation was present. The accused's contention that she had committed a 'crime of passion' was rejected. She had actually, over a period of sixteen hours, planned to set fire to the shack where the deceased (her former lover) and his new girlfriend were sleeping. *Mgibelo*—not referred to in *Kekana* and decided only after *Raath*—is really of no help except to illustrate what a clear-cut case of premeditation is. *Raath* and *Kekana* illustrate the difficulties that can arise when the decision to murder and the steps taken to execute the decision are only separated by minutes.

In *Kekana* Mathopo AJA was less accommodating than Bozalek J in *Raath*. After having accepted that it was only 'a matter of a few minutes, at the least' between the appellant's decision to kill his wife and the locking up of his wife in the bedroom where he had set the petrol-doused bed alight (at [12]), Mathopo AJA went on to say: 'Time is not the only consideration because even a few minutes are

enough to carry out a premeditated action' (at [13]). One must agree that time alone cannot be decisive. But it is also clear that *Kekana* is very much a borderline case that can easily be misunderstood or interpreted to give an over-broad meaning to 'premeditated' for purposes of Act 105 of 1997. This concept appears in a penal provision; and it ought not to be interpreted too liberally. The absence or presence of premeditation should not be assessed by looking only at the steps taken by an accused after he had taken the decision to kill. A more acceptable approach, it is submitted, would be to ask whether the decision to murder and the steps taken to commit this murder, were in terms of time, place and circumstance so closely connected that the steps taken—far from indicating prior or advance planning—were merely the immediate result of, and part and parcel of, the earlier decision to murder. This type of test, it is submitted, would give true expression to the general principle of penal policy that crimes which result from rash or impulsive decisions are less reprehensible (and deserve lesser sentences) than those which are planned in terms of means, opportunity and final execution.

Let there be no mistake: the murder in *Kekana* was a most condemnable deed, involving, as it did, domestic violence of an extremely repulsive kind and committed with a callousness that is shocking in the extreme. But it is doubtful whether there was, for purposes of Act 105 of 1997, a premeditated murder.

For further cases on premeditated murder, see the notes on s 277 in *Commentary*, sv *Murder: Absence of premeditation*.

(iii) Appeal and Review

There were no cases of significance in the period under review.

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