CRIMINAL JUSTICE REVIEW

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Editorial Note

The feature article in this edition explores and analyses some of the challenges facing the courts when the complainant in a sexual offence is allegedly mentally disabled. Section 51 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides that imprisonment for life is the minimum sentence for the rape of a mentally disabled person as defined in s 1 of that Act. But how is the state to prove that the complainant *is* mentally disabled? May the complainant be called into court without testifying so that the court may make its own assessment? Should the state lead expert medical evidence or can it, instead, call the complainant as a witness so that the court can observe him or her and form its own opinion on the matter? What happens if the complainant, as a result of the mental disability, is not a competent witness?

The section on Legislation draws attention to the provisions of the Judicial Matters Amendment Bill which will (in all probability during 2017) amend several provisions in the Criminal Procedure Act.

Several interesting and important questions are considered in the case notes. In *MR v Minister of Safety and Security* the Constitutional Court considered the principles underlying the arrest and the detention of children against the backdrop of the responsibility, under s 28(2) of the Constitution, to uphold the best interests of a child. In the discussion of the substantive criminal law, there is a consideration of the circumstances in which disobeying a court order might amount to contempt of court (*S v Samuels*) as well as an application of the principles governing the defence of voluntary intoxication (*S v Ramdass*).

Evidence cases feature prominently, with cases involving: the admissibility in criminal cases of hearsay evidence against the accused (*S v Seemela*); the need to limit, in appropriate cases, the rule that isolates evidence given in a trial within a trial when the admissibility of a confession is determined, from the evidence given in the main trial (*S v Krejcir*); the effect of an involuntarily made report of rape by a complainant (*S v Vilakazi*); the ambit of the 'doctrine of recent possession' in cases involving theft (*S v Mothwa*); the responsibilities resting on the prosecution when material has been sent for DNA forensic testing (*S v Molehe & another*); and the circumstances in which the procurement of real evidence by means of an unlawful search and seizure may lead to the exclusion of that evidence and other derivative evidence in terms of s 35(5) of the Constitution (*S v Gumede*).

Other questions tackled in cases considered in this edition include: What are the requirements for the valid prosecution of an official who sets or takes part in a trap or undercover operation in terms of s 252A (*S v Beyleveld*)? When should a preservation order be issued following an unlawful search and seizure of property (*Page & others v Additional Magistrate, Somerset West & others*)? When are goods the 'proceeds of unlawful activities' for the purpose of obtaining a forfeiture order under s 48 of POCA (*National Director of Public Prosecutions v Airport Clinic JHB International (Pty) Ltd & another*)? What constitutes 'exceptional circumstances' allowing the President of the Supreme Court of Appeal to make a referral for reconsideration and, if necessary, a variation of a decision by that court concerning leave to appeal under s 17(2)*(f)* of the Superior Courts Act (*S v Malele; S v Ngobeni*)? And what is the juristic *nature* of such a 'reconsideration' under that section (*S v Notshokovu*)?

Finally, the cases dealing with sentencing addressed these issues: What must a court take into account in the sentencing of a primary caregiver of minor children; and when precisely is an offender a 'first offender' for the purpose of sentencing?

Andrew Paizes

(A) FEATURE ARTICLE

Protecting mentally disabled victims of sexual offences: Impermissible parading in court

In *S v Mnguni* 2014 (2) SACR 595 (GP) the appellant was charged with and convicted of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereinafter 'SORMA'). The defence of consent was rejected and the trial court had also concluded that the victim, a 20-year-old woman, was mentally disabled as defined in s 1 of SORMA and as alleged by the prosecution. The trial court found that there were no substantial and compelling circumstances justifying a lesser sentence than the prescribed minimum sentence. The appellant was accordingly sentenced to life imprisonment which is the minimum sentence in terms of s 51 of the Criminal Law Amendment Act 105 of 1997 for the rape of a mentally disabled person as defined in s 1 of SORMA.

In terms of s 1(1) of SORMA a person would be 'mentally disabled' if at the time of the commission of the relevant offence, he or she was:

> 'a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was—
> (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
> (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
> (c) unable to resist the commission of any such act; or
> (d) unable to communicate his or her unwillingness to participate in any such act. . .'

On appeal against conviction and sentence in respect of the rape in contravention of s 3 as read with s 1 of SORMA, Louw J (Keightley J concurring) pointed out that the prosecution was required to prove that the victim was mentally disabled as contemplated in one of the four categories identified in s 1(1)*(a)–(d)* of SORMA: 'The nature of the mental disability required to be proved is therefore specific. It is not sufficient for the state to merely prove that the victim is mentally disabled or retarded or challenged.'

Louw J was satisfied that the prosecution's evidence was inadequate. In the course of his evidence Mr P, a clinical psychologist who had examined the victim and was called as a state witness, never addressed the definition of a mentally disabled person as defined in s 1(1) of SORMA (at [5]). Indeed, the closest Mr P got to an assessment of the victim's mental ability for purposes of the case, was to state that a clinical assessment indicated that she was 'mentally retarded' and that her ability to distinguish between right and wrong was 'compromised to the age below 13 years'. This evidence could not have advanced the prosecution's case; and the evidence concerning her ability to distinguish between right and wrong was most unhelpful.

Another expert called by the state was Ms M, a registered nurse specialising in sexual assault and physical assault examinations. According to her she had 'observed' that the victim was 'severely mentally challenged' and it was difficult to communicate with her (at [7]). Her evidence in respect of the issue was not of assistance. Louw J concluded (at [8]):

> 'When asked in cross-examination whether an ordinary person who just meets the victim would gather that she was mentally challenged, she said they might or might not. Ms [M] is not an expert in this field and her evidence in any event also did not address the requirements of the definition of a mentally disabled person in . . . [SORMA].'

The trial court's finding that the appellant had raped a mentally disabled person as defined in SORMA, had to be set aside. However, Louw J agreed with the trial court that the appellant's defence of consent had to be rejected (at [9]). In this regard the expert evidence of Ms M, the registered nurse referred to above, was indeed most helpful. She described in detail the extent of the victim's gynaecological injuries when she examined her. Specific reference was made to the most serious injury which was a tear that, according to the witness, 'does not occur even during rough sexual intercourse and usually only happens during childbirth' (at [9]). The severe nature of the victim's injuries indicated that consent was absent. Louw J accordingly convicted the appellant of rape which is a competent verdict on the charge on which the appellant was arraigned (at [9]). The appellant was—in the absence of substantial and compelling circumstances—sentenced by the appeal court to 10 years' imprisonment which is the minimum sentence prescribed by the Criminal Law

Amendment Act in respect of rape in contravention of s 3 of SORMA.

Apart from her concurrence in the judgment of Louw J on the merits and sentence, Keightley J also wrote an additional and separate judgment dealing with 'the correct approach that should be followed at trial in circumstances where an accused is charged with the crime of rape of a mentally disabled person' (at [12]). Her true concern was that the trial record reflected that the magistrate had, as a result of the prosecution's rather poor attempt to prove mental disability as described in s 1(1) of SORMA, sought to solve the issue by calling the complainant into court so that the magistrate herself as well as the prosecutor, the appellant and his legal representative 'could see for themselves whether the complainant was mentally disabled' (at [21]). It would appear that the purpose of the exercise was to create an opportunity where, in the words of Keightley J at [13], 'some sort of lay person's assessment could be made of [the victim's] mental abilities or disabilities'.

The view was taken that in *Mnguni* the prosecution had failed to act in terms of its constitutional obligations (at [10]). The prosecution had also acted contrary to the spirit and objectives of SORMA by failing, for example, to protect the vulnerability of a mentally disabled victim of a sexual offence (at [14]–[16]). It was furthermore held that relevant directives issued by the National Director of Public Prosecutions had not been followed: there was no victim-centred approach (at [17]); inadequate expert evidence was led on the issue of mental disability (at [20]) and, prior to trial, the prosecutor had not checked whether the psychologist's report 'correctly addressed what needed to be addressed, namely, whether the complainant was mentally disabled as defined in [SORMA] and, hence, whether she was able or not to consent to sexual intercourse. . .' (at [19]). Were it not for these failures and defaults, it would—according to Keightley J at [27]—have been unnecessary to have subjected the victim and her family 'to secondary victimisation and traumatisation by parading her in front of the court'. The victim—who was called into court not as a witness but simply for observation—was subjected to a procedure which Keightley J found unacceptable (at [22]–[23]):

> 'Not only is it quite irregular for the court to try to formulate an opinion in this manner, but it is also fundamentally contrary to the complainant's rights to privacy and dignity. She was effectively put on display and discussed as an object by the magistrate and others involved in the trial.
>
> This was all captured for posterity in the court transcript. The presiding magistrate and the public prosecutor ought not to have allowed this to happen. Their conduct amounted to a violation of their constitutional obligation to ensure that the complainant's rights to privacy, bodily integrity and dignity were respected and protected.'

There is no doubt that *Mnguni* was correctly decided; and the valid remarks made by Keightley J in her additional and separate judgment must be heeded by prosecutors and courts.

Mnguni should, it is submitted, be compared with *S v Katoo* 2005 (1) SACR 522 (SCA) which was decided before SORMA became law. In *Katoo* the accused was charged with the common-law crime of rape of a 16-year-old female. The alternative charge was sexual intercourse in contravention of the now-repealed s 15(1)*(a)* of the Sexual Offences Act 23 of 1957, that is, sexual intercourse with an 'imbecile' (the outdated term used in the Act). The accused's defence on these charges was consent, with the additional averment that in respect of the alternative charge—where intention was of course also an element of the crime—he did not know that the victim was an imbecile (at [5]). The prosecution called a clinical psychologist, Mr D, in order to prove that the accused was aware of the fact that the victim 'was incapable of consenting to sexual intercourse as she obviously was an imbecile' (at [6]). Mr D had examined the victim and had prepared a report on her. In his expert opinion she suffered from 'severe mental retardation', had the mental age of a four-year-old child and 'could consequently be described as an imbecile' (at [6]). However, Mr D also testified that he could not establish whether the victim could distinguish between truth and lies (at [6]).

In *Katoo* the prosecution—in contradistinction to the position in *Mnguni*—wanted to call the victim as a state witness. But the trial judge ruled that the expert evidence diagnosing the victim as an imbecile had rendered the victim an incompetent witness on account of the provisions of s 194 of the Criminal Procedure Act 51 of 1977. The relevant portion of s 194 determines that a person who appears or is proved to be labouring under any imbecility of mind due to intoxication or drugs or the like and who is thereby deprived of the proper use of his or her reason, shall not be competent to give evidence while so afflicted or disabled.

The prosecution made a successful application to the Supreme Court of Appeal for the following issue to be reserved as a question of law as provided for in s 319 of the Criminal Procedure Act: was the trial judge correct in law in denying the prosecution an opportunity to present the evidence of the complainant on the relevant charges?

Jafta JA, writing for a unanimous full bench, held that the trial judge had erred in law and that the reserved question of law accordingly had to be answered in the negative (*Katoo* at [20]). Relying on the provisions of s 194, it was held that '[i]mbecility is not a mental illness and per se did not disqualify [the victim] as a witness' (at [11]). It was also pointed out that it is 'only imbecility induced by ''intoxication or drugs or the like''[as stipulated in s 194] that falls within the ambit of the section' (at [11]).

At [9] and [14] in *Katoo*, Jafta JA also relied on the rebuttable presumption in s 192 that every person is competent to give evidence in a criminal trial unless expressly excluded by the Act from doing so. Competence, it was said, should also not be confused with a separate and discreet issue which must be dealt with under s 164 of the Act, namely whether the witness concerned understands the nature and import of the oath or affirmation, as the case may be. It was, furthermore, held that on account of the fact that s 193 requires a court to determine competency, the trial court should have conducted a proper investigation into the cause of the victim's imbecility before concluding that she was incompetent. An inquiry of this nature, it was said, could be by receiving medical evidence on the mental state of the witness 'or by allowing the witness to testify *so that the court can observe him or her and form its own opinion on the witness's ability to testify*' (at [12], emphasis added). Our courts, said Jafta JA, have permitted imbeciles and persons suffering from mental disorders 'to testify subject to their being competent to testify'. Imbecility on its own does not necessarily result in incompetency. See also the discussion of *Katoo* in the notes on s 193 in *Commentary*, sv *General*. The decision to answer the reserved question of law in the negative was clearly correct. However, for present purposes specific attention must be drawn to the following observation in *Katoo* (at [13], emphasis added):

> 'In addition, the intention of the State here was not to rely on the truth of the evidence of the complainant; *it was to demonstrate to the Court that she was an imbecile and that that fact would have been apparent to anyone*—in other words, a procedure akin to an inspection *in loco*.'

Can it be said that the procedure as described in the above passage (hereinafter referred to as 'the procedure in *Katoo*') is in conflict with Keightley J's view in *Mnguni* (supra) at [21]–[23] and [27], namely that secondary victimisation takes place when a mentally disabled person is paraded in court in breach of his or her rights to privacy, bodily integrity and dignity?

It is necessary to identify some vital differences between the procedure in *Katoo* and the unacceptable parading of the victim in *Mnguni*.

In *Mnguni* the prosecution had no intention of calling the alleged mentally disabled victim as a witness. Indeed, one can assume that it was probably precisely on account of her mental disability that the prosecution never attempted to call her as a witness. The trial court in *Mnguni* was therefore not called upon to determine the testimonial competence of the victim as envisaged in and required by s 193 of Act 51 of 1977. The prosecution had set out to prove that on the basis of expert evidence the victim fell into one or more of the categories identified in s 1 of SORMA. But the expert evidence in this regard was totally inadequate. This, in turn, prompted the trial magistrate to resort to the procedure of 'parading her in front of the court' (at [28]). Parading the victim so that the trial court, prosecutor and defence could have an opportunity to observe her was not for the purpose of determining her testimonial competence. Parading had the unacceptable purpose of providing the trial magistrate as a lay person with some 'real evidence' which could purportedly have enabled the magistrate to decide an issue such as mental disability without expert evidence. Whilst the trial court's observation of the victim could obviously have provided it with some general impression of her mental ability, the fact remains that the proper determination of the precise level, depth and category of the victim's mental disability for purposes of s 1 of SORMA, was a matter that fell outside the magistrate's competence or experience and called for expert evidence. See generally *Minister of Basic Education, Sport and Culture v Vivier NO & another* 2012 (2) NR 613 (SC) at [31].

A further question arises: was the parading of the victim in *Mnguni* permissible for the purpose of assisting the court to determine an issue that was very relevant to the accused's defence, namely whether a lay person—like the accused—would have detected that the victim was a mentally disabled

person not capable of giving informed consent to sexual intercourse as envisaged in s 57(2) of SORMA? Here, too, the answer is that expert evidence can be led to decide this issue. See, for example, *S v Van der Bank* [2015] ZASCA 10 (unreported, SCA case no 245/15, 9 March 2016) where B, a registered psychologist, had, prior to trial and during consultations with the victim, not only conducted psychological tests but had also conversed with her and observed her behaviour. When called by the prosecution as an expert witness at the regional court trial, B expressed the opinion that the 16-year-old victim was 'intellectually seriously retarded and operated on a mental level of approximately eight and a half years old' (at [15]). She also testified that 'any lay person would quickly detect that the complainant did not function at the level of an ordinary 15–16 year-old person' (at [16]). This expert opinion evidence was of appreciable help to the court in ultimately deciding on the accused's defence that there was valid consent and that he lacked intention because the victim was in his view 'not stupid' (at [22]). The process of presenting expert opinion evidence is to be preferred to the inherently dehumanising effect of parading the victim in open court where she is, in the words of Keightley J in *Mnguni* (supra) at [22], 'effectively put on display and discussed as an object by the magistrate and others involved in the trial'.

It is submitted that the procedure of parading the victim, must be distinguished from the procedure in *Katoo* at [14], where the issue was the testimonial competence of the victim. In *Katoo* the trial court had incorrectly denied the prosecution an opportunity of adducing evidence on the question of competence. The prosecution had in good faith sought to have a competence issue determined in terms of the applicable statutory provisions and common-law rules, including the rule that in the process of assessing and determining competence a court may rely on its own observations of the person concerned, for example, the oral responses and physical reactions of the person to questions posed in order to assist the court in deciding the issue of competence. The matter is accurately summarised by Zeffertt & Paizes *The South African Law of Evidence* 2 ed (2009) at 811:

> 'A trial court has a duty properly to investigate whether the witness is incompetent. This may be done by an inquiry in which medical evidence is led or by allowing the witness to testify so that the court may make its own finding from its observations or, it is submitted, by both these means.'

The suggestion in *Katoo* at [14] to the effect that the procedure in *Katoo* is 'a procedure akin to an inspection *in loco*', is perhaps unfortunate. An inspection *in loco* relates to physical observations of tangible matter, such as the scene of an incident, or examinations of objects too big to be received in court as exhibits. It is submitted that far more closely aligned to the procedure in *Katoo*, are the common-law evidential rules and principles governing 'demeanour' as one possible factor which—in the context of all factors and the evidence as a whole—can assist a court in deciding an issue. On the meaning of demeanour and its limited role as an aid in assessing evidence, see generally Schwikkard & Van der Merwe *Principles of Evidence* 4 ed (2016) 575–6.

Be that as it may, the parading of the victim in *Mnguni* was unacceptable, irregular, indefensible and—above all—entirely inconsistent with constitutional values and the need to protect the dignity and privacy of victims of sexual crimes. However, the procedure in *Katoo*—which confirms that a court can rely on its own observations of the victim in determining testimonial competence—is part and parcel of our procedural and evidential trial system which is based on the principle of orality which ensures that parties can confront witnesses in a situation where the parties and the court can observe the demeanour of the witnesses. The mere fact that a mentally disabled victim is observed by the court—be it for purposes of determining competence or deciding on the merits of the case—is a constitutionally permissible procedure in our adversarial system which protects and maintains constitutional fair trial norms. Indeed, observation of the victim may very often secure a fair result as regards the merits of the case. This much, it is submitted, is evident from the recently decided case *S v Prins* (unreported, WCC case no A153/16, 19 September 2016) where on appeal Gamble J stated as follows (at [21]–[22], emphasis added):

> 'When it came to the question of the victim's ability to testify, there was no objection or challenge from the side of the defence. *Clearly her mental disability was apparent to those present in the court* a quo. The record before us reflects that the examination of the victim (both in chief and under cross) was conducted in the most elementary fashion possible. The victim's

> replies to short and simple questions were mostly single words or short phrases. . . . The impression that one has after reading the record is that the victim is indeed an unsophisticated young woman with intellectual disability, as the evidence of the psychologist suggests. . . . I am satisfied that the victim was unable to appreciate both the nature and reasonably foreseeable consequences of participating in an act of sexual intercourse.'

When all is said and done, it is ultimately the duty of courts, prosecutors and practitioners to make a solid contribution to the sensitive and sensible treatment of mentally disabled victims within our existing procedural and evidential rules. The trial court's parading of the victim in *Mnguni* made no such contribution.

Steph van der Merwe

(B) LEGISLATION

During the period under review there were no amendments to the Criminal Procedure Act 51 of 1977. However, note should be taken of the Judicial Matters Amendment Bill [B14—2016] which will (in 2017 in all probability) amend several provisions in the Criminal Procedure Act, as discussed below.

Judicial Matters Amendment Bill [B14—2016]

In paragraph 1 of the memorandum on the objects of the above Bill published in *GG* 40274 of 14 September 2016, it is stated that the Bill seeks to amend the provisions of several Acts in order to address practical and technical issues of a non-contentious nature. Clauses 8 to 13 of the Bill contain amendments to the Criminal Procedure Act 51 of 1977. Only some of these clauses are referred to below.

Prescription of the right to prosecute: Torture as an exception

Section 18 of the Criminal Procedure Act states that the right to prosecute prescribes 20 years after the commission of the crime, except for offences referred to in s 18*(a)* to *(i)*. Section 18 has over the past decade and a half been amended on several occasions in order to accommodate serious statutory offences in respect of which there is no prescription of the right to prosecute. See the discussion of s 18 in *Commentary*, sv *Section 18(*h*): Contravention of certain sections of the Prevention and Combating of Trafficking in Persons Act 7 of 2013*.

Clause 8*(d)* of the Bill adds paragraph *(j)* to s 18 of the Criminal Procedure Act. In terms of this paragraph the following serious statutory offence will also have no prescription period: '[T]orture as contemplated in s 4(1) and (2) of the Prevention and Combating of Torture of Persons Act, 2013 (Act No 13 of 2013)'. Act 13 of 2013 (hereinafter the Torture Act) came into operation on 29 July 2013. See *GG* 36716 of 29 July 2013. The Torture Act gives effect to South Africa's obligations in terms of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. This convention was adopted by the General Assembly of the United Nations on 10 December 1984 and ratified by South Africa on 10 December 1998. As state party to this Convention, South Africa was required to adopt legislative, judicial and other measures to prevent acts of torture. See further Paizes (ed) *Criminal Justice Review* (2013–2015): *Supplement to Commentary on the Criminal Procedure Act* (2015) at 66 for a summary of criminal conduct constituting 'torture' as stipulated in s 3 of the Torture Act, as read with torture offences created by s 4 of the same Act.

By adding s 4(1) and (2) of the Torture Act to the category of offences falling outside the normal 20-year prescription period, the legislature seeks to comply with South Africa's international law obligations. In paragraph 2.8 of the memorandum which accompanied the Bill, reference is made to a judgment of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. In this judgment it was said that the prohibition against torture has evolved into a peremptory norm and, ranking higher than even 'ordinary' customary rules, should not be subjected to prescription. By adding paragraph *(j)* to s 18 of the Criminal Procedure Act, our law would, in respect of the 'crime of torture', comply with international demands concerning non-prescription of the right to prosecute.

Prescription of the right to prosecute: Re-insertion of certain repealed statutory sexual offences as exceptions

Section 18*(h)* of the Criminal Procedure Act used to refer to contraventions of s 71(1) and (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereinafter 'SORMA') as offences in respect of which the right to prosecute was not barred by lapse of time. However, s 71 of SORMA was repealed by s 48 of the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (hereinafter the 'PCTP Act'). Section 48 of the PCTP Act also amended s 18*(h)* of the Criminal Procedure Act—the references to the repealed s 71(1) and (2) of SORMA were removed and replaced by references to offences as provided for in ss 4, 5 and 7, and involvement in these offences as provided for in s 10 of the PCTP Act. However, the failure to retain contraventions of the now-repealed s 71(1) and (2) of SORMA as offences with no prescription period, was unfortunate. In paragraph 2.8.2 of the memorandum that accompanied the Bill, it is stated that the 'remote possibility' exists that charges in terms of the repealed s 71 might materialise at a later date. In order to cover this possibility, clause 8*(a)* of the Bill seeks to add paragraph (*h*A) to s 18 of the Criminal Procedure Act: '[T]rafficking in persons for sexual purposes by a person as contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related

Matters) Amendment Act, 2007'. If s 18(*h*A) were to become law, then trafficking in persons committed whilst s 71 of SORMA was the relevant law will be excluded from the 20-year prescription period identified in s 18.

Witness about to abscond: Prescribed procedure to cover all offences

Section 184(1) of the Criminal Procedure Act provides that whenever any person is likely to give material evidence in criminal proceedings, any judicial officer of the court before which the relevant proceedings are pending may, upon written information under oath that such person is about to abscond, issue a warrant for his arrest. However, s 184(1) also contains a provision to the effect that persons likely to give evidence in respect of an offence identified in Part III of Schedule 2 to the Criminal Procedure Act, are excluded from the operation of s 184(1). These witnesses must be dealt with in terms of s 185 which is far more invasive than s 184. Section 184 provides for a judicial warning to the witness and release of the witness on certain conditions set out in s 184(2), whereas s 185, in certain circumstances and at the initiative of a Director of Public Prosecutions, sets in motion a process for the pre-trial detention of the witness concerned.

In paragraph 2.9 of the memorandum that accompanied the Bill it is stated that there is no reason why s 184 should not be applicable to *all* offences, 'since it is not always necessary to detain a witness pending the relevant proceedings as envisaged in terms of section 185. . .'. Clause 9 of the Bill therefore seeks to amend s 184 by extending its application to all offences. This proposed amendment, it was noted, was at the request of the National Prosecuting Authority.

The proposed amendment of s 184 is to be welcomed, especially since s 184 can in several instances serve as a useful and less invasive alternative to s 185. Indeed, s 185 should be avoided because of its 'constitutional shortcomings' and procedural imperfections. See generally Steytler *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa, 1996* (1998) at 53.

Testimonial incompetence due to state of mind: Court may order report by expert

Clause 10 proposes the insertion of s 194A in the Criminal Procedure Act. The proposed s 194A(1) provides as follows:

> 'For purposes of section 193, whenever a court is required to decide on the competency of a witness due to his or her state of mind, as contemplated in section 194, the court may, when it deems it necessary in the interests of justice and with due consideration to the circumstances of the witness, and on such terms and conditions as the court may decide, order that the witness be examined by a medical practitioner, a psychiatrist or clinical psychologist designated by the court, who must furnish the court with a report on the competency of the witness to give evidence.'

The above provision merely confirms and formalises what is already happening in practice. See also the discussion of *S v Katoo* 2005 (1) SACR 522 (SCA) in the feature article of this edition of *Criminal Justice Review*.

In terms of the proposed s 194A(2) all experts designated by the court in terms of s 194A(1), who are not in the full-time service of the state, must be compensated for their services. Section 194A(3) provides that if the contents of a report contemplated in s 94A(1) are not disputed, the report is admissible as evidence.

(C) CASE LAW

(a) Criminal Law

Criminal capacity, intoxication and the application of s 1(1) of the Criminal Law Amendment Act 1 of 1988

The accused in *S v Ramdass* (unreported, KZD case no CC43/2015, 16 September 2016) was charged with the murder of his girlfriend. The deceased was found strangled in the Durban home she shared with her mother and the accused, and the facts showed beyond a reasonable doubt that it was the accused who had killed her. The car which the deceased had been using was missing, but it was found in a Durban street a short time after the discovery of the body. The accused was found later that morning in Umhlanga Rocks. He claimed that he had no recollection of what had happened to the deceased or how he ended up in Umhlanga Rocks. He said, however, that he had been drinking alcohol the previous afternoon and had, in addition, smoked crack cocaine. If it was he who had killed the deceased then, he maintained, he did so without realising what he was doing and without the intention to kill her.

The accused's defence amounted to a lack of criminal capacity in that the consumption of the alcohol and drugs had rendered him unable to appreciate the unlawfulness of his conduct or to act in accordance with such an application. As Ploos van Amstel J explained, this defence was available to an accused in circumstances of severe intoxication since the decision in *S v Chretien* 1981 (1) SA 1097 (A). That case significantly altered the law since, previously, the position was that voluntary intoxication which did not result in a mental disease was not a complete defence in respect of an offence committed during that state. The decision in *Chretien* has, as the judge pointed out, had a mixed reception, with some academic writers critical of it and others supporting it with some reservation. In *S v Eadie* 2002 (1) SACR 663 (SCA) at [27] Navsa JA said that it was important to bear in mind a comment made by Burchell in *South African Criminal Law and Procedure Vol 1 General Principles of Criminal Law* 3 ed (1997) at 188 that '[w]hile *Chretien* cannot be faulted on grounds of logic or conformity with general principles, the judgment might well have miscalculated the community's attitude to intoxication'. The court did not, however, overrule *Chretien*, which still reflects the current state of our law.

Ploos van Amstel J referred to what Rumpff CJ said in *Chretien* about amnesia: that the mere fact that an accused cannot remember what he had done does not necessarily mean that he was not criminally responsible. Whereas amnesia is not in itself a defence (see, for instance, *S v Piccione* 1967 (2) SA 334 (N) at 335C–D), Ploos van Amstel J pointed out that it may nevertheless be *relevant* in determining whether a defence such as automatism or lack of criminal capacity has been established. The onus is, of course, on the state to prove beyond a reasonable doubt that the accused *had* the necessary capacity and intention, and the accused is required to do no more than 'lay a foundation for it, sufficient at least to create a reasonable doubt on the point' (*Eadie* at [2]). It is then 'for the Court to decide the question of the accused's criminal capacity, having regard to the expert evidence and all the facts of the case, including the nature of the accused's actions during the relevant period' (*Eadie* at [2]).

Ploos van Amstel J (at [29]) was 'conscious of the need for caution in finding too readily that a person who had killed someone is not criminally responsible because he acted involuntarily or without criminal capacity', since, as Rumpff CJ recognised in *Chretien*, this may bring the administration of justice into disrepute. The judge concluded, however, that the accused had established a sufficient foundation for the absence of criminal capacity and that the totality of the evidence created a reasonable doubt as to his criminal capacity. Some of the evidence that prompted this finding included: evidence that their relationship was good and that the accused and the deceased were planning to marry; there was no evidence of a motive to kill her; he was regarded by those who knew him as a gentle and humble person so that his conduct was completely out of character; the evidence relating to the consumption of alcohol and the smoking of crack cocaine; his amnesia following the incident; the fact that, when he was found in Umhlanga Rocks the following morning, he made no effort to avoid those who were looking for him, and seemed genuinely to have believed that they were interested in some other matter unrelated to the murder of his girlfriend; and the fact that he had wanted to plead guilty until counsel advised him that, on his version, he might well not be guilty. There was, moreover, no expert evidence to suggest that it was likely that he killed her well knowing that what he was doing was wrong.

He could, accordingly, not be convicted of murder. Could he, as the state argued, be convicted of culpable homicide? No, said the judge, since criminal capacity is required to be proved for that offence

in the same way that it is for murder. The judge turned, next, to the provisions of s 1(1) of the Criminal Law Amendment Act 1 of 1988, which was designed to provide criminal liability for those who fall through the net by reason of what was held in *Chretien*. That section creates a statutory offence in the following terms:

> 'Any person who consumes or uses any substance which impairs his or her faculties to appreciate the wrongfulness of his or her acts or to act in accordance with that appreciation, while knowing that such substance has that effect, and who while such faculties are thus impaired commits any act prohibited by law under any penalty, but is not criminally liable because his or her faculties were impaired as aforesaid, shall be guilty of an offence and shall be liable on conviction to the penalty which may be imposed in respect of the commission of that act.'

This provision has been the subject of sharp criticism by Paizes 'Intoxication through the looking-glass' (1988) 105 *SALJ* at 776 as well as other commentators. One of the grounds of criticism has been the causal requirement that the legislature requires to be forged between the non-liability of the accused (in respect of the primary offence, such as, in this case, murder) and the impairment of his or her faculties. If, say, the accused is acquitted on a charge of murder because it is reasonably possible that he lacked criminal capacity, he cannot, as Ploos van Amstel J pointed out (at [33]) after taking into account the academic criticism, be convicted of the statutory offence unless the court finds it proved beyond a reasonable doubt that he did not have such capacity. This follows since *all* elements of the offence must, in line with general principles, be established beyond a reasonable doubt, and one of the elements of the statutory offence, as it is articulated, is that the accused 'is not criminally liable *because* his or her faculties were impaired as aforesaid' (emphasis added).

This is a major defect of the provision, and the courts have, on other occasions too, had occasion to draw attention to it (see, for instance, *S v Hutchinson* 1990 (1) SACR 149 (D) at 154–5; *S v Mbele* 1991 (1) SA 307 (W) at 311; *S v September* 1996 (1) SACR 325 (A) at 327–8). As Whiting pointed out in his Memorandum to the Law Commission on the draft Bill, the wording of the provision leads to the curious situation where 'the prosecution might well fall between two stools', in that it will be unable to prove beyond a reasonable doubt either that the accused *had* the requisite criminal capacity or that he *lacked* it.

It is, said Ploos van Amstel J (at [33]), 'up to the legislature to decide whether or not the statute should be amended'.

Contempt of court: When does disobedience of a court order constitute contempt?

S v Samuels 2016 (2) SACR 298 (WCC)

The court in this case examined the essential elements of the offence of contempt of court, which it defined as consisting in 'unlawfully and intentionally violating the dignity, repute or authority of a judicial body' (at [19]). See Milton *South African Criminal Law and Procedure: Common-law Crimes* vol 2 (3 ed, 1996) at 164. Dlodlo J (Nuku AJ concurring) observed that the authorities recognised that a person who unlawfully and intentionally disobeys a court order will be guilty of this offence. See *S v Beyers* 1968 (3) SA 70 (A). In the present case, the appellant had been convicted of contempt of court *ad factum praestandum*, arising out of non-compliance with a court order which required her to *do* something—in this case to leave her dwelling following an eviction order. The dwelling was of an informal kind and was on state land.

The test for when disobedience of a civil order constitutes contempt, said Dlodlo J, is whether the breach was committed 'deliberately and *male fide*'. See *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc* 1996 (3) SA 355 (A) at 367H–I; *Jayiya v MEC for Welfare, Eastern Cape, & another* 2004 (2) SA 611 (SCA) at [18]–[19]; *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA). In *Fakie*, which Dlodlo J clearly viewed as the leading case on the matter, Cameron JA made it plain (at [9]) that a deliberate disregard was not enough, 'since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt', in which case 'good faith avoids the infraction', even if the refusal to comply is objectively unreasonable. 'These requirements', said Cameron JA (at [10]), 'that the refusal to obey should be both wilful and *mala fide*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt', are in accordance with 'the broader definition of the crime, of which non-compliance with civil orders is a manifestation'. They show 'that the offence is committed not by mere disregard of a

court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces', and '[h]onest belief that non-compliance is justified or proper is incompatible with that intent'.

In *Samuels* the appellant had, in the trial court, pleaded guilty. However, when she was questioned under s 112(1)*(b)* of the Criminal Procedure Act, she claimed, first, that she lived 'alongside' the state land in question, but not on or above it. Second, she alleged that she did not demolish and vacate her informal home as required by the order because she had nowhere else to go. As a result, said the court, the trial court should have been in doubt from this questioning as to whether she had the necessary intention deliberately and *mala fide* to disobey the court order, especially since she was unrepresented at the trial. The failure of that court to act in terms of s 113 of the Act was, therefore, a serious misdirection which resulted in a failure of justice. See, too, *Badenhorst NO & another v Moqhaka Local Municipality & others* [2016] 3 All SA 723 (FB) where similar conclusions were reached.

(b) Criminal Procedure and Evidence

(i) Pre-sentence

s 40(1)(*j*): Arrest of a child and the impact of the constitutionally protected 'best interests' of the child

In *MR v Minister of Safety and Security* 2016 (2) SACR 540 (CC) the applicant claimed damages against the respondent for unlawful arrest and detention. She was unsuccessful until she reached the Constitutional Court.

The common factual background was that Ms MR, the applicant, was 15 years old at the time of her arrest. She was arrested in terms of s 40(1)*(j)* of the Criminal Procedure Act 51 of 1977. This section provides for the warrantless arrest by a peace officer of any person 'who wilfully obstructs him in the execution of his duty. . .'. Her arrest took place at her parental home when she 'intervened and interposed' herself between her mother and police officers. She did so to stop the police from arresting her mother for violating a protection order. Ms MR was forcibly put into a police vehicle. She and her mother, who was also arrested, were taken to the nearest police station where they were detained. After approximately 19 hours they were released on warning. The prosecutor later refused to prosecute Ms MR and her mother.

In the respondent's final heads of argument it was conceded that both the arrest and subsequent detention of Ms MR were unlawful (at [22]). The concessions made by counsel for the respondent were 'tantamount to an abandonment of the merits of the appeal in the applicant's favour' (at [27]).

However, the constitutional and other legal arguments advanced in the courts below and before the Constitutional Court, were addressed.

Bosielo AJ, writing for a unanimous court, concluded that arrest and detention are two separate legal processes. This much is clear from the Criminal Procedure Act and s 35 of the Constitution. Sections 40 and 41 of the Act authorise and regulate arrests, whereas s 50 of the Act deals with procedure and detention after an arrest (at [37]–[38]). It was held that the mere fact that arrest and detention 'both result in someone being deprived of his or her liberty, does not make them one legal process' (at [39]).

It was confirmed that in terms of our law the police have a discretion whether they would arrest a person obstructing them in their duty. This is a 'fact-specific enquiry' in that police officers must 'weigh and consider the prevailing circumstances and decide whether an arrest is necessary' (at [42]). It was argued on behalf of the applicant that on account of the fact that she was a child whose best interests were paramount in terms of s 28(2) of the Constitution, the police officers who arrested her were required to consider and accord her best interests paramount importance. At [52] Bosielo AJ took the view that the police officers concerned had failed to consider crucial facts such as, for example, that Ms MR

> 'was no danger to them; that they could have handled or subdued her with ease; that she did not try to run away from them; that she was not causing any physical harm to them; that she was at or near her parental home and, importantly; that her father was present with them. No doubt such an approach to an arrest of a minor is incompatible with section 28(2). If the police officers had considered the applicant's best interests, there would have been no reason for them to arrest her.'

Bosielo AJ pointed out that the police could have relied on s 38 of the Criminal Procedure Act by either issuing a summons or written notice 'or, as her

father was present, leaving her in his custody with instructions for him to bring her to court' (at [52]). The arrest of Ms MR was accordingly found 'inconsistent with the Constitution and therefore unlawful' (at [52]). It must be pointed out that the court's reference to s 38 was a reference to the law as it stood on 6 April 2008, that is, the date of Ms MR's arrest. The present methods of securing the attendance at court of someone under the age of eighteen years are set out in Chapter 17 (ss 17–20) of the Child Justice Act 75 of 2008 which only came into operation on 1 April 2010. But the principle is the same: the police may not ignore less drastic means available to them and must consider the best interests of the child.

However, it should be noted that the Constitutional Court found that there was no need to make s 28(2) an additional jurisdictional requirement for a lawful arrest: 'It is sufficient that in arresting a child, police officers must do it through the lens of the Bill of Rights and pay special attention to the paramount importance of the best interests of such a child' (at [65]).

The constitutional provision relevant to the lawfulness of Ms MR's detention—as opposed to her arrest—was s 28(1)*(g)*. The essence of this section is that every child has the right not to be detained except as a measure of last resort and then only for the shortest appropriate period of time. At [67] Bosielo AJ made the following observations as regards the true meaning and impact of s 28(1)*(g)*:

> 'In its ordinary and grammatical meaning, the expression ''a measure of last resort'' means that the detention of a child should happen when all else has failed. This requires police officers to investigate other less invasive methods which can satisfy their legitimate purpose without having to detain a child. This is because, first, a detention constitutes a drastic curtailment of a person's freedom which our Constitution guards jealously, and should only be interfered with where there is a justifiable cause. Second, detention has traumatic, brutalising, dehumanising and degrading effects on people.'

The court noted that 'our detention centres, be they police holding cells or correctional centres, are not ideal places' and can have harmful effects on the detained child (at [68]). This, said the court, was one of the reasons why s 28(1)*(g)* stipulates that a child's detention should be for the shortest appropriate time.

Bosielo AJ confirmed that the need to detain a child is 'necessarily a fact-based inquiry that requires a balancing of interests' (at [69]), and was satisfied that there was no evidence that the police had considered all the circumstances to determine whether Ms MR's detention was a measure of last resort. As a result, 'her detention was in flagrant violation of s 28(1)*(g)* . . . [and] therefore unlawful' (at [70]).

It is submitted that the Constitutional Court displayed a sound grasp of the realities of our criminal justice system and achieved a sensitive and appropriate accommodation of opposing rights and interests. It was pointed out that s 28(2) does not mean that children's rights trump all other rights (at [59]). It was stated further at [69] that s 28(1)*(g)* does not mean that children may never be detained. What is required, however, is a child-sensitive and fact-sensitive approach—seen through 'the lens of the Bill of Rights'.

s 105A(7)(*b*)(i)(*bb*): The plea and sentence agreement and the court's discretion to hear the evidence of the complainant

In *Wickham v Magistrate, Stellenbosch & others* [2016] ZACC 36 (unreported, CC case no CCT 118/16, 25 October 2016) a unanimous Constitutional Court refused the applicant leave to appeal against the order and judgment of the High Court in *Wickham v Magistrate, Stellenbosch & others* 2016 (1) SACR 273 (WCC). The applicant claimed that he had the right to testify in the course of proceedings relating to a s 105A plea and sentence agreement. The agreement was one that the Director of Public Prosecutions had reached with the accused who had pleaded guilty to two charges of culpable homicide involving a motor car accident in which one of the deceased was the applicant's son. The applicant alleged that the magistrate had incorrectly declined to exercise his discretion, as provided for in s 105A(7)*(b)*(i)(*bb*), to hear the evidence that he, in his capacity as complainant and father of one of the deceased, wanted to give. For purposes of his application to the Constitutional Court, the applicant also argued that the High Court's decision 'sets a precedent that will undermine victims' rights' as set out in s 2 of the Charter for Victims of Crime in South Africa which was adopted by Parliament in terms of s 234 of the Constitution (at [20] and [23]).

At [26] the Constitutional Court concluded that it 'is . . . clear from the language contained in section 2 of the Victims' Charter that these rights are not absolute'. It was also pointed out that a victim's right

to participate in the sentencing proceedings in relation to plea and sentence agreements must be read with s 105A of the Criminal Procedure Act, especially s 105A(1)*(b)*(iii) which provides that a prosecutor may enter into an agreement after having afforded the complainant an opportunity to make representations to the prosecutor, where it is reasonable to do so and having regard to the circumstances of the offence and the interests of the complainant. See also the discussion of s 105A(1)*(b)* in *Commentary*, sv *Section 105A(1)(*b*): Duties of the prosecutor during the pre-agreement stage*.

The Constitutional Court was satisfied that the applicant's rights as a victim 'were duly addressed through the extensive participation that he was afforded by the prosecutor throughout the duration of the prosecution' (at [29]).

In response to the applicant's argument that his evidence relating to aggravating circumstances should have been received in terms of s 105A(7)*(b)*(i)(*bb*), the court pointed out that 'the victim's right to place evidence before the court (either through a statement or by oral evidence) is wholly within the court's discretion' (at [31]). In *Wickham* the prosecutor had requested the applicant to furnish a victim impact statement which he undertook to attach to the s 105A plea and sentence agreement. However, the 'victim statement' prepared by the applicant addressed the merits of the case and rested on facts inconsistent with the factual matrix agreed upon by the prosecution and the accused for purposes of the plea and sentence agreement. The statement was therefore not submitted to the court. The prosecutor nevertheless suggested that the applicant should be in court during the sentencing proceedings in case the court required him to testify orally. However, during the proceedings the magistrate was alerted to the factual inconsistencies between the applicant's statement and the factual matrix agreed upon by the accused and the prosecution. The magistrate accordingly refused to receive the statement. At [33] the Constitutional Court was satisfied that there was nothing on record to show that the magistrate had improperly exercised his discretion.

ss 190 and 208: Complainant's report of rape as previous consistent statement: Conditions for admissibility and effect of

S v Vilakazi 2016 (2) SACR 365 (SCA)

The appellant had been convicted of raping a 12-year-old girl. She had, after the alleged incident, made a report to her mother in which she blamed the appellant but the circumstances showed that it was clearly not made voluntarily or spontaneously. Her mother had noticed that she was walking with discomfort and asked her what was wrong. She replied that she had a wound on her foot but her mother, on examining the foot, observed that it was too small to cause the discomfort she had noticed. She then gave the complainant a hiding, upon which her daughter told her that the appellant had had sexual intercourse with her. This evidence was received by the trial court and the conviction was confirmed by the High Court.

The treatment of this evidence, however, divided the Supreme Court of Appeal. Dambuza JA (with whom Shongwe, Theron and Mathopo JJA agreed) considered what had been said in *S v T* 1963 (1) SA 484 (A), where the report had been drawn out of the complainant after her mother had threatened her with a stick, and where the court concluded, after considering a number of English authorities, that a complaint will not be admissible if it is made as a result of intimidation. The complaint in *Vilakazi* was also clearly involuntarily made, but Dambuza JA (at [15]) was of the view that the 'courts have not considered the lack of evidence of a voluntary complaint (also referred to as a ''first report'') to be fatal to a charge of rape' since, as Milton points out (see Milton *South African Criminal Law and Procedure: Common-law Crimes* vol II 3 ed at 461), a complainant 'may hesitate to complain of rape for reasons of shame, embarrassment or fear'. As Hoexter JA said in *S v T* (at 487F), the question is whether a failure of justice has resulted from the wrongful admission of the complaint, and the 'test to be applied is whether a trial court hearing all the evidence but refusing to admit the complaint, would inevitably have convicted the appellant'. In this case the majority decided that the rest of the evidence was sufficient to prove the appellant's guilt beyond a reasonable doubt, even after the exercise of the necessary caution that had to be exercised in respect of her evidence, given that she was a young child who had, in addition, made an initial complaint involuntarily.

In a dissenting judgment, Mhlantla JA considered the circumstances in which the report had been made to be 'more serious' than those in cases such as *S v T* (supra), *S v MG* 2010 (2) SACR 66 (ECG) and *S v GS* 2010 (2) SACR 467 (SCA) and found that one could not 'exclude the possibility that the complainant made the report of the identification of the person

who raped her in an attempt to save herself from any further hiding' (at [30]). The report should clearly have been excluded, and the question was whether its admission brought about a failure of justice. Mhlantla JA, unlike the other judges, was unconvinced that the remaining evidence was sufficient to establish the appellant's guilt in view of (i) inconsistencies between the medical evidence and the testimony of the complainant; (ii) unsettling aspects of her mother's testimony which indicated that she had suspected another man of committing the crime; (iii) weaknesses in the evidence of the complainant's younger sister, who was either 4 or 5 years old at the time of the incident; and (iv) the fact that the alibi defence of the appellant, in which Mhlantla JA found 'nothing improbable', and which had been introduced only during his testimony, had not been put to the witnesses. The state, said Mhlantla JA, could have applied for the re-opening of its case and recalled the complainant to rebut that evidence.

s 216: Hearsay in criminal cases: A cautionary note

S v Seemela 2016 (2) SACR 125 (SCA)

The trial court had convicted the appellant of, inter alia, two counts of murder. His appeal to the High Court was unsuccessful and he appealed further, with greater success, to the Supreme Court of Appeal. The two convictions were set aside, with the second count being replaced with a conviction of attempted murder. Ponnan JA (at [2]) described the matter as 'an object lesson in how litigation, in particular in criminal trials, should not be conducted'.

Much turned on the admissibility of evidence that was clearly hearsay, being statements made by the victims which were adduced in terms of s 3(1)*(c)* of the Law of Evidence Amendment Act 45 of 1988. There were several major problems relating to the admissibility of this evidence. First, the trial court did not consider any of the matters listed in s 3(1)*(c)* as factors to which a court *must* have regard before considering whether it is of the opinion that the evidence should be admitted in the interests of justice. Second, on the first count reliance was placed *solely* on the hearsay evidence in order to sustain the conviction. Ponnan JA was of the view that the trial judge 'seriously underestimated this factor and was too easily persuaded to place weight on this evidence for the purpose of convicting the appellant' (at [14]), and 'did not manifest a sufficient awareness of the perils of relying solely on that evidence to found a conviction'. Ponnan JA 'instinctively baulk[ed], at founding a conviction solely on that statement'. Third, the investigating officer to whom the statement was made by the victim in respect of the second count did not testify. The evidence was thus, in effect, double hearsay. In those circumstances, said Ponnan JA (at [16]), the statement ought not to have been admitted into evidence.

A fourth consideration, in Ponnan JA's opinion, was that 'a judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so' (at [13]). He spoke, too, of a 'Court's intuitive reluctance to permit untested evidence to be used against an accused in a criminal case', and relied on what had been said in this regard by Schutz JA in *S v Ramavhale* 1996 (1) SACR 639 (A) and by the court in *Metedad v National Employers' General Insurance Co Ltd* 1992 (1) SA 494 (W). It is important to note, nevertheless, that the Supreme Court of Appeal has, despite warning of this nature, taken the stance that this reluctance to admit hearsay against an accused should *not* entrench itself as a rule. In *S v Shaik & others* 2007 (1) SA 240 (SCA) at [171] and *S v Van Willing & another* [2015] SASCA 52 (unreported, SCA case no 109/2014, 27 March 2015) at [34], there are strong pronouncements to the effect that each case must be treated on its own merits and that the test remains the flexible one set out in s 3(1)*(c)* which is determined by the interests of justice. See, for a discussion of these cases, *Commentary* in the notes to s 216 sv *Section 3(1)*(c)*(i) of Act 45 of 1988: The nature of the proceedings.*

s 217: Confessions: Trial within a trial: Principles

S v Krejcir & others 2016 (2) SACR 214 (GJ)

The second accused, who was one of six standing trial, together with the other accused raised the defence that there had been a plot to obtain their convictions based on false evidence. It was alleged that the investigating officer was involved in this plot. That officer was called to give evidence in a trial within a trial on the question of the admissibility of the second accused's statement.

The difficulty facing the court was that if, as the cases have often held, the trial within a trial is 'a proceeding which isolates the evidence given within it from the evidence given in the main trial, and which deals only with the admissibility of accused

2's statement, other issues may not be dealt with at the trial within a trial, as they are not germane and hence are inadmissible' (at [31]). How, then, were the accused to elicit information concerning their defences if they were denied an opportunity fully to cross-examine the investigating officer?

If the investigating officer were to testify at the main trial, the accused would, of course, be entitled to ask him all relevant questions in relation to the alleged plot and its execution, and he would be compelled to deal with these questions without demur. But there was always the chance that he might in fact not be called as a witness by the state, in which case the opportunity to confront him in this way would be lost.

The state suggested that the remedy for the accused would be to call the investigating officer at the trial or to motivate the court to call him. The first option was dismantled by Lamont J: if the defence called him to testify, it would not be able to cross-examine him unless it had him declared hostile, which would be difficult to do. The second option, too, was unsatisfactory: the accused would have to rely on the court actually calling him in advance of its having made such a decision. If the court failed to call him, the accused would be left without a remedy.

The rule governing the isolation of the evidence in a trial within a trial is, said Lamont J (at [43]), 'a flexible matter'. It was a procedure 'designed to implement the substantive law and must be flexibly applied to achieve a fair and just result'. The question was whether the prejudice caused by deviating from the rule outweighed the prejudice that would be suffered by the accused should they be denied a proper opportunity to cross-examine the investigating officer in order to establish a basis for their defence. Lamont J held that it did not. In the judge's view, a deviation from the rule was warranted to afford the accused the ability to conduct the trial fairly, 'albeit for different reasons than those customarily considered'. The *admissibility* of the evidence would fall to be considered 'as and when it [was] reviewed in the trial' (at [45]).

The prejudice that would ensue if this deviation were allowed, said Lamont J, was that there would be 'a proliferation of the issues dealt with . . . during the trial within the trial' should the evidence be allowed. This would result in 'a separation of the proximity of the evidence which [was] led on the admissibility of the statement' (at [48]), as well as 'an invasion of the right of the state to deal with the admissibility issue alone, uncontaminated by other issues'. The prejudice caused by this 'dislocation' was, in Lamont J's view, however, 'insignificant . . . compared to the prejudice which results to the accused if they are prevented from making use of an opportunity which presents itself to properly canvass issues relevant to their defence'.

In order to avoid the kind of absurdity pointed to by Schutz J in *S v Muchindu* 2000 (2) SACR 313 (W) (see *Commentary* in the notes to s 217, sv *Procedure: Trial within a trial*), it was necessary to see the rule governing the admissibility of evidence at a trial within a trial, not as requiring the isolation of one piece of evidence from another at the trial but, rather, as requiring 'that the person who assesses the evidence on a particular issue and its admissibility exclude only such evidence as is necessary to enable the accused to feel that he must freely, and without fear of it being used against him, deal with the admissibility of the statement' (at [53]). The court has a duty to ensure that the rights of an accused are protected, and the routine exclusion of evidence in a trial within a trial does not serve those ends.

Lamont J summed up his approach as being 'all evidence admissible on all issues, save for some evidence ruled inadmissible on some issues', and expressed the view that, if the rule were seen in this way, it 'would do away with the absurdities' which have been remarked upon in other cases (at [56]).

It is worth remarking that although Lamont J did not seek constitutional support for his approach, he might have found some in s 35(3)*(i)* which, as part of the right of an accused to a fair trial, accords him or her the right 'to adduce and challenge evidence'. It is not difficult to see, were the rule to be such that the accused in *Krejcir* would be at risk of being denied a proper opportunity to elicit relevant information to establish their defence, how a court might regard such a rule as constituting a limitation of the right conferred by s 35(3)*(i),* one which would be neither reasonable nor justifiable within the meaning of s 36(1) of the Constitution.

ss 25 and 225: Illegal searches and improperly obtained evidence

S v Gumede [2016] ZASCA 148 (unreported, SCA case no 800/2015, 30 September 2016)

The appellant had been convicted by the trial court of murder, robbery with aggravating circumstances and unlawful possession of a firearm and ammunition. His appeal to the full court of the KwaZulu-Natal Provincial Division was unsuccessful and he

appealed further to the Supreme Court of Appeal. In the appeal he contested the admissibility of the two principal items of evidence upon which the conviction rested: the finding of a firearm in his home and a pointing-out made by him to the police in which he had pointed out a building outside which he and others 'robbed the pension money from the security guards'.

The appeal succeeded. Zondi JA (who delivered the judgment of the court) concluded (at [41]) that, having regard to 'all of the circumstances of [the] case', the admission of the evidence of the discovery of the firearm and the pointing out evidence was detrimental to the administration of justice under s 35(5) [of the Constitution] and it ought to have been excluded'.

The search of the appellant's premises was conducted without a warrant. Zondi JA was satisfied that a search warrant ought to have been sought and obtained as there was sufficient time and the police were not faced with circumstances of urgency or emergency such as would have brought the matter within the borders of s 22 of the Act. The search was thus, as the state itself conceded, illegal, and the obtaining of the firearm violated the appellant's right to privacy. The fairness of the trial, however, was not impaired, said Zondi JA, since the firearm was 'real evidence that the police probably would have found if they had entered the premises lawfully in terms of a search warrant and without breaching the appellant's right to privacy' (at [32]). The existence of the firearm would, in other words, 'have been revealed independently of the infringement of the appellant's right to privacy'.

The court turned next to the second leg of the s 35 inquiry: whether the evidence of the discovery of the firearm should have been excluded on the ground that its admission was detrimental to the administration of justice. Since there was an 'inextricable link between the firearm evidence and the pointing out evidence' (at [35]), the court considered that both had to be analysed together in addressing this question. It concluded that the appellant's right to privacy and the right against self-incrimination had been 'flagrantly violated by the police during the investigation'. Zondi JA pointed to the following facts: the manner in which the police sought to justify their failure to obtain a search warrant as well as their 'inadequate and in certain respects contradictory explanation of how the appellant's rights were explained to him on arrest and before interrogation, and why after a very short and straightforward interrogation at 3am, the appellant admitted his guilt and wished to do a pointing out, but not tell his story to a magistrate' (at [40]). From these and other facts it was clear to the court that the appellant 'must have been subjected to a considerable degree of coercion, such that his conduct was neither free nor voluntary'. Moreover, it was clear, given the haste with which the investigation had been conducted and completed, that the appellant had not been informed properly of his rights—in particular, the right to be informed of the *consequences* of not remaining silent. The admission of the two items of evidence would, Zondi JA concluded, be detrimental to the administration of justice under s 35(5). The fact that the police had *deliberately* misled the court in attempting to *justify* a serious rights violation was by itself a matter that brought the administration of justice into disrepute (at [34]).

It is worth taking note of one aspect of the judgment. Zondi JA correctly observed (at [24]) that there is, in this area of the law, 'a great similarity between s 35(5) of our Constitution and s 24(2) of the Canadian Charter of Rights and Freedoms and it is therefore not surprising that the impact of Canadian law, on South African jurisprudence, in this area has been substantial more especially when it comes to the treatment of derivative evidence'. Zondi JA referred to the decision in *S v Pillay* 2004 (2) SACR 419 (SCA) (at [89]) where the Supreme Court of Appeal, after 'a thorough review of Canadian cases dealing with s 24(2)', summed up the Canadian position on derivative evidence as follows:

> 'What emerges from this is that evidence derived (real or derivative evidence) from conscriptive evidence, ie self-incriminating evidence obtained through a violation of a Charter right, will be excluded on grounds of unfairness if it is found that, but for the conscriptive evidence, the derivative evidence would not have been discovered.'

The reliance by the court in both *S v Gumede* and *S v Magwaza* 2016 (1) SACR 53 (SCA) on Canadian authority in its treatment of derivative evidence is certainly not unwelcome given the carefully reasoned judgments of the Canadian Supreme Court on that topic, and given the similarities between s 35(5) of our Constitution and s 24(2) of the Canadian Charter. In *Magwaza* the court correctly noted the rejection by the Canadian courts of the distinction, previously relied upon, between real and testimonial evidence in this regard. The court in that case recognised that this distinction, forged in *R v Collins*

[1987] 1 SCR 265, was unfounded and that more recent decisions 'emphasised that the admissibility of evidence under s 24(2) depended ultimately not on its nature as real or testimonial, but on whether or not it would only have been found with the compelled assistance of the accused' (at [13]).

In neither *Gumede* nor *Magwaza*, however, is there any mention on what is now the leading decision in Canada in this area, *R v Grant* 2009 SCC 32, [2009] 2 SCR 353, which is discussed at length in *Commentary* in the notes to s 225 (sv *The Canadian position on illegally or improperly obtained evidence*). This case marks a significant point of departure for Canadian jurisprudence in this area, as it sets itself against previous decisions which had been read as creating 'an all-but-automatic exclusionary rule for non-discoverable conscriptive evidence'. The old approach, said the court in *Grant*, seemed to go against the requirement in s 24(2) of the Charter that the court had to consider 'all the circumstances'. The flexible new approach, instead, sets out 'three avenues of inquiry', which are discussed in *Commentary*, for determining what might bring the administration of justice into disrepute.

It is unlikely that the adoption of the *Grant* test would have altered the court's conclusions in either *Magwaza* or *Gumede*. The *Grant* test is, in fact, entirely consonant with what our courts have said on many occasions. It sits well, for instance, with what was said in *Magwaza* (at [15]) in a passage quoted by Zondi JA in *Gumede* (at [25]), that '[a]lthough s 35(5) of the Constitution does not direct a court, as does s 24(2) of the Charter, to consider ''all the circumstances'' in determining whether the admission of evidence will bring the administration of justice into disrepute, it appears to be logical that all relevant circumstances should be considered'.

It is submitted that our courts should embrace the *Grant* test as a very valuable and useful tool for engaging the test set out in s 35(5). The rejection by the court in *Grant* of the 'near-automatic presumption that the admission of a broad class of evidence would render the trial unfair, regardless of the circumstances in which it was obtained' (at [65]) as being difficult to reconcile with 'trial fairness as a multi-faceted . . . concept', sits well with the aversion which our courts have shown in this area to rule by category rather than by principle. And the three lines of inquiry serve as the kind of didactic exercise which has served us well in our treatment of hearsay, in respect of which s 3(1)*(c)* sets out factors which *have* to be addressed by a court in determining whether any item of hearsay evidence may be received in the interests of justice.

Grant, in other words, squares in its spirit as well as its form with what our courts have said and done in this area as well as others. It deserves to find greater recognition and more enthusiastic support at the highest levels of our judiciary.

s 225: DNA evidence: Responsibilities of the prosecution when material sent for DNA testing

In two recent cases, our courts have drawn attention to the very important responsibilities that rest on the prosecution when material has been sent for DNA testing. In *S v Molehe & another* (unreported, FB case no A89/2013, 14 May 2015) the prosecutor indicated that a condom, found in the body of a rape complainant, had been sent for testing. The prosecutor, however, failed to present the forensic results or explain the failure to do so. The court stressed (at [17]) that it was expected of a prosecutor to disclose either the results of the test or the reason for their not being available. It was said, too, that a court should take note of the failure of the prosecution to comply with this duty and, at least, touch upon it in giving judgment.

These responsibilities formed the subject of concern of the full bench in *S v Mpontshane* [2016] 4 All SA 145 (KZP), where Pillay J (with whom Jappie JP and Mthembu AJ agreed) was highly critical of a situation where 15 years had elapsed after the taking of the samples from the complainants, especially since the prosecution rested on the evidence of children. In such cases, said the court, 'the State *must* obtain DNA evidence when samples are taken from these complainants'; '[a]t the very least the State must account to the complainants and the court whether samples were tested and what the results were' (at [27]).

If the 'forensic laboratory was unable to produce the results of its tests timeously to the trial court, sitting more than two years later, it should have applied to lead fresh evidence to produce the results to this Court, irrespective of whether they were conclusive'. Pillay J referred to what was said by Grosskopf JA in *S v Ndweni & others* 1999 (2) SACR 225 (SCA) at 230*b–c*: 'The dictates of fairness require that all relevant information bearing on the applicants' guilt or innocence should be before the trial Court to enable it to determine the true facts, lest there be an injustice either to the applicants or the State'.

The perils of not heeding this warning were considered by the court in *S v N* 1988 (3) SA 450 (A) at 458–9 and 463–4, where Corbett JA regarded the failure of the prosecutor as 'an error of judgment and breach of his general duty to disclose information favourable to the accused'. It was, said Corbett JA, 'for the Court, not the prosecutor, to evaluate the cogency of the evidence'.

Pillay J (at [30]) asked this question: would the production of DNA evidence improve prosecutorial and adjudication services? In the judge's view it would 'undoubtedly' do so for these reasons:

> 'As objective scientific evidence it would go a long way to assist decision makers in determining vital questions of fact, especially in sexual offences in which complainants and accused are likely to give unreliable versions either because they deliberately choose to mislead or because of a loss of memory and powers of recollection fail. Institutionally, efficiencies in the criminal justice system would improve remarkably. Decision-making by prosecutors about whether to prosecute or not, and the courts in assessing the credibility of complainants and accused would be more certain, reliable and acceptable to the litigants and the community at large. Producing DNA evidence could corroborate either the version of the defence or the State. It could ensure that an innocent person is not sentenced to life imprisonment and a guilty person is not set free. An innocent accused would not have to face the trauma of a protracted trial. A guilty accused would be more inclined to reconsider his plea thus sparing the complainant the trauma of reliving her ordeal. Bearing in mind that a huge proportion of the court rolls are filled with rape and murder cases, the savings gained from these efficiencies for court services would be great. These savings could go to bolstering the medical and forensic services.'

Can an accused person *insist* on knowing whether the state has obtained a forensic report on DNA evidence and what the contents of such a report are? Pillay J was of the view that such a right might well arise out of the authority of *S v N* and, possibly, the constitutional right to information. Further, an insistence by the accused in appropriate cases on such tests being conducted and on receiving the results of those tests could favour his credibility. Pillay J warned, however, that a converse *adverse* inference could not be drawn should the accused *not* exercise this right, since to draw such an inference would infringe his right to silence.

The court added the further warning that since DNA evidence was circumstantial, it 'may or may not be conclusive proof that an accused raped the complainant'. It is worth taking note of what was said by the Supreme Court of Appeal in this regard in *S v SB* 2014 (1) SACR 66 (SCA) discussed in *Commentary* (notes to s 225, sv *What is the nature of DNA evidence*?), where Van der Merwe JA considered that the *weight* of this class of circumstantial evidence depended on a number of factors, including: (i) the establishment of the 'chain evidence'; (ii) the proper functioning of the machines and equipment used to produce the computer-generated graphs produced by the forensic process; (iii) the acceptability of the interpretation of these graphs; (iv) the probability of a suitable match in the circumstances; and (v) the other evidence in the case. See, in respect of (iv), the discussion in *Commentary* (sv *How is a court to evaluate DNA evidence?*) relating to the possible uses of mathematical models and, in particular, Bayes' Theorem in the drawing of inferences of guilt from DNA matches.

s 240: Doctrine of recent possession—effect of and practical application

In *S v Mothwa* 2016 (2) SACR 489 (SCA) the Supreme Court of Appeal considered the reach and effect of the so-called 'doctrine of recent possession', which, in certain circumstances, allows a court, if an accused is shown to have been found in possession of recently stolen goods and has failed to give an explanation which could reasonably be true, to infer that he or she stole them or, in a proper case, received them knowing them to be stolen.

The appellant had been convicted of robbery with aggravating circumstances after the complainant had been robbed at gunpoint of a motor vehicle which had been found in the possession of the appellant three days after the incident. The High Court dismissed an appeal on the ground that no reasonable inference could be drawn from the facts other than that the appellant was one of the perpetrators of the robbery. The minority, however, disagreed and relied on the decision in *S v Madonsela* 2012 (2) SACR 456 (GSJ) in holding that since a motor vehicle in today's times is capable of exchanging hands within minutes or hours, the appellant might not have been one of the perpetrators of the robbery. This reasoning was relied on by the appellant's counsel who argued that the fact that the vehicle already had different

registration numbers and was registered in the name of a third person was a sufficient basis for demonstrating that the vehicle could have exchanged hands.

Mathopo JA (with whom Maya DP and Theron JA agreed) considered how the doctrine of recent possession had been applied by the courts and concluded that: (1) a court had to have regard to factors such as the length of time that had passed between the possession and the actual offence, the rareness of the property and the readiness with which the property could or was likely to pass to another person (see *S v Skweyiya* 1984 (4) SA 712 (A)); and (2) the doctrine must not be used to undermine the onus of proof, which always remains on the state: it is not for the accused to rebut an inference of guilt by providing an explanation, and all that the law requires is that he or she, having been found in possession of property that has recently been stolen, gives the court a reasonable explanation for such possession (see *S v Zwane & another* [2013] ZASCA 165 (unreported, SCA case no 426/13, 27 November 2013) at [12]).

In the present case the following facts were in the appellant's favour: he was arrested three days after the robbery and he immediately gave an explanation for his possession; his explanation was supported by documents which made his version more probable; when he was arrested, the appellant was in possession of the registration documents in the name of the third party; and no investigation was made to verify the information provided by the appellant. The state had the opportunity and the means to verify the facts but it failed to do so. The fact that the registration had been effected in this interval was, said the court, clear evidence of how easy it is for a motor vehicle to change hands. In addition, the appellant's evidence at the trial was 'clear, consistent and straightforward' (at [11]), and his version could not be rejected as not being reasonably possibly true.

The state had, it was held, failed to prove his guilt beyond a reasonable doubt.

s 252A(5)*(b)*: Validity of prosecution of official who sets or participates in a trap or an undercover operation

The scope and reach of s 252A(5)*(b)* fell to be considered by Landman J in S v Byleveld (unreported, NWHC case no CC 2/2015, 29 April 2016). This section provides that '[n]o prosecution for an offence contemplated in paragraph *(a)* shall be instituted against an official or his or her agent without the written authority of the attorney-general'. Paragraph *(a)* of the section provides that '[a]n official or his or her agent who sets or participates in a trap or an undercover operation to detect, investigate or uncover or to obtain evidence of or to prevent the commission of an offence, shall not be criminally liable in respect of any act which constitutes an offence and which relates to the trap or undercover operation if it was performed in good faith'.

The juristic basis for the non-liability of the trap or agent is considered in *Commentary* in the notes to s 252A (sv *Section 252 A(5): Non-liability of the trap)*. What Landman J had to consider was the meaning of 'attorney-general' in this context, and what the consequences would be if the requisite 'written authority' was not given by that person.

Landman J referred to s 45 of the National Prosecuting Authority Act 32 of 1998, which provides as follows:

> 'Any reference in any law to—
> (a) an attorney-general shall, unless the context indicates otherwise, be construed as a reference to the National Director; and
> (b) an attorney-general or deputy attorney-general in respect of the area of jurisdiction of a High Court, shall be construed as a reference to a Director or Deputy Director appointed in terms of this Act, for the area of jurisdiction of that Court.'

The judge referred to the decision of the Supreme Court of Appeal in *Naidoo & others v The National Director of Public Prosecutions & another* (unreported, SCA case no 062/04, 29 March 2005), in which it was held (at [37]) that, since 'the heads of prosecution authority offices at the seats of the High Courts . . . are responsible for and manage prosecutions within their areas of jurisdiction', they had 'comprehensive powers which, by necessary implication, must include the power to reinstitute prosecutions subject only to oversight by the NDPP'. Directors such as the second respondent (the Director of Public Prosecutions, Cape of Good Hope Provincial Division) were, then, 'the equivalent of the erstwhile attorneys-general'.

In *Byleveld* the prosecution of the accused had not been authorised in writing by the Director of Public Prosecutions for the province. Two arguments put forward by the state for regarding this omission as not fatal to the prosecution were rejected by Landman J. The first was that the mandate given to the accused was one that did *not* permit him to commit

crimes. Landman J accepted this proposition, but considered that this did not dispose of the objection: '[T]he fact that the informer may have acted outside his or her mandate is the very question that the DPP must take into consideration; it does not excuse the requisite authorisation' (see *S v Domingo* 2002 (1) SACR 641 (C) at 646*h–i*, where it was held that the language of the provision was peremptory, and that it could not be argued that the requisite authority was not required when the agent had allegedly acted outside his mandate).

The second argument was that the indictment had been signed by a deputy DPP and that this *implied* that the prosecution had been authorised. Landman J disagreed, holding that such an inference could not be made 'as section 252A(5)*(b)* speaks of authorisation and requires the DPP to apply his or her mind and authorise the prosecution in writing'. This authorisation in writing was 'a separate administrative decision from the decision to indict an accused'. The prosecution of the accused in question had *not*, then, been authorised in terms of the provision.

(ii) Sentencing

Sentencing of a primary caregiver of minor children and the constitutional 'best interests' rights of children

In *S v M (Centre for Child Law as* Amicus Curiae) 2007 (2) SACR 539 (CC) the Constitutional Court confirmed that on account of s 28 of the Constitution the best interests of a child are paramount in all matters concerning a child, including the situation where a court is required to sentence an offender who is the primary caregiver of a young child. At [35] Sachs J explained that

> '[I]t is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children. It is the imposition of the sentence without paying appropriate attention to the need to have special regard for the children's interests that threatens to do so. The purpose of emphasising the duty of the sentencing court to acknowledge the interests of the children, then, is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm.'

Sachs J also identified certain procedural and substantive guidelines in order to 'promote uniformity of principle, consistency of treatment and individualisation of outcome' (at [36]). Since the decision in *S v M*, our courts have, on several occasions, resorted to these guidelines in their attempts to apply the best-interests principle when sentencing a primary caregiver. See the cases referred to by Phelps 'Sentencing' (2016) 29 *SACJ* 197 at 202.

S v N is one of the latest examples where a court—in applying the principles and guidelines in *S v M* (supra)—managed to reconcile various competing considerations in sentencing a primary caregiver.

In *S v N* 2016 (2) SACR 436 (KZP) the accused, a 32-year-old mother of two children aged 16 and 2, was convicted of murder. She had shot and killed the man with whom she had been having a relationship since 2012. Substantial and compelling circumstances were present. The incident was triggered because the deceased had rejected her and she had experienced a severe emotional response. The accused also had a long history of psychological problems, depression and mental illness (at [17]). It was found that her 'power of restraint and self-control, compared to a normal person, was substantially reduced' (at [11]). Indeed, Poyo-Dlwati J was satisfied that the accused's criminal responsibility at the time of the commission of the offence was diminished, which rendered her conduct morally less reprehensible. The accused was a first offender and at age 32 a good candidate for rehabilitation (at [12]). It was noted that she had no propensity for violence, was not a danger to society and was unlikely to commit such an offence again (at [16]). Identifying and accepting all these mitigating circumstances created no real difficulty. The 'major difficulty in dealing with this matter', said Poyo-Dlwati J at [12], was the fact that the best interests of the minor children had to be taken into account in sentencing the accused. And the sentence, clearly, could not be a non-custodial one.

The position of the 16-year-old was not really a matter of great concern because he was already being taken care of by a relative. This was confirmed in reports received by the court. The accused was at the time of consideration of sentence no longer the primary caregiver of her 16-year-old child.

In addressing the accused directly, Poyo-Dlwati J said the following as regards the 2-year-old boy (at [12]):

> 'The second child is the one I am most concerned about. This is so because he is of tender age and requires special attention. You are his

> primary caregiver and you are the only parent he knows and will know nothing of his father, the deceased, as he is no more.'

At [13] the provisions of s 28 of the Constitution and the decision in *S v M* (supra) were duly noted. Specific reference was made to s 28(1)*(b)* of the Constitution. This section provides that every child has the right 'to family care or parental care, or to appropriate alternative care when removed from the family environment'.

On behalf of the accused it was submitted that one of her cousins would take care of her 2-year-old son should a term of direct imprisonment be imposed. There was an alternative: according to a report of a social worker in the Department of Correctional Services, the accused could be incarcerated at the Westville Female Correctional Centre which had facilities where children were kept with their mothers and taken care of. However, the accused herself indicated that in the event of her incarceration, she would prefer that her cousin should keep and look after her 2-year-old son. This preference was not entirely irrelevant but could hardly be binding on the court in exercising its sentencing discretion. Poyo-Dlwati J found other and valid reasons which happened to coincide with the accused's choice (at [15]):

> 'I am of the view that it is best that the child is not kept with you in prison as this would be tantamount to the child being imprisoned with you which is against Article 30 of the African Charter on the Rights and Welfare of the Child which was ratified by this country and we are therefore obliged to comply with its obligations. In my view, whilst there will be an impact on the child as a result of the sentence I am going to impose, that impact will be minimal and the child will be taken care of whilst you are away. I am of the view that the sentence I am going to impose will take into account the best interests of the child but not to the detriment of the other factors that need to be considered.'

With the toddler in the care of the cousin, the immediate best interests of the toddler were catered for. However, the long-term best interests of the child also had to be taken into account. In this regard Poyo-Dlwati J expressed the view that a long period of separation between mother and child was not in the best interests of the child 'especially due to his age' (at [14]). A sentence of five years' imprisonment in terms of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977 was imposed. This is imprisonment from which the offender may be placed under correctional supervision at the discretion of the Commissioner of Correctional Services. The offender, however, must serve at least one sixth of the sentence before being considered for placement under correctional supervision, unless the court has directed otherwise. See s 73(7)*(a)* of the Correctional Services Act 111 of 1998. Once released, the offender is treated like any other offender under correctional supervision.

The sentence in terms of s 276(1)*(i)* reconciled all competing considerations: it was a custodial sentence (given the nature of the crime) which was brief enough on account of all the mitigating personal circumstances and which involved an independent consideration of the short and long-term best interests of the child concerned.

It is submitted that the decision in *S v N* links up neatly with the reasoning, thinking and observations of Sachs J in the Constitutional Court decision *S v M* (supra) at [18]:

> 'Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of s 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.'

It is, furthermore, submitted that *S v N* should not be interpreted as a precedent to the effect that babies and toddlers may never be in prison with their mothers. The fact that the cousin was going to be the caregiver whilst the mother was in prison was probably the most decisive consideration in *S v N*. The facts of each case will ultimately determine what would be the most appropriate route to minimise the negative effects on a child as a result of imprisonment of a parent or other primary caregiver. It is constitutionally required that the best interests of the child must be considered independently.

The decision in *S v N* should be compared with *S v De Villiers* 2016 (1) SACR 148 (SCA) where a sentence in terms of s 276(1)*(i)* of the Criminal Procedure Act was imposed on appeal. The discussion hereunder of *S v De Villiers* will also appear in *Commentary*, as revised by the forthcoming Revision Service 57.

S v De Villiers was a successful appeal against a

custodial sentence imposed in *De Villiers v S* (unreported, GPJ case no A168/2012, 27 February 2014) which is referred to in *Commentary* in the discussion of s 276A, sv *Correctional supervision: Constitutional 'best interests' right of children and court's duty when sentencing primary caregiver of minor children*.

In *S v De Villiers* Lewis JA, writing for a full bench, made the factual finding that the regional court in sentencing the appellant to eight years' imprisonment for theft of R1 409 000 from her employer, had failed to consider the interests of the children of the appellant. This failure was described as a 'grave misdirection' (at [6]). Lewis JA also concluded that the High Court's statement, on appeal, that the regional court had considered all the evidence 'meticulously', was itself also a serious misdirection (at [7]). The Supreme Court of Appeal could therefore consider the matter of sentencing afresh; and it could in the interest of finality impose a new sentence, especially since it happened to be in as good a position as the trial court would have been (at [49]). Referring to *S v M* (supra), Lewis JA stated that s 28 of the Constitution requires that

> 'when a custodial sentence of a primary caregiver is in issue the court has four responsibilities: to establish whether there will be an impact on the child; to consider independently the child's best interests; to attach appropriate weight to those interests; and to ensure that the child will be taken care of if the primary caregiver is sent to prison.'

Lewis JA also pointed out that when considering the best interests of children, a court is required to consider their 'current position' (at [11]). And for this purpose the court, on application by the appellant at the hearing of the appeal, received a report prepared in 2015 by one D, a senior counselling psychologist, who was requested to address the following matters: (i) was the appellant the children's primary caregiver? (ii) what were the children's circumstances prior to the hearing of the appeal? (iii) what steps had to be taken if the appellant were incarcerated? (iv) what would be the effect of a custodial sentence on the appellant?

On the available evidence it was clear that the appellant—who was in the process of divorcing her husband—was indeed the primary caregiver of her two children, aged 8 and 11; her husband—who, like the appellant herself, had a history of drug abuse—could only make 'a minute contribution to the maintenance' of the children (at [24]) and 'could not afford to pay for the supervision of a social worker' (at [23]); the maternal grandmother could not afford to maintain the children and was-because of ill-health and her age-unable to take care of the children without assistance (at [24]–[25]). All the circumstances indicated that the Supreme Court of Appeal, which had to pass sentence in order to avoid further delays, had to deal with a situation where a custodial sentence was called for even though such a sentence would without doubt have affected the best interests of the two children. 'The objects of deterrence and prevention', said Lewis JA at [50], 'must be met'. However, in determining the nature and duration of the custodial sentence, proper account had to be taken of the best interests of the children. At [51] Lewis JA stated:

> 'I therefore consider that the fraud committed by De Villiers against her employer, when she was in a position of trust, is such that a custodial sentence is required. Society must be assured that persons who abuse positions of trust for their own gain are not allowed to walk free. At the same time, taking into account the best interests of De Villiers' very young children, the period of imprisonment should not be lengthy and should take into account the period for which she was incarcerated after her appeal to the full bench failed and before she was again released on bail. And she should be given an opportunity to make arrangements for their care and support before she is incarcerated.'

The sentence of eight years' imprisonment was set aside and the appellant was sentenced, in terms of s 276(1)*(i)* of the Act, to three years' imprisonment from which she could be placed under correctional supervision in the discretion of the Commissioner of Correctional Services or a parole board (at [52]). A specific order was also made to the effect that the sentence would only take effect four weeks after the date of the order (at [52](3)).

Sentencing: When is an offender a 'first offender'?

In *S v Troskie* (unreported, ECG case no CA&R 73/2016, 27 July 2016) the appellant appealed against her sentence of 3 years' direct imprisonment imposed by the trial court on 16 September 2015 following her plea of guilty on a charge of fraud committed on 13 February 2013. Her fraud resulted in an irrevocable loss of R15 000 to the complainant, her former employer.

At the trial the prosecution did not prove any previous convictions. However, in the course of her evidence in mitigation the appellant voluntarily disclosed that she was 'currently serving' a sentence of 7 years' imprisonment—with 2 years suspended—imposed on her during September 2013 for a fraud committed in 2009 (at [5]). In response to questions put by the magistrate, the appellant stated that when she committed the 'present offence' (that is, the fraud committed on 13 February 2013) she had not yet been convicted of the fraud committed in 2009 and for which she was sentenced in September 2013.

On appeal Rugunanan AJ (Louw J concurring) found that on the facts and circumstances as described above, the magistrate was correct in treating the appellant as a first offender (at [7]). However, for purposes of the appeal against sentence it was found that the magistrate had given insufficient consideration to, or had overlooked, the appellant's potential for rehabilitation (at [8]). It was also concluded that the magistrate's approach amounted to a misdirection, entitling the court of appeal to interfere with the sentence 'and to revisit the identification of a sentence which is appropriate in all the circumstances of the matter' (at [9]).

In considering the sentence afresh, the appeal court noted that its new sentence would not assume concurrent status with the sentence which was imposed by another court in September 2013, unless the court of appeal were to order that its own sentence, or a portion thereof, were to run concurrently with a sentence previously imposed by another court. Making an order of concurrency is in the discretion of the sentencing court. See the discussion of s 280 in *Commentary*, sv *Concurrent sentences*. The following order was made by the court of appeal (at [12.2]): 'The sentence of 3 years' imprisonment is set aside and substituted with a sentence of 2 years' imprisonment, 6 months of which is ordered to run concurrently with the sentence previously imposed.' The substituted sentence was ante-dated to 16 September 2015 (at [12.3]).

It might at first glance appear as if *Troskie* is a rather peculiar decision: the conviction in respect of the earlier fraud could not serve as a previous conviction for purposes of sentencing the appellant for the second and later fraud, but the prison sentence in respect of the earlier fraud was taken into account by the court of appeal in making the order that 6 months of the 2 years' imprisonment imposed for the second fraud had 'to run concurrently with the sentence previously imposed'. However, an appreciation of the following principles and rules can put the decision in *Troskie* in the proper perspective:

(a) For purposes of sentencing a previous conviction refers to a *conviction* prior to the commission of the 'current crime'. See Terblanche *Guide to Sentencing in South Africa* 2 ed (2007) 80.

(b) Section 280 allows a sentencing court to impose a custodial sentence that will run concurrently with another custodial sentence which the offender is already serving and which was imposed by another court. See *S v Motloung* 2015 (1) SACR 310 (GJ) at [27].

(c) The rule that a court may order that a prison sentence should wholly or in part run concurrently with another prison sentence, is to ensure fairness. Periods of imprisonment are generally served cumulatively, that is, the one is served after the expiration, setting aside or remission of the other. The cumulative effect may, however, be too severe. See the discussion of s 280 in *Commentary*, sv *Cumulative sentences*. An order of concurrency can ensure fairness. In this context fairness cannot depend on the question whether the prison sentence the offender is already serving, is a prison sentence stemming from a previous conviction in the technical sense. It is the totality of circumstances that must be considered. And this is what was done in *S v Troskie*.

Sv Troskie should be compared with S v Coetzee 2016 (1) SACR 120 (NCK) where the meaning of 'first offender' arose in a completely different context. In *Coetzee* the accused, who had no criminal record, was convicted of 45 contraventions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. All these offences were committed over a four-year period, that is, from May 2010 to April 2014. Kgomo JP refused (correctly, it is submitted) to treat the clean record of the convicted offender as something that had to go into the scales as a mitigating factor. At [20.13] he said:

> 'Convoluted and ironic as it seems, the accused is classified as a first offender with no history of unlawful conduct or blemishes, which, counsel contended, is indicative of a prior law abiding character. This point, it must be stated, is almost immediately rendered nugatory by the accused's four-year harmful trade. . . .'

The decision in *Coetzee* illustrates—like the one in *Troskie*—that the question whether the offender is a 'first offender' or not, is merely one of the initial steps in the process of determining a fair sentence having regard to the nature of the crime(s), the offender's personal circumstances and the legitimate interests of society.

(iii) Forfeiture and confiscation

s 20: Test for whether goods are the 'proceeds of unlawful activities' for the purpose of obtaining a forfeiture order under s 48 of the Prevention of Organised Crime Act 121 of 1998 (POCA)

The test was examined by Adams AJ in *National Director of Public Prosecutions v Airport Clinic JHB International (Pty) Ltd & another* 2016 (2) SACR 576 (GJ). The applicant had applied for an order for the forfeiture of foreign currency held by the South African Reserve Bank that had been seized from the first respondent. The money had been acquired *lawfully* by that party by way of payments for medical services rendered and medication supplied by the clinic to travellers from time to time. It did *not* constitute the proceeds of *criminal* activities because the money was not acquired in the commission of a crime. It was argued by the appellant that the property nevertheless was the proceeds of *unlawful* activities, in that the first respondent had infringed the Foreign Exchange Control Regulations (and Regulation 6(1) in particular) by failing to sell the foreign currency to an authorised dealer within 30 days of receiving the money, which constituted a criminal offence in terms of Regulation 22.

In terms of s 1 of POCA, 'proceeds of unlawful activities' means 'any property . . . which was derived, received or retained, directly or indirectly . . . in connection with or as a result of any unlawful activity carried on by any person . . .'. Adams AJ turned to the decision of the Supreme Court of Appeal in *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd & another; National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA), in which the philosophy behind the provision was explained. It was said that the purposes of Chapter 6 of POCA included '*(a)* removing incentives for crime; *(b)* deterring persons from using or allowing their property to be used in crime; *(c)* eliminating or incapacitating some of the means by which crime may be committed . . . and . . . *(d)* advancing the ends of justice by depriving those involved in crime of the property concerned'.

Adams AJ applied the principles set out in *Seevnarayan* and was not persuaded that the property constituted the proceeds of unlawful activities. The judge could not accept that the foreign currency, which was acquired lawfully in the ordinary course of business, was the proceeds of unlawful activities arising out of a contravention of Exchange Control Regulation 6(1). In the words used by the Supreme Court of Appeal, Adams AJ considered that the 'connection' envisaged by the definition 'requires some form of consequential relation between the return and the unlawful activity' (at [18]). In other words, the judge added, 'the proceeds must in some way be the *consequence* of unlawful activity' (emphasis added).

There was no such connection in this case between the foreign currency and the contravention of Regulation 6(1) by the respondents. The application for forfeiture was accordingly dismissed.

s 21: Preservation order following seizure under an unlawful warrant

The judgment of Dolamo J (with whom Desai J agreed) in *Page & others v Additional Magistrate, Somerset West & others* [2016] 3 All SA 619 (WCC) contains a useful and succinct summary of the principles governing the issue and legality of a search warrant in terms of s 21 (read with s 20) of the Criminal Procedure Act. This discussion is followed by a consideration of what relief a court might grant if it is determined, as it was in *Page's* case, that the search warrant was not, in fact, lawful.

This question was, said Dolamo J, raised by Langa CJ in *Thint (Pty) Ltd v National Director of Public Prosecutions & others; Zuma v National Director of Public Prosecutions & others* 2009 (1) SA 1 (CC) at [129]. See, for a detailed discussion of this aspect of the *Thint* decision, *Commentary* in the notes to s 201 sv *The nature of the privilege at common law and under the Constitution.* In short, Langa CJ held, putting an end to the differing views among judges of the Supreme Court of Appeal in separate judgments, that a preservation order would 'frequently be a just and equitable remedy' (at [219]). The 'ordinary rule' (at [223]) would be that a court, when it found a warrant to be unlawful, would preserve the evidence so that the trial court could apply its mind to the discretion set out in s 35(5) of the Constitution

relating to whether the unlawfully obtained evidence should be admitted or not.

Dolamo J stressed correctly, however, that Langa CJ 'did not grant the courts a blanket jurisdiction to order preservation of evidence obtained through an unlawful search and seizure' (at [40]). The only situations in which such an order should *not* be granted, however, said Langa CJ, were where 'an appellant can identify specific items the seizure of which constitutes a serious breach of privacy that affects the inner core of the personal or intimate sphere' or where there has been 'particularly egregious conduct in the execution of the warrant' (at [223]). The fact that Langa CJ used the words 'only if an applicant can identify' conveyed, to Dolamo J (at [40]), 'that a preservation order *would* ordinarily be granted unless there was a serious violation of the right to privacy which infringes the inner core of the personal or intimate sphere and where the warrant was executed in an egregious manner that a court should refuse to grant a preservation order'.

It was argued that the circumstances in *Page* justified a departure from the ordinary rule since the object seized was a laptop computer which contained highly personal details of the applicant's financial affairs as well as intimate correspondence with his fiancé. The applicant complained, too, about the execution of the warrant, claiming that the police were hostile and unsympathetic and that he was treated like a criminal. The court, however, found that the conduct of the police did not qualify as 'egregious', which it understood to connote 'outstandingly bad or shocking conduct' (at [43]). To be such, it had to be 'not only an irritant or inconvenience to the person searched but must be outrageously bad so as to shock any right thinking individual'.

Although the laptop *did* contain information of a personal and intimate nature and although access to this information *would* 'constitute a serious breach of privacy that affects the inner core of their personal or intimate sphere' (at [45]), there had been no allegation that any unauthorised person had had any *access* to any private documents. The laptop was in the possession of the police for only a brief moment, was in the further possession of a firm of attorneys, again for only a brief moment, and had remained in the safe custody of the Registrar of the court ever since. Dolamo J was in no doubt that 'with the necessary safeguards in place access to information of the private documents of a personal and intimate nature which [might] lead to a breach of [the applicant's] right to privacy [could] be prevented' (at [46]). Such safeguards, Dolamo J explained, might include 'providing for supervised access to the contents of the laptop, separating those documents which contain information of an intimate or personal nature from the rest' and restricting access only to emails of a potentially criminal nature.

In short, it would, said the court, be 'just and equitable to preserve the mirror image of the laptop so seized with the necessary safeguard as to [the applicant's] privacy'.

(iv) Appeal and review

Appeal: What constitutes 'exceptional circumstances' as required by s 17(2)(*f*) of the Superior Courts Act 10 of 2013?

S v Malele; *S v Ngobeni & others* [2016] ZASCA 115 (unreported, SCA case no 723/16 and case no 724/16, 13 September 2016)

In the above two matters the applicants had applied to the President of the Supreme Court of Appeal for an order that an earlier dismissal by the Supreme Court of Appeal of their applications for special leave to appeal against their convictions and sentences be referred to the Supreme Court of Appeal for reconsideration and, if necessary, variation. The applicants relied on s 17(2)*(f)* of the Superior Courts Act 10 of 2013. This section promotes the important principle of finality by determining that the Supreme Court of Appeal's decision to grant or refuse applications for leave to appeal 'shall be final'. However, s 17(2)*(f)* also contains an important proviso to the effect that 'the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation'.

The powers of the President to refer the earlier decision are subject to the criterion 'in exceptional circumstances' as stipulated in the proviso to s 17(2)*(f)*. What would constitute 'exceptional circumstances' for the purposes of s 17(2)*(f)*? The decision of Mpati AP in *Malele*; *Ngobeni* (supra) provide some useful guidelines.

At [10] Mpati AP pointed out that the applicants relied heavily on the fact that in an earlier and separate application to the Supreme Court for leave to appeal, one of their erstwhile co-accused, one BM, was granted leave to appeal to the full court of the Gauteng Division against his conviction as well

as sentence. It was argued on behalf of the applicants that the granting of leave to BM was 'a compelling reason' why their appeals also had to be heard (at [10]). However, Mpati AP took the view that the mere fact that BM, as a former co-accused of the applicants, had successfully applied for leave to appeal 'does not necessarily mean that the applicants should, without more, also be granted leave to appeal' (at [11]). In circumstances such as these it was necessary to examine the judgment of the trial court to determine whether the position of BM was any different from the position of the applicants. Indeed, Mpati AP was satisfied that the trial court had failed to differentiate between BM's conduct and the conduct of the applicants: BM, unlike the applicants, took steps to prevent further injuries to the deceased. There was, accordingly, no merit in the submission of the applicants that BM was granted leave 'on the same facts' (at [10]). In fact, the position of BM was different (at [11]) and his successful application was really a neutral factor which could not constitute an exceptional circumstance for the purposes of s 17(2)*(f)*.

However, there was one issue of law in respect of which Mpati AP had 'grave doubts', namely 'the appropriateness of the trial court's application of the doctrine of common purpose in the case before it' (at [8]). He took the view that a correct application of this doctrine—as enunciated in *S v Mgedezi & others* 1989 (1) SA 687 (A) and affirmed in *S v Thebus* 2003 (2) SACR 319 (CC)—might well yield 'a result other than a murder conviction' (at [8]). It would appear that in this regard the concerns of Mpati AJ were indeed valid. The trial court had accepted that two applicants—accused 2 and accused 8 at the trial—had initially attempted to assist the deceased but had to abandon their attempt when it became impossible to continue their assistance. Despite these facts, the trial court concluded that the initial attempt to assist could not 'absolve' the two applicants concerned. At [9] Mpati J also questioned the trial court's conclusion that the form of *mens rea* on the part of the applicants was *dolus eventualis*: 'In my view, another court might find differently'.

Taking into account the legal and factual matters referred to in the previous paragraph, Mpati AP concluded at [12] that 'a grave injustice may . . . result' if he were to refuse to make an order as provided for in s 17(2)*(f)*. And a conclusion of this nature, he said at [12], did in itself constitute 'exceptional circumstances' as required by s 17(2)*(f)*. He was accordingly entitled to make the following order (at [13](2)):

> 'The decision of this court dated 3 May 2016 dismissing the applicants' application for special leave to appeal against their conviction and sentence is referred to the court for reconsideration and, if necessary, variation, in terms of s 17(2)*(f)* of the Superior Courts' Act 10 of 2013.'

On the approach the Supreme Court of Appeal is to adopt in reconsidering an application for leave to appeal referred to it by the President of the Supreme Court of Appeal in terms of s 17(2)*(f)*, see *S v Notshokovu* [2016] ZASCA 112 (unreported, SCA case no 157/15, 7 September 2016) which is briefly discussed below, sv 'Appeal: Section 17(2)*(f)* of the Superior Courts Act 10 of 2013 and the Supreme Court of Appeal's reconsideration of its earlier decision refusing special leave to appeal'.

Appeal: Section 17(2)(*f*) of the Superior Courts Act 10 of 2013 and the Supreme Court of Appeal's reconsideration of its earlier decision refusing special leave to appeal

The appellant in *S v Notshokovu* [2016] ZASCA 112 (unreported, SCA case no 157/15, 7 September 2016) was convicted by the regional court on one count of rape and sentenced to 6 years' imprisonment. His application for leave to appeal against his conviction and sentence was refused by the trial court. A subsequent petition to the High Court was unsuccessful and a further special leave application to the Supreme Court of Appeal, before two judges, also failed. However, one further avenue opened up as a result of the appellant's successful application for an order by the President of the Supreme Court of Appeal in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013, requiring the Supreme Court of Appeal to reconsider and, if necessary, vary its earlier decision dismissing the application for special leave to appeal. On the 'special circumstances' that must be present before an order in terms of s 17(2)*(f)* can be made, see *S v Malele*; *S v Ngobeni & others* [2016] ZASCA 115 (unreported, SCA case no 723/16 and case no 724/16, 13 September 2016) which is discussed above, sv 'Appeal: What constitutes ''exceptional circumstances'' as required by s 17(2)*(f)* of the Superior Courts Act 10 of 2013?'

In *Notshokovu* (supra) Shongwe JA, writing for a unanimous full bench, pointed out that an appeal as a

result of an order in terms of s 17(2)*(f)* is not an appeal on the merits against conviction and sentence but a *reconsideration* of the decision refusing leave to appeal. 'This court', it was said at [2], 'has to decide whether or not the courts below, including the two judges of this Court, ought to have found that reasonable prospects of success existed to grant leave or special leave respectively'.

In reconsidering the matter in the above context, Shongwe JA pointed out that the trial court's refusal of leave 'was factually based' and included a finding that 'there were no reasonable prospects of success' (at [3]). The argument that the trial court had applied an incorrect test by requiring the appellant to prove that his version of events was probable, was rejected (at [12]):

> 'It is quite clear from the tenor of the judgment as a whole, that in arriving at her conclusion, the magistrate had had regard to the credibility of all the witnesses. [T]he record reveals that the magistrate made a proper assessment and analysis of all the evidence, by amongst other things, weighing the strength and the weaknesses of the State's case vis-à-vis that of the appellant, including the probabilities and improbabilities. It is axiomatic that an examination of the probabilities cannot be done in a vacuum. Such an exercise requires an analysis and evaluation of the evidence as a whole.'

Shongwe JA was satisfied that on the facts of the case, the prosecution had proved beyond reasonable doubt that the complainant had not consented to intercourse (at [13]). The appellant had also failed to demonstrate any special circumstances meriting a further appeal to the Supreme Court of Appeal and, therefore, special leave to appeal was justifiably refused. At [15] it was also concluded that there were no reasons to vary the order of the courts below, including the decision of the two judges of the Supreme Court of Appeal: the case 'was not of great public importance', nor one of those 'where without leave a grave injustice would result'.

Table of Cases