Office of the Director of Public Prosecutions

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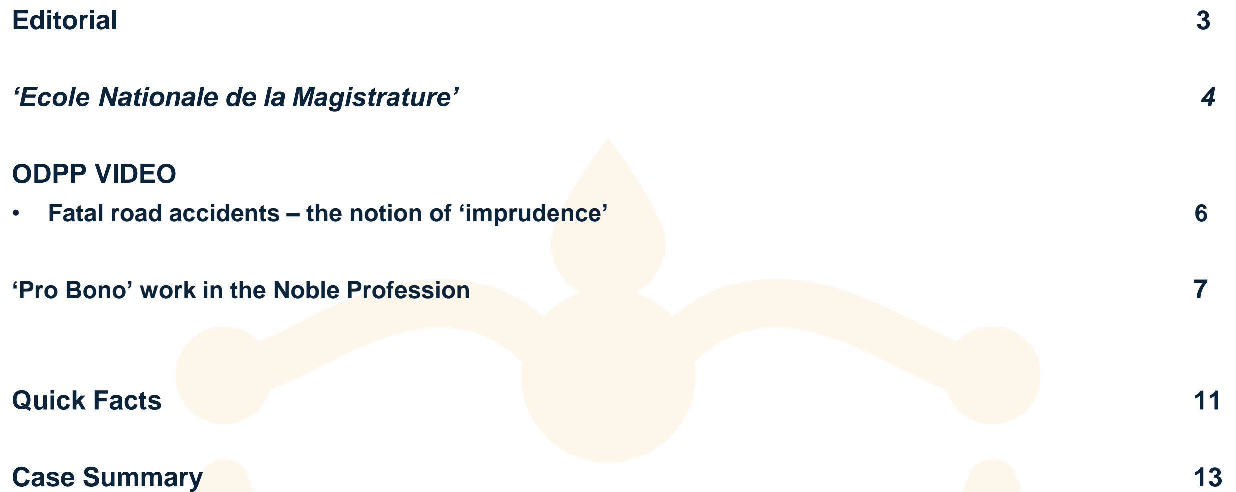

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Editorial

Anusha Rawoah
Senior State Counsel

Dear Readers,

It is with immense pleasure that we bring to you the second issue of the ODPP e-newsletter for the year 2019. As promised, we have included another video whereby Mr Azam Neerooa, Assistant Director of Public Prosecutions, comments on a recent Supreme Court Judgement. The Judgment deals with the legal interpretation of 'imprudence' of drivers on the road in the context of fatal road accidents. On another note, recently, one of our law officers attended a training session at the *'Ecole Nationale de la Magistrature'* in France on 'Corruption'. An overview of the training session is included.

Often, in the legal jargons, we encounter the latin phrase *'pro bono*'. Pro bono cases and services leverage the skills of legal professionals to help those who are unable to afford lawyers. In this issue, we provide an article explaining the concept of *'pro bono*' legal services. Moreover, in accordance with our endeavour to keep readers abreast with important legal facts, we have for this month, included in our 'Quick Facts' part, an environmental law offence - the illegal use of plastic bags. Since 2016, the concept of 'Sustainable Development Goals' (SDGs) has taken a crucial place on the global arena and one of the prevalent discussion on the SDGs is the protection of the environment, which is the responsibility of each and every citizens.

Finally, we provide summaries of recent Supreme Court Judgements at page 13.

We wish you a pleasant read and always welcome your comments on odppnewsletter@govmu.org.

‘Ecole Nationale de la Magistrature’ Training Session

LA CORRUPTION: DETECTION, PREVENTION, REPRESSION

La corruption n’épargne aucun pays au monde et constitue une menace grave pour la démocratie. Elle prend parfois des proportions telles qu’elle risque de freiner la croissance économique et de contrarier les efforts accomplis en vue d’instaurer une bonne gouvernance. Elle entraine, à terme, la dégénérescence du tissu social et fausse le système économique et la structure politique des Etats.

Dans le but de combattre la corruption, encourager la transparence et accroitre la responsabilité, une formation sur la détection, la prévention et la répression a été dispensée conjointement par l’ENM et l’Agence Française Anticorruption (AFA). La formation était destinée a ceux qui sont confrontés à la gestion administrative ou judiciaire des faits de corruption ou assimiles et à leur prévention. La session a sensibilisé et a formé les professionnels tant à la prévention qu’a la répression de ce phénomène.

Elle a permis notamment de mettre à la disposition des participants, l’expertise de l’Agence Française Anticorruption (AFA), ainsi que des outils techniques et juridiques permettant de détecter au mieux, de réguler ou de traiter ce type de comportement.

Plusieurs acteurs des différents secteurs concernés ont été réunis, notamment, AFA, juges financiers, procureurs, enquêteurs spécialises, avocats, universitaires, représentants du Groupe d’Etats contre la corruption (GRECO), Organisation de coopération et de développement économiques (OCDE), Organisations non gouvernementales (ONG), services de renseignement financier comme le Traitement du renseignement et action contre les circuits financier clandestins (TRACFIN), hauts fonctionnaires du ministère de la justice, des finances ou des affaires étrangères et responsables du secteur privé. Ils ont tous intervenus au cours des sessions afin de partager leurs expériences et leur connaissance du phénomène et de son traitement avec, pour objectif, une meilleure prise de conscience des enjeux de la corruption.

Mrs Shaaheen Mohung-Dawreeawoo
State Counsel

ODPP VIDEO

Fatal road accidents
The notion of 'imprudence'

To view video, click on the picture below or on any of the following links:

https://youtu.be/UiREl2GNZml

http://dpp.govmu.org/English/Media-Library/Documents/ODPP%20Video%20-%20Fatal%20Road%20Accidents.mp4

‘Pro Bono’ work in the Noble Profession

“We make a living by what we get, but We make a life by what we give.”

-inspired by Sir Winston Churchill

1.The legal profession is one of the most respected profession. The public places trust and confidence in this noble profession and this helps to uphold the rule of law. The philosophy of ‘Pro Bono’ reinforces the code of ethics for barristers. The nobility of the profession can be seen by the willingness of its members to engage in ‘Pro Bono’ work. This article tries to highlight what is ‘Pro Bono’, its different variances and its effect on practitioners adhering to this philosophy.

2.‘Pro bono’ is a Latin phrase for professional work undertaken voluntarily and without remuneration, which includes free legal advice or service for ‘public good’. A barrister must adhere to the code of ethics. Therefore, a barrister should provide his services to a very high standard of professionalism whether remunerated or not. Should a barrister feel that he does not have the requisite experience or competence to handle a brief, he should not accept such brief**.** Eventually, whether remunerated or not, a barrister is liable for law suits in cases of professional negligence. Quality of the work must not be affected whether it is pro bono or remunerated work. In UK, barristers pay insurance to protect themselves from potential professional negligence claims. However, it is unlikely that insurance coverage will extend to ‘Pro Bono’ work.

3.The cab – rank rule is dealt in **Paragraph 3.3** of **The Code of Ethics (Mauritius)** states that ‘a barrister in independent practice shall hold himself out as being willing at all time in return of payment of appropriate fees, to render legal services to the public generally in relation to work appropriate to his rank and seniority.’ The cab-rank rule seems not apply to ‘Pro Bono’ which is purely at the discretion of the barrister to accept it. Even if a barrister is free and has the required experience, he is not obliged to accept a brief if he is not remunerated. A barrister can accept a brief even if he does not receive “appropriate fees”. **Paragraph 3.6** of the **Code of Ethics (Mauritius)** provides that a barrister may supply legal services in civil or criminal matters, whether acting for a fee or not, only when he is briefed or instructed by an attorney-at-law. So our **Code of Ethics (Mauritius)** acknowledge that legal practitioners can legitimately provide unpaid legal services. ‘Pro bono’ work have been provided by legal practitioners in the past and is being provided currently.

4. In Australia, incompetence of a barrister is a valid ground of appeal against conviction. An appellant who appeals on ground of incompetence of barrister must demonstrate that the counsel’s conduct caused miscarriage of justice as per **section 6(1) Criminal Appeal Act 1912**. Therefore, barristers have the onus to provide a very high standard of legal service irrespective of whether it is remunerated or on pro bono.

‘Pro Bono’ work in the Noble Profession

5.’Pro Bono’ work, apart from having an altruistic flair to the legal profession, has lots of positive influence on careers of barristers whether new-comers or experienced ones. It is a way to get engaged in sensitive matters and get media coverage. **Paragraph 7** of the **Code of Ethics (Mauritius)** state that a barrister ‘shall not advertise or seek personal publicity’. But by engaging in ‘Pro Bono’ work, the legal practitioner does get media coverage which indeed creates ‘publicity’ and attracts more clients. It is also a strategic choice for experienced barristers. It is an undeniable fact that a relatively large number of politicians in Mauritius have a legal background. Many politicians engage in ‘pro bono’ work to create proximity with their voters and this may be viewed as a political strategy to secure votes. Such practice does not directly go against **Paragraph 7.2** of the **Code of Ethics (Mauritius)** which state that barristers shall not do ‘anything with the primary motive of personal advertisement’ . The reason being that the primary motive of ‘Pro Bono’ work is not ‘personal advertisement’.

6. In UK, since 2003, many UK law firms and law schools have celebrated an annual Pro Bono week which encourage barristers and solicitors to offer pro bono services and increases general awareness of pro bono services. There is also Pro Bono Protocol (UK) endorsed by Bar Council of England and Wales which promote and support constantly high standard of pro bono work. In the United States, lawyers are recommended under the American Bar Association (ABA) ethical rules to contribute at least 50 hours of pro bono work per year. In South Korea lawyers are required to do at least 30 hours of pro bono work per year. There exists a culture of ‘Pro Bono’ in Mauritius. For example, pupillage for prospective barristers is not paid unlike in UK where pupillage can be paid. Such practice denotes that the concept of ‘pro bono’ is inculcated to prospective barristers.

7. Pro Bono precedes the concept of Corporate Social Responsibility whereby businesses engage in social responsible activities for the welfare of society. It is usual practice in the profession that barristers usually do not charge other barristers. In Mauritius, barristers usually do ‘Pro Bono’ work for friends, family members, relatives or members of the Bar. It seems that the cab rank rule does not apply to Pro-Bono work. The practitioner has complete discretion as to whom he will provide ‘Pro Bono’ Services. Therefore, providing ‘Pro Bono’ work to unknown individuals is indeed a sign of altruism and consciousness of humanity.

8. **Article 10(2)d** of the **Mauritian Constitution** provides that “*Every person who is charged with a criminal offence shall be permitted to defend himself in person or, at his own expense, by a legal representative of his own choice or, where so described, by a legal representative provided at the public expense*”. To complement this provision, the **Legal Aid and Legal Assistance Act 1973** and subsequent amendments come into play. The legal aid system in Mauritius provides legal services free of charge to minors and to individuals whose total income is less than Rs15,000 a month and whose net worth is Rs 500,000 or less apart from their wearing

apparel and tools of trade and the subject matter of proceedings. The essence of legal aid is to allow individuals of poor and vulnerable background to benefit from assistance from legal aid for a wide range of criminal offences as well as civil cases like divorce proceedings. The main concern is that not everyone qualifies to apply for legal aid. Even if someone earns more than Rs 15,000, this does not mean that the individual will be able to afford paid legal representation. To overcome this anomaly of the system, ‘Pro Bono’ work can partly fill in the gaps and meet the needs of individuals of vulnerable backgrounds. Inability of clients to pay for legal services is a big obstacle for access to justice. Our legal aid assistance does not fully adhere to **Article 10** of our **Constitution** which states that ‘any person charged with a criminal offence’ if he meets the eligibility criteria should be entitled apply for legal aid. However, the **Legal Aid and Legal Assistance Act 1973** cover only a range of criminal offences and therefore does not cover all criminal offences. The **Constitution** does not explicitly differentiate between the seriousness of the offences. Another critic of the legal aid system is that junior counsel and senior counsel do not provide the same standard of work as they do not possess the same experience. When someone applies for legal aid, the person is not guaranteed the same standard of work.

9. Is it worth working for free? The legal profession is associated with prestige, glamour, hefty fees and fame. All these are derived from the fees paid by clients and the best interests of the client have to be served. According to the **Code of Ethics**, barristers must charge ‘appropriate fees’. However, the ‘Pro Bono’ aspect of the profession is often overlooked. This is a concept outside normal business practice of give and take. This philosophy gives the letter of nobility to the profession. In UK, free legal advice can be given even on hourly basis on helpline for legal aid.

10. Pure ‘ pro-bono’ work is financially unsustainable. Operating a private practice has cost implications ranging from office rent, secretary salaries, telephone and utility bills. All businesses including law firms operate in society. These firms derive honorarium and profits from members of the society. So Pro Bono is a sort of ‘pay back’ to society to those who are vulnerable or without protection. Therefore Barristers have the opportunity to be the voice of vulnerable. Government incurs the cost of operating the judiciary and the police force. Legal Aid Assistance does provide some help to vulnerable persons but not every poor or vulnerable individual qualify for such assistance. It can be seen that ‘Pro Bono’ assistance is not a substitute to a properly funded legal aid system but is complementary to it.

Vedbahu Dudhee
Former Pupil Barrister
ODPP

QUICK FACTS

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Quick Facts

DID YOU KNOW?

The Environment Protection (Banning of Plastic Bags) Regulations 2015

Penalty for the import, manufacturing, selling or supply of a plastic bags (not applicable to exempted plastic bags)

Fine not exceeding 10,000 rupees

Examples of exempted plastic bags

Transparent roll-on bag solely used to contain meat, seafood, etc..

Bag designed for disposal of waste

Biodegradable plastic bags

SUPREME COURT JUDGMENTS SUMMARY

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SUMMARY OF SUPREME COURT JUDGMENTS: February 2019

RAMGOOLAM G. D. v THE STATE 2019 SCJ 35

By Hon. Judge Mrs. R. Teelock and Hon. Judge Mr. N. F. Oh San-Bellepeau

Novel grounds of appeal – Vagueness of ground of appeal – Procedural defect – Section 93(2) of the District and Intermediate Courts (Criminal Jurisdiction) Act 1992

The Appellant was found guilty by the District Court for the charge of wilfully and unlawfully obstructing a public officer whilst in the performance of his public duty in breach of **section 3(1)(a)** of the **Public Officers' Protection Act.**

Counsel for the Appellant insisted on one ground of appeal which read as follows:

"In her Judgment, the Learned Magistrate was wrong to come to the conclusion that the Accused was guilty and wrongly took into account that:

a) "Accused moved towards witness 4 and uttered some foul words"."

At the very outset itself, the Appellate Court made a remark to the effect that this ground did not in any way convey to the opposing side or to this Court as to how the learned Magistrate had failed to properly appreciate the evidence, thus leading her to make a wrong finding of guilt and justifying the present appeal.

The Appellant's skeleton arguments in fact sought to cure the vagueness in the ground by listing a number of alleged "serious inconsistencies" in the evidence adduced before the learned Magistrate in order to challenge her judgment on the basis of factual issues which were never canvassed during the trial. The Respondent objected to such course of action.

The Appellate Court was of the view that the Privy Council decision in **Toumany & Another v Veerasamy [2012] UKPC 13** could not be of help to the Appellant since the remarks made in that judgment concerned mistakes made in the documentation filed with regard to the jurisdiction invoked, whereas the present appeal was founded on a ground of appeal which was tainted with vagueness and which the appellant was trying to improve by introducing new reasons to appeal without satisfying any of the requirements enacted under **section 93(2)** of the **District and Intermediate Courts (Criminal Jurisdiction) Act**, and without the Respondent having been given adequate notice to address these new arguments.

The Court thus refused the introduction of the new grounds of appeal through the back door as part of skeleton arguments, especially when no reasons had been advanced to justify such a course of action and since the new issues raised related to disputed facts which were never canvassed before the trial Court.

Nonetheless, the Court assessed the ostensive merits of the ground in question and concluded that the appeal was devoid of merit and frivolous, hence dismissing the appeal.

JHUNGEE A. K. v THE STATE 2019 SCJ 40

By Hon. Judge Mrs. R. Teelock and Hon. Judge Mr. P. Fekna

Fundamental defect in information – Plea of guilty – Application and interpretation of Section 44 of the Interpretation and General Clauses Act - Supervisory jurisdiction of the Supreme Court – Proprio Motu intervention - Conviction quashed

The Appellant was charged before the Intermediate Court under count 1 with the offence of carrying out a financial service without licence in breach of **Sections 14(1)(2)** and **90** of the **Financial Services Act** together with **Section 44(1)(b)** of the **Interpretation and General Clauses Act** and under the two remaining counts with the offence of knowingly receiving articles obtained by means of a crime in breach of **Sections 40** and **330(1)** of the **Criminal Code** together with **Section 44(1)(b)** of the **Interpretation and General Clauses Act**.

The Appellant pleaded guilty to all three counts and was sentenced to pay a fine of Rs 10,000 under count 1 and to undergo a term of 6 months' imprisonment under each of the two remaining counts and to pay the sum of Rs 500 as costs.

The Appellant appealed against the sentence inflicted upon him on the ground that it was manifestly harsh and excessive in the circumstances of the case. However, on the day the case was scheduled to be heard, Counsel for the respondent stated that he would no longer be resisting the appeal based on a point of law which had come to his attention and which he invited the Court to consider proprio motu since it revealed a fundamental defect in the information. He was of the view that the conviction itself could not stand inasmuch as one essential element of the offences had not been averred in all three counts of the information.

The argument of Counsel for the Respondent hinged on the application of **section 44** of the **Interpretation and General Clauses Act**, the relevant part of which provides the following :

"**44. Offence by ……. body corporate**
(*1) Where an offence is committed by –*

(a) …………………………………..

(b) body corporate, every person who, at the time of the commission of the offence, was concerned in the management of the body corporate or was purporting to act in that capacity shall also commit the like offence unless he proves that the offence was committed without his knowledge or consent and that he took all reasonable steps to prevent the commission of the offence" (emphasis added).

The Appellate Court noted that where an offence has been allegedly committed by a body corporate having a legal personality, a natural person working in or for that body corporate can also commit the like offence and can be prosecuted in his personal name provided certain conditions are met, namely:

(a) that that person 'was concerned in the management of the body corporate' or that, alternatively, (b) that person 'was purporting to act in the capacity of a person who was concerned in the management of the body corporate'.

Moreover, a person who is thus prosecuted in his personal name has two defences available to him, namely where he can prove that: (a) the offence was committed without his knowledge or consent; or (b) he took all reasonable steps to prevent the commission of the offence.

In the light of the provisions of **section 44** of the **Interpretation and General Clauses Act**, the Appellate Court held that it is not sufficient, in an information prosecuting a natural person for an alleged offence committed by a body corporate, for the prosecution to aver that person for an alleged offence committed by a body corporate, for the prosecution to aver that that person occupied a certain post in the company.

It must be specifically averred that, by virtue of his occupying that post, the person 'was concerned in the management of the body corporate' or that he 'was purporting to act in the capacity of a person who was concerned in the management of the body corporate'. The prosecution has to be precise and say which one of these two alternatives is applicable to an accused party and to prove that averment by adducing sufficient evidence on the issue.

The Appellate Court concluded that that the degree of involvement of a natural person in the activities of a body corporate is an essential element of the offence and it is not sufficient that **section 44(1)(b)** of the **Interpretation and General Clauses Act** be mentioned in the heading of the information. This element has to be specifically included as an averment in the body of the information.

The failure to set down this element has serious consequences in the sense that it is one of those instances, provided for in law, whereby the burden of proof shifts on the accused party to establish that he has a defence in the sense that 'the offence was committed without his knowledge or consent and that he took all reasonable steps to prevent the commission of the offence'.

In the present case, a reading of the information revealed that the Appellant was prosecuted in his personal name for the said offences since the three counts of the information were directed against him and not against Fast Leasing Co Ltd.

Secondly, the relevant phrase in all three counts was that the appellant committed the alleged offences 'whilst being the director of Fast Leasing Co. Ltd'. The Appellate Court found it arguable that the body of the information avers that the appellant was acting in his capacity as director of the company and that it can be inferred that he must have been actively involved in the management of the affairs of the company.

However, this is not necessarily so since a person may be one of the directors of a company without being concerned in the management thereof or purporting to act in such capacity. Thus, a director of a company is defined in **sections 2** and **128** of the **Companies Act 2001** as 'including a person occupying the post of director of the company by whatever name called', a difference being made between 'an executive director' which refers to 'a director who is involved in the day-to-day management of the company' and a 'non-executive director' which means 'a director who is not involved in the day-to-day management of the company'.

The present information did not specify whether the appellant was alleged to have committed the offence whilst being 'an executive director' or a 'non-executive director' and if the information had given an indication of the degree of involvement of the appellant in the affairs of the company such as his being 'an executive director of Fast Leasing Co Ltd' or his 'being a director concerned in the management of Fast Leasing Co Ltd', or his 'being a director purporting to act in the capacity of a person who was concerned in the management of Fast Leasing Co Ltd', that would have clarified this element of the offence.

However, the manner in which the information has been presently drafted is vague and does not make any specific averment concerning the element of the capacity in which the appellant was supposed to have acted within the company when the alleged offence was committed. Hence the Court was of the view that the information was defective.

The Appellate Court supported its analysis and conclusion by referring to the case of **Jhummun S v The State of Mauritius [2016 SCJ 296]** where a similar situation arose and where the Court held:

"*However, there is no averment in the body of the information that the appellant, then accused, who was being prosecuted in his personal capacity, was concerned in its management or was purporting to act in that capacity. The mere description of the accused as a director of a named company cannot be equated to an averment that he was concerned in its management ………. For all the above reasons we hold that the appeal is rightly not resisted. The lack of averments which would constitute the very foundation of the charge as essential elements thereof is fatal thereto*".

The Court highlighted that as a general rule, an Appellate Court would not travel outside the grounds on which an appeal is based. However, there exist a few exceptional cases where the Court would, proprio motu and pursuant to its inherent supervisory jurisdiction, consider allowing an appeal outside the grounds filed if the point is so fundamental as to vitiate the whole proceedings that took place before the trial Court, as the present case.

It is worth noting that the Appellate Court commended the fair stand taken by Counsel for the Respondent and equally commented on the care that ought to be taken at the Office of the Director of Public Prosecutions in relation to vetting of information, the moreso considering an accused who may, for all intents and purposes be guilty, would walk away without having had to bear the sanction provided for by law for the commission of an offence with which he has been formally charged.

The conviction was accordingly quashed.

DE SENNEVILLE H. R. B. v THE STATE 2019 SCJ 41

By Hon. Judge Mrs. G. Jugessur Manna and Hon. Judge Mrs. K.D. Gunesh-Balaghee

Licensing conditions – Excise Regulations 1994 – Evidence falls short of requirements of law – Normal dictionary meaning of "entertainment"

The appellant was charged before the District Court of Rivière du Rempart on two counts of an information as follows:

(1) under count 1, for the offence of "allowing licensed premises to remain open during prohibited hours", in breach of **regulation 27(1)** and **(2) of Excise Regulations 1994 (GN 102/94) and section 48 of the Excise Act;**

(2) under count 2, for the offence of "carrying on a tourist enterprise without appropriate licence", in breach of **section 26(1) and (8)** of the **Tourism Authority Act.**

The Appellant was found guilty as charged under both counts and was sentenced to pay a fine of Rs 5000 under each count and Rs. 100 as costs.

The grounds of appeal challenging the conviction of the Appellant are as follows:

1. "The learned magistrate erred in her interpretation that the licensed premises were opened (sic) and customers

were still present consuming foods (sic) and drinks and thereby renders the accused in breach of Regulation 27.

2. The elements of the offence were not proved beyond reasonable doubt.

3. Count II does not disclose any offence by the Accused."

Counsel for the respondent did not resist the appeal with regard to ground 1 as it was not disputed that the Appellant held a tourist enterprise licence in the trade name of Le Grillon Banana Café and the evidence on record also showed that the Appellant held a "Retailer of Liquor and Alcoholic Products- Restaurant" licence issued under the **Excise Act**.

The evidence before the trial Court included the testimony of PS Gopaul who deposed on behalf of the prosecution to the effect that he contravened the manager of the restaurant Banana Café on 21 March 2015 at 00.45 hours for the offence of operating the premises at an unauthorised time [opening time for "Retailer of Liquor and Alcoholic Products – Restaurant" licence being "Everyday, between 8 a.m and midnight."] and for not abiding by the conditions of the licence.

However, PS Gopaul who deposed before the trial Court stated that the people who were there were finishing their drinks and there was no evidence that the waiters were serving drinks or would have been prepared to serve drinks.

The Appellate Court concluded that even if the restaurant was open, it could not, on the evidence before the learned Magistrate, be said to be open for the purpose of selling or serving liquor to its clients (vide **Ah Line Tso Sye v The Queen [1959 MR 421])** which was allowed only between 8.00 a.m. and midnight by virtue of the licence held under the **Excise Regulations 1994**.

Hence, the conviction under count 1 was quashed.

Under Count 2, the charge against the accused was one of "carrying on a tourist enterprise without the appropriate licence" in breach of the **Tourism Authority Act**.

Section 2 of the Tourism Authority Act defines a "tourist enterprise" as "an establishment or activity specified in the First Schedule." The tourist licence in the name of the Appellant in fact bore the particulars of "Restaurant including liquor and alcoholic beverages without entertainment" and the case of the prosecution was that the restaurant was not one licensed to provide entertainment so that by providing a dance floor, the Appellant was in breach of the licensing conditions.

The Appellate Court perused Sub-Part II of the First Schedule to the Tourism Authority Act whilst listing the 4 types of restaurants, namely - those that can sell liquor and other alcoholic beverages with entertainment, those that can sell liquor and other alcoholic beverages without entertainment, those that cannot sell liquor and alcoholic beverages but with entertainment and those that cannot sell liquor and alcoholic beverages without entertainment.

The Appellant was the holder of a licence without entertainment. The Appellate Court added that the legislator does not legislate in vain and there must be a distinction between a licence with entertainment and one without entertainment. The Court held that the learned Magistrate could not be faulted to take the view that providing a separate dance floor and music amounted to providing entertainment, as per the normal dictionary meaning of the word "entertainment".

The Court's view that the learned Magistrate was right in finding that the restaurant was providing entertainment is buttressed by the definition of "night club" in the **Tourism Authority Act** as "a place of entertainment which –

(a) is open to the public;

(b) provides music and space for dancing on its premises; and

(c) and optionally serves food and refreshments, including alcoholic drinks;"

Thus, the Court found that there was ample evidence before the learned Magistrate to find that count 2 was proved beyond reasonable doubt, hence ground 3 failed.

The appeal was allowed in relation to count 1 only and was otherwise dismissed so that the appellant was ordered to pay half the costs of the appeal.

CHEETAMUN S. v THE STATE 2019 SCJ 49

By Hon. Chief Justice Mr. K.P. Matadeen, Hon. Judge Mr. A. Caunhye and Hon. Judge Mrs. K. D. Gunesh-Balaghee

Newton Hearing – Cases of conflicting versions – Seriousness of the offence – Sentence not manifestly harsh and excessive/wrong in principle – Appeal dismissed

The Appellant was initially prosecuted for the offence of rape followed by manslaughter but he pleaded guilty to the reduced charge of rape followed by wounds and blows causing death without intention to kill in breach of **sections 228(1)**, **(3)** and **(4)** and **249(1)** of the **Criminal Code**. The Appellant was convicted and following a hearing, he was sentenced to undergo 22 years' penal servitude.

The Appellant is now appealing against the judgment on the following grounds:

"1. The Learned Judge failed to appreciate and attach due weight to the whole of the evidence which would have caused an impact on the guilty plea and sentence.

2. The facts and evidence at the hearing disclosed sufficient and serious doubts for the guilty plea to stand. In the circumstances, the Learned Judge should have held a proper Newton Hearing and ruled on the disputed facts. The Learned Judge was wrong NOT to have held a proper Newton Hearing which rendered the trial procedure defective and the trial unfair.

3. The facts and evidence before the Learned Judge, withstanding or not, the Newton hearing, disclosed sufficient and serious doubts for the guilty plea to stand. In the circumstances, it was incumbent upon the Learned Judge to make an order to vacate the guilty plea, proprio motu, in the interests of justice and in the interest of public. The Learned Judge was wrong NOT to have vacated the guilty plea and the failure not so to do has undermined the proper administration of justice.

4. The fact that there was no evidence to support the charge of rape after the unreliable DNA evidence was rejected by the Prosecution and the fact that no other evidence was at hand, except the guilty plea of the Accused, the Learned Judge was wrong NOT to have vacated the guilty plea on rape as the aggravating factor.

5. Given the facts and circumstances of this particular case and the legal framework put before the Court by way of case law at submission stage, the sentence is wrong in principle and manifestly harsh and excessive."

The facts of the case are as follows as per the defence statements: On 22 April 2013 at around 08:30 a.m. the appellant was walking towards his maternal uncle's house in company of the latter in Hermitage when he saw an old lady (late Mrs Bullywon) sweeping her yard. He there and then made up his mind to sexually assault her.

On reaching his uncle's place he kept thinking as to how to enter the old lady's house in order to rape her in such a way that he would not be recognised by her. He then returned to the place where he had previously seen the old lady in order to rape her. As the door was locked he entered into the old lady's house through a window.

On seeing him, the old lady started shouting but he hit her at her face. He then carried her to a bed where he undressed and raped her. Following the rape, he decided to commit further sexually perverse acts upon her.

As he inserted two of his fingers into her vagina, the old lady moaned in pain; he derived great pleasure in seeing her in pain and that increased his excitement. He added that being animated by a sadistic impulse ("ene l'esprit maniac") to see her suffer more, he inserted the handle of a broom, which he found near the bed where he had raped her, into her private parts.

He inserted the handle inside the old lady's private parts and moved the handle to and fro in the old lady's private parts for about ten times. He then realised that the old lady had seen his face and would be able to identify him. He therefore made up his mind to kill her by beating her up; he sat on top of her and compressed her neck before inflicting several harsh blows to her face and other parts of her body.

The old lady was in the meantime crying and screaming but he paid no heed to her and continued to assault her. On hearing the voice of some persons approaching the house he tried to escape through an open window but he was held and stopped by a man.

The Appellant thus made a clean breast of the offence and his statements contained a full admission of the above facts which were never challenged at any stage of the proceedings before the learned Judge.

Moreover, the medico-legal report carried out on late Mrs. Bullywon revealed that the old lady who was 80 years old had died out of shock due to multiple injuries.

The Appellate Court advanced that there no dispute as regards the facts which were placed before the court and the plea of guilty was never questioned nor put in issue at any stage of the proceedings.

Ground 1 was dismissed given that it was couched in such vague and uncertain terms that it did not in effect amount to a ground of appeal proper and failed to identify the facts and/or evidence upon which the appellant was relying to challenge the judgment.

Under Grounds 2 and 3, the Court highlighted that a Newton hearing is resorted to in cases where at sentencing stage the court is faced with conflicting versions of facts put forward by the prosecution and the defence. The Newton hearing is then held by the court for it to determine which version to accept before meting out the penalty. It is of interest to note that in the case of **R v Newton, 77 Cr. App. R. 13**, Lord Lane CJ identified three different approaches that could be taken by a judge who was faced with conflicting versions of facts of the offence put forward by the prosecution and the defence on a guilty plea.

One of those approaches, known as a Newton hearing, consists of the judge himself hearing evidence on the prosecution's side and the defence's side and then drawing his own conclusion on the basis of the evidence heard by acting "so to speak as his own jury". Following the case of **Newton** (supra), it was held in **R v Underwood [2005] 1 Cr. App. R. (S.) 90**, that "the essential principle in relation to sentencing was that the judge must do justice. So far as possible the offender should be sentenced on a basis which accurately reflected the facts of the individual case…..".

The Court further added that in the UK what was said in the case of **Underwood** (supra) was incorporated in a large part into the criminal practice directions (see **Criminal Practice Directions VII** (Sentencing) **B, paras B. 6-27)** and that Underwood and the practice directions have been backed up by a restatement of certain core principles in **R v Cairns [2013] 2 Cr. App. R. (S.) 73** which is aptly summed up at **paragraph 5A-277 of Archbold** as follows:

"In particular, a guilty plea constitutes an admission of the offence charged and not necessarily of all the facts or inferences for which the prosecution contend; the responsibility for determining all the facts upon which the sentence is to be based is that of the judge, and, normally, the facts will be those disclosed in the statements; the onus is on the defendant to challenge that account and to identify the areas of dispute in writing, first with the prosecution, and then with the court."

The Appellate Court held that there was never any question of different versions being put forward by the prosecution and the defence, hence no disparity of evidence which required the intervention of the court and the need for a Newton hearing. Grounds 2 and 3 also failed.

Ground 4 also failed in as much as there was unchallenged evidence on record, other than the DNA evidence, to establish that the Appellant had committed the offence for which he was convicted.

Ground 5, on the other hand, challenged the sentence as being wrong in principle and manifestly harsh and excessive. The Appellate Court endorsed the sentence passed by the Learned Judge, i.e. 22 years' penal servitude, since the Court viewed the sentence to be commensurate with the seriousness of the offence and cannot for any reason be said, in the circumstances, to be harsh and excessive nor was it established that it was in any way wrong in principle.

Hence, the Appeal was held to be without merit and was dismissed with costs.

"The future belongs to those, who prepare for it today."

– Malcolm X

"TO NO ONE WILL WE SELL,
TO NO ONE DENY,
OR DELAY RIGHT OR JUSTICE"

Chap 4, Magna Carta 1215