



# Office of the Director of Public Prosecutions

'To No One Will We Sell, To No One Deny or Delay Right or Justice'  
Chapter 40, Magna Carta 1215

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*The views expressed in the articles are those of the particular authors and should under no account be considered as binding on the Office.*

# Editorial

Dear Readers,

*"Sexual violence against women and girls is rooted in centuries of male domination. Let us not forget that the gender inequalities that fuel rape culture are essentially a question of power imbalances."*

- UN Secretary-General António Guterres

Welcome to the November issue of our monthly e-newsletter. In this issue, in our 'ODPP Video', our law officer explains a Supreme Court judgment dealing with the offence of 'Driving under the influence of alcohol'. Furthermore, in the wake of the 'International Day For The Elimination Of Violence Against Women', commemorated on 25<sup>th</sup> November by the United Nations, an article is provided on the 2019 theme *"Orange the World: Generation Equality Stands Against Rape."* We also provide you with an overview of the visit at the ODPP, of the Malagasy delegation headed by the National Coordinator from the 'Poles Anti- Corruption', Madagascar, and comprising members from the *Parquet du Second Degre, Juge D'instructions du Premier Degre* and the *Prosecuteur General*. Moreover, in November, the ODPP was pleased to welcome Père Stéphane Joulain, who addressed our law officers on the topical issue of sexual abuse on children. An article is provided on his address. You will also read on a training attended by our law officer at the *'l'École Nationale de la Magistrature de Paris et l'Institut Médico-Légal de la capitale française.'*

In our 'Quick Facts' section for the month, we grapple with another offence under the Child Protection Act, namely that of 'selling liquor, rum or compounded drinks to a child'. Finally, our usual rubric, the summary of recent Supreme Court Judgments is provided at Page 20.

We wish you a pleasant read and always welcome your comments on [odppnewsletter@govmu.org](mailto:odppnewsletter@govmu.org).



Anusha Rawoah  
Senior State Counsel



# ODPP VIDEO

**ODPP VIDEO – ‘Driving under the influence of alcohol’**

Click on the ‘Play’ icon below to view the video or view video on <https://youtu.be/llhimi3glUk>



**Sannidi Pillay Paupoo  
State Counsel**



# ARTICLES

## “Orange the World: #HearMeToo”

### International Day For The Elimination Of Violence Against Women

The logo for 'Orange the World' features the words 'Orange the World' in a white, cursive, hand-drawn font. The text is set against a background of orange and red splatters and brushstrokes, creating a sense of movement and activism.The '#HearMeToo' logo consists of the hashtag '#HearMeToo' in a bold, blue, sans-serif font. Below it, the words 'END VIOLENCE AGAINST WOMEN AND GIRLS' are written in a smaller, bold, orange, sans-serif font. A vertical blue line is positioned to the left of the text.

An average of 137 women across the world are killed by a partner or family member everyday. This is an alarming revelation made by the United Nations Office on Drugs and Crime (UNODC) in its last report on the 'Global Study on Homicide'. The continuum of gender-based violence remains prevalent across the world, including Mauritius.

November 25 marks the International Day for the Elimination of Violence Against Women, a day designated by the United Nations to address the issue of violence against women and girls and to call for more and more action to combat this heinous act. The date marks the brutal assassination in 1960 of the three Mirabal sisters, political activists in the Dominican Republic. Over the years, the day has evolved into a widespread initiative that now incorporates 16 Days of Activism and the UNiTE campaigns. Every year, 25 November and the ensuing 16 Days of Activism against Gender Violence which follow (ending on 10 December, Human Rights Day) are commemorated around the world, providing us a chance to mobilize and call attention to the urgent need to end violence against women and girls.

Violence against women and girls remains no doubt, one of the most persistent and devastating human rights violations in our world today. It remains however largely unreported due to the impunity, silence, stigma and shame surrounding it. Violence against women manifests itself in physical, sexual and psychological forms, encompassing domestic violence (battering, psychological abuse, marital rape, femicide), sexual violence and harassment (rape, forced sexual acts, unwanted sexual advances, child sexual abuse, forced marriage, street harassment, stalking, cyber-harassment); human trafficking (slavery, sexual exploitation); female genital mutilation; and child marriage.

The Declaration on the Elimination of Violence Against Women, issued by the UN General Assembly in 1993, defines violence against women as *“any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”*

## “Orange the World: #HearMeToo”

The 2019 theme for the International Day for the Elimination of Violence Against Women is ‘**Orange the World: Generation Equality Stands Against Rape**’. Rape is a criminal offence that has deep roots in patriarchal beliefs, power and control. It is also a criminal offence that does not end with the act itself. It is often followed by “*victim-blaming, sexual objectification, trivializing rape, ... refusing to acknowledge the harm of sexual harassment or assault.*” According to Amnesty International UK, approximately a third of women who have been in a relationship have experienced physical and/or sexual violence by their partner.

In Mauritius, ‘rape’ is made a criminal offence under **section 249(1)** of the **Criminal Code**, which reads as follows:

*“249. Rape, attempt upon chastity and illegal sexual intercourse*

*(1) Any person who is guilty of the crime of rape, shall be liable to penal servitude for a term which shall not be less than 10 years.”*

**Section 249(1) Criminal Code** is inspired from **Article 332-1** of the **French Penal Code**. However, the definition of the said crime of rape has been provided neither by the legislator nor under the old French penal code. In fact, whilst **Garçon** confirms in his **Code Pénal Annoté, Tome I, livre III, page 844, note 11** that there is no statutory definition for the crime of rape, he adds at **note 12** that the most preferred definition for the said offence is that of *Jousse* which is “*toute conjonction illicite commise par force et contre la volonté des filles, femmes et veuves*” (**Jousse IV, p.743**) or that of *M.Garraud* which reads “*Le viol est le coït illicite avec une femme qu’on sait n’y point consentir*” or “*le viol est le fait de connaître charnellement une femme sans la participation de sa volonté*” (**Garr., IV, 452, IV 1816**).

The elements of the offence of rape are thus : “*1° l’existence d’un fait matériel de viol ; 2° des actes de violence ; 3° le caractère illicite de ces actes ; 4° une intention criminelle*” (**Dalloz, Droit Penal, V° Viol, §2, note 3 et s.**)

In 2008, the legislator amended **section 249** of the **Criminal Code** by virtue of **Act No. 36 of 2008** to add the following:

*“(1A) Notwithstanding any other enactment, where a person is convicted of an offence under **subsection (1)**, the Intermediate Court shall have -*

*jurisdiction to inflict penal servitude for a term not exceeding 40 years;*

*power to order sentences of penal servitude to be served consecutively, provided that the terms of such sentences shall not in the aggregate exceed 20 years.*



# “Orange the World: #HearMeToo”

*(1B) Notwithstanding any other enactment, prosecution for the offence of rape may, at the sole discretion of the Director of Public Prosecutions, take place before a Judge without a jury where it is averred that the offence of rape was committed by 2 or more individuals.*

*(1C) Sections 151 and 197 of the Criminal Procedure Act, and the Probation of Offenders Act, shall not apply to a conviction for the offence of rape.”*

Hence, the legislator increased the sentencing power of the Intermediate Court for the offence of rape to penal servitude for a term not exceeding 40 years, while also providing in **subsection (1C)** that a person convicted for this offence cannot be granted absolute or conditional discharge nor a term of imprisonment in lieu of the penal servitude.

Over the years, Mauritius has been unfortunately witnessing several cases of sexual violence against women. Globally, campaigns such as #MeToo, #TimesUp, #Niunamenos, #NotOneMore, and others, have shed light on the issue of rape and sexual violence. However, despite all these efforts underway, there still need a concerted approach to address this devastating human rights violation, by re-educating the society, by empowering our women, and by providing them with ongoing support. Immense focus on prevention is more than ever required, through the promotion of gender equality, women’s empowerment and their enjoyment of human rights. This also means making the home and public spaces safer for women and girls. Alongside, continuous action should be taken in ensuring women’s economic autonomy and security, and increasing women’s participation and decision-making powers in the home and relationships, as well as in public life and politics. Awareness-raising and community mobilization, is another crucial aspect of an effective prevention strategy.

It cannot be denied that violence against women is an obstacle to constructing inclusive and sustainable societies. With the number of cases of violence against women reported in our society lately, we are once again reminded of the urgent engagement needed from all of us to build a future free of sexual and gender-based violence.

It is time to galvanize action to end violence against women and girls in our society. It is incumbent on each and every one of us to stand up against violence against women and girls. No excuse.

**Anusha Rawoah**  
Senior State Counsel

# Meeting with Malagasy Delegation

On the 22nd of November 2019, the Office of the Director of Public Prosecutions (ODPP), welcomed a delegation headed by the National Coordinator from the 'Poles Anti- Corruption', Madagascar, comprising members from the Parquet du Second Degre, Juge D'instructions du Premier Degre and the Procureur General.

The purpose of the meeting was to discuss the best practices as prevailing in Mauritius with regard to the fight against Corruption and Money Laundering, inter alia.

Mr Rashid Ahmine, Acting DPP, made an expose of how the ODPP operates, its mandate under section 72 of the Constitution which empowers the DPP to institute criminal proceedings and that in the exercise of its powers, the DPP is not subject to the direction and control of any other person and authority. The Acting DPP also elaborated on the '**Serious Fraud & Tax Evasion/Money Laundering and Combatting Financing of Terrorism Unit**', which is a specialised Unit at the ODPP, dealing mostly with Money Laundering and Corruption cases. The discussion also evolved around how the office of ODPP works in close collaboration with the Investigative Agencies such as ICAC and Police which conduct the enquiry and submits the files for advice to the DPP, who may either prosecute the case or refer it to be conducted by the ICAC.

Reference was also made to the 'Financial Intelligence and Anti Money Laundering Act' and the 'Prevention of Corruption Act', the number of investigations and prosecutions, the jurisdictions of the Intermediate Court where the cases of Corruption and Money Laundering are prosecuted and the timelines within which such cases are disposed, the challenges, the number of convictions and forfeiture under the 'Asset Recovery Act'.

The meeting also provided an opportunity for the ODPP to better understand the Malagasy Legal System and its intricacies. The discussion was full and frank and both parties emphasised the importance of inter-agencies and regional cooperation in order to tackle Money Laundering and Corruption offences which are also transnational in nature.

The delegation also raised the issue of Malagasy citizens on remand or undergoing imprisonment for drug trafficking offences and the absence of a 'Transfer of Prisoners' memorandum between Mauritius and Madagascar which needs to be addressed. Both parties undertook to further enhance collaboration in the fight against Money Laundering and Corruption.

**Pravin Harrah**

Principal State Counsel



**Mr Rashid Ahmine, Acting DPP, chairing the meeting**



# **WORKSHOPS/ CONFERENCES REVIEW**

# Les abus sexuels à l'encontre des enfants

## Père Stéphane Joulain

Le Bureau du Directeur des Poursuites Publiques a eu l'honneur, le 14 novembre 2019, d'accueillir le Père Stéphane Joulain. Le Père Joulain, en sus d'être prêtre, est aussi psychothérapeute et détient une License d'Art en théologie, un diplôme en victimologie, une maîtrise en théologie pratique et un doctorat en counseling et spiritualité. Il était accompagné de deux psychologues dont Dr Emilie Duval et Dr Mélanie Vigier de Latour-Bérenger.

La présentation a débuté avec un discours de bienvenue de la part de Mme Ramano-Egan (Assistant DPP), qui a introduit le Père Joulain à l'audience et a encouragé les participants à participer aux discussions.

Le Père Joulain a commencé par donner un aperçu de la problématique des agressions sexuelles sur mineurs. Il a expliqué que l'abus sexuels est un problème allant au-delà de la pédophilie et que plus d'un milliard d'enfants à travers le monde sont exposés à une forme ou une autre de violence. Le problème d'abus demande une action forte de tous les acteurs, que ce soit la société civile, les religions, les responsables politiques, la police, la famille, ou encore les responsables judiciaires. Il est impératif d'instaurer une culture qui pourra accorder une meilleure place aux enfants au sein de la société. Le Père Joulain a fait ressortir que la pédophilie est une partie restrictive des troubles qui peuvent mener à l'agression sexuelle d'un enfant. Les enfants sont en danger dans nos sociétés, dans les familles, les écoles, les clubs de loisirs et sports, les services sociaux, les lieux de cultes ou tout autre lieu qui est habilité à recevoir des enfants. Il faut s'assurer que les personnes qui sont en contact avec les enfants soient des personnes de confiance. Afin d'éradiquer la violence sur les enfants, il faut repenser la place de l'enfant dans nos sociétés. L'enfant doit être considéré comme une personne et non une propriété.

Le Père Joulain a aussi adressé la nécessité de clarifier le vocabulaire en faisant la différence entre les différents termes utilisés. La maltraitance est un mauvais traitement de l'enfant où l'intention est de maltraiter l'autre, par exemple, la violence physique ou psychologique infligée à l'enfant ainsi que le harcèlement. La négligence peut être un mauvais traitement mais sans l'intention de faire du mal, par exemple, l'absence de soins adéquats, la déscolarisation ou encore la démedicalisation. L'abus signifie, au sens littéral de la traduction du mot latin *abusus*, ce qui va au-delà de l'usage coutumier sauf qu'il n'y a pas d'usage coutumier de la sexualité avec un enfant. On ne peut pas abuser de la sexualité avec un enfant parce qu'elle n'est jamais légitime. Le Père Joulain a fait ressortir que ce serait mieux d'utiliser des expressions comme agression au lieu d'abus pour que cela s'insère dans le périmètre dont il fait partie, par exemple dans le périmètre des violences sexuelles, des crimes et des délits. L'inceste est une des particularités dans la violence sexuelle qui signifie un acte sexuel imposé par un parent.



Père Stéphane Joulain

# Les abus sexuels à l'encontre des enfants



Le comportement sexuel criminel signifie tout acte avec contact (ex. caresses, masturbations, pénétrations anales, vaginales ou orales) ou sans contact (ex. l'exhibitionniste, voyeurisme, exposition à la pornographie, etc.) de nature sexuelle avec ou sur une personne n'ayant pas donné son consentement ou bien dans l'incapacité de donner son consentement de manière consciente et légale. En ce qui concerne le consentement, pour les enfants et les adolescents, le consentement ne peut être légitime parce qu'ils n'ont pas la maturité émotionnelle et psychologique pour donner un consentement légitime.

Le Père Joulain a ensuite fait la distinction entre la pédophilie, l'hébéphilie et l'éphébophilie. La pédophilie signifie l'attirance exclusive envers les enfants pré-pubère, de 0 – 13 ans (ou 0 – 9 ans). Il y a d'autres causes d'agressions sur les mineurs que la pédophilie, par exemple la personne peut souffrir d'un trouble narcissique pervers qui va l'emmener à rechercher la satisfaction de sa personnalité par une faible estime d'elle-même. Il y a également les personnes qui souffrent de comportement antisocial et qui, pour eux, l'important c'est la transgression de la norme et de la loi. Il y a d'autres personnes qui peuvent souffrir d'hypersexualité et qui recherchent la multiplication fréquente des orgasmes. Il y les gens qui perdent les repères moraux suite à un divorce ou une dépression profonde et qui consomment de l'alcool ou de la drogue et leurs inhibitions se retrouvent diminués. La hébéphilie, par contre, signifie l'attirance exclusive envers les enfants de 10 – 11 ans. L'éphébophilie a pour signification l'attirance exclusive envers les enfants de 12 – 17 ans.

En ce qui concerne les chiffres pour les offenses d'abus sur les enfants, il est difficile d'avoir des statistiques exactes sur les violences sexuelles car il y a un manque d'études comparatives et transnationales et aussi ces crimes sont insuffisamment signalés aux autorités à cause de stigmatisations. Selon le Père Joulain, la difficulté de nature consiste à construire une société dans laquelle les enfants ne risquent plus d'être les victimes de comportements sexuels criminelles ou délictueux. Les Nations Unies estiment qu'une fille sur trois et un garçon sur cinq auront à subir une agression sexuelle avant leurs 18 ans et que les adolescents sont les plus affectés. Il a également adressé le problème d'agressions sexuelles sur mineurs commis par d'autres mineurs.

Il a ensuite abordé les conséquences pour les victimes ainsi que les signes et les indicateurs. L'agression sexuelle d'un enfant par un adulte va affecter la personne sur différentes dimensions de son être - au niveau physique, psychologique et relationnel ainsi qu'au niveau spirituel. Il y a des facteurs de risque qui existent, qui font qu'un enfant va être plus exposé qu'un autre à la violence sexuelle, par exemple, le genre de la victime (les filles sont plus exposées à la violence sexuelle que les garçons). Les autres facteurs de risques comprennent les groupes d'âges (les jeunes adolescents sont particulièrement exposés) ; l'état cognitif et émotionnel de l'enfant (des enfants avec des déficits émotionnels sont plus à risque, ainsi que des enfants qui ont une figure parentale absente sont plus sujet à rechercher un attachement à

# Les abus sexuels à l'encontre des enfants

une autre figure d'autorité parentale) ; le contexte familial (si les parents sont présents et en état de protéger leurs enfants) ; la présence ou absence de parents (les enfants qui sont laissés à la garde de leur grands-parents qui ne sont pas capables de tous les surveiller) ; l'environnement social (la pauvreté, la criminalité).

En ce qu'il s'agit des conséquences physiques de l'agression sexuelle d'un enfant, ils sont souvent asymptomatiques, tels que douleurs, saignements, incontinences et souillures non reliées, mauvais état général de la santé, obésité, ou encore maladies gastro-intestinales. Les conséquences psychologiques sont la dépression, l'abus de substance, troubles de l'anxiété, ou encore des tendances suicidaires.

Bien qu'il soit difficile d'identifier si un enfant a été victime d'agression sexuelle, il y a des indicateurs comportementaux tels qu'un manque d'attention, une tendance à crier ou pleurer souvent, une mauvaise hygiène personnelle, troubles du sommeil ou cauchemars, pertes d'appétit ou encore peur de la maison ou d'un endroit spécifique. Les indicateurs comportementaux diffèrent chez l'adolescent et se manifestent par la crainte ou par des réactions effarouchées au touché, fugue de la maison, hostilité face aux autorités, difficultés scolaires ou mauvais résultats imprévus, porter des vêtements provoquants, ou encore manque de confiance dans les autres.

L'agression sexuelle a aussi des conséquences sur l'expérience spirituelle des gens. Dans toutes les religions, il y a une croyance fondamentale qui est liée à l'anthropologie. Il y a trois croyances principales : 1. le monde est bienveillant ; 2. le monde a du sens ; 3. on a de la valeur. L'agression sexuelle d'un enfant met ces croyances en doute. Le monde devient dangereux et perd son sens et l'enfant perd sa valeur car son 'non' n'a pas été reconnu.

Pour finir, le Père Joulain a souligné l'importance de développer des environnements sûrs tels que des salles ouvertes et éclairées avec des fenêtres pour que les autres puissent voir de l'extérieur. Il faut également que les personnes qui sont en contact avec les enfants soient des personnes de confiance.

La présentation s'est terminée avec une session de questions et réponses.

**Neelam Nemchand**  
Legal Research Officer



# JUSTICE ET MÉDECINE LÉGALE

La pertinence de la justice pénale se trouve souvent directement subordonnée à celle de la médecine légale, dont les procédés, qu'il s'agisse de la thanatologie ou de la médecine légale du vivant, contribuent à établir des preuves solides qui influent sur la justesse des droits reconnus aux justiciables.

Une formation sur cette thématique, destinée aux juges, magistrats, procureurs et enquêteurs, a été proposée par l'École Nationale de la Magistrature de Paris et l'Institut Médico-Légal de la capitale française en octobre dernier.

Cette formation avait pour objectifs de faire le point sur les évolutions les plus significatives de la médecine légale, de tirer les enseignements de cas concrets de gestion de scènes de crime complexe (notamment les attentats de Charlie Hebdo et du Bataclan), et de favoriser une harmonisation des pratiques pour rendre plus accessibles les informations aux juristes.

Les séances quotidiennes durant cette formation ont été ponctuées par des échanges suivant les présentations faites par les participants et acteurs des domaines concernés représentant différents corps du judiciaire français (procureur de la République d'Orléans, Tribunal de Grande Instance de Bobigny, département d'entomologie de l'Institut Médico-Légal, Unité Médico-Judiciaire de Paris, Cour de Cassation et Laboratoire d'analyses criminalistiques de Marseille). Plusieurs sujets ont ainsi été abordés, dont le syndrome du bébé secoué, l'estimation de l'âge du mineur, la détermination de l'incapacité totale de travail, les apports de l'expertise balistique, l'odontologie médico-légale et la morpho-analyse des traces de sang, entre autres.

**Mrs Leelamane Jeewon-Neeraye**  
State Counsel



# QUICK FACTS



## Quick Facts

DID YOU KNOW?

### The Child Protection Act 1994

*Section 16(1)(a) prohibits any person from selling liquor, rum or compounded drinks to a child.*

*Penalty under Sections 16(1)(a), 16 (1)(b), 16(2), 16(3) and 17 of the Act*

*Under Section 16: Upon conviction, the person shall be liable to a fine not exceeding Rs 10, 000 and to a term of imprisonment not exceeding 2 years.*

*Under Section 17: Upon conviction, the person shall be liable to a fine not exceeding Rs 25,000 and to imprisonment for a term not exceeding 2 years.*



[www.clipartof.com](http://www.clipartof.com)

*Under Section 16(1)(b), it is an offence to cause or allow a child to have access to premises in respect of which a licence has been issued for the sale of liquor, rum or compounded spirits for consumption on the premises.*

*Exceptions: Restaurants, hotels or boarding house keepers holding a retailer licence for the sale of liquor, rum and compounded spirits.*



[www.alamy.com](http://www.alamy.com)



*Section 16(2) specifies that any person who causes or allows a child to have access to a gaming house shall commit an offence.*

*Under Section 16 (3), it is offence for any person, other than an agent of an educational or cultural institutions organisation, who in respect of a child under the age of 16, to allow the child who is unaccompanied by an adult to have access to a video club or to rent out a video tape to the child.*



*Section 17 creates an offence for any person who causes or allows any child under his care to beg*



# **SUPREME COURT JUDGMENTS SUMMARY**

# SUMMARY OF SUPREME COURT JUDGMENTS: November 2019

THE DPP v TAKOOREE D 2019 SCJ 303

By Hon. Judge Mr. N.F Oh San-Bellepeau and Hon. Judge Mrs. S. B. A Hamuth-Laulloo

**Sentence being unduly lenient – Gravity of offence – Power to increase sentence on appeal – Drink driving offences**

This is an appeal against the judgment of the Intermediate Court convicting the Respondent for the offences of involuntary homicide by imprudence under **count 1**; wounds and blows by imprudence under **counts 2 and 3**; failing to report an accident in breach of the **Road Traffic Act** under **count 4**; and driving under the influence of intoxicating drink under **count 5**. The car driven by the Respondent knocked against several cyclists and caused the death of one of the cyclists and injuries to two other cyclists.

The Respondent was sentenced under **count 1** to one month's imprisonment, with endorsement, cancellation and disqualification of his driving licence for all types of vehicles, under each of **counts 2 and 3**, to a fine of Rs. 50,000, and, finally, under **counts 4 and 5** to fines of Rs. 10,000 each.

The DPP appealed against the sentences under **counts 1, 3 and 5**. In short, the DPP questioned the undue leniency of the learned Magistrate's sentence under these three counts and argued that, when considering the overall circumstances of the case, the sentences are manifestly inadequate and disproportionate to the gravity of the offences.

The Appellate Court highlighted some of the relevant considerations which the trial Court should

have borne in mind in the present case, namely:

*(i) what type of sentences would properly reflect the seriousness of the offences committed when having regard to the circumstances of the case, as disclosed by all the evidence?*

*(ii) what were the consequences of the offences committed by the respondent e.g., what was the severity of the injuries caused to the victims in the present case?*

*(iii) how effective would her sentences be in deterring future potential offenders?*

*(iv) how would the sentences imposed by her assist in better protecting road users against similar potential offenders?*

*(v) how adequate were the sentences imposed as punishment and as effective rehabilitation methods for the offender, having regard to the serious offences committed, and after considering the particular circumstances revealed by the evidence?*

The Court pointed out that these considerations were by no means exhaustive and every sentencing exercise should be conducted according to the particular facts and circumstances of each case. However, it is obvious that in the present case, had the learned Magistrate first considered the objectives of sentencing together with the evidence adduced, before she applied her mind to the mitigating elements, her sentencing approach would have been different.

In **Kailaysur v The State [2004 MR 244]**, the Judicial Committee of the Privy Council observed that the power of the Supreme Court to increase a sentence on appeal is one "*which must be relatively sparingly exercised and then only in cases where the sentence imposed by the trial court was manifestly inadequate*".

Moreover, the Appellate Court deemed it appropriate to quote from **Mc Hugh, J. in Everett v. R. (1994) 124 ALL ER p. 529 at p. 537**, that *“in passing sentence, Courts must realise that inadequate sentences also give rise to a sense of injustice, not only in those who are the victims of the crimes in question but also in the general public. Inadequate sentences are also likely to undermine public confidence in the ability of the Courts to play their part in deterring the commission of crimes”*.

The Court held that the present appeal was an exceptional case where the sentences imposed by the learned Magistrate were *“manifestly inadequate”*, so that it was a fit case for the Court to intervene and increase the sentences.

The Appellate Court further reiterated the strong warning given by this Court in **Sobnath S.K. v The State [2012 SCJ 274]** to all drivers so that they realise that driving under the influence of intoxicating liquor above the permissible limit is a very serious offence which amounts to deliberately endangering the lives and safety of other innocent road users. Our Courts will consequently not treat such offences with undue leniency.

Hence, the appeal was allowed and the sentences passed by the learned Magistrate under **counts 1, 3 and 5** were quashed. The Court substituted instead a sentence of twelve months' imprisonment **under count 1**; a sentence of two months' imprisonment **under count 3** and a sentence of six months' imprisonment **under count 5**, to which an order of disqualification of 12 months for all types of vehicles as well as the endorsement of his driving licence were imposed.

**STATE v JEAN JACQUES R. D. & ANOR 2019 SCJ 312**

**By Hon. Judge Mrs. S.B.A. Hamuth-Laulloo**

***Demise of the trial Judge – Breach of Section 10 of the Constitution - Abuse of process – Stay of proceedings – No compelling reasons to warrant Court’s discretion***

The two accused in the present case have been charged with drug dealing offences, with the averment of drug trafficking. The trial ended in November 2016 and judgment was reserved. The trial Judge passed away on 07/08/2019 without having delivered the judgment. The matter was then fixed to be heard anew before the present bench.

At the outset of the proceedings, Counsel for both accused moved that the present proceedings be permanently stayed for abuse of process, as the continuance of such proceedings would, in the particular circumstances of the case, be unfair and prejudicial to the accused and in breach of their constitutional right to a fair trial under **Section 10 of the Constitution**.

Our Constitution provides for the protection of individual rights, more specifically under **Section 10**. It ensures that any person who is charged with a criminal offence shall be afforded a fair trial within a reasonable time. In this respect, the Court has a power which should be judiciously exercised, to stay proceedings in order to protect its process from abuse. (**vide Connelly v D.P.P. (1964) A.C. 1254 H.L.**). This power to stay proceedings for abuse of process has been interpreted to include a power to protect an accused from oppression or prejudice. (**vide Connelly v. D.P.P.**).

Abuse of process was defined, in **Hui Chi-Ming v R (1992) 1 A.C. 34, PC**, as “*something so unfair and wrong that the Court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding*”.

In essence, the legal principles and authorities cited above confirm that the court has a duty to protect the individual from being prosecuted in circumstances where it would be seriously unjust and unfair to do so. In that process, it has the power to stay proceedings “*not only where a fair trial is impossible but also where it would be contrary to the public interest and the integrity of the criminal justice system that a trial should take place.*” (vide **R v. Horseferry Road Magistrates’ Court, Ex p Bennett [1994] 1 A.C. 42**).

The crucial question for the Court was whether it would be fair to have the two accused stand a fresh trial in the particular circumstances of the case.

The Court concluded that the lapse of time between the end of the first trial and the demise of the learned Judge without judgment having been delivered does not preclude a fresh trial. It is important to make it clear to one and all that, the “*discretion to stay is not a disciplinary jurisdiction and ought not be exercised in order to express the court’s disapproval of official conduct.*” (vide **Lord Lowry in Bennett**).

The next question for the Court to determine was whether the accused had been able to demonstrate any prejudice arising out of this delay. The Court held that in the absence of any evidence to that effect, the issue of prejudice did not hold water. In any event, the Court opined that any apprehended unfairness could be cured by the exercise of the Judge’s discretion at trial.

This was confirmed in **R (on the application of Ebrahim) v. Feltham Magistrates’ Court [2001] 1 ALL ER 831** where the court held that “*...in most cases, any alleged unfairness can be cured in the trial process itself*” and “*... this residual (and discretionary) power of any court to stay criminal proceedings as an abuse of its process is one which ought only to be employed in exceptional circumstances, whatever the reasons submitted for invoking it*”. Moreover, the present case should be distinguished from the case of **R v Horsham Justices, ex p Reeves** where the court ordered a stay of a repeated committal because the first committal was for all intents and purposes a “dummy run” by the prosecution. In the present matter, a fresh trial had in fact become necessary because of the demise of the trial Judge.

Having found no compelling reasons to stay the proceedings against both accused, the Court rejected the motion of the defence and ordered that the trial be proceeded with.

“Learning is a gift. Even when pain is your teacher.”

–**Maya Watson**



**“ TO NO ONE WILL WE SELL,  
TO NO ONE DENY,  
OR DELAY RIGHT OR JUSTICE ”**

**Chap 4, Magna Carta 1215**