Office of the Director of Public Prosecutions

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Editorial

Anusha Rawoah
Senior State Counsel

Dear Readers,

Welcome to the June edition of our e-newsletter. This issue starts with an article from the Director of Public Prosecutions, Mr Satyajit Boolell, SC entitled *'Lethal Dose*'. Furthermore, our usual rubric, ''ODPP Video', focuses on a Supreme Court judgment dealing with health and safety of employees at work, under the Occupational Safety and Health Act. Moreover, during the month, the Director of Public Prosecutions was invited by the Institute of Judicial and Legal Studies to give a lecture on an interesting topic, namely, *'"Mauritian Constitution: A modified version of the Westminster Model?"* A review of same is provided at Page 8. The ODPP also congratulates Ms Mohana Naidoo upon her appointment as Deputy Master and Registrar of the Supreme Court.

Additionally, an overview is provided on a plenary workshop organised by the UNODC in Seychelles, as part of the "Caught Red-Handed Project". The project has for mission, to increase Maritime Domain Awareness, and one of our law officers participated in the workshop. The 'Quick Facts' section for this month addresses the legal provisions pertaining to 'Consumer Protection' in Mauritius and the different offences under the law. Finally, you will read the summaries of recent Supreme Court judgments at page 16.

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

Mr Satyajit Boolell, SC
Director of Public Prosecutions

Lethal Dose

Last month, a 17 year old girl from the Netherlands, a survivor of sexual abuse, voluntarily chose to put an end to her life after years of struggling with depression. She died after refusing all food and fluids for several days. Her death, which is deeply distressing, prompts us to reflect on the question of ‘assisted dying’.

Under our law assisted dying is illegal. Those who choose to defy the law, run the risk of facing a term of imprisonment of up to a maximum of sixty years, and the fact that it was done on compassionate grounds is not an excuse.

People do have a right to kill themselves, but they have no right to expect someone else to do it on their behalf. Doctors very often, find themselves faced with such a dilemma when pressurised by patients or families to assist the terminally ill to end their lives. But too often, we forget that doctors are, first and foremost, healers and abide by the Hippocratic Oath to use treatment to help the sick, but never “to injure or to administer poison to anybody when asked to do so”.

Some doctors though, consider that respect for the sanctity of life also means alleviating a patient of his or her suffering even if it means putting an end to the life of the patient. A line needs to be drawn to demarcate what is permissible, and safeguards ought to be provided to prevent abuses.

The debate can be quite complex as it will inevitably, involve legal, moral, religious and medical issues. It is the role of the State to take the lead, as has been the case in many countries, and strike a balance between the protection of the patients’ right to life and the protection of their right to privacy and personal autonomy.

Lethal Dose

The European Court of Human Rights has held that a State's obligation to protect life under Article 2 of the European Convention on Human Rights does not preclude a State from legalising voluntary assisted dying cases, provided that adequate safeguards are put in place and adhered to.

Canada is an example where physician-assisted dying is legal for all people over the age of 18, who have a terminal illness that has progressed to a point where natural death is foreseeable. Similarly, in India its Supreme Court ruled that passive euthanasia by means of withdrawal of life support to patients in a permanent vegetative state is guaranteed by the Constitution. In Switzerland, for instance, the government has adopted a more liberal approach. Passive euthanasia can take place subject to a certificate from an independent doctor. An all inclusive package in a private clinic can cost as little as one hundred and fifty thousand rupees.

In the absence of any law or guidelines from the Medical Council, the risk of abuse is a real one. Too many vulnerable patients are being told that they are a burden to their families and to society. They will readily shift that burden on their treating doctors.

Who will care to make a complaint when a lethal dose has been surreptitiously administered?

ODPP VIDEO

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Occupational Safety and Health Act

Click on the 'Play' icon below to view the video or click on:

https://youtu.be/fFGVLy0DGjU

Mrs Shaaheen Mohung-Dawreeawoo
State Counsel

Lecture at the IJLS

Mr Satyajit Boolell, SC
Director of Public Prosecutions

On 27th June 2019, the Director of Public Prosecutions, Mr Satyajit Boolell, SC gave a lecture at the seat of the Institute for Judicial and Legal Studies (IJLS) entitled *"Mauritian Constitution: A modified version of the Westminster Model?"* It was attended by various members of the bar.

The lecture considered the period leading to independence, our understanding of the Westminster model today and why features of our Constitution differ from the Westminster model. Mr Boolell, SC started his lecture by making allusion to Professor Stanley de Smith and his paper entitled *"Constitutionalism in a plural society" (November 1968 Modern Law Review).* He then went on to discuss the landmark events which took place from the time Mauritius was colonised by the French in 1715, till it attained independence in 1968. Events such as the establishment of the 1885 Council of Government, the 1961 Constitutional Review Conference, the General Election of 1963 and the 1964 Constitution were discussed.

The DPP then addressed the audience on the main features of the Westminster model Constitution and analysed several key judgments which marked our constitutional history, such as **Hinds v The Queen [1977] AC 195, Ahnee vs DPP (1992) 2 AC 294** and **Mahboob vs Government of Mauritius (1982) MR 135**. He also discussed the manner in which the judiciary in Mauritius ensures the supremacy of the Westminster model Constitution. Finally, he gave the reasons as to why our Constitution "*seem to be a not very remarkable product of the Westminster export model factory*" by explaining how not all the features of the Westminster model have been incorporated by the founders of our Constitution.

Ms Mohana Naidoo
Deputy Master and Registrar

Ms Naidoo appointed Deputy Master and Registrar

Ms Mohana Naidoo, who was until 30th June, the Senior Assistant Director of Public Prosecutions at the ODPP, has now been appointed Deputy Master and Registrar at the Supreme Court of Mauritius. Ms Naidoo reckons more than 23 years of experience in the legal profession. She studied her LLB (Hons.) at the University of Mauritius, following which she did her Bar Vocational Course. Ms Naidoo was then awarded a scholarship to pursue her pupillage in London (Doughty Street Chambers) and France (Cabinet Cazeres-Pinatel). She was called to the bar in Mauritius in 1995, following which she exercised as a barrister-at-law before joining the Attorney General's Office in 1997. She has 12 years of experience at the Attorney General's Office and 10 years at the Office of the Director of Public Prosecutions.

In her enriching career, Ms Naidoo has appeared before all Courts in Mauritius as well as before Tribunals. She has conducted various high profile criminal cases and jury trials. She also has experience in providing legal advice to Ministries and drafting of Regulations. Ms Naidoo had also served as District Magistrate. At the Office of the DPP, she has been a pupil master for several years. Ms Naidoo, who is very passionate about her work, has always been providing guidance to junior law officers at the ODPP. She was also leading the 'Ministry of Labour unit' at the Office. She has followed professional courses at institutions such as the 'Ecole Nationale de la Magistrature'. Despite her busy professional schedule, Ms Naidoo always finds time to balance her personal life by pursuing her favourite hobby, swimming. She is also an ex-basketball player, who used to play for the Basketball Club of Beau-Bassin/Rose-Hill.

The ODPP wishes Ms Naidoo a successful career at the judiciary.

Ms Naidoo with the DPP, Mr Satyajit Boolell, SC

WORKSHOPS/ CONFERENCES REVIEW

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Caught Red-Handed Project: Plenary Workshop for Fisheries Officer and Public Prosecutions to counter fisheries crimes

The UNODC organised a plenary workshop from the 22nd to 24th of April 2019 in Seychelles as part of the "Caught Red-Handed Project". This project has for mission to increase Maritime Domain Awareness, which is the effective understanding of anything associated with maritime that could impact on the security, safety, economy or environment. The other goals of the project are to aid in investigations of fisheries crimes and to increase the rate of prosecutions in this field.

The three-day workshop aimed at bringing together all the countries of the Western Indian Ocean (WIO) in order to foster sharing of data, cooperation and collaboration in their common fight against fisheries crimes. Comoros, Kenya, Mauritius, Madagascar, Mozambique, Seychelles, Maldives, Somalia, Tanzania, Sri Lanka and Djibouti participated in the workshop. Mauritius was represented by two Law Officers from the DPP's Office, namely Mrs Yusra Nathire Beebeejaun and Mr Ronish Bangaroo.

The WIO Maritime Domain covers some 30 million km^2 and the Exclusive Economic Zones (EEZ) of the WIO countries extends over 6 million km^2. Mauritius has the biggest EEZ among these countries, with 2.3 million km^2, out of which 400,000 km^2 is jointly managed with Seychelles.

The main fisheries crime in the region is illegal fishing. It is estimated that up to one third of the fish caught in the WIO is either illegal, unreported or unregulated (IUU). The challenge of keeping track on all fishing activities at sea is immense since most of these operations occur over the horizon and out of sight of most nations. However, technology by itself will not solve the problem of IUU fishing. Human power is needed to analyse and process the information received. For instance, the description of the suspect vessel is very important. The unique markings, painting schemes or even rust marks are crucial when it comes to recognising a vessel whose name has been fraudulently altered. It has also been seen in some cases that offending ships switched off their vessel tracking systems so as not to be detected on radars. Vigilant patrolling by coastguards is therefore imperative because what they find in real is completely different from what the technology shows.

Another hurdle in combating this crime is that the penalties imposed are not significant when compared to the profits reaped from the IUU fishing. The fines provided for do not pose a serious deterrent at all when we consider that illegal fishing is a very lucrative business and that the chances of getting caught is very low being given the vastness of the high seas. All the participating countries recognised that prosecutions in this field must lead to more than just a speeding ticket. For the beneficiaries behind these illegal activities, the fines are viewed as merely part of the administrative costs of doing business and do not have any consequence on their usual operations.

In cases where the fines imposed remained unpaid, the vessels were confiscated but then again, the vessels used were not of a big value, hence rendering the penalties pointless.

To investigate and prosecute a fisheries case can sometimes be complicated and a resource-demanding process, especially when foreign fishing vessels are involved. While we focus on prosecuting the crew and the captain, the networks behind these fishing operations are not being worried at all. The transnational nature of that business involve numerous jurisdictions. For instance, the suspect vessel may be flagged to Ghana, with a crew from Russia and Indonesia, owned by a company registered in Senegal and carrying out fishing in Ivory Coast. Shell companies are also often used in a complex setup such that it becomes very hard to identify the individuals behind the vessels through routine checks of documentation. Deeper investigations and analysis are required.

Since there is big money involved, the suspect vessels have now become not only vehicles for IUU fishing but also for other fisheries crimes which are committed along the entire value chain. For instance, transnational and organised crimes such as human trafficking, money laundering, corruption, drug trafficking and tax fraud, are crimes often linked to the fisheries industry. It must therefore be ensured that the officers who investigate the fisheries cases are alive to the different possible offences. In the Mauritian piece of legislation, that is the **Fisheries and Marine Resources Act 2008**, the Fisheries Control Officers are given powers to act only when the provisions of the **Act** are being contravened. Hence, if during their patrol, they find drugs or suspect a case of human trafficking, they cannot do anything. They can only relay the information and request assistance from the National Coast Guards, which is a division of Mauritius Police Force.

A broader law enforcement approach to fisheries crime is therefore necessary. To start with, we need to have a coordinated law enforcement response at the domestic level. Unlike Seychelles and Madagascar where the National Information Sharing Centre and the Information Fusion Centre are found respectively, Mauritius does not have any platform for interagency collaboration and coordination in cases of fisheries. Fragmented data does not lead to effective investigations and successful prosecutions. There is also a need to build and strengthen international and regional networks to share real-time intelligence, to facilitate cooperation and to coordinate actions to further investigate fisheries crimes. Mauritius forms part of the FISH-i Africa task force which comprised of 8 countries of the WIO. Whilst a lot has been made in respect of monitoring, control and surveillance of fishing vessels in the region, fisheries crimes and more precisely, illegal fishing, will not be effectively tackled until those who benefit from the profits reaped from the business are not targeted. As rightly concluded at the workshop, unless treated as a transnational crime on the same level as piracy or drug trafficking, the problem of illegal fishing will remain.

Mrs Yusra Nathire-Beebeejaun

State Counsel

QUICK FACTS

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Quick Facts

DID YOU KNOW?

The Consumer Protection (Price and Supplies Control) Act 1998

Penalty under Section 31(2) of the Act

First Conviction: Fine of not more than Rs 100,000 and imprisonment for a term not exceeding 3 years;

Second or subsequent Conviction: Fine of not more than Rs 100,000 and imprisonment for a term not less than 7 days and not more than 3 years

Examples of offences for which the penalty is provided under Section 31(2) of the Act

Source: www.forthcapital.com

Illegal charging of VAT by a trader, whilst selling or supplying any goods, where either VAT is not chargeable by him; or where he charges a higher rate or amount of VAT than is lawfully chargeable (Section 6)

In addition to any penalty, the Court can order the closure of the premises or part of it in relation to which the offence was committed for a period of not less than 7 days and not more than 3 months

Source: www.shutterstock.com

A registered person or other trader who sells at a price higher than that displayed on the label, shall commit an offence **(Section 8)**

Refusal by a trader to sell any goods exposed or kept for sale on his trading premises; or any goods kept in his warehouse, at a price which is displayed for the goods **(Section 19)**

Source: friendlyatheist.patheos.com

Other offences for which the penalty is provided for under Section 31(2) are:

Section 3: Selling or supplying any controlled goods at a price higher than that which has been fixed. Such goods are provided in the First Schedule and include, but is not limited to: bread, butter and margarine, coffee, fruit juices, etc.

Section 13: A trader who keeps any goods specified in the Third Schedule on any premises other than his trading premises; or a registered warehouse, shall commit an offence. Such goods include, but is not limited to, alcoholic drinks, biscuits, candles, butter and margarine, canned fish, cheese, etc.

SUPREME COURT JUDGMENTS SUMMARY

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SUMMARY OF SUPREME COURT JUDGMENTS:

June 2019

COOPAMAH B. v THE STATE 2019 SCJ 162

By Hon. Judge Mr. O.B. Madhub and Hon. Judge Mrs. K.D. Gunesh-Balaghee

Appeal –Imprudence – road traffic offence - Sentence manifestly harsh and excessive – Delay from commission of the offence

The Appellant was prosecuted before the Intermediate Court for the offences of “involuntary homicide by imprudence” under **section 239(1)** of the **Criminal Code** coupled with **sections 133** and **52** of the **Road Traffic Act** (count 1) and “driving a motor vehicle when under the influence of intoxicating drink” under **sections 123E(1)(a), (2), (3)** and **52** of the **Road Traffic Act** (count 2).

The Court found him guilty as charged and sentenced him to undergo 6 months’ imprisonment under count 1 and to pay a fine of 10,000 rupees under count 2 together with Rs. 500 as costs. He was further disqualified from holding and/or obtaining a licence for a period of 9 months in respect of all types of vehicles under both counts and his driving licence was also cancelled and endorsed.

The Appellant has appealed against the judgment on 10 grounds which question both the sentence and conviction, dropped ground 6 during the hearing of the appeal. The grounds of appeal are as set out below:

1. Because the learned Magistrate was wrong to have held that the version of Mr. Geega was more plausible in view of the evidence of PC Powakel that Mr. Geega did not mention anything about the lights on the day of the accident.

2. Because the prosecution failed to establish that the then Accused, now Appellant, was unfit to perform a breath test and a blood test was warranted in the circumstances.

3. Because the evidence of the prosecution failed to establish that the then Accused now Appellant was injured at his mouth in as much as the evidence below the lower Court revealed that the then Accused, now Appellant was conversing after the accident.

The Appellate Court did*4. Because the prosecution failed to establish which vehicle had priority in the light of the conflicting versions on record.*

5. Because the prosecution failed to establish that all procedures were undertaken according to law for the breath tests.

6. Because taking all the evidence adduced before the lower Court, the Prosecution failed to prove beyond reasonable doubt Count 1 and Count 2.

7. Because the sentence is wrong in principle and manifestly harsh and excessive.

8. Because the learned Magistrate erred in holding that the points of impact were not really indicative of any imprudence.

9. Because the learned Magistrate erred in holding that the Appellant was proceeding at a much higher speed when the evidence on record fell short of establishing any evidence of speeding.

10. Because the prosecution failed to establish before the Lower Court that it was the imprudence of the Accused, now Appellant, that was the cause of the accident.

The Appellate Court did not find any merit in the above grounds of appeal.

On the issue of imprudence under ground 10, the Appellate Court referred to the test laid down in the case of **Chaddee v The State 2011 SCJ 149** which was quoted by the lower Court as follows:

“*On a charge of imprudence, the focus should not be on the choice of versions between that of the prosecution and the defence but whether objectively speaking the driver in question may be stated to have driven his vehicle with the standard required in the conditions of light, weather, time and traffic as revealed generally by the particular facts and circumstances of the case of which the trial court is the sovereign judge.*

*The test is an objective one as decided in **McCrone v Riding [1938] 1 All ER 157**. What the prosecution has to prove is “that the defendant has departed from the standard of a reasonable, prudent and competent driver in all the circumstances of the case”*.”

The learned Magistrate then proceeded to make a thorough analysis of the evidence on record before determining whether the appellant was imprudent and her conclusion that the appellant must have been speeding after considering the damages to the vehicles and the nature of the impact cannot be faulted.

Hence, the Appellate Court noted that the learned Magistrate was right to find that the appellant had departed from the standard of a reasonable, prudent and competent driver so that ground 10 did not hold ground.

Under ground 7, the sentence inflicted was argued to be wrong in principle and manifestly harsh and excessive. The Appellate Court went to set out the relevant sections of the law together with the sentence applicable:

The appellant was prosecuted for the offence of involuntary homicide by imprudence in breach of **section 239(1)** of the **Criminal Code** coupled with **sections 133** and **52** of the **Road Traffic Act** under count 1. **Section 239(1)** provides for a punishment of imprisonment and a fine not exceeding 150,000 rupees. Pursuant to **section 12** of the **Criminal Code**, imprisonment may be imposed for a term exceeding 10 days but not exceeding 10 years. In addition, under **section 52** and the **Second Schedule** to the **Road Traffic Act**, where an accused is found guilty for the offence of involuntary homicide by imprudence, it is mandatory for the court to disqualify the accused from holding or obtaining a licence in Mauritius for a minimum period of 9 months. The court may also cancel the appellant's licence.

Under count 2, the appellant was prosecuted for the offence of driving under the influence of intoxicating drink under **sections 123E(1)(a)(2)(3)** and **52** of the **Road Traffic Act**. The sentence provided for under the said sections at the material time was a fine of not less than 10,000 rupees nor more than 25,000 rupees and to imprisonment for a term not exceeding 6 months. In addition, the court had the discretion of cancelling the licence for the said offence and disqualification was mandatory for a minimum term of 12 months. (underlining ours)

In light of the circumstances of the present case, namely the proportion of alcohol in Appellant's blood being almost 4 times the permissible limit at the material time and the accident resulting in the death of two persons, the Court held that the sentence was neither manifestly harsh and excessive nor wrong in principle. However, regarding the length of disqualification, since **section 123E** of the **Road Traffic Act** provides that the disqualification period must be for a minimum of 12 months, the Court substituted the period of disqualification of 9 months imposed by the learned Magistrate under count 2 by a period of disqualification of 12 months.

Furthermore, Counsel for the appellant argued that imprisonment for a term of 6 months was not warranted given the time that had elapsed since the commission of the offence.

She referred to the case of **Heerah v The State 2012 SCJ 71** where the court stated the following:

"*Courts should refrain from imposing custodial sentences as a matter of reflex and indiscriminately in all cases where fines and Probation Orders and Conditional Discharge Orders are not found appropriate. Serious consideration should be given to that intermediate option inasmuch as "the deprivation of liberty through a custodial sentence is the most severe penalty available to the courts and the proper punishment for the most serious crimes*:" *[see **Home Office, 1990, para. 2.11 of the White Paper on Crime, Justice and Protecting the Public**. This study culminated in the passing of the **Criminal Justice Act 2003** in England and Wales which vested in their Courts the power to make Community Orders].*

In a number of cases, the objectives of the criminal justice system are better served when the offender's sense of responsibility to society and his self-reliance are triggered. As the Home Office Paper comments: Imprisonment "is likely to diminish an offender's sense of responsibility and self-reliance," and "provides many opportunities to learn criminal skills." What is more serious, imprisonment can have a devastating effect on some offenders as well as on their families. It would be unrealistic for society to expect that those who deserve lesser but are sentenced to imprisonment for not so serious offences would ever "emerge as reformed characters."

The Appellate Court disagreed with the argument that the sentence having been passed 7 years after the commission of the offence, the learned Magistrate was precluded from passing a custodial sentence. The punishment of offenders, the reduction of crime (including its reduction by deterrence), the reform and rehabilitation of offenders, the protection of the public, and the making of reparation by offenders to persons affected by their offences are all factors (except in the earlier period for the last factor) which have been features of sentencing policy for very many years. In the present case, the fact that time has elapsed does not change the fact that the Appellant deserved to be punished for the offence committed or that the sentence should act as a deterrent for future offenders. In the circumstances, the Court did find any ground to interfere with the sentence of imprisonment imposed by the learned Magistrate.

The appeal was thus dismissed with costs.

NICOLAS J P v THE STATE 2019 SCJ 167

By Hon. Judge Mrs. G. Jugessur- Manna and Hon. Judge Mr. N. F. Oh San-Bellepeau

Appeal – Issue of mandatory warning – Adducing fresh evidence on appeal – Issue of proportionality

This is an appeal against a judgment of the District Magistrate of Rivière du Rempart convicting the appellant for the offences, namely under count 1, driving a motor vehicle under the influence of intoxicating drink in breach of **sections 123 E (1) (a) Part VIII A** of **Act 09/03 & 52 of Road Traffic Act**; and under count 2, refusing to give a specimen of blood or two specimens of urine in breach of **section 123 H (1) (b), (2), (4) section 163** of **Road Traffic Act.**

The Appellant was sentenced under count 1 to undergo 6 months' imprisonment and to pay a fine of Rs20,000 and under count 2 to pay a fine of Rs. 5,000 and Rs. 100 costs. His driving licence was cancelled and he was further disqualified from holding or obtaining a driving licence for all types of vehicles for a period of 8 months under count 1.

The appeal is being pressed under 2 grounds, namely under ground 3, the contention of the Appellant is that his conviction under count 2 was unsafe inasmuch as he had not been given the mandatory warning prescribed under **section 123H (5)** of the **Act** and under ground 4, the Appellant is challenging the sentence under count 1 as being manifestly harsh, excessive and wrong in principle.

To better understand the provisions of the law in relation to the issue of a warning provided for in **section 123H (5),** the Appellate Court deemed it apposite to look at the relevant parts of **Section 123H** of the **Act** –

123H. Provision of specimens for analysis

(1) -

(2) –

(3) A specimen of urine shall be provided within one hour of the requirement for its provision being made and after the provision of a previous specimen of urine.

(4) A person who, without reasonable excuse, fails to provide a specimen when required to do so in pursuance of this section shall commit an offence.

(5) A police officer shall, on requiring any person to provide a specimen for a laboratory test in pursuance of this section, warn him that a failure, without any excuse, to provide it may render him liable to prosecution and may be used against him as evidence.

*(6) (a) In a prosecution under **section 123D** or **123F** of this **Act**, a refusal without reasonable excuse by a person to submit himself to a breath test or to give a specimen of his blood or specimens of his urine when required to do so in pursuance of this section shall be held against him as prima facie evidence that at the material time the proportion of alcohol in his blood exceeded the prescribed limits.*

(b) Paragraph (a) shall not apply where the person has not been warned by a police officer in accordance with subsection (5).

In line with the above section, learned Counsel for the appellant relying on the cases of **B. Luximon v The State 2012 SCJ 276** and **Jean Marc Etienne Ally v The State of Mauritius 2014 SCJ 283** submitted that the Appellant's conviction under Count 2 was faulty inasmuch as no evidence about the circumstances of the offence being committed had been adduced before the lower Court. Learned Counsel also submitted that even if the appellant accepted having committed the above offence by pleading guilty to count 2, the prosecution should have adduced evidence that the police had mandatorily given the appellant a warning and that particular evidence should have been on record before the learned Magistrate.

On the other hand, Learned Counsel for the respondent submitted that it is a condition precedent for a person to be convicted of an offence under **section 123H (4)** of the **Act** to be given a mandatory warning as set out under **section 123H (5)** of the **Act**. However, since the appellant's refusal to provide for a specimen of his blood or urine has not been used against him as catered for in **section 123H (6)** to prove the offence for which he was charged, the prosecution need not adduce any evidence to establish that a warning was given to the appellant.

The issue of a warning to be given to a person required to provide a specimen of breath, blood or urine for a laboratory test under **section 123H (5)** of the **Act** has been considered by this Court in the case of **B. Luximon** (supra) and the principle laid down is as follows:

"*It is a condition precedent for a person to be convicted for an offence under **section 123H** (i.e. for failure to provide a specimen without excuse) that he should be given a warning as set out in **section 123H (5).** The requirement to give such a warning is mandatory.*"

The Appellate Court distinguished the present case with the case of **B. Luximon** (supra) where the appellant pleaded not guilty to the offences of refusing to give specimen of blood or urine in breach of **section 123H (4)** of the **Act** and driving a motor vehicle with alcohol concentration above prescribed limit in breach of **section 123F** of the **Act**.

There was uncontroverted evidence before the trial Magistrate that a police officer had cautioned and had explained to the appellant the consequences of refusing to give a sample of blood or urine and the appellant in that case had replied "*mo pas pou faire aucaine test mo accepté mo sou*". The Supreme Court held that the appellant was adequately warned.

On the other hand, in **Jean Marc Etienne Ally** (supra) the appellant was charged for similar offences as in the present case and he pleaded not guilty to the offences charged and then changed his plea to one of guilty and his new plea was not recorded by the trial Magistrate.

It was also borne out from the record that the appellant gave two statements to the police about the circumstances of the incident. Unlike the case of **Jean Marc Etienne Ally** (supra), in the present case, the appellant did not give any statement to the police explaining the circumstances of the incident and it was not challenged that he instead stated that he would give his explanation in Court. In the course of the hearing before the trial Court, he admitted having committed both offences. Furthermore, he never made it a live issue before the trial Court that the police did not warn him that the failure to provide the specimen of blood or urine would render him liable to prosecution and such failure might be used as evidence against him.

The Appellate Court highlighted that by stating in his ground of appeal that he was not given a mandatory warning as prescribed in **section 123H (5)** of the **Act**, the appellant is in fact attempting to adduce evidence through the back door. It is common practice that to adduce fresh evidence on appeal, an incidental application should be made by way of motion and affidavit stating the reason why fresh evidence should be allowed on appeal. It is equally settled now that the Supreme Court, sitting on appeal, has the power to receive fresh evidence where the interests of justice so demand. The admission of fresh evidence is a matter of discretion and the applicable principles have been summarized by this Court in **S. Jhoolun v The State 2005 SCJ 200** after considering the case of **Sumodhee & Anor v The State 2004 SCJ 149** in which the Court adopted the guiding principles enunciated in the English cases of **R v Parks [1961] 1 W.L.R. 1484 at 1486-1487; R v Pendleton [2002] 1 WLR 72** and **Stafford v Director of Public Prosecutions [1974] A.C. 878.**

In the absence of the proper procedure being followed for the Supreme Court to receive fresh evidence on appeal and bearing in mind the fact that the Appellant did not give a statement to the police that he was not informed of the consequences of refusing to give blood test or urine test and that it might be used against him by the police, the Appellate Court refused to interfere the moreso, the appellant did not make the lack of police warning a live issue in the lower Court. Ground 3 was thus dismissed.

In relation to ground 2, the Appellate Court referred to the principles borne out in the case of **Philibert & Others v The State 2007 SCJ 274** to the effect that a lesser sentence than the minimum mandatory sentence is justified only if the circumstances of the case at hand show that the six months' imprisonment would clearly be disproportionate. In the absence of any evidence constituting any special reason or circumstance which would warrant the Court to come to the conclusion that the sentence offends the principle of proportionality and is harsh and excessive, the Appellate Court held that the minimum mandatory sentence imposed was richly deserved as the Appellant, being a second time offender, has shown that the fine meted out to him the first time had not been effective and had not encouraged him to mend his ways; instead he has deliberately flouted the law again. Ground 4 was also dismissed.

By virtue of **section 96** of the **District and Intermediate Courts (Criminal Jurisdiction) Act**, the Appellate Court amended the sentence passed by the learned Magistrate and ordered that the appellant's driving licence be endorsed with the particulars of his conviction and disqualification. Otherwise, the appeal was dismissed with costs.

THE DPP v HOSSENNY S 2019 SCJ 169

By Hon. Judge Mr. D. Chan Kan Cheong and Hon. Judge Mrs. K. D. Gunesh-Balaghee

Appeal – Equivocal plea of guilt – Hearing for sentencing purpose - State v Maudarboccus – Fresh hearing

The Respondent was prosecuted before the District Court of Upper Plaines Wilhems for the offence of "Attempt upon Chastity" upon one Marie Lucinda Aurelle Anastasia Hossenny in breach of **section 249(2)** of the **Criminal Code**. He pleaded guilty.

After taking into consideration the Respondent's advanced age, his clean record, his frail state of health and "*the circumstances of the case*", the learned Magistrate sentenced him to pay a fine of Rs 3000 and Rs 100 as costs.

The Appellant appealed against the judgment on the ground that the learned Magistrate was wrong in law and in principle to have imposed a fine for the present offence in breach of **section 249(2)** of the **Criminal Code** as the penalty provided for by the said section is penal servitude for a term not exceeding 10 years.

Whilst Counsel for both the Respondent and Appellant conceded that the sentence was wrong in law, the Appellate Court pointed out that although the respondent had pleaded guilty, the evidence adduced for the purposes of sentencing did in no way shed any light on the circumstances of the commission of the offence, which is a fundamental issue. Moreover, the record showed that the Respondent stated that he pleaded guilty simply to finish off with the case. In addition, he stated that the complainant was his daughter in law and that "*they are levelling a false allegation against me just to benefit my wealth.*"

The Appellate Court found it apt to refer to the following extract from the case of **State v Maudarboccus MN & Ors 2002 SCJ 88**:

"*Indeed, it appears to me to be an obvious and fundamental principle of criminal justice that a person who has pleaded guilty to a charge or has been, upon a plea of not guilty, found guilty of an offence charged in the information, should be given a fair hearing during the proceedings conducted for the purposes of sentence. This implies, inter alia, that –*

(1) Only the facts averred in the information which he has admitted by his plea of guilty should be acted upon as admitted facts and it should not be further presumed that he has, by his plea of guilty, actually admitted the precise version being relied upon by the prosecution unless he indicates, by himself, or his counsel, that he admits the facts alleged by the prosecution. It is that piece of sound legal reasoning that has led the court (C.I. Moollan C.J. and R. Lallah J.) in ***Vengrasamy v. The Queen [1984 SCJ 27]****…. to say that a statement of agreed facts was acceptable evidence but that a mere statement by the prosecution according to its own version without the accused being called upon to say whether those facts were admitted or not, could not constitute evidence on which the court could act to determine the appropriate sentence …..*

(2) the burden falls squarely on the prosecution, to prove each and every fact not specifically admitted by the accused, on which it wishes to rely for sentence purposes;

(3) …

(4) …

(5) Counsel for the prosecution and Counsel for the accused parties should duly perform the functions which devolve upon them in the circumstances, bearing in mind their respective roles within our adversarial system of justice, their duty towards the court – in particular their duty to help in the administration of justice – and, of course, the norms laid down in the Code of Ethics for Barristers….

For too long, the sentencing stage in Mauritius has been somehow not given the attention which it deserves and that is very regrettable indeed since justice is not only concerned with findings as to whether accused parties are guilty or not guilty but also with the assessment of all the relevant evidence available for purposes of sentence. Accused parties are as much concerned with the sentence which may be passed by the Court as with the finding of guilt or otherwise by the Court…"

In the circumstances, the case was remitted back to the lower Court to be heard by a differently constituted court for a fresh hearing, bearing in mind the ambiguous statement made by the Appellant from the dock with regard to his guilt.

"We should not look back unless it is to derive useful lessons from past errors, and for the purpose of profiting by dearly bought experience."

– George Washington

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

Chap 4, Magna Carta 1215