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

E-newsletter - Issue 107 **October 2020**

In this Issue

Editorial Team

Editorial

Anusha Rawoah
Ag Principal State Counsel

Dear Readers,

Dear Readers,

Welcome to the 107th issue of our e-newsletter. November 25th marks the 'International Day for the Elimination of Violence Against Women.' Around the world, violence against women harms not only millions of women and girls every year, but also their communities and families. Eliminating violence against women requires the dedication of all stakeholders in a community to create an enduring impact. The ODPP, through its 'Vitcim and Witness Support Unit' joins hands in this fight and participates with the civil society in creating awareness campaigns on this topical issue, as well as prioritizing cases of violence against women. As such, one of our law officers, Ms P.D. Mauree, Principal State Counsel, was invited as speaker on 'domestic violence' in an outreach programme organised jointly by the Police Family Protection Unit in collaboration with Metropolitan Division 'North' Police. You will read on same. Another law officer of the said Unit, Mrs Audrey Sunglee, Principal State Counsel, organised an interactive workshop at the ODPP whereby Dr Emilie Duval and Mélanie Vigier De Latour-Bérenger discussed with law officers on the psycholigocal issues pertaining to sexual abuse cases. A review of same is provided.

In this issue, you will also read on the legal issues surrounding 'corroboration' and the law of evidence. There is also an article addressing the sentencing trend of 'manslaughter cases' in Mauritius. In the 'Quick Facts' section for the month, we deal with one of the 'money laundering' offences provided under the 'Financial Intelligence and Anti-Money Laundering Act.'

Finally, you will are provided with summaries of Supreme Court judgments at page 22.

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

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ARTICLES

E-newsletter - Issue 107 **October 2020**

Campaign to encourage early reporting by victims of domestic violence

P.D Mauree
Principal State Counsel
Head of Gender Issue
Victim & Witness Support Unit

I was invited by the Metropolitan North Division Police to deliver an inaugural address on November 7, 2020 in an awareness campaign at Kaylasson Meenachi Amman Hall, Port Louis. It formed part of an outreach programme organised jointly by the Police Family Protection Unit in collaboration with Metropolitan Division 'North' Police. This awareness campaign was to promote early reporting by victims of domestic violence involving some 200 to 250 people of the locality.

In my address, I laid emphasis on the fact that domestic violence is a serious criminal offence with dire social and economic repercussions. It destroys the family, social fabric and harmony. It is a threat to law and order in the country. It has led to atrocious crimes. In most cases, children are the innocent victims of same. I dealt with the legal provisions under the **Protection from Domestic Violence Act** providing for a protection, occupation and tenancy order. The amendment of the law in 2016 now gives accrued protection as an assault between partners is qualified as an act of domestic violence in itself. The law protects against all forms of domestic violence whether it be physical, moral, or even economic. The ambit of the law is also very wide. It protects not only the wife, husband and children but also the other members of the family living under the same roof from acts of domestic violence.

I dealt with all facilities provided by the Police Family Protection Unit, Ministry of Gender, the Probation Office, Child Development Unit, Ministry of Health, Citizens Advice Bureau and the Citizen Support Unit to help the public report such cases. However, despite all these structures and institutions, victims of domestic violence live in fear to report such cases as they are still living with the perpetrators of domestic violence. They depend financially on the perpetrators of domestic violence.

The fight against domestic violence has always been a priority of the Office of the DPP. The first podcast of the Office deals with domestic violence. In accordance with that objective, the Victim and Witness Support Unit published, in 2014, three informative pamphlets on domestic violence in French, English and Creole to inform the public of the provisions of the law and what a victim can do. This year in line with its commitment, the Victim & Witness Support Unit has created a Gender Issue Section of which I am the current Head to promote all activities and help the police and all authorities to address the issue of gender based violence. The aim of this Section is to create awareness and provide support to the authorities dealing with such issues to address this problem more effectively.

The public was informed of the work of the High Level Committee on the elimination of Gender Based Violence which is very wide and encompasses much more than domestic violence.

Campaign to encourage early reporting by victims of domestic violence

Pamphlets on Domestic Violence published by the ODPP

The Office of the DPP was represented by Mrs R.Jannoo-Jaunbaccus SADPP and myself during the stakeholder representations made on October 2 at the level of the Office of the DPP and on October 14. Some of the measures proposed by the Office of the DPP to reinforce the fight against domestic violence: centralised information system to make domestic violence information available to all stakeholders, specialised department in each police station to give a fast track service to victims of domestic violence, introduction of an electronic bracelet for victims of domestic violence similar to what exists in France to inform police in case of danger, introduction of proper welcome areas in all district courts for victims as it exists in Rodrigues Court, introduction of a Victim Impact Statement Report in the law to assist Courts in giving proper sentence to offenders.

After making an overview of the government commitment and serious engagement of Our Office in the fight against domestic violence, I made a vibrant appeal to the Mauritian public to make a judicious use of all the facilities and structures in place to report such cases early for faster detection and prosecution of such offences and proper policy making decisions.

Mrs B.R Jannoo-Jaunbaccus, Ag. Senior Assistant of DPP (center-left) and Ms P.D Mauree, Principal State Counsel (Center –right) together with other law officers and Mr J.Meyers, Consultant from PMO and representatives from the Attorney General's office were present for a stakeholder meeting on 02 October 2020 at the DPP's Office.

VIOLENCES SEXUELLES ET TRAUMA

Le Bureau du Directeur des Poursuites Publiques a eu l'honneur, le 7 octobre 2020, d'accueillir deux éminentes psychologues, à savoir Dr Emilie Duval et Mélanie Vigier De Latour-Bérenger, pour un atelier de travail dédié aux officiers du bureau. Dr Duval est responsable du département de conseil psychologique à l'Institut Cardinal Jean Margéot ainsi que le département psychologique du Diocèse de Port Louis. Elle est aussi facilitatrice de pensée positive et membre du Kolektif Drwa Zanfan Morisien. Mélanie Vigier De Latour-Bérenger est, elle, consultante à l'Institut Cardinal Jean Margéot. Elle était Directrice de Pédostop et est également membre du Kolektif Drwa Zanfan Morisien. Le but de cet atelier était d'expliquer aux officiers la thématique de l'enfant victime de violences sexuelles; les mécanismes, les réactions et éventuellement comment recueillir les témoignages des victimes en cour.

L'atelier de travail a débuté par un discours de bienvenue de la part de Me. Audrey Sunglee, Acting Principal State Counsel, qui a mis l'emphase sur le fait que la moitié des cas référés au bureau sont des cas d'abus sexuels à l'encontre des enfants et des femmes. Les cas d'abus sexuels sont, de par leur nature, des cas sensibles et requièrent une attention spéciale. La majorité des victimes d'abus sexuels sont issues d'une famille vulnérable. Bien qu'il y ait certains cas qui sont simples, d'autres impliquent toutes sortes de difficultés légales, rendant ces cas complexes. Par exemple, il y a des cas où la victime et l'auteur du délit sont étroitement liés; il y a aussi la différence d'âge entre la victime et l'auteur; les antécédents familiaux; ou encore le fait que dans certains cas il y a des enfants qui sont nés du délit; quelques fois la victime finit par se marier et décide de ne pas faire suite du cas en cour ; le temps de délai pour que l'affaire soit appelée en cour; les situations où la victime décide de ne pas témoigner. Il faut prendre en considération tous ces éléments avant de décider s'il y a matière à poursuivre ou pas.

Vient ensuite les différents problèmes au niveau de la poursuite et les différents tests qui doivent être faits pour déterminer si l'enfant, en dessous de l'âge de 14 ans, est capable de témoigner ou pas. Il y a aussi la possibilité que la victime ait du mal à s'exprimer correctement sur les faits, ce qui provoque souvent des incohérences dans les témoignages, ou quand la défense se conduit d'une façon abusive dans son contre-interrogatoire. En tant que procureur, les avocats du bureau ont la tâche importante de déterminer comment efficacement poursuivre ce genre de cas étant donné que le témoignage de la victime est primordial. Il est important de s'assurer que la charge de la preuve soit remplie et en même temps s'assurer que les intérêts de l'enfant soit également protégés.

VIOLENCES SEXUELLES ET TRAUMA

Comment faire alors pour que la justice triomphe dans les cas d'abus sexuels? Me. Sunglee pense que comprendre ou même avoir une notion de l'aspect psychologique de ces situations problématiques aiderait les officiers du bureau à être mieux armé pour aborder les cas d'abus sexuels. Pour conclure, Me. Sunglee espère que les officiers du bureau travailleront en étroite collaboration avec le Dr Emilie Duval et Mélanie Vigier De Latour-Bérenger et que cet atelier de travail marque la première phase de cette collaboration.

Mélanie Vigier De Latour-Bérenger a débuté la session en précisant qu'il est difficile de répondre à comment interroger l'enfant victime d'abus sexuel sans parler des enjeux d'abus sexuels et les conséquences, notamment sur le cerveau face à un trauma. Le lien est directement fait par rapport à la mémoire traumatique et par rapport à la parole, qui peut être difficile, car les souvenirs peuvent ne pas venir d'un coup. Aussi, selon l'âge de l'enfant et dépendant de son développement, il/elle peut avoir du mal à expliquer ce qui s'est passé. Le discours, ainsi que les éléments, peuvent ne pas être les mêmes. Il est important qu'il ait cette collaboration entre avocats et psychologues car les logiques entre ces deux sont complémentaires.

Les chiffres d'abus sexuels sont préoccupants car une fille sur cinq et un garçon sur treize sont victimes de violences sexuelles. En ce qui concerne les auteurs de violences sexuelles, le profil de ces derniers démontre souvent qu'ils ont subi eux-mêmes de la maltraitance, un manque d'amour, ou encore qu'ils ont été victimes de toutes sortes de violences que ce soit physiques, émotionnelles ou sexuelles. En fait, 90% des auteurs de violences sexuelles ont eu des troubles d'attachements, de manque d'amour et de soin.

Mélanie Vigier De Latour-Bérenger a ensuite expliqué la différence entre un pédophile et un pédocriminel. Un/une pédophile est quelqu'un/e qui a du désir à avoir des relations sexuelles avec des enfants. Le pédocriminel par contre passe à l'acte et n'arrête d'agresser tant qu'il est en liberté parce que ce sont des personnes qui ont un dysfonctionnement. Il est à noter aussi que dans la plupart des cas, les agressions sexuelles subies par des enfants sont commises par des proches. Ce sont majoritairement des personnes de confiance et qui forment bien souvent partie du cercle familial. Le pédocriminel va repérer l'enfant fragile, qui est souvent seul et va souvent l'appâter avec des cadeaux. L'acte est généralement prémédité et l'auteur va prendre plusieurs semaines avant de passer à l'acte.

Dr Emilie Duval a expliqué que l'enfant n'est habituellement pas conscient de ce qui se passe lors de l'agression sexuelle. L'enfant est confus, mais sait ressentir un malaise pendant l'agression sans pour autant se rendre compte de la gravité de la situation. Le pédo-criminel va souvent solliciter le secret auprès de l'enfant ou peut même proférer des menaces pour que l'enfant garde le silence. Dr Duval explique aussi que le sujet de sexualité étant tabou à Maurice pose un gros souci car les enfants ont du mal à s'exprimer librement sur le sujet si cela venait à les toucher un jour.

VIOLENCES SEXUELLES ET TRAUMA

Mélanie Vigier De Latour-Bérenger a ensuite parlé des différentes raisons pour lesquelles les victimes d'abus sexuels gardent le silence. Les raisons avancées sont ; le trauma, la honte, la peur, le sentiment de culpabilité, la proximité avec l'auteur du délit, le besoin de rester loyal envers la famille, ou encore la dissuasion des instances de protection. Elle a aussi partagé l'obligation en France de soin thérapeutique pour les auteurs d'agression sexuelles en prison, qui a été mis en place par Samuel Lemitre, psychologue-clinicien qui a travaillé avec Roland Coutanceau, psychiatre. Elle soutient qu'on peut réduire le risque de récidive avec un soin thérapeutique. Selon Samuel Lemitre, un cas sur trois est commis par un mineur. Il y a aussi beaucoup de cas de violences sexuelles qui sont commis par des enfants et cela illustre la nécessité de s'occuper de l'enfant et de l'entourer avec soin et amour. Dans des cas pareils, il devrait y avoir l'obligation de suivi thérapeutique pour les auteurs mineurs.

Selon Mélanie Vigier De Latour-Bérenger, de 4 à 6 ans, les enfants peuvent participer à des jeux sexuels. Il est primordial d'expliquer à l'enfant dès son plus jeune âge les parties du corps. Le gros problème à Maurice est un manque d'accompagnement thérapeutique de qualité. Malgré toutes les lois qui existent pour protéger l'enfant, l'application de ces lois est à débattre. Il serait important d'avoir une session de travail avec les Magistrats afin de les sensibiliser sur le fonctionnement du cerveau et le lapse de temps qui pourrait faire qu'un enfant ne se rappelle pas des évènements de façon chronologique.

Dr Emilie Duval de son côté a longuement parlé sur l'impact du trauma sur le cerveau. Elle a aussi illustré les différentes étapes du développement du cerveau de l'enfant. Elle explique que c'est le cerveau limbique, qu'on appelle aussi le radar de sécurité, qui est responsable des émotions. Quand on est stressé, il y a trois réponses, les trois 'F', qui seront déclenchés, notamment ; 'Fight' (se battre) ; 'Fly' (fuir) ; ou 'Freeze' (la sidération).

Elle expliqua aussi qu'il y a le cortex préfrontal qui se développe en dernier, jusqu'à l'âge de 25 ans. C'est ce qui va nous permettre de prendre des décisions, d'analyser, de réfléchir aux différentes possibilités, d'avoir une intuition, un raisonnement moral, la conscience de soi, la moralité, entre autres. Dans ce sens-là, le cerveau n'étant pas complètement développé, quand on parle de responsabilité criminelle à 12 ans, on se demande si un enfant est capable de réfléchir aux conséquences de ses actes ? Selon Dr Duval, la réponse à cette question est clairement non car le cerveau arrive à maturité à 24 ans à peu près.

Une vidéo a ensuite été projetée à l'audience pour expliquer les trois 'F'. Face à un trauma, la notion du temps est aussi altérée. Souvent quand les victimes vont raconter leur expérience, des détails extrêmement précis tels que la couleur du t-shirt que portait l'agresseur ou alors le bruit d'une voiture dans l'allée peuvent leur revenir.

VIOLENCES SEXUELLES ET TRAUMA

Mélanie Vigier De Latour-Bérenger a expliqué l'impact qu'un abus sexuel peut avoir sur la mémoire de la victime. Plus la personne est jeune et proche de l'agresseur, plus l'amnésie est forte puisque c'est impensable que cette personne ait pu faire une telle chose. Il y a un besoin de préparer la victime avant que celle-ci dépose en cour. Elle explique aussi que seul le dessin de l'enfant ne suffit pas. La parole de l'enfant est essentielle. Selon elle, dans un cas d'agression sexuelle, il n'y a jamais de guérison. Dans beaucoup de cas, la victime va dénoncer l'agression après plusieurs années. Si un enfant qui a été victime de violence sexuelle est aidé tout de suite et les parents le protège, les conséquences seraient réduites.

L'atelier de travail qui fut un vrai succès pris fin avec des partages, témoignages et questions-réponses.

Neelam Nemchand & Pooja Domun
Legal Research Officers

Atelier de travail dédié aux officiers du Bureau du Directeur des Poursuites Publiques sur violences sexuelles et trauma avec deux éminentes psychologues, Dr Emilie Duval et Mélanie Vigier De Latour-Bérenger

CORROBORATION - TO WHAT EXTENT IS IT MANDATORY AND/OR DESIRABLE?

Veda Dawoonauth
State Counsel

'**Corroboration**' connotes support or confirmation in relation to the law of evidence and basically refers to testimony which tends to confirm a fact in issue upon which some evidence has already been given. Corroboration is the independent evidence which renders more probable the truth of testimony of a witness as to the commission of the offence and implication of the accused therewith.

However, at common law, one credible witness is sufficient as held in the case of **DPP v Hester 1973 AC 296** and this principle has been affirmed by the Supreme Court in the case of **Paruit v R 1968 MR 27** as follows:

"*Apart from those cases specifically provided for by statute or by long established rules of practice, there is no rule of law that requires corroboration of the evidence of a single witness and a Magistrate is perfectly entitled to convict in appropriate cases on the evidence of that witness*."

Nevertheless, this does not prevent the prosecution from ushering in Court reliable corroborative evidence, which at the end of the day strengthens its case. Yet, if corroborative evidence is available, the prosecution is not bound to call same provided corroboration is not required as a matter of law. This is because the calling of such evidence may even annihilate the prosecution's case and if one credible witness has deposed, the prosecution may wish to safely rest its case. On the other hand, if the primary evidence is in itself not credible, the question of corroboration does not even arise – **Kassim v R 1988 MR 49**.

In the case of **Naggeea v The State 2010 SCJ 189**, the Court made the following pertinent remarks on the duty of the prosecution – '*The duty resting on the prosecution is to lay down all the facts relevant to its case. That duty does not include making good the deficiencies in the conduct of the defence case. She cited the following passage from the case of* ***State vs Veeren [2010 SCJ 123], quoting from R v Brown [1997 Cr. App. R. 112]*** *with which we agree where the Court reiterated the principle that "the law does not insist that the prosecution is obliged to call a witness for no purpose other than to assist the defence in its endeavours to destroy the crown's own case*."

Furthermore, in **Botte v The Queen 1968 MR 80**, the court held that '*This Court has on many occasions reiterated the well-known principle that unless the law makes it imperative, corroboration is not in every case indispensable and a court may well act on the uncorroborated evidence of a witness found to be entirely reliable*.' Indeed, the rationale is that a strict insistence on corroboration will undoubtedly lead to the let-off of many offences which have had the misfortune of being witnessed by only one person. In the same vein, the desirability of corroboration in certain cases cannot be undermined given the lack of same can lead to unsafe decisions which in turn affect the lives of innocent people.

CORROBORATION - TO WHAT EXTENT IS IT MANDATORY AND/OR DESIRABLE?

What is corroborative evidence? and When is it required and/or desirable?

For evidence to constitute corroboration, it must in the first place be relevant and admissible to the charge before the Court. Once this is established, the Court will examine whether the evidence bears the peculiar characteristics of corroborative evidence as set out in the case of **R v Beck (1982) 74 CAR 221**, namely:

1. "*It is evidence coming from an independent source;*
2. *It must be credible evidence;*
3. *It must confirm that the crime or the impugned act has been committed; and*
4. *It is evidence which affects the accused by connecting or tending to connect him with the crime charged. In other words, it is evidence which implicates the accused in the commission of the crime or the impugned act in some material particular*."

As indicated earlier, the rule of one witness subsists but as any rule of evidence, this is subject to certain exceptions, namely where:

- Corroboration is required as a matter of law;
- Corroboration is required as a matter of practice and the full corroboration warning is required as a matter of law; and
- Special need for caution or warning is required as a matter of practice.

(1) **Corroboration required as a matter of law**

Under this limb, the Court has to be in presence of corroborative evidence before it can convict since the requirement for corroboration is statutory and accordingly mandatory. There are as of date two instances where corroboration is required by statutes, to wit:

i. **Section 124(4)(b)** of the **Road Traffic Act 1962** which provides that for an offence of speeding, the conviction cannot stand solely on the evidence of one witness to the effect that the offender was driving the vehicle at any particular speed. It must be corroborated by speedometers or factual evidence such as skid marks, impact or damage [**Edoo v R 1988 MR 284**]; and

ii. **Section 253** of the **Criminal Code 1838** which caters for the offence of procuring, enticing and exploiting prostitute. **Subsection (3)** provides that corroboration is required and a single witness will not suffice. [**Chan Kwee Lin v R 1989 SCJ 471**]

In the event a person is convicted for the above offences and the court record does not show any corroborative evidence having been produced, the appellate court will have no alternative than to quash the conviction.

(2) **Corroboration required as a matter of practice and the full corroboration warning required as a matter of law**

CORROBORATION - TO WHAT EXTENT IS IT MANDATORY AND/OR DESIRABLE?

The Courts have found certain classes of evidence to be potentially unreliable, resulting in wrongful convictions. Therefore, the rules of practice have been for corroborative evidence to be adduced and/or a full corroboration warning to be administered in the following instances:

i. Evidence of accomplice deposing on behalf of the prosecution;

ii. Evidence of complainants in sexual cases; and

iii. Evidence of children.

It is to be noted that this limb has to be distinguished from the one where corroboration is required as a matter of law. Under this leg, the Court may very well act upon the uncorroborated evidence in question for the purpose of convicting and this will not be a reason for appeal. However, the Court has to imperatively address itself the appropriate '*corroboration warning*' to the effect that even if corroboration is desirable in the above classes of evidence, it can still act on the uncorroborated testimony of the witness. Hence, the Court must address its mind to the dangers of acting on the aforesaid uncorroborated evidence whilst remaining sovereign in its appreciation of the witnesses before it. Furthermore, the absence of the warning in the above scenarios is subject to appeal and shall lead to the ultimate quashing of the conviction.

(3) **Special need for caution or warning is required as a matter of practice**

Here, the Court has to inform itself that there is a need for special caution before convicting a person based on the uncorroborated evidence of the following witnesses, namely:

i. Evidence of accomplices in their own defence;

ii. Evidence of a person who has an interest of his own to serve in giving false evidence; and

iii. Evidence of visual identification.

It is noteworthy that the warning is to ensure that the uncorroborated evidence in question is treated with care and caution. In the event the Court fails to warn itself of the special need for caution, there is no automatic quashing of the conviction. This will depend on the facts and circumstances of the case and as such, an omission of the warning, is not fatal outright.

To sum up the principles governing corroboration, the case of **Golam v The State 2018 SCJ 196** can be referred to, where the appellant was found guilty on a charge of assault and was sentenced to pay a fine of 1000 rupees. Two of the grounds of appeal revolved around the issues of lack of corroboration supporting the complainant's version and the failure of the Learned Magistrate to give herself a corroboration warning before acting on the uncorroborated evidence of the complainant respectively. Disagreeing with the appellant, the Appellate Court endorsed the trial magistrate's assessment of the authorities of **The Director of Public Prosecutions v Subrattee M S [2010 SCJ 207]** and **G. Saman v The State [2004 SCJ 3]** and her reasoning on the issue being as follows:

CORROBORATION - TO WHAT EXTENT IS IT MANDATORY AND/OR DESIRABLE?

"*Learned Defence Counsel submitted that Court should be alive to the fact that the evidence given by Witness 3 is uncorroborated. In that respect, I find it apt to reproduce what was said in the case of* ***DPP v Subrattee 2010 SCJ 207****, where the Court on appeal made the following observations: 'In general, however, at common law one credible witness is sufficient (****vide DPP v Hester [1973 A.C. 296]****,* ***Lord Diplock at p. 324****)*'.

… … …

In ***G. Saman v The State [2004 SCJ 3]****, the Court had the following to say 'The general rule is that a Court is entitled to act on the sole and uncorroborated evidence of a witness who is a victim in a sexual offence case where the Court finds the witness truthful and has addressed its mind to the danger of acting on uncorroborated evidence. The Court must obviously be more alive to that requirement of proof where the witness, the alleged victim, is a young person. But still, there is no legal requirement that because the person who has allegedly been assaulted sexually is young the Court will only act on that person's testimony if it is supported by corroborative evidence*'.

In the present case, the charge against the Accused is one of assault and since I have found the complainant a credible and truthful witness, I consider that there was no need for any corroboration. Although Witness 2 was on the list of witnesses for the Prosecution, the latter was perfectly entitled not to call her, a motion which was, in any event, not objected to by the Defence."

Conclusion

In view of the above, whilst corroboration may be desirable in many cases, the law and practice of our Courts have identified specific categories of evidence which necessitate '***support***' from independent and credible evidence which not only confirms the commission of the impugned act but also implicates the accused in some material aspect. As law practitioners, we are bound by the rules of evidence and our Courts have the duty to ensure that these rules are respected and applied *stricto sensu* so that no miscarriage of justice ensues.

A sentence which meets the ends of justice

Ezra Colimalay
Pupil Barrister

There has been a public outcry for a long time now that persons convicted of manslaughter were being given sentences which were either too lenient or too harsh. The wilful taking of the life of an innocent person is obviously an inhumane and atrocious crime which should be punished with utmost severity while evidently respecting the principle of proportionality.

Indeed, the law before the amendment in 2007 provided only for a maximum of 20 years penal servitude. Since the said amendment which came into force on 18 June 2007, **Section 223(3)** of the **Criminal Code** now provides for a maximum penalty of 45 years penal servitude.

While the length of the sentence to be imposed would depend on the specific facts and circumstances of each case and remains the sole discretion of the trial Judges, guidance is often sought by looking at previous sentences passed for similar offences thereby establishing a sentencing trend. The Court of Criminal Appeal in the case **of GARBURRUN R. v THE STATE 2018 SCJ 418** which was referred to in the case of **LACLOCHE J.C.B. v THE STATE 2019 SCJ 93** established that the sentencing trend for the offence of manslaughter would range from 25 to 30 years penal servitude.

However, it does not mean that every sentence should fall within that range. There have been more than a few instances where the Courts have imposed a sentence greater than 30 years penal servitude. For example, in the case of **THE STATE v KOOSHNA S 2010 SCJ 307**, where the Accused had strangled a female victim to death because the latter had refused to have sexual intercourse with him, the Court imposed a sentence of 38 years penal servitude. The Supreme Court in the case of **STATE v DOORGACHURN S K 2015 SCJ 55** also imposed a sentence of 38 years penal servitude whilst in the case of **STATE v CALOU F 2016 SCJ 115**, the Accused was convicted to 33 years penal servitude. In **STATE v. TAKOORDYAL A 2017 SCJ 2**, the Accused who killed his wife because he suspected her of adultery, was convicted to 35 years penal servitude.

The Courts have been particularly severe in cases where the barbarism of some Accused parties is such that they do not hesitate to take a human life for petty gains. And as such, the Courts have shown utmost severity for those who set out to commit the offence of larceny but instead, end up leaving a trail of dead bodies simply to ensure that their crime goes unpunished. The Supreme Court, in no uncertain terms, expressed its duty to protect society in the case of **STATE v LEFRANC A K 2011 SCJ 264**:

"*In my view, the circumstances of this case give an insight of the danger that honest citizens who are toiling peacefully to earn a living may have to face from unscrupulous people like the accused who are prepared to kill for an insignificant gain. No doubt, the Court has a duty to protect society by imposing a penalty that is appropriate in the circumstances and commensurate with the gravity of the crime…*"

A sentence which meets the ends of justice

When considering the length of sentence to be imposed, the courts are also mindful of the now accepted principle of sentencing that where an accused party makes a timely plea of guilty, he is entitled to a maximum discount of one-third. However, as stated in **STATE V MOOTIEN T AND OTHERS [2009 SCJ 28]**: "*the actual discount to be given for a plea of guilty still remains a matter of discretion for the court having regards to the circumstances of each particular case*."

The recent case of **MANSING K. v. THE STATE 2020 SCJ 248** delivered by the Court of Criminal Appeal brings clarity and structure as to how the Courts should apply the said discount. In that case, the Accused together with his confederates, armed with knives, committed larceny at the place of a Scottish lady whom they knew quite well and thereafter killed her. This incident occurred in the presence of the victim's adopted autistic son who was then 10 years old. The accused who had been given a sentence of 33 years penal servitude appealed on the ground that the said sentence was wrong in principle and manifestly harsh and excessive. The said appeal was dismissed.

According to **MANSING K.** (Supra), the Courts must now proceed in the following stages when passing sentence:

1) *Determine the appropriate sentence for the offence(s) in accordance with any offence specific sentencing guideline.*
2) *Determine the level of reduction for a guilty plea in accordance with this guideline.*
3) *State the amount of that reduction.*
4) *Apply the reduction to the appropriate sentence.*
5) *Follow any further steps in the offence specific guideline to determine the final sentence.*

MANSING K. (supra) is therefore a leading authority on how the Courts should proceed when granting reductions or discounts to sentences and was recently applied in **STATE v ELAHEE M B 2020 SCJ 283**. In this case, it was further established, upon reference by Learned Counsel for the prosecution to the case of **Attorney General's References [Nos. 19, 20 and 21 of 2001]; R v Byrne; R v Field; R v Cuthbert [2001] EWCA Crim 1432**, that the following factors should be taken into account when determining the appropriate sentence in cases of manslaughter:

(1) the context in which the death was caused,

(2) whether violence was contemplated or intended by the defendant, and

(3) the behaviour of the defendant after inflicting the serious injury.

In **STATE v ELAHEE** (Supra), the Supreme Court was of the view that a term of 29 years penal servitude would meet the ends of justice. It is, therefore, safe to say that the sentencing trend in cases of manslaughter sends a strong signal to potential offenders and shows the courts' duty to protect society.

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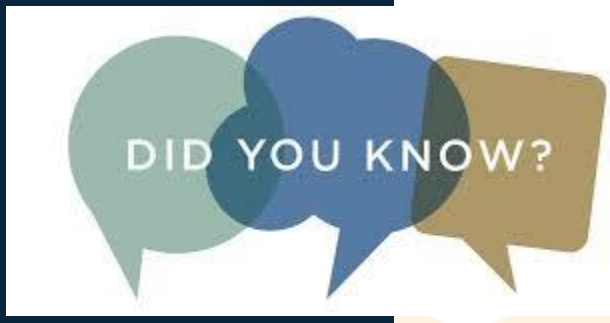
QUICK FACTS

E-newsletter - Issue 107 **October 2020**

Quick Facts



THE FINANCIAL INTELLIGENCE AND ANTI-MONEY LAUNDERING ACT 2002

Penalty for breaching Section 5 of FIAMLA – Limitation of payment in cash is provided under Section 8 (1) of the Act

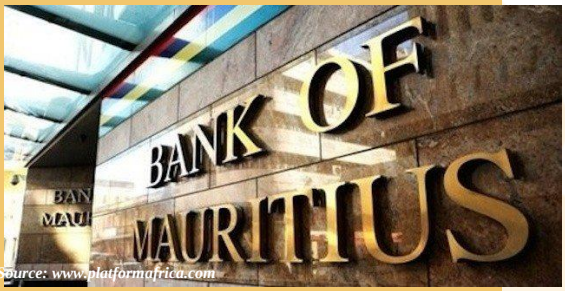
Fine not exceeding 10 million rupees and penal servitude for a term not exceeding 20 years.

Section 5 - Limitation of payment in cash

Section 5 (1) - Notwithstanding section 37 of the Bank of Mauritius Act 2004, but subject to subsection (2), any person who makes or accepts any payment in cash in excess of 500,000 rupees or an equivalent amount in foreign currency, or such amount as may be prescribed, shall commit an offence.

Section 5 (2) - Subsection (1) shall not apply to an exempt transaction.

NB: What amounts to an exempt transaction?



Source: www.platformafrica.com

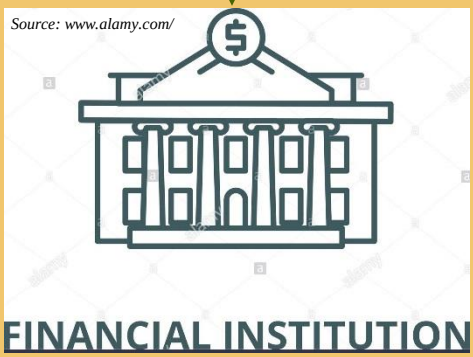
(a) A transaction between the Bank of Mauritius and any other person;

(b) A transaction between a bank and another bank;

Source: www.carolrealini.wordpress.com

Source: www.mobilepaymentstoday.com

(c) A transaction between a bank and a financial institution;



Source: www.alamy.com/

(d) A transaction between a bank or a financial institution and a customer where –

(i) The transaction does not exceed an amount that is commensurate with the lawful activities of the customer, and -

Source: www.cloudcherry.com

(A) the customer is, at the time the transaction takes place, an established customer of the bank or financial institution; and

Source: www.dreamstime.com

(B) the transaction consists of a deposit into, or withdrawal from, an account of a customer with the bank or financial institution; or


Source: www.alamy.com

(ii) the chief executive officer or chief operating officer of the bank or financial institution, as the case may be, personally approves the transaction in accordance with any guidelines, instructions or rules issued by a supervisory authority in relation to exempt transactions; or

Source: www.mddionline.com

(e) A transaction between such other persons as may be prescribed.

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Legal Research Officer

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SUPREME COURT JUDGMENTS SUMMARY

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SUMMARY OF SUPREME COURT JUDGMENTS: October 2020

PARTAB S. v THE STATE 2020 SCJ 255

By Hon. Judge Mrs. A.D. Narain and Hon. Judge Mrs. P.D.R. Chittoo

Child Protection Act – Scope of section 14(1)(a) – Elements of the offence – Failure to address issue of mens rea – Conviction quashed

The appellant was convicted for the offence of causing a child to be sexually abused by him in breach of **sections 14(1)(a)(2)(a)** and **18(5)(b)** of the **Child Protection Act** by the Intermediate Court. He was sentenced to pay a fine of Rs 30,000 under each of the counts of the information.

The Appellate Court chose to deal with Ground of Appeal No. 13 which challenged the learned Magistrate's appreciation of the issues of law and the elements of the offence under the **Child Protection Act 1994**.

Quoting the full bench authority of **Ritta v The State 2018 SCJ 304**, the Court considered that the scope of the offence under **section 14(1)(a)** of the **Child Protection Act** is now settled:

*"(a) **section 14(1)(a)** of the **Act** creates a "complete" offence of causing, inciting or allowing a child to be sexually abused;*

*(b) it is open to the prosecution in an appropriate case to rely on the "deeming provision" at **section 14(2)(a)** to establish that the child was sexually abused for the purposes of **section 14(1)(a)**."*

Furthermore, **section 14(2)** enhances the legal arsenal for the protection of children and prosecution of child abusers by providing for a "*presumption of sexual abuse*" where a child has taken part in a sexual act for any of the purposes specified in that subsection [**Gukhool v The State 2017 SCJ 113**].

It extends the scope of the offence of child sexual abuse and does not restrict or curtail its application; in other words, a person may be charged with and convicted of child sexual abuse under **section 14(1)(a)** without any reliance being placed on the presumption at **section 14(2)** and the prosecution would then have to establish all elements of the offence, including that of sexual abuse, beyond reasonable doubt on the basis of the evidence on record.

The Court further added that where the prosecution chooses to rely on the presumption in **section 14(2)**, the particular facts specified in that subsection which would give rise to the presumption need to be averred as particulars of the information, as they will have to be established by the prosecution for the presumption to come into play. Indeed necessary particulars would appear to have been averred in **Ritta (supra) and Teeluck v The State** [**2014 SCJ 398**], but not in **Gukhool (supra)** where the Supreme Court noted from the information that the charge was brought solely under **section 14(1)(a)** and the prosecution was not relying on the presumption in **section 14(2)**.

In the case at hand, the Appellate Court concluded that the offence was one under **section 14(1)(a)** of the **Child Protection Act**, albeit **section 14(2)(a)** was mentioned in the information. Nevertheless, after analysing the judgment of the lower Court, the Court concluded that the Learned Magistrate did not address her mind to the particular elements of the offence under **section 14(1)(a)** of the **Act** and she did not carry out any proper analysis to establish whether these elements were established beyond reasonable doubt. In fact, the lower Court did not even use the words "*sexually abused*" nor did she consider whether the accused "*caused*" the child to be sexually abused by him. Furthermore, the Learned Magistrate did not consider the mens rea of the accused in her judgment.

Given this ground of appeal was well-taken, the Court quashed the conviction of the appellant.

BAICHOO MANISH v THE STATE OF MAURITIUS 2020 SJ 258

By Hon. Judge Mr. D. Chan Kan Cheong and Hon. Judge Mrs. R. Seetohul-Toolsee

Right to silence – Adverse comments – Dangerous Drugs Act – Pharmacist – Authorised officer

The appellant was prosecuted before the Intermediate Court for the offence of possession of dangerous drugs, namely Tramadol, for the purpose of distribution in breach of **sections 30 (1)(f)(i), 45(1)** and **47(5)(a)** of the **Dangerous Drugs Act**. He pleaded not guilty to the charge and was assisted by Counsel. The appellant was found guilty and sentenced to pay a fine of Rs 100 000 and Rs 500 as costs.

The appeal was against conviction only.

Ground 8 of the appeal was to the effect that the learned Magistrate erred in law when she made adverse inference from the fact that the Appellant remained silent "*upon being intercepted*" and that his explanations "*came some days after he was arrested*", more particularly in the light of the Appellant's statement wherein he invoked his constitutional rights to remain silent and retain services of counsel.

The Appellate Court tackled this ground of appeal by referring to the case of **Carpenen v The State 2014 SCJ 382**, quoting **R v Shummoogum 1977 MR 1 where section 10 (7)** of the **Constitution** was analysed as follows:

"*It should be noted that **s. 10(7)** is couched in negative terms: it does not say that the accused has a right to silence, but that he shall not be compelled to give evidence. In our view, all that the enactment requires is that the judge must not suggest to the jury that from the silence of the accused they may infer his guilt, or that his silence corroborates the evidence for the prosecution …*"

In Carpenen, it was held that the impugned comment by the learned trial Judge amounted to a serious misdirection by inviting the jury to draw an inference of guilt from the appellant's silence upon being identified by the complainant.

The Court, on appeal, highlighted that the observations made by the lower Court were only setting out the appellant's version and explanations and the learned Magistrate's analysis thereof. Additionally, no adverse comment was made by the Magistrate on the choice of the appellant to give his version in presence of his counsel days after his arrest. Hence, **ground 8** failed.

Grounds 1 and **2** of the appeal, taken together, questioned the finding of the learned Magistrate that the appellant was not in the exercise of his profession as a pharmacist on being found in possession of the Tramadol Hydrochloride tablets and was not therefore an "*authorised person*".

The Appellate Court dismissed these grounds. In this line, **section 21(5)** of the **Dangerous Drugs Act** provides a defence to a pharmacist, as an authorised person, to possess such dangerous drugs as may be necessary for the practice of his profession. However, this section would be applicable only if the appellant had been in the exercise of his profession at the time he was stopped by the police with the drugs on him, which was not the case having regard to the particular circumstances of the present case.

It was also pointed out that the mere fact that the appellant is a pharmacist does not mean that he can be in possession of dangerous drugs at any time without having to comply with the **Dangerous Drugs Act**. He must show that he had authority to possess them, which was clearly not the case as per the facts found proved before the learned Magistrate.

The appeal was dismissed since all the grounds of appeal failed.

"If you want to fly, give up everything that weighs you down."

–Buddha

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

Chap 4, Magna Carta 1215