'To No One will We Sell
To No One Deny or Delay Justice'

Chapter 40, Magna Carta 1215

Office of the Director Of Public Prosecutions

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EDITORIAL

Dear Readers,

The legal profession has seen numerous activities in May 2011. It has benefited from the expertise of Mr Debasis Nayak on Cybercrime issues and the Rapporteurs from the United Nations Office on Drugs and Crime have made a thorough analysis of the situation of child trafficking, prostitution and pornography in Mauritius. Furthermore, the launching of the Laws of Mauritius online took place at the seat of the Bar Council and the Young Bar had its first dinner of the year last week. The important issue of Community Service Orders, which has been the subject matter of numerous Supreme Court judgments lately, has also been canvassed.

I wish you all a pleasant reading.

Zaynah Essop
State Counsel

IN THIS ISSUE

THOUGHT OF THE MONTH

The biggest mistake that you can make is to believe that you are working for somebody else. Job security is gone. The driving force of a career must come from the individual. Remember: Jobs are owned by the company, you own your career!

Earl Nightingale

Talk on Cybercrime Laws by Mr Debasis Nayak

On 11th May 2011, the Mauritius Bar Association, together with the Association of Magistrates, invited Mr Debasis Nayak, a specialist in cybercrime laws and intellectual property issues, at the seat of the Bar Council to provide *'an overview of Cyber law in Mauritius with emphasis on evidentiary aspects of cybercrime.'* Sir Hamid Moollan, QC made the welcoming speech by reiterating the common role of judges, magistrates and barristers in the due administration of justice. This was followed by an introductory note by His Honour Patrick Kam Sing, Vice-President of the Intermediate Court (Civil Side), who laid emphasis on the threat imposed by Cybercrime and the fact that it is difficult to secure a conviction given the transnational nature of such offences.

Mr Debasis Nayak, expert in Cybercrime and director of Asian School and Cyberlaws in India, gave a brilliant presentation on the subject. He analysed the relevant laws applicable in Mauritius. He explained that in matters of Cybercrime, the author of such crime is usually an unknown person who is behind a computer and this brings its share of challenges when the prosecution is called upon to prove the matter in court and to secure a conviction. An article from Mr Nayak can be found at page 15 of this newsletter.

Launching Ceremony of Laws of Mauritius

On 12th May 2011, the Attorney General's Office held a launching ceremony of the Revised Laws of Mauritius online at the seat of the Bar Council. The relevant laws can be accessed at the following web address:

http://www.gov.mu/portal/site/webattorney

Community Service Order: an alternative to custodial sentence, conditional or absolute discharge

Community Service Order ('CSO') is an alternative to custodial sentence, conditional and absolute discharge. According to C.Ball, K. Mc Cormac and N.Stone in *'Young Offenders, Law, Police and Practice' (London, Sweet & Maxwell 1995)*, 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. The sentence "removes an offender from home, determines where he or she will live during sentence and decides how and where he or she will spend every hour of each day."

A custodial sentence is likely to diminish an offender's sense of responsibility and self-reliance, provides many opportunities to learn criminal skills, can have a devastating effect on some prisoners and on their families and it is unrealistic to expect persons so sentenced "to emerge as reformed characters.

Also conditional or absolute discharge might not in certain instances be the appropriate approach to condemn the offence committed by the convicted person. Christopher J. Emmins stated in *"A practical approach to sentencing" (1985) at page 228 paragraph 15.1.1.* that:

"It is not appropriate to conditionally discharge an offender who has committed a serious or fairly serious offence. To do so would appear to excuse criminal conduct which, whatever the mitigation, cannot be excused. [….] The prime use of conditional discharges is in respect of minor instances of 'real' crime, especially where the offender is of good or relatively good character. Examples of cases where the court would carefully consider a conditional discharge are offences of petty dishonesty; assaults where no weapon is used and no significant injury caused; sexual peccadilloes (e.g. indecent exposure or buggery between consenting adults in a cubicle of a public lavatory), and possession of small amounts of soft drugs for personal consumption."

In Mauritius, the Criminal Procedure Act provides that conditional discharge may be used as a non-punitive sentence.

S197 of our Criminal Procedure Act provides for this sentence where the Court thinks that having regard to: to the character, antecedents, age, health or mental condition of the person, to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed; it is inexpedient to inflict punishment and that a probation order is not appropriate.

On the other hand, a CSO contains a punitive element in that the offender is deprived of his leisure time, but on the other hand it avoids the harsh effects of a prison sentence upon young offenders with clean records – exposure to the criminal subculture in a prison environment, subsequent stigma and, more generally, the "thoroughly detrimental effect upon their future life prospects".

The Law

The ***Community Service Order Act 2002*** "**the Act**" states the steps which a trial court must go through before passing or refusing a CSO. ***S2 of the Act*** defines a CSO as an order requiring a convicted person to perform unpaid work in the open for a specified period and in the form set out in the ***First Schedule of the Act***.

Under ***s3(1) of the Act***, a CSO is applicable to a minor between the ages of 16 and 18 who is sentenced to imprisonment and also to a person of 18 years old or over. The order is applicable only when the trial court passes a sentence of imprisonment which does not exceed two years and it must not be a sentence fixed by law, that is, a mandatory sentence fixed by any enactment or a sentence in respect of an offence for the prosecution of which ***s205 of the Criminal Procedure Act*** provides that Part X of that Act shall not apply.

A CSO can also be made when the convicted person is unable to pay the fine imposed as provided for in ***s3(3) of the Act***. When a CSO is made with the consent of the convicted person and subject to ***s3(2) of the Act***, the court suspends the sentence of imprisonment and orders the convicted person to perform unpaid work in the open for a specified period.

S3(2) of the Act provides that ***s3(1***) shall not preclude the court from making such order for costs or from imposing such disqualification against the convicted person as may be made or imposed under any enactment.

Under ***s4(1) of the Act***, it is incumbent upon the court, before making a CSO, to explain to the convicted person in a language which he understands, the purpose, effect and duration of that order and the conditions which it intends to attach to it and the consequences of any breach. ***S4(2) of the Act*** provides that no CSO is made unless: (a) the convicted person gives his consent thereto; (b) the court, after considering a report from a probation officer or hearing the probation officer, is satisfied that the convicted person is a suitable person to be the subject of such an order; and (c) adequate arrangements have been made for the carrying into effect of the order.

When a court makes a CSO, it is provided under ***s4(3) of the Act*** that the following matters shall be taken into consideration: (a) the convicted person's free time, including weekends; (b) whether the convicted person may be a threat to public safety; (c) that the work to be performed by the convicted person will benefit the State, a statutory body, a charitable institution or a voluntary organisation.

The duration of CSO as provided under ***s5(1) of the Act*** shall be made "for a period of not less than 60 hours not more than 300 hours, spanning over a period of **not more than 12 months**." Furthermore, under ***s5(2) of the Act***, where a court makes CSOs for 2 or more offences, the court may direct that they shall be concurrent or consecutive. If the court directs that 2 or more CSOs be consecutive, it shall not impose in the aggregate more than 300 hours of work.

S6(1) of the Act provides for the conditions that can be imposed in a CSO and they include the following: (a) the day on which work must commence; (b) the time at which the work must be performed; (c) the place where the work should be performed and the place where the person shall reside.

S10 of the Act provides the manner in which a convicted person who breaches the conditions of the community service order must be dealt with.

Application of the Law by the Supreme Court of Mauritius

In ***Joomun vThe State 2005 SCJ 152***, the Court in considering the purport of **s3 of the Act** had this to say, "the word **"may"** clearly illustrates the discretionary powers of the trial court. While it may be desirable that this new concept of a more humane treatment of offenders have a wide application.it is obvious that it would not be an appropriate measure in all situations. **S4(2) (b) of the Act** indeed states that ***"a Court shall not make a CSO unless ….it is satisfied that the convicted person is a suitable person to be the subject of such an order."***

In ***Ramnarain v The State 2004 SCJ 164***, the Supreme Court noted that the learned magistrate ought to have passed the custodial sentence first and it is only when the term of imprisonment is less than two years that he can consider a CSO. A social enquiry report is called for the purpose of ascertaining whether the convicted person is suitable to perform community service work. If the report reveals that he is unsuitable, the court needs not proceed further. If the report is favourable and an institution as provided under ***s4(3) of the Act*** is identified, then the court considers the conditions to be imposed as provided by ***s6 of the Act***. Having regard to ***ss4(1) and 6(1) of the Act***, it was the duty of the trial court to set down all the conditions of the CSO and not for the convicted person to dictate the terms and conditions.

Appeal against Community Service Orders

In ***Bajan v The State 2010 SCJ 348***, the Supreme Court considered whether an appellant may appeal against his conviction when he is the subject of a CSO pursuant to the Community Service Order Act 2002. It held that in the present state of our law, no appeal lies against a Community Service Order. However, leave to appeal to the Judicial Committee of the Privy Council has been granted to look at the ambit and purport of s10 of the Constitution.

Y.Bhookhun

State Counsel

Please find below a summary of Supreme Court judgments for the month of May 2011

State v Jhulloo
[2011 SCJ 136]
Discretion of prosecution to call a witness – Commencement d'execution

The Accused was prosecuted before the Assizes for attempt at possession of 115 grams of heroin, with an averment of trafficking.

Counsel for the accused did not contest the prosecution evidence showing that a parcel was intercepted at the DHL Warehouse which came on the name of Pritam Dowansing. He however submitted that since it was admitted by the main witnesses for the prosecution that without the assistance of Pritam Dowansing, the accused would not have been arrested by the police, the evidence of Pritam Dowansing was the backbone of the prosecution case. He went on to say that by not calling Pritam Dowansing to show the nexus between the drugs and the accused, the more so that the parcel also contained a watch and a Christmas card addressed to Pritam Dowansing, or to show that it was destined to the accused, the prosecution had failed to establish that there was a *commencement d'exécution* on the part of the accused which failed by circumstances independent of his will.

On that issue, the Court took into account the principals which have emerged from decided cases and from rules of practice in England, as set out by the Court of Appeal in the case of **R. V. Russell-Jones [1995] 1 Cr. App. R 538,** and which have been applied by our Courts. One of those principles as reproduced in Archbold 2006 Edition at paragraph 4-275 is that:

"A prosecutor properly exercising his discretion will not therefore be obliged to proffer a witness merely in order to give the defence material with which to attack the credit of other witnesses on whom the prosecution relies. To hold otherwise would, in truth, be to assert that the prosecution are obliged to call a witness for no purpose other than to assist the defence in its endeavour to destroy the Crown's own case. No sensible rule of justice could require such a stance to be taken."

The list of principles enunciated in the above case was said "*not be regarded as a lexicon or rule book to cover all cases"*. The established principle that was derived is that the decision to call a witness is a judgment to be made primarily by the prosecution and that in general, the Court would only interfere with it if the prosecution went wrong in principle. In the present case the prosecution preferred not to include Pritam Dowansing as a witness on their list of witnesses and to rely on the evidence available to them. The prosecution were perfectly entitled to exercise that discretion and to take that decision.

When analysing the whole evidence before the Court, the Learned Judge was of the considered view that the accused was not truthful when pretending not to have known Pritam Dowansing in the light of the clear evidence adduced by the prosecution showing beyond reasonable doubt that Pritam Dowansing and the accused communicated by mobile phone and met on the day in question.

The Court came to the conclusion that there had been a commencement d'execution which linked the accused directly with the parcel which he had knowledge and believed contained drugs. The Supreme Court accordingly found him guilty and convicted him to 28 years penal servitude from which was to be deducted half of the time spent on remand.

Bajan v DPP
[2011 SCJ 119]
Section 10 of Constitution – Appeal against CSO

The applicant applied to the Supreme Court for leave to appeal to the Judicial Committee of the Privy Council under section 81 (1) (a) of the Constitution on a question of interpretation of the Constitution.

The question involved was whether section 10 of the constitution confers a right of appeal on the Applicant. The applicant was initially prosecuted for swindling before the Intermediate Court. He was found guilty and was sentenced to 3 months' imprisonment. However, the Learned Magistrate considered that a Community Service Order ('CSO') would meet the ends of justice. Therefore, with the consent of the Applicant, he made an order under the Community Service Order Act.

On appeal against conviction, the Supreme Court *proprio motu* raised the issue whether the Appellant could appeal against the CSO under section 10. The Supreme Court held that section 10 was never meant to give a constitutional guarantee for a person convicted of a criminal offence to have his conviction reviewed. It therefore went on to hold that no appeal could lie against a CSO. The Supreme Court in the present application held that the question involved an interpretation of the constitution and referred the matter to the Privy Council.

Gungabissoon v The State
[2011 SCJ 128]
Embezzlement – Contract of agency

The Appellant was prosecuted for embezzlement before the Intermediate Court. The issue before the learned Magistrate was whether the evidence revealed that the money was delivered to the appellant in pursuance of a contract of agency (*mandat*) set out in section 333 (1) of the Criminal Code, which has been inspired from the offence of *abus de confiance* under *article 408* of the French *Code Pénal*. It is a settled principle that a contract of agency (*mandat)* envisaged under section 333 (1) of the Criminal Code is, as defined by *article 1984 of the Civil Code,* « *un acte par lequel une personne donne à une autre le pouvoir de faire quelque chose pour le mandant et en son nom.*»

It is recognised by eminent commentators in France that much difficulty is encountered in certain cases in deciding whether the evidence reveals that the embezzlement has been committed in respect of remittances pursuant to a contract of agency. This is brought out in **paragraphs 2327** and **2328** of **Garraud Droit Pénal Français Vol V**:

2327. Le mandat est l'acte par lequel une personne donne à une autre le pouvoir de faire quelque chose pour elle et en son nom (C.civ., art. 1984). C'est le titre qui, à raison de son étendue, fournit les plus nombreux cas d'abus de confiance aux tribunaux correctionnels, et qui, à raison de sa nature, soulève le plus de difficultés dans l'appréciation du caractère des faits constitutifs du délit.
2328. Sa portée juridique doit être précisée, soit au point de vue des personnes qui agissent pour le compte d'autrui, soit au point de vue des choses remises à titre de mandat.

The legal implication of "*mandat*" under the civil law is a vital consideration in deciding whether there is a contract of agency under section 333 (1) of the Penal Code. In ***Garçon, Code Pénal annoté*** **Art. 408**, **note *448*** is of relevance:

448… *L'abus de mandat se trouve ainsi circonscrit dans des limites juridiques précises. Le mot mandat a certainement dans l'art. 408 le même sens qu'en droit civil et il ne faut pas l'entendre autrement pour appliquer une peine…*"

The power given by the "*mandant*" to the "*mandataire*" to represent him is the essence of a "*mandat*". One person, the "*mandant*" allows another, "*le mandataire*", to represent his person and to act for him. This representative aspect of the matter has two effects. First, the main object of such a contract must be to perform an "*acte juridique*" as opposed to an "*acte matériel".* This is tersely explained in ***Répertoire Civile Dalloz, avril 2006, Mandat, note 72*** which reads as follows:

72. La première conséquence du caractère représentatif du mandat est que ce contrat ne peut avoir pour objet, à titre principal....que l'accomplissement d'actes juridiques (tandis que, à l'inverse, le contrat d'entreprise, relatif à des actes matériels, ne confère aucun pouvoir de représentation). D'où, lorsque la mission confiée à un tiers porte sur un acte juridique, l'unique qualification possible est celle de mandat, à l'exclusion de celle du contrat d'entreprise…Seuls des actes juridiques se prêtent à cette technique de la réalisation au nom d'autrui. Sont donc exclus tous les faits juridiques (d'où le mandataire reste personnellement responsable envers les tiers de ses délits ou quasi-délit...et les actes matériels (le contrat par lequel quelqu'un s'engage à réaliser un acte matériel pour autrui est un contrat d'un autre type…

The second essential characteristic of « *mandat* » in ensuring the representation of one person by another is that the "*mandataire*" has to enjoy a certain freedom ("*autonomie*") in the performance of the *"acte juridique" – vide* ***note 76*** *of* ***Répertoire Civile Dalloz, avril 2006, Mandat****:*

76. La seconde conséquence du principe selon lequel la représentation est de l'essence du mandat est que le mandataire doit jouir d'une autonomie certaine, d'une sorte d'indépendance, d'une liberté – même relative – dans la négociation ou la rédaction de l'acte juridique…

In other words, the "*mandataire"* has to be able to have a certain degree of initiative and a margin to manoeuvre in accomplishing the act. Certain examples referred to in ***note 74*** of the above authority give a clear insight of the concept of "*mandat"* with regard to certain professionals:

74. .. force est d'opérer une distribution des qualifications (et des régimes juridiques) en fonction des tâches : mandat pour les actes juridiques, entreprise (ou un autre contrat) pour les actes matériels. C'est ce critère qui permet de déterminer les droits et obligations de maints professionnels. L'agent de publicité qui loue un espace a un « support » pour un annonceur est un mandataire …; mais s'il conçoit une campagne publicitaire, il est pour cette activité lié par une convention d'entreprise …….L'avocat, qui représente son client dans les actes de la procédure, est un mandataire, tandis qu'il est tenu par un contrat de louage d'ouvrage s'il le conseille...

When considering whether there was a contract of agency (*mandat)* between the complainant company, represented by Mr. Makoondlall, and the Appellant, the Learned Magistrate referred to the case of **Nilmony v State [2007 SCJ 173]** and the following excerpt from *Garçon, Code Pénal annoté* (1959 Edition) Art. 408, notes 447 cited therein:

447. …. le mandat suppose que le mandataire s'est engagé à accomplir un acte juridique pour autrui …

It was, however, clear that the Learned Magistrate did not consider and pronounce on whether the appellant had engaged himself to do an "*acte juridique pour autrui*" in pursuance of a contract of agency. He differentiated the present case in stating that in the case of **Nilmony** (supra) the evidence of the complainant on the issue of the contract of agency was described as "hazy" to the extent that it was not clear whether the money was handed over to the agent to carry out a division in kind, to pay for a plot of land or to cover the cost of an affidavit. Whereas here, the Learned Magistrate said, the Appellant had agreed to take the money to pay to the Municipality which was further confirmed by the Appellant's handing over of the ostensible licence to Mr. Makoondlall so that the nature of the transaction was clearly established as being for the payment to the Municipality of the trade licence of the company in respect of which Mr. Makoondlall, its representative, handed over to the appellant a specific sum "to carry out a specific purpose". This shows that the Learned Magistrate misdirected himself in deciding whether there was a contract of agency. In fact, in the case of **Nilmony** (supra), the appellate Court (Balancy, Caunhye, JJ.) said:

"*On the confused and equivocal evidence of the complainant, it was not, in our view, clearly established that the remittance was in pursuance of a contract of agency (mandat), as opposed to remittance for a work with the condition that same be employed for a specific purpose*".

See also **Poonye v The State [2007 SCJ 267]**, a judgment of Caunhye and Domah JJ.

It is a settled principle that the latter contract does not fall within the purview of "*mandat*". Guidance for such a proposition can be found in ***Garçon, Code Pénal annoté*** **(1959 Edition) Art. 408, note 447** where it is said that:

447. Les mots 'pour un travail salarié ou non-salarié' visent le cas où l'auteur du détournement s'est engagé à accomplir pour autrui un travail matériel ou à lui rendre certains services qui ne constituent pas un acte juridique. [Emphasis added].

The Court also looked at the following in *note 639* of ***Garçon, Code Pénal annoté*** **referred to above**:

639. La convention de travail non salarié est un contrat innommé, qui ne diffère du louage d'ouvrage que par son caractère de gratuité. Par exemple, je remets ma montre à un ancien horloger qui s'est offert à la raccommoder gratuitement ; ou bien je charge mon voisin de porter, par complaisance, une obligation foncière chez mon banquier. Le législateur a compris ce contrat innommé spécial dans les prévisions de l'art. 408 et rien n'est plus juridique. La possession précaire de l'objet est transmise en exécution de cette convention, et celui qui a reçu cet objet et le détourne frauduleusement ne peut évidemment trouver aucune justification dans l'absence de tout salaire stipulé.

In the light of the above authorities relating especially to the connotation of "*mandat"* under the civil law, the Learned Judges considered that the Magistrate misdirected himself in his appreciation of the facts as the evidence does not establish that the remittance was in pursuance of a contract of agency (*mandat*) as averred in the information. In their view, the evidence adduced tended to establish that the money was delivered for a work without a promise of remuneration with the condition that it be employed for a specific purpose. The Learned Magistrate therefore faulted when he convicted the appellant for embezzlement of money remitted in pursuance of a contract of agency.

Conviction and sentence quashed.

Ramdin & Anor V State
[2011 SCJ 144]
Application for stay - Hearing of new trial

An application was made for an order staying the hearing of a new trial scheduled to start on the following day before the Intermediate Court pending the determination of an application for special leave to appeal to the Judicial Committee of the Privy Council which was apparently to be filed during the course of that day. The application was objected to by the Respondent and the matter was fixed for arguments.

The Learned Judges were of the view that such application was tantamount to asking them to sit on appeal and render nugatory the judgment of the Supreme Court enjoining the Intermediate Court to hear the case as expeditiously as possible. They were of the view that such matter ought to be left to the wisdom of the Judicial Committee which is the highest Appellate Court to consider whether, in the circumstances, the stay of the fresh hearing before the Intermediate Court should be ordered.

Application refused with costs.

Govinden v State
[2011 SCJ 121]
Embezzlement and Swindling – ATM – Admissibility of video recording

The appellant was prosecuted before the Intermediate Court under one count of embezzlement and 3 counts of swindling. He was found guilty and sentenced to 18 months' imprisonment under each count, which sentence was converted into a CSO. He appealed against his conviction on various grounds.

His ground of appeal against the conviction for embezzlement was that the fact that the ATM card and the National Identity Card subject matter of the offence was not '*choses appreciable en argent*'. After taking into consideration French doctrine and case-law and the provisions of the National Identity Card Act, the Court held that the ATM card and the National Identity Card were in fact goods and valuables as defined under section 333 of the Criminal Code. The conviction for embezzlement was maintained.

Whilst the court held that the offence of swindling through an ATM could be committed either by using fictitious name or assuming false character, it quashed the Appellant's conviction for the following reasons. Even though evidence of video recording was admissible, for there to be irresistible inference to be drawn, the court had to be satisfied that there were no other co-existing circumstances which would weaken or destroy the inference. In the present matter, the prosecution did not adduce sufficient evidence to satisfy the court in this connection. Moreover, there were variances between the withdrawn amounts mentioned in the Information and the evidence of such withdrawals given by a bank officer who was called at trial. The conviction on the charge of embezzlement was maintained whilst the charges of swindling were dismissed.

Chelin v State
[2011 SCJ 120]
Importation of drugs – Guilty knowledge

The appellant was prosecuted before the Intermediate Court for drug dealing (attempt to procure the importation of cannabis resin) in breach of the Dangerous Drugs Act under count 1 and importation of prohibited goods in breach of the Customs Act under count 2. He was found guilty and sentenced accordingly under each count. He appealed against his conviction. The main grounds of appeal under count 1 challenged the finding of the Learned Magistrate that the Appellant had the required guilty knowledge.

The circumstances of the case are that the Appellant received a parcel from one Aurélie from France. He went to collect the said parcel at the Post Office. There, two officers opened the parcel in front of him. Among the items found, the Appellant was shown some brownish powder which he recognised as cannabis resin. Upon being questioned, he bolted away. There was also a letter from the sender Aurélie.

The Supreme Court on appeal held that the Learned Magistrate was wrong to have found that the appellant had the required guilty knowledge. After considering the case of **Warner v Metropolitan Police Commissioner [1962] 52 CAR 373**, and as it was applied in the local cases, it held that the letter could not be relied upon to infer guilty knowledge inasmuch as it was hearsay. Moreover, the behaviour of the appellant was not indicative of the fact that he had guilty knowledge. The conviction under count 1 was quashed.

Under count 2, the Appellate Court held that the Learned Magistrate was wrong to have relied on the letter to find the Appellant guilty. Moreover, reliance was placed on the case of **AG of Hong kong v Tse Hung-Lit [1986] 1 AC 876** where the word 'cause' was explained inasmuch as the Customs defined 'import' as 'bring or cause to be brought'. The Supreme Court quashed the conviction under count 2 since there was no evidence that the Appellant caused the prohibited goods to be brought in Mauritius.

Roopnarain D v State
[2011 SCJ 142]
Possession of drugs – Appropriate sentence

The appellant was prosecuted before the Intermediate Court on count 1 for possession of cannabis for the purpose of selling and on count 2 for possession of cannabis for the purpose of distribution. He had pleaded Guilty to both charges and was convicted and sentenced to 3 years' penal servitude under each count. The ground of appeal was that the sentence passed was manifestly harsh and excessive.

The Learned Magistrate started from the correct bench-mark of what the legislator provided in such cases. She then considered whether the facts belonged to an extreme scenario on one side or the other. She weighed the mitigating factors with the aggravating factors making allowance for the guilty plea. The appellant was not at his first offence so that his previous convictions had to be taken into account. The two convictions were quite recent, one in 2004 and the other in 2008.

The learned Magistrate was correct in her conclusion that the appellant had graduated from being a mere consumer to a dealer. The Appellate Court relied on the cases of **Guylene v The State [2005 SCJ 117]** and **Ramdass v The State [2009 SCJ 324].**

The Appellate Court found that a term of 3 years' penal servitude was not harsh and excessive nor was it wrong in principle.

Appeal dismissed.

DPP v Camoin
[2011 SCJ 129]
Alibi – Burden on prosecution

The respondent was prosecuted before the District Court of Upper Plaines Wilhems (Curepipe) for having on the material day at Curepipe, wilfully and unlawfully made use of abusive language in public, not carrying with it the imputation of a fact, in breach of section 296 (b) of the Criminal Code. He was not represented by Counsel and he pleaded not guilty to the charge.

In his statement to the police, the respondent denied the charge, stating that the complainant, M. Luffur, had levelled a false charge against him. He further raised an alibi saying that on the day of the alleged incident he was working as mason in Morcellement Reunion, Vacoas. He also added that he had a dispute with M. Luffur who damaged his house and he gave a declaration to the police in that respect. That was, according to the respondent, the reason why M. Luffur was levelling a false charge against him.

The DPP has appealed against the judgment. There is only one ground of appeal to the effect that the learned Magistrate was wrong in law to find that the Prosecution did not adduce any evidence to disprove the alibi of the respondent.

It has indeed been decided by the Supreme Court in a long line of cases that when an accused party puts forward an alibi, the burden is on the prosecution to negative that alibi and not on the defence to substantiate and prove the alibi, see **Alcindor v R [1963 MR 47]**, **Ramdharry v. R [1983 MR 32]**, and **Boodoo v. State [1997 SCJ 37]**.

Whether the prosecution has been able to negative the alibi depends on the strength of the evidence adduced by the prosecution. It has also been decided that in order to negative the alibi raised by an accused party the prosecution may rely solely on the evidence of the complainant and need not call the witness named by the accused in his defence .

In **Levantard v The State [1997 SCJ 234]** the Appellate Court had this to say:

"...it was argued that the learned Magistrate was wrong to have reached the conclusion that the prosecution had discharged the burden of disproving the alibi. The prosecution had relied solely on the evidence of the complainant to disprove the alibi. It was therefore not necessary for the prosecution to call the witness named by the Appellant since the case for the prosecution would obviously rest or fall on the evidence ushered. In our minds, in accepting the version of the complainant, the learned Magistrate by necessary implication found that the alibi put forward by the Appellant was not true. Consequently it cannot be arguably sustained that the prosecution had failed to disprove the alibi."

In **Babeea v The State [1997 SCJ 239]** the Court said the following:

"In accepting the version of the complainant, the learned Magistrate was indirectly rejecting the version of the Appellant that at the material time he was at his place and not at the site. As the learned Magistrate did not misdirect herself as to the burden of disproving the alibi, we find no cause to intervene."

In **Mooniaruch v State [2010 SCJ 21]** the Court made the following remark:

"It is trite law that, once an alibi is raised, it is for the prosecution to rebut that alibi: ***Alcindor & Anor v The Queen [1963 MR 47]; Toory & Ors v R [1990 MR 313]****. However, there was no obligation upon the prosecution to show that the appellant could not have been at all the places he alleged he was. It was sufficient for the prosecution to establish that the appellant was at the scene of the crime at the material time."*

The Court then went on to cite with approval the case of **Foollee v The State [2004 SCJ 251]** where it is clear that when evidence capable of proving the case against the accused and of disproving his defence is adduced by the prosecution, there is a kind of tactical burden which is then borne by the accused.

In the present case, the Appellate Court considered that the Learned Magistrate was wrong in holding that the prosecution had not adduced any evidence to disprove the alibi raised by the respondent. The Learned Magistrate said in no uncertain terms that the testimony of the complainant stood unshaken thus implying that she was satisfied that the prosecution had adduced evidence that was capable of disproving the alibi, and since the respondent had done nothing with regard to the evidential burden that had shifted on him, the learned Magistrate was necessarily saying that she was therefore rejecting the version of the respondent.

Angateeah V State
[2011 SCJ 146]
Sodomy – Husband and wife – Sentencing principles

The Appellant was prosecuted on two counts of the information for the offence of sodomy upon the person of his wife in breach of s250 of the Criminal Code. He pleaded not guilty to both counts and he was represented by counsel. The Learned Magistrate found him guilty as charged and sentenced him to undergo two years' imprisonment under each count. The only ground of appeal was that the sentence was manifestly harsh and excessive.

The facts of the case are such that the Appellant forcefully sodomised the victim 2 weeks after their wedding. She had implored him to stop as she could not bear the pain. His reply was that he enjoyed that type of intercourse and that she belonged to him. She was sodomised on a second occasion before the victim left the conjugal roof.

Counsel for the Appellant submitted that a CSO would have been more appropriate on the ground that this was a case of husband and wife and that the latter had consented to such act. The Appellate Court reiterated the governing principle for its power to review sentences which is that the Court, '*ought to consider the facts in the particular case and if the sentence is manifestly excessive to the crime to reduce it and make it appropriate to the crime. The Court does not assert the right to review a sentence merely because they think that if they had to try the case themselves, they would have given a sentence which would be different; they only reduce a sentence when manifestly excessive'* (**Leste V R [1947 MR 65]**). This was quoted with approval in **Curpen V State [2008 SCJ 305]**.

Learned Counsel for the State referred to the case of **Milberry V R [2003] 1 Cr. App. R. 25** in which the Court of Appeal in England reviewed the sentencing guidelines in rape cases. For our present purposes, the following guidelines, which received the seal of approval from the Court of Appeal, are of some relevance:-

(a) *"relationship rape" and "acquaintance rape" are to be treated as being of equal seriousness to cases of "stranger rape"; it can be just as traumatic to be raped by someone you know and trust who has chosen you as his victim, as by a stranger who sexually assaults the first man or woman who passes by;*

(b) *there is no inherent distinction for sentencing purposes between anal and vaginal rape.*

Paragraph (a) above provides the short answer to the contention of learned Counsel for the appellant that we are here dealing with a husband and wife relationship. Moreover, it was incorrect on the part of learned Counsel for the appellant to submit that the victim consented to being sodomised by the appellant. On the contrary, the learned Magistrate, when passing sentence, laid emphasis on the fact that the victim did not consent to the acts of sodomy and was utterly against them and was, in fact, deeply traumatised by the incidents. And, although consent is not relevant to the issue of guilt in the present case, it must clearly be weighed in the sentence which is meted out (vide **Guya v The State [2000 SCJ 069]**).

As regards the mitigating factors in favour of the appellant, the learned Magistrate did bear in mind the clean record of the appellant which she found to be a strong mitigating factor on his behalf. However, as was held in **Murden v The State [1999 SCJ 165]**, '*it must be borne in mind that the Appellate Court will intervene only when the sentence is wrong in principle and manifestly harsh and excessive and that a clean record per se does not bestow an automatic right to leniency*.' Furthermore, in **R v Millberry** (above), the Court agreed with the proposition that a '*defendant's good character, although it should not be ignored, does not justify a substantial reduction of what would otherwise be the appropriate sentence*.'

Furthermore, the appellant pleaded not guilty to both counts of the information so that he was not entitled to any discount usually given for timely pleas of guilty (vide **Dookee v The Director of Public Prosecutions [2010 SCJ 71]**)

Learned Counsel for the State very aptly referred us to the case of **Goomany v The State [1998 SCJ 152]**, the facts of which are strikingly similar to the present one. In that case, the accused, after pleading not guilty, was convicted by the Intermediate Court on two counts of having committed sodomy upon the person of his wife without her consent. He was sentenced to two years' imprisonment with hard labour on each count. The appellate Court held that the sentence was not harsh or excessive. He also referred to the cases of **Arestide V State [1997 SCJ 2]** and **Marcelin V State [1994 SCJ 323]**.

The Appellate Court noted that the Learned Magistrate had rightly taken a strong view of the offence committed and that it was important to bear in mind that the maximum penalty for the offence of sodomy is 5 years' penal servitude. The Court held that the custodial sentence imposed was neither wrong in principle nor manifestly harsh and excessive. *Appeal dismissed with costs.*

Samyan P.H.J.C V State
[2011 SCJ 145]
Embezzlement – Maximum fine

The Appellant was sentenced to pay a fine of Rs 20,000 under count 1 for embezzlement and he was granted a conditional discharge provided that the latter furnished a security of Rs 5000 within a delay of 21 days and entered into a recognisance to be of good behaviour for 2 years under count 2 failing which he shall undergo 2 months' imprisonment for trading without a licence.

The grounds of appeal were that the fine of Rs 20,000 was manifestly harsh and excessive in as much as the Appellant never pleased guilty to count 1 and that the Learned Magistrate failed to take into account the relevant mitigating circumstances whereby he had refunded all the money.

Counsel for the Appellant was of the view that a Community Service Order ('CSO') would have met the justice of the case. The Appellate Court noted that from the record that the Learned Magistrate had enquired from the Appellant whether he could perform a community service but he stated that he could not do hard labour. The Learned Magistrate then imposed a fine of Rs 20,000 under count 1.

The Appellate Court agreed with submission of Learned Counsel for the State that the Magistrate erred when she imposed such a fine since, as per the law then, the maximum fine that she could have imposed was Rs 10,000 and a term of imprisonment. The Learned Magistrate also erred when she stated that the Appellant had pleaded guilty to count 1. The appeal was accordingly allowed and the sentence was amended and substituted with a fine of Rs 10,000, pursuant to s92 of the District and Intermediate Courts (Criminal Jurisdiction) Act.

Azize B F v State
[2011 SCJ 139]
Swindling - CSO

The appellant was prosecuted before the Intermediate Court on a charge of swindling a sum of Rs 132,956 from the Ministry of Social Security, National Solidarity, Senior Citizen & Reform Institutions. She initially pleaded not guilty to the charge but subsequently changed her plea to one of guilty before the hearing of the case. She was convicted and sentenced to 12 months imprisonment.

The grounds of appeal are as follows:

(1) *The sentence passed by the Learned Magistrate is wrong in principle, manifestly harsh, excessive and disproportionate in nature;*

(2) *The learned magistrate should have in the circumstances of the case suspended the sentence passed and ordered a community service order.*

Under ground 1, the Learned Magistrate specifically stated when passing sentence that she had considered all the facts and circumstances of the case, the timely plea of guilty, the fact that appellant had a clean record and had expressed remorse, that she had two children under her care and that she had co-operated with the police during the enquiry. She however emphasized that the sum of money swindled and which had benefitted the appellant was not the result of a single act but was the result of a dishonest scheme continuing and stretching over 3 years; that the sum defrauded was meant for the most vulnerable section of our society; that a strong signal ought to be sent to all those who would be tempted, for their own selfish motive, to make an abuse of the welfare benefits system put in place by the State. The Appellate Court was fully satisfied that the sentence passed by the trial Court was neither wrong in principle, nor harsh or excessive or disproportionate.

Under count 2, there was no legal obligation on the trial Court to consider a CSO. In view of the nature and seriousness of the offence, repeated well over three years by a mature person, a suspended sentence would have been most inappropriate so that the decision of the trial Court not to call a social enquiry report and to consider a CSO was perfectly understandable, justifiable and proper.

Appeal set aside with costs.

State v Beerbul
[2011 SCJ 123]
Manslaughter – Deduction of sentence

The Accused pleaded guilty for the offence of manslaughter and the Supreme Court found him guilty. The Learned Judge took into account the fact that the Accused had pleaded guilty, that he has shown remorse and begged for excuse. Bearing in mind that the offence took place about a month before the coming into force of Act No. 6 of 2007 so that the maximum sentence which can be imposed in this case is 20 years penal servitude, vide the case of **The State v Jeetun [2006 SCJ 62]**, the Court sentenced the accused to undergo 14 years' penal servitude from which was deducted half of the 32 months he spent on remand - vide **Mbokotwana v The Commissioner of Prisons [2010 SCJ 310]**.

Chaddee V State
[2011 SCJ 149]
Involuntary homicide – Imprudence

The Appellant was prosecuted before the Intermediate Court for a charge of involuntary homicide by imprudence in breach of s239(1) of the Criminal Code coupled with s133 and s52 of the Road Traffic Act. He pleaded not guilty. He was found guilty and he was sentenced to pay a fine of Rs 25,000 with costs. His driving licence was endorsed and cancelled and he was further disqualified from driving all types of vehicle for a period of 3 years. He appealed against both conviction and sentence on the following grounds:

(1) It was wrong to conclude that the charge was proved in view of the scanty evidence;
(2) A miscarriage of justice has happened due to the wrong interpretation of the plea given by the accused;
(3) The Learned Magistrate was wrong to conclude that the accused had departed from the standard of a reasonable driver;
(4) It was wrong to hold that the 'faute' of the accused was so 'grossiere qu'elle fait disparaitre, en realite, toute faute de la part de l'auteur materiel de l'homicide';
(5) The disqualification order is unreasonable and disproportionate;
(6) It was wrong to hold that the accused did not take any evasive action on seeing the lady crossing the road;
(7) It was wrong to find that the evidence of the accused was inconsistent;
(8) It wrong to reject the evidence of the accused.

Grounds 2 and 4 were not insisted on. Grounds 1, 3, 6, 7 and 8 were dealt with together. Learned Counsel for the Appellant submitted that the evidence on record was scanty, namely: (a) the visibility was poor and time in the evening with a drizzling condition; (b) undue weight should not be given to the fact that the car had stopped at a distance of 17.50mts; and (c) even if it were admitted that the Appellant was speeding, speed per se does not amount to imprudence as per Cayeux **V The Queen [1961 MR 265]**. Cases of **Vincent V The State [2005 SCJ 45]** and **Beegoo V The State [2006 SCJ 169]** were also relied upon.

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 motor vehicle with the standard required in the given 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 have 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." (see also **Walker v Talhurst [1976] 1 RTR 513**; **R v Lawrence 1981 RTR 217**; **Marot v R [1990 SCJ 17]**; **Ramlell v R [1990 SCJ 237]**; **Affoque v State [2005 SCJ 108]**.

On such a test, the imprudence of the appellant in this case was more than self-evident. The Appellant, on his own admission, was unable to see a lady crossing the road from his right to the left. That lady had already covered 5.40 metres on the road before he hit her with the front offside corner of his vehicle. The impact was violent. The lady landed on the bonnet before being projected at a distance of 19.80 mts on the nearside.

Both the decisions of **Vincent** and **Beegoo** referred to by Learned Counsel relate to cases where the victims had crossed the road from the left to the right. Those decisions are explicable. A driver, more often than not, has little time as well as space to avoid a collision when a pedestrian takes a suicidal or near suicidal leap as it were into the path of his car when the pedestrian emerges from the nearside of the road. Unless he otherwise anticipates the move, by the time the driver is able to see and brake promptly, the colliding may have already taken place. It is unlikely that imprudence may be imputed to the driver in such circumstances. However, that is a far cry from the present circumstances where a driver puts up a defence that he has had basically neither the time nor the space to see a pedestrian crossing the road from the right to the left. That he was speeding at a place and in conditions he is not expected to or not keeping a proper look-out, or been guilty of both, is manifest by the facts.

Indeed, the facts show that the Appellant was speeding, was not keeping a proper look-out on the road, braked only after impact and the road was well lit even if wet. The speeding is evident by the very nature of the injuries to the victim and the damages to the car. He could not have been travelling at 30 kmts an hour. The absence of proper look-out is evident by the fact that he himself says that he saw the victim when he found her in front of him. It would be nonsensical to accept the version of the appellant that the 70-year old lady ran from the right to the left at such a speed that it is she who landed on his car. The rule is that on seeing an obstacle on the road, the first move of a driver is to brake. What the appellant did on seeing the lady in front of him is next to nothing. He was, as per his evidence on oath, shocked.

The Learned Judges pointed out that the single authority of **Cayeux** is not updated. This Court has over the years held that while it is true that speed by itself cannot be taken to be evidence of imprudence, **Cayeux v R [supra]**, that proposition should not be carried too far. Speed is inherently dangerous and if combined with other factors will constitute imprudence as has been made clear in such decisions as **Pitot v R [1954 MR 205]; Teeroovengaum v R [1956 MR 52]; Ramessur v R [1961 MR 76]; Paul Gerard Christian Affoque [2005 SCJ 108]; Baucchа v The State [2007 SCJ 46]; Ramtohul v The State [2008 SCJ 227] ; Dustagheer v The State [2010 SCJ 8]; Bachu v The State [2010 SCJ 14].**

With regards to ground 5, the Appellate Court stated that, as an accountant, he should have realized that he was a professional before he engaged in that type of driving which caused the accident rather than after: see **Keerapah v Q [1988 SCJ 166]** and **Gopaul v State [2000 SCJ 285].**

Appeal dismissed with costs.

Li Chit Khim V State
[2011 SCJ 148]
Trademark – Resemblance

The Appellant was prosecuted for having been found in possession for sale of goods for which a mark so nearly resembling a trademark as to be calculated to deceive was falsely applied. The goods were particularised as being 4 t-shirts bearing the trademark 'Angels.' Those t-shirts bore the word 'Peach' in the front and at the back the word 'Angels' were written horizontally in white character. The word "WARRIORS" was written in bigger characters and in capital, vertically between two designs of a decorative pattern which were not described at the District Court. The word 'WARRIORS' was to be found immediately beneath the word 'Angels.'

Counsel for the Appellant offered arguments on the first ground which is to the effect that the Learned Magistrate failed to attach due weight to the appearance of the two words "Angels" and "Warriors" which, he submitted, must be looked at conjunctively, and on the second ground which questioned the judgment of the Learned Magistrate for failure to have considered the registration of the trade mark "Angels", an English word in common usage, as abusive.

Counsel for the State disagreed with these submissions and contended that the word "Angels" were prominent and protection thereto was approved through registration. Counsel for the Appellant also requested the Judges to consider *proprio motu* two matters which, in his opinion, rendered the conviction unsafe. Whereas, he submitted, the information was amended to particularise the offence as being in relation to 4 T-shirts instead of 7 t-shirts, the Learned Magistrate found established that there was only one t-shirt exposed for sale. He also submitted that an important element was missing in that the case was not one of mere possession, but one of offering for sale, in respect of which there was no evidence adduced.

At that stage of the proceedings, the Appellate asked Learned Counsel for the Respondent to submit on whether evidence of resemblance to the trademark 'Angels' had been established before the Learned Magistrate. At the resumed sitting on the following day after consultation with the DPP, Counsel quite fairly stated that he was no longer supporting the judgment of the Magistrate in the light of the remarks made by the Learned Judges. The latter were of the view that Counsel's stand was correct in law and on the facts, and this appeal could be disposed of on that issue alone without going into the merits of the grounds of appeal raised.

It was indeed clear that in the present case, the Magistrate had to decide whether there was resemblance with the registered trade mark having regard to the visual details appearing on the t-shirts, and more specially the manner in which the words were written on those t-shirts. It was incumbent on the Magistrate to consider the two marks (the registered one and the one appearing on the exhibits) overall, and decide whether on a comparison of the two marks he could safely decide that there was a will in the infringer to create a confusion in the mind of the public. It is also well established that any confusion may not only be made when the products are placed side by side but also by general recollection. The cases of **Cordova V Vick Chemical Co [1951] 68 RPC 103** and **Federal Marine Ltd V Veerapen [1997 MR 47]** were referred to.

In the present case, the prosecution had produced a document entitled "Data Base Extract – Trademark" which purported to confirm that the extract corresponded to the "record data with respect" to the trade mark 'ANGELS'. There had been no attempt on the part of the prosecution to establish the configuration of the registered trade mark which would have enabled the learned Magistrate to assess, and eventually make a conclusion, whether on a comparison, side by side, or by general distant recollection, there was the possibility of deception or confusion.

Appeal allowed and conviction quashed.

Meeajun M J v State
[2011 SCJ 141]
Money Laundering

The Learned Magistrate of the Intermediate Court convicted the Appellant under four counts of an information charging him with breach of section 5 (1) and 8 of the Financial Intelligence and Anti-Money Laundering Act (the Act). This section lays down the limit within which a person may carry out a transaction in cash, which at the material time was Rs350,000. She sentenced him to pay a fine of Rs100,000 under each count.

The grounds of appeal were as follows:

(1) *The learned Magistrate failed to make a separate determination for each of the 4 counts;*
(2) *The learned misdirected herself both on the facts and in law inasmuch as (a) no payment as such was effected by the Appellant; (b) the particulars of each of the 4 counts refers to "exchange" and not to "purchase;" (c) ex-facie the evidence on record it was the financial institutions which purchased the foreign currencies.*
(3) *The learned Magistrate misdirected herself on the facts and in law inasmuch as, ex facie the record, on the evidence adduced by the witnesses called by the Prosecution, the transaction in respect of each of the 4 counts was an exempt transaction.*
(4) *The learned Magistrate failed in her legal duty to determine the issue of mens rea.*
(5) *The learned Magistrate failed to carry a proper balancing exercise.*

In relation to ground 1, the charges in the four counts differed only in the particulars: i.e. with respect to the dates, the sums in excess of the Rs350,000 and the places where the alleged offence had taken place. As per the information, all the four charges were under section 5(1) of the Act had the same elements. The Learned Magistrate noted in the very first paragraph of her judgment the individual transactions under each count and the fact that these were not disputed by the Appellant in his out of court statements. It cannot, therefore, be argued that she failed to determine each count separately before convicting the appellant on the four counts.

With regards to count 2, it was not Shibani Finance Money Changer who went to the appellant to buy GBP. It was the Appellant who went to Shibani Finance Money Changer to buy Mauritian rupees. If he, as customer, went to buy Mauritian rupees from Shibani Finance Money Changer as the shopper, it follows that it was the Appellant who paid in GBP for same. He, therefore, made a payment in cash for the impugned transaction which exceeded the permissible statutory amount of Rs 350,000. Section 5(1) does not speak of exchange as such but only of making and accepting payment in cash. Cash in section 2 means "money in notes or coins of Mauritius or in any other currency."

Under ground 3, the question whether the transaction was exempt or not was not a question of fact as such but rather a question of law. The transactions had to comply with s2 of the Act, which they did not, independently of the personal views of the witnesses who obviously had an interest to serve in making such a statement.

As per ground 4, s5 of FIAMLA cannot be regarded as a technical offence a criminal offence requiring *mens rea,* considering the nature of the activity that it incriminates and the penalty that it envisages. Court relied on **Gammon Hong Kong Ltd. v. Attorney-General of Hong Kong v. (1985) AC 1,** applied in the case of **Rayapoulle v The State [1990 MR 286].** In the case of the Appellant, however, the *mens rea* of appellant was more than self-evident since he knew what he was doing. He knew he was carrying cash on him, not once, not twice, not thrice but four times. He knew they were foreign currency. He knew he wanted cash in Mauritian rupees. He knew after changing the GBP he needed to deposit same in his regular accounts at a bank. It cannot, therefore, be said that he lacked the criminal intent.

Under ground 5, the mischief which the law seeks to prevent when an individual chooses to physically carry an out of the ordinary amount of cash on his person from one jurisdiction to another in pursuit of business or otherwise had been addressed in the case of **Abongo v The State [2009 SCJ 81]** where the Learned Judges stated that the Act was meant to combat money laundering. That the appellant, after carrying out the impugned transactions, placed the moneys in an established bank account, therefore, is more damning to him than redeeming of him.

Appeal dismissed with costs.

State v Ramchurn
[2011 SCJ 125]
Knowledge of possession – Over acts by accused – Commencement d'execution

The Accused was prosecuted before the Supreme Court for attempt at possession of heroin for the purpose of delivery, with an averment of trafficking.

He pleaded not guilty.

The Court stated that knowledge per se is not sufficient on a charge of unlawful possession of drug. There must also be some overt acts to connect the accused to the drug. (vide **Chung Po v Q [1970 SCJ 191], Ginger v R [1973 SCJ 55], Chamroo v Q [1984 MR 15], M.S.Curpenen v The State [2000 SCJ 245], Salarun v Q [1984 SCJ 194], Emambux v R [1988 SCJ 440], Rayapoulle v R [1990 MR 286], Sheriff v The State[1993 SCJ 31], Lam Cham Kee v The State [1994 SCJ 74], J.J.S.F.K.Yow Ok Cheung v The State [1997 MR 117]**, **J.T. Nanak v The State [1998 SCJ 357], State v G. Ariyatrishnan [1998 SCJ 350], State v Diouman and Anor [2004 SCJ 77] and Mestry v The State [2007 SCJ 309], State v Banda and Ors [2009 SCJ 101]**).

If on a charge of possession, the prosecution must not only prove that there must be knowledge and overt acts connecting the accused to the drug, on a charge of attempt, those facts must also be established before it failed through circumstances independent of the will of the accused. Those facts must be those linked with the "*commencement d'exécution*" and passed the stage of "*acte préparatoire*". They must be acts linked directly with the offence charged and effected with the intention of committing the said offence. (vide **State v N. Ahmed and 2 Ors [2000 SCJ 107]**, **State v Diouman and Anor** (supra)**, State v Islam Siddick [2007 SCJ 158]).**

In the case in hand, the legal proposition in respect of a classical container case as propounded in **Warner v Metropolitan Police Commissioner (1968) 52 CAR 373** which was applied in **State v Dalziel [2007 SCJ 330], State v Moazzam Ali Shaik and Anor [1998 SCJ 145], State v Jocelyne Oodally [2008 SCJ 44]** finds no application in the present case. In **R v R.K. Kunnath [1989 SCJ 288]**, it was stated that '*mere detention without knowledge of the contents or nature of the object or substance does not necessarily amount to possession and everything depends on the circumstances of the case*".

The Court found on the evidence that the prosecution had not proved beyond reasonable doubt the charge levelled against the accused as it had not been proved that accused knew or ought to have known that the parcel which he had collected on behalf of the said Winsley contained drugs.

Case dismissed.

Leung Miow Wah F K S V State
[2011 SCJ151]
Larceny

The Appellant was convicted by the Intermediate Court on a charge of larceny by more than 2 individuals in breach of s301(1) and 305(1)(b) of the Criminal Code. He was sentenced to undergo a term of 3 years' penal servitude. The grounds of appeal were that there is no evidence on record to show that the Appellant had used a knife and that the sentence imposed was manifestly harsh and excessive.

The evidence on record showed that the Appellant had at first opportunity pleaded guilty to the charge. He had also co-operated with the Police and asked forgiveness from his victims. The Appellant pleaded in mitigation that he was a married man with a family, that he was HIV positive and was on medical treatment. The record showed however that the appellant had, with three other persons who were riding two motorcycles, attacked three women as they were walking along Marine Road with their handbags. The Learned Magistrate stated that she had noted that three innocent ladies had been the victims of an offence where a knife was used. That statement was factually correct and nowhere was it said, albeit impliedly, that the Appellant was the person using the knife.

In relation to ground 2 of the grounds of appeal, it was abundantly clear from the evidence on record that the appellant was very much privy to a serious offence which was committed jointly by four persons. The Learned Magistrate stated that such type of offences (targeting women walking on the streets with their handbags) was in the increase and that the Court could not condone such acts.

Finally, the Appellant had a previous conviction for larceny with violence in 2004 for which he was shown much leniency. It appears, therefore, that the Appellant had not learnt from his previous conviction. The offence for which the Appellant was charged is one punishable by penal servitude which ranges from 3 to 40 years as amended by Act 36 of 2008, so that the sentence imposed was at the lower rung of the ladder.

Appeal dismissed with costs.

Cyber crimes: Scourge of the present age

Introduction

A computer based crime may be defined as an unlawful act in which a computer is used either as a tool or as a target or as both. The important characteristic of all computer based crimes is the manipulation of information stored in or transmitted through a computer. Such manipulation may itself result in a crime *(eg tampering with data)* or may facilitate further crimes *(eg cheating, fraud or forgery).*

Since, a computer based crime, necessarily, must affect information in some way or the other, the focus of investigation in all such crimes cases must be *electronic information*, leading to apprehending and subsequently prosecuting the offender. By nature, such information is intangible, fickle and easily corruptible requiring special expertise in its collection, storage, analysis and documentation.

Effects

As the value of information in modern society increases, proportionally, the crimes affecting such information have deeper social and financial impacts. The value of information, in its various avatars *(electronic money, demat shares, IP, sensitive personal date or databases)*, being not clearly perceivable by law enforcement and prosecuting agencies, specifically in context of countries like Mauritius, where awareness needs to develop, the rate of conviction of offenders committing such crimes remains low. This, in itself, proves to be ineffective deterrence to prospective offenders.

The Internet magnifies seemingly innocuous crimes like defamation and flaming, which are considered as misdemeanours legally and yet have as much psychological impact on the minds of the victim as grave felonies. The paragraphs below4 indicate the financial loss caused to victims of cyber frauds.

The Internet Crime Complaint Center (IC3) is a partnership between the Federal Bureau of Investigation of the United States and the National White Collar Crime Center. The IC3 has already registered its 2 millionth crime. The IC3 receives, develops, and refers cyber crime complaints to local, state, federal, and international law enforcement agencies. The majority of referrals involved fraud in which the complainant incurred a financial loss. The total reported loss from these referrals is approximately $1.7 billion, with a median reported loss of more than $500 per complaint.

There is an urgent need for imparting basic training and sensitization on a wide scale, especially in developing countries to all stakeholders involved in the administration of justice, namely, law enforcement, the Bar and the Bench so that the spiralling effect of such crimes can be inhibited.

Legislation

Most countries have realized the need for comprehensive legal provisions to fight this menace. The Computer Misuse and Cyber Crime Act 2003 (The Act) is currently in force to address substantive and procedural legal issues related to cyber crimes in Mauritius. The Act is divided into four Parts comprising of 23 sections in all, which together form a comprehensive piece of legislation to address cyber crimes. The definitions of important terms are contained in Part I while Part II lays down the substantive criminal law relating to cyber crimes. Part III tackles investigation issues related to cyber crimes and Part IV addresses important issues like jurisdiction and extradition.

Debasis Nayak
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Rapporteurs from United Nations Office on Drugs and Crime on Child Trafficking, Prostitution and Pornography

During the month of May 2011, two Rapporteurs from the United Nations Office on Drugs and Crime ('UNODC') were in Mauritius in order to assess the situation in relation to child trafficking, prostitution and pornography. Following meetings with various agencies such as the Child Development Unit, the Ombudsperson for Children and officers from the Office of the DPP amongst others, they made a presentation of their findings at the Ministry of Gender Equality, Child Development and Family Welfare on 11th May 2011. According to their research, the percentage of child trafficking and prostitution is low but however the definition of prostitution under our law is unclear. In their view, the interpretation given by Magistrates and Judges to the notion of 'beyond control' in our law ought to be reviewed and clearly defined. The following suggestions were also made for improvement of the situation of children in Mauritius: (a) review of our national adoption system; (b) an in-depth analysis of the causes and prevention of child trafficking and prostitution; (c) the training of judges, magistrates and police officers when dealing with children; (d) legal assistance to children; and (e) the psychological support to children and their rehabilitation after the age of 18 when they are left on their own should be foreseen.

Mauritius has been a signatory of the Optional Protocol to the Convention on the Rights of the Child on Sale of Children, Child Prostitution and Child Pornography since 11th November 2001. Mauritius is currently in the process of ratifying the said Optional Protocol.

Young Bar Dinner

Friday 27th May 2011
Vaneron Gardens, Trianon

LAWYER'S JOKE

The police, the MSF and the DIC are all trying to prove that they are the best at apprehending criminals. The Prime Minister decides to give them a test. He releases a rabbit into a forest and each of them has to catch it. The police goes in. They replace animal informants throughout the forest. They question all plan and mineral witnesses. After 3 months of extensive investigations, they conclude that rabbits do not exist. They petition Parliament for more money for rabbit-detecting satellites. The MSF goes in. After 2 weeks with no leads they burn the forest, killing everything in it, including the rabbit. The MSF informs the press that the rabbit was a baby rabbit molester, and obviously set the fire. The agents involved are given medals for their bravery. The DIC goes in. They come out two hours later with a badly beaten bear. The bear is yelling: 'Okay! Okay! I'm a rabbit! I'm a rabbit!'

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