THE JUDICIAL OFFICER

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From the Editor.

This is the fourth electronic edition of the **Judicial Officer**. In this edition there are 3 articles which cover areas of criminal procedure and criminal law. It is also the first electronic edition which contains articles written by a female magistrate. I am really pleased about this and hope that more ladies will in future contribute to the journal. I wish to place on record my gratitude to Ron Laue who assisted with the editing. Opinions expressed by authors are their own and does not necessarily reflect that of the *Judicial Officers Association of South Africa.*

Gerhard van Rooyen
Magistrate/G reytown

Contents

THE JUDICIAL OFFICER – GUIDELINES FOR AUTHORS

1. Readers are invited to submit articles, notes, reviews of cases and correspondence to the editor with a view to publication. In general we welcome contributions of 1 000 to 3 000 words.

   We wish to publish articles of practical interest for magistrates that includes the several aspects of public law and private law that magistrates encounter every day.

2. Submissions should be in English and all submissions should be submitted by e-mail in MS Word to the editor at gvanrooyen@justice.gov.za . Pages should be numbered. Titles and headings should be kept as short as possible.

3. Footnotes should be kept to a minimum and numbered consecutively with arabic numerals.

4. Cases and statutes should be cited accurately and fully.

5. It is assumed that contributions are original and have not been submitted for publication elsewhere.

Is it a Justifiable Injustice?

A critical analysis of the constitutionality of the provisions of section 112 (1) (a) of Act 51 0f 1977.

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1. INTRODUCTION

A well known principle in the South African criminal justice system is that the prosecution bears the onus of proving the guilt of the accused person beyond a reasonable doubt. This principle is an established and a fundamental cornerstone of criminal processes in various civilised countries. In South Africa, this principle, together with a right to be presumed innocent until proven guilty is now an ingredient of a right to a fair trial.[1]

Whereas the Constitution raises no doubt about the significance of the presumption of innocence as well as the accused's right to have his or her guilt proved by the state beyond a reasonable doubt, the provisions of section 112 (1) (a) of the Criminal Procedure Act 51 of 1977[2] grants a court a discretion of

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1 CRM Dlamini Proof beyond reasonable doubt: an analysis of its meaning and ideological and philosophical underpinnings" (1998) 11 SALJ 423.

2 Section 112(1) (a) of the Criminal Procedure Act 51 of 1977 provides that :where the accused at a summary trial in any court pleads guilty to the offence charged, or to the offence of which he may be convicted on the charge and the prosecutor accepts that plea the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the minister from time to time by notice in the Gazette, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the minister from time to time by the notice in the Gazette or deal with the accused otherwise in accordance with law.

convicting the accused person without the court satisfying itself that the accused is indeed guilty. The accused is convicted on the basis of the guilty plea alone. It is not even peremptory for the presiding officer to ascertain if the accused pleads guilty freely and voluntarily.

Any presiding officer who questions the unrepresented accused person who pleads guilty in order to ascertain if he or she admits all the allegations in the charge in accordance with the provisions of section 112 (1) (b) of Act 51 of 1977[3] must surely agree that many unrepresented and mostly uneducated accused persons plead guilty even though they do not admit all the allegations in the charge or have a valid defence to the charge.

It goes without saying that there is always a danger of convicting an innocent person through the utilisation of the provisions of section 112 (1) (a) of the Criminal Procedure Act 51 of 1977. This section of the Act is favoured by a large number of the magistrates who, at times are proud and content to have finalised a large number of cases per month. The question therefore is whether this advantage of the application of the provisions of the Act outweighs the intrusion into a right to a fair trial. Put differently, the question is whether the provisions of the Act constitute a constitutionally permissible infringement of a right to a fair trial.

2. MAGISTRATES' COURTS AND THE CONSTITUTION

The provisions of the Act are seldom applied in courts other than in Magistrates' Courts. Magistrates' Courts are creatures of statute and may not inquire into the constitutionality of any legislation. Even though they are creatures of statutes,

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3 Section 112 (1) (b) of the Act directs the court to question the accused who pleads guilty to the offence. The aim is to ascertain if the accused is admitting all the allegations in the charge.

they are, when exercising a discretion, expected to uphold and promote the spirit ,objects and values enshrined in the Constitution because they are, like any other court, accountable to the constitution and the law.[4] Whenever discretion is to be exercised the advantages and disadvantages of the Act's application must be weighed against each other to ascertain the interests of justice in a given situation.

3. ADVANTAGES OF THE APPLICATION OF THE ACT

Those in favour of the application of section 112 (1) (a) of the Act often put forward the following advantage:

3.1 Speedy disposition of cases

Section 112 (1) (a) of the Act allows a conviction on the basis of the plea alone. When the accused pleads guilty he or she may immediately be convicted without any questioning and without the basis of the plea being established. This therefore provides a speedy disposition of cases. Time is saved.

3.2 Curbing expenses for accused and state

As the state does not have to prove guilt of the accused in these circumstances, the witnesses do not have to come to court to testify. Hence the state does not incur travelling and food costs for such witnesses. In these poor socio economic conditions the Act may be applauded for rescuing the state, but at what cost to the accused?

3.3 Clearing the court rolls of minor offences

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4 Section 165 (2) of the Constitution.

Our court rolls are crowded with so many cases. The provisions of the Act offer a way of disposing of the cases quickly. It is intended for minor offences wherein punishment does not merit imprisonment without the option of a fine or a fine in excess of R1 500-00. The easy and speedy finalisation of these cases enables the prosecution to clear the roll quickly and pay more attention to serious offences.

3.5 Aid in manpower

Offences like assault common and theft by shop lifting are committed frequently and if the courts were to be burdened with ascertaining the guilt of the accused beyond a reasonable doubt in all those cases, more courts and more manpower would be needed to deal thoroughly with the cases. There is no confidence that the state may be able to cope with a huge demand of additional manpower and resources.

It is evident from the aforegoing that the main significance of the provisions of the Act is easing the state's burden of proving the guilt beyond a reasonable doubt and aids in the speedy finalisation of the cases. Whilst the Act no doubt assists the state, there are some disadvantages.

4. DISADVANTAGES OF THE APPLICATION OF THE ACT.

The following are the disadvantages of the provisions of the Act;

4.1 The provisions infringe constitutional rights of an accused person.

The constitution is the Supreme law of the country and any conduct inconsistent with it is invalid. Whilst that is the case the following enshrined bill of rights are infringed by section 112 (1) (a) of the Act.

4.1.1 Right to be presumed innocent until proven guilty and right to have a case proved by the state beyond reasonable doubt.

The right to be presumed innocent protects the fundamental liberty and human dignity of any and every person accused by the state of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to a social stigma and ostracism from community as well as other social, psychological and economic harms .In the light of the gravity of these consequences the presumption of innocence is crucial. It ensures that until the state proves the guilt of the accused beyond a reasonable doubt, he or she is innocent. This is essential to a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind: it reflects our belief that individuals are decent law abiding members of the community until proven otherwise.[5]

The significance of the presumption of innocence is further highlighted in *S v Manamela* where it is stated that: '*the purpose of presumption of innocence is to minimise risk that innocent people may be convicted and imprisoned. It does so by imposing on a prosecution a burden of proving the essential elements of the offence charged beyond a reasonable doubt, thereby reducing to an acceptable level of risk of error in the courts overall assessment of evidence tendered in a criminal trial*'[6].

In *Scott Crossley v State* [7] the Supreme Court of Appeal emphasized that "*the two pillars of our criminal justice system are that the accused person is presumed innocent until proven guilty and that the onus lies on the state to prove the guilt of the accused beyond reasonable doubt. A corollary principle to that is that an accused person is not entitled to incriminate himself* ".

[5R] *v Oakes (*1986) DLR 4 at 200.

6 *S v Manamela* 2000 (3) SA (CC) at 16.

7 *Scott Crossley v S* (2007) SCA 127.

From the aforegoing, the provisions of section 112 (1) (a) of the Act are contrary to the constitutionally entrenched right to be presumed innocent until proven guilty. In accordance with the Act, the accused is convicted without the state proving the guilt beyond a reasonable doubt or at least laying the basis of the accused's guilt.

4.1.2 The right to remain silent

The right to remain silent is a right not to cooperate, and not to answer questions unless the individual chooses to do so in an unfettered exercise of free will. The basic idea is that the accused is not expected to assist the state in proving or disproving his guilt.[8] Section 112 (1) (a) of the Act does not make it peremptory for the presiding officer to alert the unrepresented accused of his or her right to remain silent: the accused may plead guilty not knowing that she is entitled to remain silent even at pleading stage, whereas if she knew of her right to remain silent she might have chosen to exercise that right and the court would be bound to enter a plea of not guilty in terms of section 109 of Act 51 of 1977.

4.1.3 The right to freedom and security of persons

Section 12 of the Constitution guarantees everyone a right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause and not to be detained without trial. De Waal correctly points out that section 12 guarantees both substantive and procedural protection of a person's physical freedom. The substantive component requires the state to have good reasons for depriving someone of their freedom and procedural component requires the deprivation to take place in accordance with fair procedures[9]. The right to freedom is one of the most fundamental rights

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8 C Theopulous"An analysis of American fifth amendment jurisprudence and its relevance to the South African right to silence"2006 SALJ 123 (part3)516.

9 J de Waal, I Currie and G Erasmus *Bill of Rights Handbook* 4th ed. (2001) page 249.

embodied in the Constitution. Human freedom is one of the founding provisions of the Constitution as section 1 of the constitution provides that the Republic of South Africa is one sovereign, democratic state founded on the following values: human dignity, the achievement of equality and advancement of human freedoms. It would appear that the provisions of the Act are intended for minor offences which merit punishment not in excess of a fine of R1 500-00. With poor socio economic conditions, many cannot afford to pay any fine. This is shown by the number of awaiting trial prisoners who linger in custody for a very long time irrespective of bail fixed at the amount of less than R1 000-00.

Judge Van Dijkhorst held that the cut off point in respect of the maximum fine that may be imposed under these provisions is too high.[10] In *S v Coetzee and others*[11] Justice O' Regan held that deprivation of liberty without established culpability is a breach of a rule that people who are not at fault should not be deprived of their freedom by the state. Without questioning the accused the presiding officer will in no way be able to establish whether the accused had a blameworthy state of mind at the time of the commission of the offence. It is doubtful whether there is justification in having a person deprived of freedom or punished without the court being satisfied that the person is indeed guilty.

The cardinal feature of the provisions of the Act is that it does not stipulate the maximum term of imprisonment which may be imposed as an alternative to the fine. The accused person who may fail to raise R1500-00 for a fine or lesser amount imposed may find himself lingering in jail for a considerable period of time without his guilt having been proved beyond a reasonable doubt. This may rightfully be argued as a serious deprivation of freedom without a just cause.

Besides infringing constitutional rights, the Act may be criticised on the basis of the following:

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10 S v Van Wyk 1992(2) SACR 325.

11 1997 (4) BCLR 437 (CC) at par. [166].

4.2. Conviction follows without the attainment of the truth

The criminal court's function is to find truth and to punish the guilt. The provisions of section 112 (1) (a) thwart the whole idea of truth finding. The accused is found guilty without the basis being laid for that guilt.

4.3. The provision of the Act offends theories of punishment

Snyman[12] states that punishment is a drastic step aimed at rehabilitating the offender, deterring the offender and other would be offenders, restoring the balance disturbed through the commission of the offence, and showing the community's disapproval of the behavior labeled as crime. Without certainty that the person is indeed guilty, there is no basis for punishment. Punishment must be fair and it is only fair if it is deserved.[13] How can the court then punish a person without satisfying itself that a person deserves punishment because of guilt?

4.4 Conviction carries stigma

The fact that section 112 (1) (a) appears to have been enacted for trivial offences does not take away the fact that there is a stigma attached to every conviction. A person with a conviction of theft carries a stigma of being a dishonest person. He may not get employment.

Irrespective of whether the accused was convicted in terms of section 112(1) (a) or not, if she appears in court again charged with another offence, she must be kept in custody unless he adduces evidence to the satisfaction of the court that the interest of justice permit her release or that there are exceptional

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12 CR Snyman *CRIMINAL LAW* 4th ed. (2004) at 247.
13 CRM Dlamini (note 1 above) at 21.

circumstances which in the interest of justice permit her release as per the requirements of section 60 (11) (a) and (b) of Act51 of 1977.

My view is that it is totally unfair to convict a person under section 112(1) (a) of the Act because that conviction will, if he faces other criminal charges, count against him and place a heavy burden on him not withstanding that such conviction did not follow upon the court's satisfaction that the accused is indeed guilty.

From the aforegoing, it can be stated that there are indeed many disadvantages of the application of the provisions of the Act .However fundamental rights are not absolute and the question then is whether the provisions of the Act constitute a constitutionally permissible infringement of the constitutional rights. This can be answered by an analysis of section 36 of the constitution.

5. Section 36 of the constitution.

Rights contained in the bill of rights may only be infringed in accordance with the criteria in section 36 of the constitution which provides that:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Therefore section 36 of the constitution provides an objective orientated manner of determining whether a right or purpose of the limitation is to dominate in the circumstances.

The law of general application which is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom may limit the right legitimately.

The provisions of the Act constitute a law of general application as these provisions are clear and straight forward and they can be applied to anyone equally in respect of offences falling under the provisions.

Even though the provisions constitute the law of general application the question still remains whether they are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

In testing justification of the infringement of the right, the court held in *S v Makwanyane* 1995 (6) BCLR 665 (CC) at 705 that *"the relevant consideration will include the nature of the right that is to be limited, its importance to an open and democratic society based on freedom and equality, the purpose for which the right is to be limited and the importance of such purpose to society"*

Therefore, to bring section 112 (1) (a) of the Act under the scrutiny of section 36 of the Constitution, the nature of the rights infringed by the section must be scrutinized as well as their importance in the society. This must be weighed against the objective or purpose of the Act, the importance of the purpose of

limitation as well as the nature and extent of limitation. All the rights infringed by section 112 (1) (a) of the Act appear to be aimed at guarding against or minimizing the risk of convicting the innocent person whereas the provisions of

the Act appear to be to be a convenient way of providing for speedy finalization of cases, clearing court rolls as well as all other advantages of section 112 (1) (a) mentioned under paragraph 3 *supra*.

I am of the view that section 112 (1) (a) of the Act is unconstitutional. Its purpose does not, in my view, constitute a justifiable and a reasonable infringement of the constitutional rights.

6. CONCLUSION

My submission is that the judicial officers must, when executing judicial functions, be conscious of their constitutional mandate which revolves around providing justice to all.

The courts are independent and accountable to the law and the constitution and they must execute their constitutional mandate without fear, favour and or prejudice. Courts must always promote the object and spirit of the constitution. One needs to be sensitive to those unrepresented and uneducated accused who may not be aware of their constitutional rights and whose guilty plea may be ill conceived. One should not be proud of the large number of finalised cases if the finalisation thereof compromises quality, justice and fairness. Justice is about fairness and without fairness there is no justice.

Even though the constitutionality of the provisions of the Act has not been tested and thus there is nothing preventing a judicial officer from utilizing the provisions of the Act, I echo the sentiments of the court in *S v Addaba* 1992 (2) SACR 325 (T) wherein the court held that it is desirable that one must utilize the provisions of section 112 (1) (b) of Act 51 of 1977 whenever one deals with unrepresented accused who plead guilty. Furthermore it must always be established whether the accused is pleading freely and voluntarily; otherwise the application of the provisions of section 112 (1) (a) of the Act in respect of the unrepresented and uneducated accused amounts, in my view, to an unjustifiable injustice.

THE DETERMINATION OF A CHILD'S COMPETENCY TO TESTIFY: IS IT AN EXERCISE IN FUTILITY? – SOME REMARKS

Nkhangweni E Denge [1]

Introduction

Presiding judicial officers often voice concerns over the process to determine questions around testimonial competency of a child witness. The following concerns are often raised:

- whether there is a need for an inquiry into the witness' testimonial competency;
- whether the inquiry should precede determinations of questions regarding an oath, affirmation or admonition, or vice versa; and
- the frustrations often experienced.

In dealing with these issues, this article will address aspects ranging from the duty of a presiding judicial officer; who is competent to testify; the real problems; the relevant stage of the inquiry in the proceedings; whether the inquiry should be conducted twice; and some suggestions on how to go about inquiring into testimonial competency of a child witness.

1 Presiding judicial officer obliged to determine the question

The provisions of s1 93 of the Criminal Procedure Act[2] place a duty on the presiding judicial officer to determine the question of testimonial competency.

Matters of testimonial competency are crucial in such a way that not even the parties can consent to the admission of the evidence of an incompetent witness.[3]

According to the South African Law Commission Report on the Protection of a Child Witness[4] 'sound justice cannot be based on the evidence of incompetent witnesses.' The provisions of s194 of the Criminal Procedure Act[5] are a clear example of this truth. They provide that persons deprived of the proper use of reason (for example, the mentally afflicted) shall not be competent to testify, whilst so afflicted or disabled.

It is clear from the aforegoing that the determination of testimonial competency is a crucial function.

1(a) Who is competent to testify?

The general rule regarding both criminal and civil proceedings is that every person is presumed to be competent to give evidence.[6]

Children are included in the phrase 'every person' and therefore, they are generally presumed to be competent to give evidence. According to *Schwikkard and Van der Merwe*,[7] there is no specific age limit at common-law: The authors indicate that very young children may testify, as long as

(a) they appreciate the duty of speaking the truth; (b) have sufficient intelligence; and (c) communicate effectively.

1(b) Determination of testimonial competency – an exception rather than a norm.

It is clear from 1(a) above that testimonial competency inquiries are not supposed to be conducted indiscriminately.

Some judicial officers argue that the fact that a child gave his or her statement to the police is on its own an indication that the child is a competent witness.

The argument does not seem to hold water. The court is duty-bound to inquire into the question. In appropriate cases, the court will conduct the said inquiry in the interest of justice.

2 Unpacking the real issues

For those who have inquired into testimonial competencies of children, for example those aged, 12, 13, 14, 15, 16 and 17, you may have realized that it was not worth the exercise. My opinion on this seems to be backed by judgments of some appeal courts.

In the case of *S v Mashava*[8] the appellant was convicted in the regional court on a charge of culpable homicide. He was convicted on the evidence of a young girl aged twelve (12). After the young girl had given her age to the court, the court proceeded as follows:

> "You are warned to tell this court what you know and not what you have been told by others to come and tell this court."

It was contended on behalf of the appellant (on appeal) that the evidence of the witness ought not to have been admitted, as the requirements of SS162 and 164 of the Criminal Procedure Act[9] (i.e. regarding the oath and admonition, respectively) had not been complied with.

The court, on appeal, held in favour of the appellant. In its judgment, the appeal court dealt with questions of oath, admonition and affirmation (S163 of the same Act). The question of testimonial competency did not arise.

In *S v Pienaar en andere*[10] the court, (on review) dealt with the evidence of children aged 13 and 15.

The following warning was directed to P, the 13 year - old: 11

> *" Nou kyk jy word geroep as 'n getuie in hierdie saak. Jy mag vir my net die waarheid vertel. Jy mag nie vir my leuens vertel nie. Verstaan jy?"*

The following warning was directed to M, the 15 year - old:

> '' *M, jy word geroep as 'n getuie in hierdie saak. Jy mag vir my slegs die waarheid vertel. Jy mag nie vir my leuens vertel nie. Verstaan jy?"*

The court's approach[12] was that the evidence of the two children should have been given under oath. It was further held that the warning (purported warning in respect of S164), was in any event deficient.

Also in this matter, the question of testimonial competency never arose.

With the very young, the court must satisfy itself that a child witness is competent to give evidence.

The difficulty in cases of the very young seemed to have always centered around age or developmental - appropriateness, or otherwise of questions directed to the (young) witness, with a view to determining his or her testimonial competency.
The case of *S v T* [13] is a typical example:

The following words were directed to a 5 year old child witness: 14

> " **Hof:** *J, Jy moenie bang wees nie. Jy moet net praat wat jy weet wat gedoen is en wat jy gesien het. Kan jy verstaan, J. Kan jy*

verstaan jy moet net praat wat die waarheid is wat iemand gedoen het en wat gesê word. (The court then said): *Ek kry die indruk dat sy nie verstaan wat die aard van haar getuienis is nie.*

Staatsaanklaer: *Op hierdie stadium deel ek daardie indruk.*

Ons kan maar sien wat sy antwoord, maar ek dink sy het nie 'n be grip wat bedoel word deur die waarheid of enigiets van die aard, sy is te jonk. Is dit nie u indruk nie?

Staatsaanklaer:*Dit is die indruk wat ek ook kry.*

Hof: *Ja, ons kan maar net ons bes doen..."*

The court, per Botha JA, held[15] that it was clear that the learned Judge was not convinced that the complainant could differentiate between truth and untruth. It was further held that the complainant was thus an incompetent witness.

In *S v V*[16] the accused was charged with indecent assault in the regional court. The following questions were directed to a girl aged 4 years and nine (9) months:

Court: *"Are you able to differentiate between the truth and lie?*

Mediator: *She said no.*

Court: *Do you know what it is to tell a lie, put it that way.*

Mediator: *She said no.*

Court: *Do you know what is ---what it is to tell the truth?*

Mediator: *She nods her head affirmatively to say yes.*

Court: *Are you going to tell the truth to this court?*

Mediator: *She said she does not know? ...Ja."*

Based on the above, the appeal court found that the complainant was an incompetent witness. The conviction was set aside.

In my view, the questions which were directed to the child witness in the aforementioned two cases were highly pitched. The age-inappropriateness of the questions might have determined the outcome.

3 Testimonial competency inquiry must precede other inquiries

Determination of testimonial competency must of necessity precede the oath, affirmation or admonition inquiries. The knowledge or appreciation of the truth is the prerequisite for these other questions.[17]

It follows that the court cannot deal with the oath, affirmation or admonition questions before inquiring into the questions of testimonial competency or before it forms a mere opinion that the witness is competent to give evidence.

4 How many times must the question of testimonial competency be dealt with before a witness is allowed to testify?

Some judicial officers regard it as trite law that the question of testimonial competency must be determined twice.

this. This view is quite illogical! You are dealing with one witness. How then can you, after determining that the witness is competent or incompetent to testify, again ask the same question as a prelude to other questions?

The legislature could never have intended such an interpretation.

I am inclined to believe that the view taken by these judicial officers was informed by the misinterpretations of either the relevant provisions of the Criminal Procedure Act [20] or the decisions of *S v N* and *S v Malinga.*[21]

In *S v N*, the regional court magistrate, in dealing with a ten (10) years old complainant, purported to act in terms of S162 of the Criminal Procedure Act. The oath was administered.

On appeal, the court per *Van Reenen J* (with King J concurring), found on the facts[22] that the magistrate erred when he came to the conclusion that the complainant understood the nature and import of the oath.

In view of the fact that the conviction of the accused was based on the evidence of the complainant, the appeal succeeded. The conviction and sentence were set aside.

In its discussion of the provisions of SS162, 163 and 164 the court[23] said the following:

‘‘ *If ~~after~~ such an inquiry, the court finds that the witness does not possess the required capacity, (i.e. the capacity to appreciate and accept the religious sanction of the oath),[24] it should establish whether he or she understands what it means to speak the truth as in the absence of the capacity to distinguish between the truth and*

falsity, '... and to recognize the danger and wickedness of lying ...'

Even before I read the judgments in the cases of *S v N*[18] *and S v Malinga*[19] I just did not understand how one could hold a view such as

> *(Hoffmann and Zeffert [op cit at 376 in fine]), he or she is not a competent witness (see S v L) ... The capacity to distinguish between the truth and falsity is furthermore a prerequisite for the making of an affirmation or an admonition in terms of ss 1 63and 164 of the Act."*

The above quoted passage must be seen in its proper context. The regional magistrate inquired into the oath aspects and nothing more. Therefore, if the Magistrate had became aware (which he did not) of the fact that the oath taken was invalid, it would have been incumbent on him (before he either embarked on an affirmation inquiry or decided on admonishing the child witness) to inquire into the testimonial competency of that child.

In the case of *Malinga,* the magistrate did not invoke the oath inquiry, nor did he make a finding[25] that the witness, a nine (9) year old girl, did not understand the nature and import of the oath. The magistrate purported to act in terms of s164 ("admonition").

At page 617, paragraphs d – e, the court, per *Moleko AJ* (*with Hugo J* and *Combrink J concurring*), held that it was clear from the provisions of s164 (1) that a finding must be made that a witness does not understand the nature and import of an oath. The court went further:

> "*If after such an inquiry (if any) [26] the court finds that the witness does not have the capacity to understand the nature and import of an oath, it should establish whether he or she knows what it means to speak the truth ...*"

The magistrate inquired (*in casu*) whether the child could tell between the truth and falsity.[27] I quote the relevant passage hereunder:

"*Do u know the difference between truth, that which really happened and lies, made up stories?* "

Seeing that the court *a quo* dealt with testimonial competency, I hold the view that the appeal court (*in casu*), in its discussion at 617 d – e dealt with the matter in general terms, setting out the course that a court should take if the child is found not to understand the nature and import of the oath. Furthermore, I hold the view that the general discussion is (was) premised on the assumptions that an oath was administered because it was taken for granted that the child was competent to testify so that when it was found (eventually) that the oath was defective, the court would advisedly first establish testimonial competency, before it dealt with affirmation or admonition questions.

In *S v N* [28] the finding of the court at page 229 was case - specific. Also with regard to this case (*Malinga)*, I hold the same view, that when the court *a quo* administered the oath, it proceeded on the premise that the child was competent to testify (although no testimonial competency inquiry was ever conducted). I further submit that having found that the magistrate erred when he came to the conclusion that the complaint understood the nature and import of the oath, the appeal court decided that in the normal course of events, the magistrate should have inquired about testimonial competency before he dealt with the affirmation or admonition questions.

The *S v N and S v Malinga* decisions do not for a moment, suggest that the question of testimonial competency must be established twice.

5 Some suggestions on how to go about inquiring whether the very young understand the difference between truth and falsity.

A document on a practical method of establishing competency in very young children is incorporated below *(Courtesy of Justice College).*

The sketches and the relevant questions come in handy.

A trial court which employs this approach would not waste time in thinking up the questions that must be directed at a child witness. This is but a suggestion.

Any court may invent its own questions, as long as such questions are age or developmentally-appropriate.

The words of Uijs J in *S v Pienaar en andere*[29] (although they were said during discussions of the oath question) are very enlightening. I quote:

> *'Daar kan van 'n jeugdige getuie, wat nie die aard van die eed verstaan nie, skaars verwag geword om die formele woorde wat in die wetgewing gebesig is te kan verstaan nie. Uit die aard van die saak sal só 'n getuie dikwels in baie eenvoudiger terme Hy mag wel eenvoudiger taal gebesig. Maar hy 'moet' die getuie maan om die waarheid net die waarheid en niks anders as die waarheid te getuig nie, al besig hy watter woorde ookal om dit aan die getuie oor te dra."*
>
> *espreek moet word*

In the above-quoted passage the Honorable Judge Uijs emphasized that the court in conveying the provisions of s162 of the Criminal Procedure Act[30] to a child, is supposed to use simple language.

The pages with sketches following have kindly been made available by Dr Renee Potgieter. This method is based on research done by a professor in law, Thomas Lyon, who found that:

(b) five years of age, even abused and neglected children with serious delays in verbal ability have good understanding of the meaning and morality of truth-telling and lying. This understanding is apparent, however, only if sufficiently sensitive procedures are used; specifically, if children are asked to identify the truth and lies as such, they are most likely to appear competent. Most of the children we tested would not have appeared competent had they been asked only to define, or to explain the difference between, the truth and lies.

(Lyon, TD 1996 **Assessing Children's Competence to take Oath: Research and recommendations; APSAC Advisor,** V.9, n.1. (1 – 7).

It is essential that the following procedure be followed whenever any attempt is made to utilize the sketches.

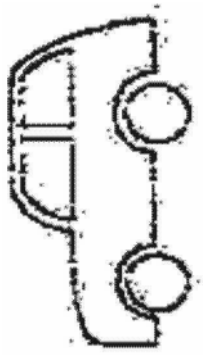
1. ***First picture:***
   ask what *objects* are shown at the top of the page
   ask what the child on the *left-hand* side says it is
   ask what the child on the *right-hand* side says it is
   ask which of the two is ***correct***

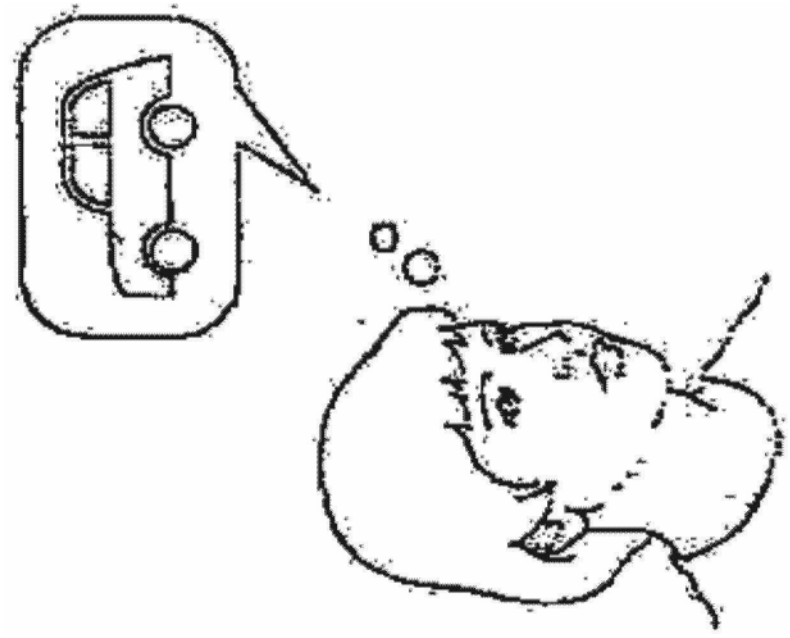
2. ***Second picture*****:** repeat the above but now ask who is ***wrong***

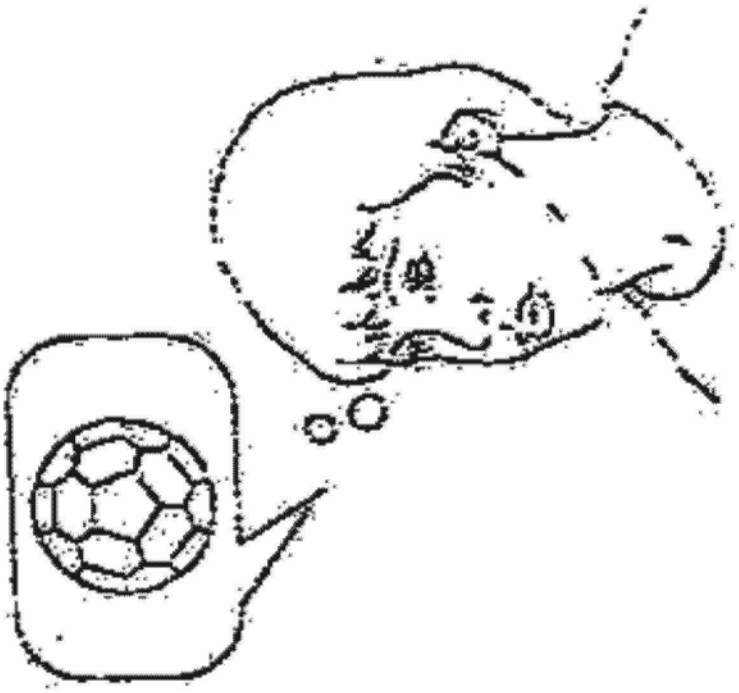
3. ***Third picture*****:** repeat the above but now ask who is ***telling the truth***

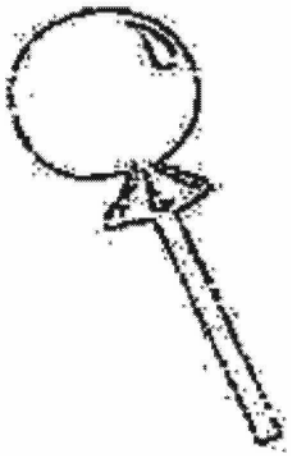
4. ***Fourth picture*:** repeat the above but now ask who is ***lying***

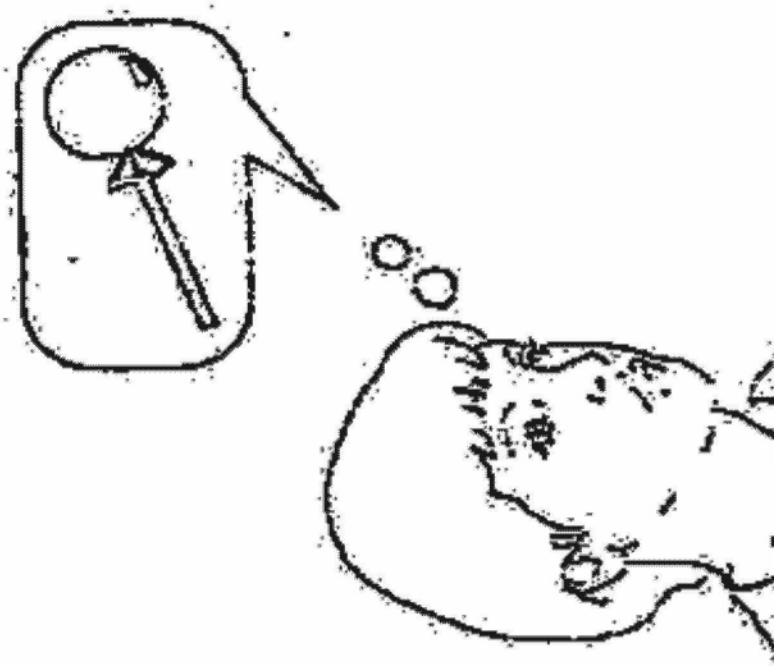
5. ***Additional picture:*** utilize additional picture, if necessary and base them on the pictures discussed and shown here. Always repeat the first three questions and frame the last question with reference to right or wrong, truth or lie as circumstances might dictate. It can be used to verify information on one of the first to fourth pictures.

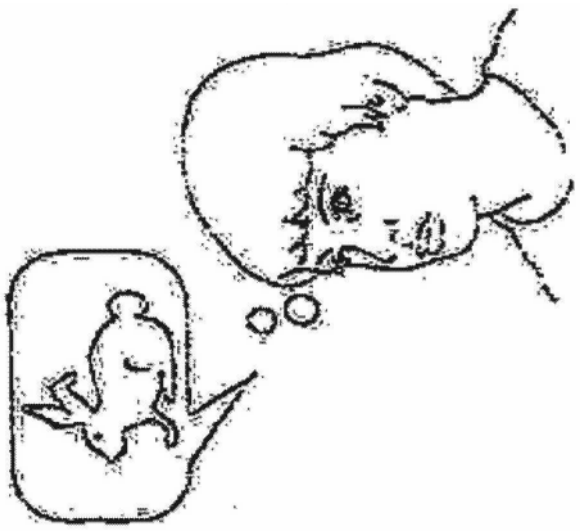


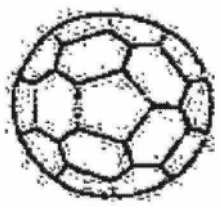


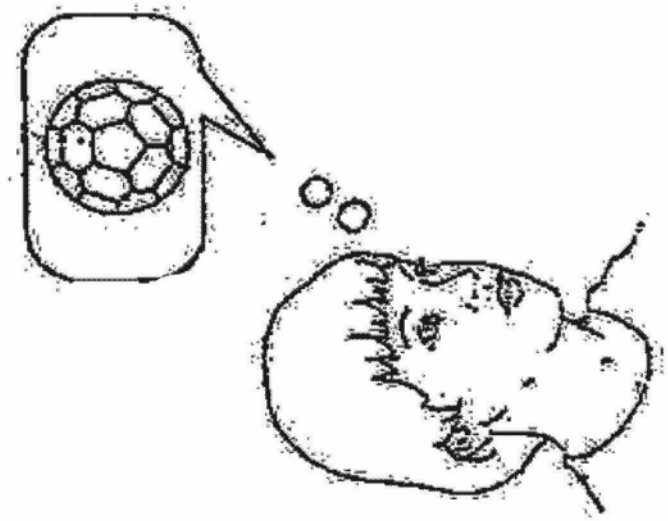


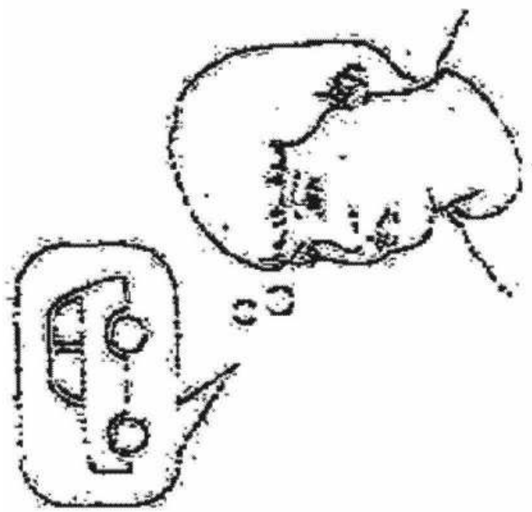


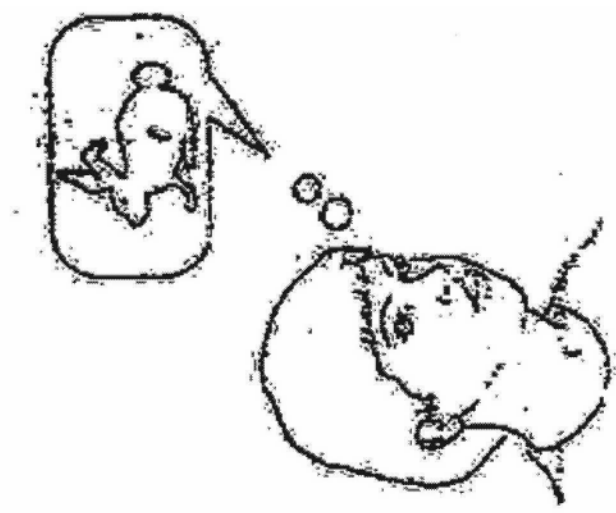












Conclusion

The question of testimonial competency is undoubtedly part of the fair trial package.

In a criminal court setting, the fact that the child had made a statement to the police is not decisive.

It is incumbent upon the presiding judicial officer in appropriate cases (including where a very young child is a witness), to inquire into testimonial competency.

The guiding principle must always be age or developmentally-appropriate questions.

1. Regional Magistrate, Gauteng
2. Act No. 51 of 1977, as amended
3. See *S v Thurston* 1968 (3) SA 284 (A) at 291, *Khanyapa* 1979 (1) SA 824 (A)
4. Project 71, February 1991, page 16, paragraph 2.37
5. (ibid)
6. See s1 92 r/w s206 of The Criminal Procedure Act (ibid); s8 r/w S42 of the Civil Proceedings Evidence Act No. 25 of 1965
7. Principles of Evidence, second edition, page 393, paragraph 22 4
8. 1994 (1) SACR 224 (T)
9. (ibid)
10. 2001 (1) SACR 391 (KPA)
11. At page 393
12. Headnote, pages 391 & 392
13. 1973 (3) SA 794 (A.D)
14. See page 798 A – B of the judgment
15. At 796 C
16. 1998 (2) SACR 651 CPD at 653 e – g
17.
    a. S162 CPA: The oath: "*I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God.*"
    b. S163 CPA: Affirmation: "*I solemnly affirm that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth*."

18. 1996 (2) SACR 225 (C)
19. 2002 (1) SACR 615 (NPD)
20. (ibid)
21. (ibid, notes 18 and 19)
22. At 230(d)
23. At 229
24. My emphasis
25. See S v B, 2003 (1) SACR (SCA), at page 56: The headnote: The court held that the provisions of S164 did not expressly require that an investigation be held and that an investigation was not required in all circumstances in order to make a finding that a person did not understand the nature and import of the oath or affirmation due to ignorance arising from youth, defective education or other cause.
26. My emphasis
27. Supra, At 396 e – f
28. Supra
29. At 616-h
30. Supra

THE APPLICATION OF THE DOCTRINE OF STRICT LIABILITY IN THE CRIMINAL JUSTICE SYSTEMS OF CANADA AND ENGLAND: A LESSON FOR SOUTH AFRICA?

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Additional Magistrate: Pietermaritzburg

1. INTRODUCTION

The doctrine of strict liability, which entails liability without fault, is a controversial issue within the South African criminal justice system. Strict liability clashes with the principle that there can be no liability without fault as well as the right to a fair trial. The popular view in South Africa is that the doctrine of strict liability will, if its constitutionality is challenged, be declared unconstitutional. Until the Constitutional Court pronounces on the unconstitutionality of strict liability, South African courts can still convict a blameless person. In magistrates' courts, strict liability is mostly found in statutory offences lie traffic offences and regulatory offences.

However, it is significant to note that legal systems like Canada and England still recognise the instances wherein a blameless person may be convicted as the doctrine of strict liability is recognised within their criminal justice systems.

The question therefore, is how these countries justify the conviction of a blameless person whilst they still adhere to a principle that there can be no liability without fault. Moreover, these countries recognise the right of the accused to be presumed innocent until proven guilty and they also adhere to a principle that the onus is on the prosecution to prove the guilt of the accused beyond a reasonable doubt.

It thus appears essential to scrutinise the application of strict liability in England and Canada so as to establish the justification of the doctrine of strict liability in these countries, counted amongst those with civilised legal systems. This may then inform our courts as to how best we can deal with the dilemma posed by the doctrine of strict liability.

The following reveals the manner in which the doctrine of strict liability is presently applied in South Africa. This will be contrasted with the position in England and Canada so that it can be ascertained how the courts may interpret strict liability imposing statutes in such a manner that a right to a fair trial is not negated.

Application of strict liability in South African courts

In *S v Stephano*[14], the appellant who was the sole director of the company placed in liquidation, had been convicted for contravening the Companies Act, 46 of 1926 which made provision for the director of the company placed in liquidation to attend the first and second creditor's meetings. Failure to attend constituted a criminal offence. Despite raising a defence that he was not aware of the dates on which these meetings of creditors were to be held, the magistrate convicted him, holding that he was negligent in not ascertaining the dates. On appeal it was held that *mens rea* was not an element of the offence as the statute imposed an absolute duty on the director to attend the meeting, and a lack of personal, individual notice to the director is no defence.

This judgment did not provide a detailed legal and convincing basis for holding that *mens rea* was not a requirement. It also failed to indicate why the conviction by the magistrate based on negligence was wrong.

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[14] 1977(1) SA 770 (CPD) at 771

This judgment appears to reveal the position in South African courts prior to

1994, where the courts' duty was to interpret and give effect to the will of the legislature and not to ascertain the constitutionality of the legislation.

By contrast, in *S v Qumbela*[15] the accused was charged with contravening the Suppression of Communism Act, 44 of 1950; it being alleged that he entered factory premises despite the prohibition placed on him from entering factory premises. His defence was that he was unaware that the premises were factory premises. Without detailed reasons, the Appellate Division concluded that *mens rea* in the form of *culpa* was a requirement.

In *S v Ismail* [16] it was held that strict liability is applicable if the '*intention of the legislature is to ensure public health, the means adopted by the law giver is to make a person conducting a business responsible for observing certain stringent requirements in regard thereto and the object of the legislature would be frustrated if he could shrug his shoulders and say he was away on business and did not know what was going on'.*

This case highlights the instances where the statute does not specifically exclude *mens rea* as an element of the offence, but where the courts hold that *mens rea* is not a requirement.

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15 1967(4)SA (AD) 567

16 1972 (2)SA 606 (NPD) at 610

However, in *Amalgamated Beverage Industries Natal* [17] the Appellate Division

held that if the legislature has not specifically dispensed with the requirement of *mens rea,* the court must interpret legislation as if it does impose *mens rea.*

From the aforegoing it appears that there is still uncertainty in South African law as to how the doctrine of strict liability is to be applied; and this on top of the cloud surrounding the issue of the constitutional implications of the doctrine in South African criminal law. This is in contrast with the position in England and Canada where they have clear guidelines regarding the application of strict liability. The constitutionality of strict liability has also been tested in these countries. It is thus important to evaluate the application of strict liability in these countries that have Constitutions more or less the same as that of South Africa and who are signatories to international treaties together with South Africa like for example, the European Convention on Human Rights.

2. STRICT LIABILITY IN ENGLISH LAW

In English law, crimes that do not require intention, recklessness or even negligence as one or more elements in the *actus* are known as offences of strict liability.[18] *Edmund Davies'* definition of what strict liability entails in English law appears in *Whitehouse v Gammot,* which is that '*An offence is regarded and properly regarded as one of strict liability if no mens rea needs to be proved as to the single element in the actus ectus.*[19]

Therefore, in England and South Africa strict liability is defined in more or less the same terms as in entails convicting a person who has committed a prohibited act without having due regard to his mental state as at the time of the commission of the offence.

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17 1994 (3) SA 170 (NPD) at 187
18 Smith and Hogan *Criminal Law* 10th ed. (2002) 115
19 *Whitehouse v Gay News Ltd.* 1979 AC 617 at 656.

This then necessitates a discussion as to how the courts in England reconcile the doctrine of strict liability with the principle of no liability without fault which applies in England.

English courts have a vital role to play in pioneering the circumstances justifying the imposition of strict liability which is almost invariably found in statutes. With the exception of the offence of contempt of court, all common law offences require *mens rea* as an element of the offence. Even if the statute excludes *mens rea* the courts in England may or may not ascribe the common law doctrine of *mens rea* as a necessary element of the statutory offence in question.

In *Hobbs v Winchester*[20] a butcher was unaware that he was selling unsound meat and the statute prohibited that .The butcher was found guilty of contravening the statute irrespective of his contention that he was unaware that the meat he was selling was unsound. The court emphasised that the object of the act was to protect human life - of a buyer. It was further stated that the '*the peril to the butcher from innocently selling unsound meat is deemed by the legislature to be much less than the peril to the public which would follow from the necessity of proving mens rea in each case'.*

This judgment correctly points out that strict liability is not randomly applied in England. The interest of the public is always weighed against the interest of the accused.

Kidd[21] summarises the factors prompting the courts in England to impose strict liability as follows:

- if the offence is a quasi crime having no stigma attached to criminal offences
- if the statute relates to a particular trade or profession which is not for the public in general

20 1910 2 KB 471
21 M Kidd page 26

- if the contravention of the statute imposes a danger to the members of the society.

It is evident therefore, that strict liability is not randomly applied in England. The interest of the public is always a factor to be considered.

3. STRICT LIABILITY IN CANADIAN LAW

In Canada, strict liability is imposed where '*the Crown is not required to prove mens rea or negligence and if conviction may follow merely upon proof beyond a reasonable doubt of a proscribed act and the defence of due diligence must be open to the accused.*[22]

It appears that once the prosecution proves that the accused has committed a prohibited act, the Canadian legal system then places a burden on the accused to prove that even though the prohibited act took place, there was due diligence on his part and he thus cannot be held liable. This clashes with the presumption of innocence because once the prosecution proves that the accused committed the prohibited act, there is no more presumption of innocence as the onus shifts to the accused to prove due diligence, failing which he is found guilty. Strict liability, therefore, does not only compete with some rights enshrined in the Canadian Charter of Rights, for example, the presumption of innocence, but it also clashes with the principle that there can be no liability without fault.

22 *R v Wholesale Travel Group Inc.* 84 DLR (4) at 161

The moot question then is how do Canadian courts apply and justify strict liability if it clashes with the rights entrenched in the Charter of Rights and also with the principle of no liability without fault?

Distinction of regulatory offences from other criminal offences is important in the Canadian criminal law system because it determines the situations wherein the requirement of fault may be dispensed with.

It was held in *R v Wholesale Travel Group Ltd.* [23] that acts or actions are criminal when they constitute conduct that is in itself so abhorrent to the basic values of human society that it ought to be prohibited completely. Murder, assault, fraud, robbery and theft are universally recognised as crimes. At the same time the conduct is prohibited not because it is inherently wrongful, but because unregulated activity would result in dangerous conditions being imposed on the members of society, especially those that are particularly vulnerable'

In *R v Pierce Fishers Ltd.* [24] it was maintained that regulatory statutes enacted for the regulation of individual conduct in the interest of health, convenience, safety and general welfare of the public are not subject to the common law presumption of *mens rea* as an essential element of the offence.

Regulatory offences are thus directed at the outcome of the conduct and not primarily at the conduct.

R v Wholesale Travel Group Ltd[25] illustrates the balanced approach undertaken by the Canadian courts in dealing with controversy surrounding the conflicting ideas between strict liability and the requirement of fault.

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23 See fn 9 above
24 12 DLR (3rd) 597
25 See fn 9 above

In that case the accused was charged with several counts of false or misleading advertising which was prohibited by the provisions of section 36 and 37 of the Competition Act 1982. It was common cause that the prosecution need not prove *mens rea* for that contravention. The argument by the accused was that the Act in question contravened section 7 of the Canadian Charter of Rights prohibiting deprivation of liberty and security in a manner inconsistent with principles of fundamental justice. This was based on the fact that if the accused had to be convicted he was going to be given a custodial sentence in accordance with the penal clause of the relevant legislation. It was therefore argued that deprivation of liberty without adhering to the fundamental principle requiring proof of *mens rea* by the prosecution amounted to a contravention of section 7 of the Canadian Charter of Rights.

The court's stance on unwillingness to convict without due regard to the accused's mental state is illustrated by its scrutiny of the appropriateness of the provision in the statute concerned that may limit the defence of due diligence as it appears in the statute. The court held that the requirement that the accused must have retracted the misleading advertisement shortly after publication thereof before he can succeed in raising the defence of due diligence contravened section 7 of the Canadian Charter of Rights. The court held that the accused may have been diligent but may have not retracted the advert timeously owing to lack of knowledge that the advertisement was misleading. Holding the accused who was diligent, accountable in those circumstances amount to contravening section 7 of the Charter as conviction will follow without due regard to whether the accused was negligent or not.

Therefore, though strict liability is recognised in Canada, courts are not convicting without ascertaining whether the accused had, at the time of committing a prohibited act, a blameworthy state of mind. However, the onus

shifts to the accused to prove that he is not blameworthy for the prohibited occurrence.

4. CONCLUSION

Literature reveals that strict liability is still applicable in South Africa even though there is no certainty on the circumstances under which it may be applied. There is still a question as to whether strict liability is constitutional in this era in which the courts are guardians of the rights contained in the Bill of Rights and not just the executors of the legislatures will.

However, those countries that also respect the fundamental principle of criminal justice that there can be no liability without fault, and also have constitution enshrining the rights infringed by strict liability, for example, the right to be presumed innocent and a right to prove the guilt of the accused beyond a reasonable doubt, still apply strict liability as there is a need to control behavior which can be harmful to the public and such control may be impossible if the prosecution were to be burdened with the duty of proving *mens rea*.

What can be an example to South Africa is that strict liability is not randomly applied in England and in Canada. These countries are fully aware of the harshness of strict liability and they thus try to minimise the harshness of the doctrine of strict liability in certain ways.

In Canada if strict liability is imposed by the statute, the same statute must make a provision for a defence of due diligence to be available to the accused. Even

though this places the onus on the accused to prove due diligence in order to escape liability for prohibited conduct, it ensures that the court does not convict without having any due regard to whether the accused is blameworthy or not.

The English legal system is cautious about the application of strict liability. It is applied in offences that are quasi crimes having no stigma attached to criminal offences. It is also imposed if the contravention of the statute in question poses a threat to the public.

The fact that strict liability is applied in some countries viewed as having civilised legal systems appears to indicate that there is of course some advantage attached to the application of strict liability in instances where the aim is to ensure the safety of the public and where the requirement of *mens rea* may make it easier for people to evade liability in dangerous situations.

In my view, Canadian and English courts' dealing with the controversy surrounding strict liability in criminal law is commendable .The right to a fair trial and a principle of no liability without fault is balanced against the interest of the members of the public in a given situation: thus serving both the interest of the accused and the community.. This may inform the South African legal system as to how best it can deal with the controversy surrounding the application of strict liability.