

Table of Contents

Articles		
Chuks Okpaluba	Arrest without a warrant: When is an offence committed in the presence of an arresting officer?	257
Jamil Ddamulira Mujuzi	Spent convictions in Mauritius: Analysing the Police and Criminal Evidence Bill, 2013	284
F Cassim	Regulating hate speech and freedom of expression on the Internet: Promoting tolerance and diversity	303
Comment		
Shelley Walker	Determining the criminal capacity of children aged 10 to 14 years: A comment in light of <i>S v TS</i> 2015 (1) SACR 489 (WCC)	337
GP Stevens	The concept of premeditation in South African criminal law: <i>Quo vadis?</i>	347
Shannon Hoctor	The (surprising) roots of the test for criminal liability for interrupted attempt in South African law	363
Recent cases		
Louise Jordaan	General principles and specific offences	373
Pieter du Toit	Criminal procedure	387
Lirieka van der Walt	Law of evidence	402
Annette van der Merwe	Sentencing	415
Max du Plessis	International criminal law	429
Julia Sloth-Nielsen	Recent developments in child justice	437

Spent convictions in Mauritius: Analysing the Police and Criminal Evidence Bill, 2013

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ABSTRACT

For many years courts in Mauritius have considered a conviction that was at least 10 years old to be spent for the purpose of sentencing. However, in 2002 the Mauritian Supreme Court held that there was no concept of spent convictions in Mauritian law and that disregarding convictions of 10 years or over old was a mere practice. The Supreme Court has not developed clear guidelines for considering or disregarding such convictions for the purpose of sentencing. In 2013 a Bill was gazetted, *inter alia*, to introduce the concept of spent convictions in Mauritius. This article highlights the Mauritian case law on spent convictions and the relevant clause of the Bill. The author relies on legislation from, *inter alia*, South Africa, Australia, Seychelles and Jamaica to suggest how the Mauritian law on spent convictions could be improved.

1 Introduction

In many countries a person with a criminal record faces various challenges, such as, the difficulty of finding employment.¹ This could be so because the prospective employer does not employ people with criminal records, either as a matter of policy or because the law does not allow him to employ them. The issue of whether or not a person has a previous conviction is one of the factors that courts in many African countries consider in determining an appropriate sentence. Having a previous conviction will normally be emphasised by the prosecutor as an aggravating factor when asking the court to impose a heavy sentence on the offender. The situation is no different in

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¹ See, for example, DA Mukamal and PN Samuels 'Statutory limitations on civil rights of people with criminal records' (2003) 30 *Fordham Urban LJ* 1501-1518 (for the situation in the United States of America); EL Pijoan 'Legal protection against criminal background checks in Europe' (2014) 16 *Punish & Soci'y* 50-73 (for some examples of European countries); H Lam and M Harcourt 'The use of criminal record in employment decisions: The rights of ex-offenders, employers and the public' (2003) 47 *J Bus Ethics* 237-252 (for countries such as Australia and Canada) and T Thomas 'Employment screening and the Criminal Records Bureau' (2002) 31 *IJL* 55-70 (for the situation in the United Kingdom).

Mauritius. In Mauritius, it is difficult for people with criminal records to find employment.² This explains why in 2012 the Certificate of Character Act³ was passed to provide, *inter alia*, for the circumstances in which a person's criminal record as a result of a minor offence shall be disregarded and he be considered as one who has never been convicted of the offence.⁴ A previous conviction is one of the factors that courts in Mauritius take into consideration in determining the appropriate sentence to be imposed on the offender. This has been the case for many decades.⁵ Recently the Supreme Court of Mauritius held that '[t]he previous conviction of an accused is only one of the circumstances to be taken into account and may justify a higher sentence in certain cases.'⁶ The court also held in another case that 'to impose a heavier or lighter sentence should not depend principally on whether the convicted person has a bad or clean record but on the merits of the case.'⁷ Section 85 of the Mauritian Criminal Procedure Act (cap 169 of 1853) provides:

'(1) A previous conviction or attainder for the same offence in law and in fact with that charged in an information or for an offence involving the same offence in law and in fact with the one charged in the information, may be pleaded in bar of such information. (2) The rules relating to the pleading of a former acquittal shall, so far as they are applicable, be applied to the pleading of a former conviction or attainder.'

² Mauritius Fifth National Assembly. Parliamentary Debates (Hansard). Second Session. Debate 14 of 2012, 17 July 2012, 130.

³ The Certificate of Character Act 18 of 2012.

⁴ Section 5 of the Certificate of Character Act provides: '(1) (a) The Director of Public Prosecutions or the delegated person, where he is not the Commissioner of Police, shall refer every application to the Commissioner of Police for enquiry and report. (b) Where the delegated person is the Commissioner of Police, he shall cause an enquiry to be conducted into every application. (2) Where the applicant has in Mauritius — (a) never been convicted of any crime or misdemeanour; (b) following a conviction for a crime or misdemeanour, other than an offence specified in the Second Schedule, been given only — (i) an absolute discharge; or (ii) a conditional discharge, and has complied with the terms and conditions of the discharge; or (c) more than 5 years before making the application, been convicted of a crime or misdemeanour, other than an offence specified in the Second Schedule, and been — (i) given only a fine of up to 5,000 rupees; or (ii) made the subject of a probation order only, and has complied with the terms and conditions of the order; or (d) been granted a free pardon in respect of a crime or misdemeanour pursuant to section 75 of the Constitution, the Director of Public Prosecutions shall issue a certificate in the form set out in Part A or B of the Third Schedule, specifying that the person in whose name the application has been made has never been convicted of a crime or misdemeanour in Mauritius.'

⁵ See, for example, *Carrim v The Queen* 1952 MR 39; *S C Veeren v The Queen* 1987 MR 195, 1987 SCJ 400.

⁶ *Maulaboksh M S v The State* 2014 SCJ 386 at 6.

⁷ *Marjolin C S v The State* 2014 SCJ 192 at 3.

Section 211 of the Criminal Procedure Act provides for the procedure that has to be followed in proving a previous conviction. The question that has been grappled with in many jurisdictions is whether a conviction that happened many years earlier should still be considered for the purposes of sentencing. Countries have adopted different approaches to the issue of the relevance of previous convictions at sentencing. In some countries there is legislation dealing with the issue of spent convictions.⁸ In other countries courts have invoked their inherent jurisdiction to consider some convictions as spent if doing so would be in the interest of justice. As will be shown later, this has been the position in Mauritius for many years. There are countries, for example, Malawi⁹ and Uganda,¹⁰ where the issue of spent convictions is addressed by neither legislation nor case law. Mauritian case law regarding spent convictions will now be discussed.

2 Spent convictions in Mauritius – case law

Mauritian courts have for many years considered a conviction that was at least 10 years old to be spent for purposes of sentencing. However, in 2002 the Supreme Court had to remind sentencing officers that in Mauritius there was no law regarding spent convictions. In *Tacoorsing v The State*¹¹ the Supreme Court held:

‘The appellant had one conviction for destroying an enclosure in 1986 and for which he was fined Rs 400. Having regard to the nature of this previous conviction and its date, it could not have significant weight in the balance for sentencing purposes in the present case. The learned Magistrate was therefore not wrong to discard that previous conviction, although his reference to the previous conviction as being “spent” is erroneous since there is no concept of “spent convictions” applicable by law in Mauritius, contrary to what is the case in some other countries. There is of course a practice to discard previous convictions which are 10 years old and over but this is a mere practice and will not be applied where it is in the interests of justice that the conviction be considered.’¹²

In the above decision, the court held that there are circumstances in which a previous conviction may be considered as spent. However, the court emphasised the fact that disregarding 10-year-old and over

⁸ Some of this legislation will be mentioned later in this article.

⁹ In Malawi, the Law Commission is in the process of drafting legislation on spent convictions. See Malawi Law Commission, Annual Report (2007) 21, available at http://www.lawcom.mu/docs/Annual_Report_2007.pdf, accessed on 12 November 2015.

¹⁰ See the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, available at <http://www.jlos.go.ug/jlos/index.php/document-centre/sentencing-guidelines/264-sentencing-guidelines/file>, accessed on 12 November 2015.

¹¹ 2002 SCJ 107.

¹² *Tacoorsing* supra (n11) at 108.

convictions is a mere practice. Two years later the Supreme Court had to consider the issue of spent convictions again. In the case of *Serret LH v The State*¹³ the appellant was sentenced to seven years' imprisonment for causing death without intention to kill. On appeal to the Supreme Court against sentence, his lawyer argued that the sentence was harsh and excessive. He submitted that the '[m]agistrate had wrongly allowed herself to be influenced by the previous convictions dating back to 1979, 1982 and 1992 and that those offences were not cognate.'¹⁴ The Supreme Court held:

'True it is that his previous convictions relate mainly to offences involving dishonesty viz. larcenies – some with breaking, possession of stolen property and breach of hire purchase agreement. But we must emphasize that the observations of the learned Magistrate, that his convictions cannot be overlooked although they date back more than ten years since they show his conduct, cannot be said to be unwarranted or unfair...this Court [has] held [previously] that although there is a practice to discard previous convictions which are 10 years old and over this is a mere practice which will not be applied where it is in the interests of justice that the conviction be considered.'¹⁵

In the *Serret* case the Supreme Court emphasises its holding in an earlier decision that disregarding 10-year-old and over convictions for the purpose of sentencing is a mere practice.¹⁶ However, and most importantly, the court held that such convictions will be considered for purposes of sentencing 'where it is in the interests of justice' to do so. A sentencing officer will now have to determine whether or not it is in the interests of justice to consider such convictions for the purpose of sentencing.¹⁷ A prosecutor is allowed to prove whether or not even 40-year-old convictions relate to the offence of which the person is

¹³ *Serret LH* 2004 SCJ 226.

¹⁴ *Serret* supra (n13) at 226-227.

¹⁵ *Serret* supra (n13) at 227.

¹⁶ However, the Supreme Court has continued to regard convictions of more than 10 years old to be spent. See for example, *Gajadbur v The State* 2014 SCJ 275 at 3.

¹⁷ However, in some subsequent cases in which the Supreme Court has not considered convictions that were more than 10 years old for the purpose of sentencing, it has not held expressly that they are spent. See *Gonouree Mobamad Murad Khan & Anor v The State* 2015 SCJ 245; *State v Doorgachurn S K* 2015 SCJ 55. In others it has referred to previous convictions that were over 10 years old without stating whether or not it had considered them for the purpose of sentencing. See *State v Jean Richard Vincent Georges* 2015 SCJ 172; *Dookbit S v The State* 2015 SCJ 63. However, in some instances previous convictions that were over 10 years old have been considered for the purpose of sentencing. See, for example *State v Pierre Louis J N* 2015 SCJ 50; and *State v Kell J C* 2014 SCJ 379 (previous convictions that were 22 years old were considered for the purpose of sentencing); *Manikon S v State* 2014 SCJ 361 (a previous conviction that was 21 years old was considered for the purpose of sentencing).

convicted, and it is up to the court to determine whether or not it is in the interests of justice to consider those convictions. Of course, the defence will also be given an opportunity to motivate why in their opinion it is not in the interests of justice to consider those convictions in sentencing. However, it should be recalled that Mauritian court practice shows that some courts, including the Supreme Court, have considered relevant previous convictions for the purpose of sentencing either because the law specifically allows courts to do so¹⁸ or because they have the discretion to do so.¹⁹ Other courts have considered previous convictions which are not relevant to the offence of which the offender has been convicted because such convictions show that the punishment imposed on the offender did not have a deterrent effect.²⁰ As the Privy Council observed in *Sabapathee v The State (Mauritius)*,²¹ '[a] relevant previous conviction is a good example of an aggravation which may render the accused liable to a greater penalty under the statute but does not convert the offence from a lesser offence to a greater one.'²²

However, there have been cases where courts have dealt with the issue of 10-year-old and over convictions without discussing whether or not it is in the interests of justice to disregard them. For example, in *Police v Labonne Jean Marc*²³ Mr Labonne Jean Marc was arrested for drug dealing. He applied for bail pending trial. He had a previous conviction dating back more than 10 years. In granting him bail the district court considered many factors including 'the fact that the previous conviction of the applicant dates back to 1992 and is a spent

¹⁸ See for example *Curpen S v The State* 2010 SCJ 256; *Narainen S A v The State* 2015 SCJ 260; *Seeneevassan D v The State* 2015 SCJ 255; *Pyneandee S v The State* 2015 SCJ 38; *Ramjus VS v The State* 2014 SCJ 381; *Changou J M v The State of Mauritius* 2014 SCJ 342 (in which the Supreme Court dealt with the relevant provisions of the Road Traffic Act which specifically oblige a court to consider a relevant previous conviction for the purpose of sentencing a person convicted of a traffic offence).

¹⁹ In *Moulán M S v The State* 2015 SCJ 344 (25 September 2015) the appellant was convicted of drug dealing and sentenced to 12 months' imprisonment. He appealed to the Supreme Court arguing that the sentence was excessive. In reducing the sentence to eight months' imprisonment, the Supreme Court stated: 'We have also taken note of the fact that the appellant has no previous convictions for drug-related offences although he has a series of previous convictions dating back to 2003 for offences such as aggravated larceny, possession of stolen property and swindling.' See p 2. See also *Gonouree* supra (n17); *Jawabeer V v The State* 2015 SCJ 236; *Auguste L v State* 2015 SCJ 221; *Alighan M v The State* 2015 SCJ 53; *Marcel N B J v The State* 2014 SCJ 392.

²⁰ *Mamarot J J v The State* 2014 SCJ 338 at 8.

²¹ *Sabapathee v The State (Mauritius)* [1999] UKPC 31 (21 July 1999).

²² *Sabapathee v The State (Mauritius)* supra (n21) at para [29].

²³ *Police v Labonne Jean Marc* 2008 MBG 40.

conviction.²⁴ In *Mandary V A v The State*²⁵ the accused was convicted on four counts under the Dangerous Drugs Act and sentenced to an effective term of seven years' imprisonment and to pay a fine. On appeal to the Supreme Court he argued, *inter alia*, that the sentence was harsh and excessive and that the magistrate had erred when he considered 'a previous spent conviction of the appellant when passing sentence.'²⁶ The Supreme Court, in reducing the sentence from seven to five years' imprisonment held, *inter alia*, that '[w]e are of the view...that had the Magistrate given due weight to the date of the previous conviction she would have given a lesser sentence than the one inflicted.'²⁷ Courts were not required to give reasons for not disregarding a previous old conviction for the purpose of sentencing. This position was to change in 2012.

In *Heerah Y S v State*²⁸ the appellant was convicted 'of possession of certain specified items of property without sufficient excuse or justification' and sentenced to imprisonment for one year.²⁹ He appealed against the sentence and argued, *inter alia*, that the magistrate had erred when he stated at sentencing that '...although some of his previous convictions are more than 10 years old, they should be considered in the present case.'³⁰ Two of the appellant's 'previous convictions were 35 to 30 years old'³¹ and another conviction was over 16 years old.³² The only 'live' previous conviction was about eight years old, and in all the cases the courts imposed non-custodial sentence.³³ The Supreme Court referred to some of its decisions discussed above and held:

[W]here the interests of justice demands that the decennial record of a defendant be considered, it should be so considered...While the application of the rule may go without saying, the application of the exception may need some justification. For that reason, where a Court is minded to make use of the previous conviction/s of an offender which dates over ten years, it should do so with added circumspection. Reasons may not be given for applying the rule but must be given for applying the exception. In this case, the exception was applied as a matter of course, without any reasons for same.³⁴

²⁴ *Police v Labonne* supra (n23) 41.

²⁵ *Mandary V A v The State* 2009 SCJ 354.

²⁶ *Mandary* supra (n 25) at 355.

²⁷ *Mandary* supra (n 25) at 357.

²⁸ *Heerah Y S v State* 2012 SCJ 71.

²⁹ *Heerah* supra (n28) at para [1].

³⁰ *Heerah* supra (n28) at para [4].

³¹ *Heerah* supra (n28) at para [9].

³² *Heerah* supra (n28) at para [11].

³³ *Heerah* supra (n28) at para [12].

³⁴ *Heerah* supra (n28) at para [5].

The court added:

‘In dealing with previous convictions, a distinction should be drawn between, on the one hand, sentencing an offender twice, as opposed to severely, on account of his previous convictions, all the more so when they relate to convictions which are spent. It is in order for a Court to consider the previous convictions of an offender and inflict a penalty which, except for his past record, the court would not have imposed. However, it is not in order to so increase the penalty that it would look as if the court was punishing the offender a second time for his past offence on a subsequent conviction of his.’³⁵

The court expressed concern that sentencing is not taken seriously by many lower courts and defence counsel.³⁶ It concluded that ‘in the present case, considering the age of those convictions and the nature of those non-custodial orders made, they should not have been given the importance the magistrate gave when she considered the imposition of a custodial sentence and its length.’³⁷ In this case the Supreme Court, for the first time, states that the general rule is that previous convictions of 10 years old or over have to be disregarded at sentencing. A court applying the general rule is not obliged to give reasons. However, such previous convictions may be considered for the purpose of sentencing, and a court must give reasons for doing so.

The judgment in *Chedee R v The State*³⁸ was handed down by the Supreme Court on the same day as that in the case of *Heerah v State*³⁹ (although each case was heard and decided by different judges). The appellant was sentenced by the magistrate to six months’ imprisonment for drugs-related offences. In determining the sentence the magistrate took into consideration the appellant’s five previous convictions – the first dating back almost 21 years, the second almost 16 years, the third almost 13 years, the fourth almost 11 years, and the fifth four years.⁴⁰ Chedee appealed against the sentence to the Supreme Court. On appeal his lawyer argued that the magistrate had erred in taking into account the appellant’s previous convictions.⁴¹ The Supreme Court referred to its decisions on the issue of previous convictions and to the fact that all the appellant’s previous convictions were drugs-related,⁴² and held:

‘The previous convictions of the Appellant are indicative of his conduct over a prolonged period of time. The leniency shown, in the past, by the court

³⁵ *Heerah* supra (n28) at para [6].

³⁶ *Heerah* supra (n28) at para [8].

³⁷ *Heerah* supra (n28) at para [9].

³⁸ *Chedee R v The State* 2012 SCJ 73.

³⁹ *Heerah* supra (n28).

⁴⁰ *Chedee* supra (n38) at 2.

⁴¹ *Chedee* supra (n38) at 2.

⁴² *Chedee* supra (n38) at 3-4.

in giving him non-custodial sentences seems not to have encouraged him to mend his ways nor to have deterred him from committing similar offences again. The commission of the present offence indicates that the Appellant is persisting in his involvement with illegal drugs. In the light of the case law cited above, we believe that the Magistrate was not wrong, in principle, in referring to the previous convictions of the appellant and taking them into account as carrying weight in the balance when deciding on the nature and the extent of the sentence to be imposed.⁴³

Ten months after the above two cases, the Supreme Court again considered the issue of spent convictions in the case of *Toolsy MN v The State*.⁴⁴ The appellant pleaded guilty to the charge of swindling⁴⁵ and the magistrate sentenced him to three months' imprisonment and also ordered him to pay a fine. In determining the sentence the magistrate considered, *inter alia*, the appellant's previous convictions 'some of which were spent.'⁴⁶ The appellant's lawyer argued, *inter alia*, that the magistrate had erred in taking into account the appellant's previous convictions.⁴⁷ The Supreme Court referred to its earlier judgments and held that 'the principle that previous convictions dating back further than 10 years should not be taken into account is not to be strictly adhered to. There may well be circumstances where convictions dating back further than 10 years will be taken into account.'⁴⁸ The court added:

'Whilst it is correct to say that in sentencing an offender, the sentencing Court ought not to punish the offender twice as it would be unjust to do so, it is also correct to say that the sentencing Court can take cognizance of the overall past conduct of a convicted person before passing sentence and is entitled to deal with an offender who shows himself unresponsive to leniency and persists in a life of crime by passing an appropriate sentence which would deter the offender from reoffending. We have already alluded to the mitigating factors in favour of the appellant. On the other hand, the appellant cannot be said to be a model of integrity. He has been convicted on no less than 10 occasions between the years 1996 to 2003 for offences involving dishonesty. He has benefitted from the Court's leniency on 8 occasions by being fined or conditionally discharged. On the eighth and ninth occasions he was sentenced to jail for a very short period, namely 1 month and 3 months respectively.'⁴⁹

⁴³ *Chedee supra* (n38) at 4.

⁴⁴ *Toolsy MN v The State* 2012 SCJ 410.

⁴⁵ Contrary to s 330 of the Criminal Code. For the elements of the offence of swindling see, *Police v J Courteaud* 2013 INT 341 at 12; and *Police v Ganesban Ponen* 2015 PMP 195 at 3.

⁴⁶ *Toolsy supra* (n44) 2.

⁴⁷ *Toolsy supra* (n44) 3.

⁴⁸ *Toolsy supra* (n44) 4.

⁴⁹ *Toolsy supra* (n44) 4-5.

The above discussion shows that the Supreme Court is yet to determine clear guidelines regarding the factors to be considered by lower courts in deciding whether or not to take into consideration a previous conviction which is 10 years old or over in sentencing. In some cases such convictions are disregarded and in others they are not. In view of the fact that the Supreme Court has held that there was no concept of spent convictions in Mauritian law, the National Assembly has taken steps to introduce that concept. It is to that development that we now turn.

3 The concept of spent convictions in the Police and Criminal Evidence Bill, 2013

The initial intention was to include the concept of spent convictions in the amendments to the Certificate of Morality Act. This is supported by the fact that in December 2011 the Attorney General informed the National Assembly that the Certificate of Morality Act was to be amended to introduce ‘the concept of spent convictions.’⁵⁰ However, a decision was taken to repeal the Certificate of Morality Act and replace it with the Certificate of Character Act. While introducing the Certificate of Character Bill in the National Assembly for its second reading, the Attorney General stated the objectives of the Bill. He submitted that the primary objectives of the Bill were:

‘(a) to ensure that citizens of this country are not hampered in their everyday life by not being able to obtain a certificate attesting as to their criminal record(s), or by being issued with certificates still referring to previous convictions for certain minor offences, or by being required, on numerous occasions, to submit certificates to the same employer within a short period of time, and (b) to lessen the financial and non-financial constraints on the DPP or a delegated person.’⁵¹

All the debates in the National Assembly on the Certificate of Character Bill are silent on the issue of spent convictions for the purposes of sentencing. This should be understood in light of the fact that the Certificate of Character Bill⁵² did not include a clause on spent convictions in relation to sentencing. The Honourable Third Member for Port-Louis South and Port Louis Central, Mr. Hossen, in a parliamentary question, asked the Attorney-General ‘[w]hether... Government proposes to amend legislation with a view to introducing

⁵⁰ Fifth National Assembly. Parliamentary Debates (Hansard). First Session. Debate 36 of 2011, 13 December 2011, at 40.

⁵¹ Fifth National Assembly Parliamentary Debates (Hansard). Second Session *supra* (n2) 125.

⁵² The Certificate of Character Bill 17 of 2012.

the concept of spent convictions in our legal system?’⁵³ The Attorney-General replied that the Supreme Court had held that there was no concept of spent convictions in Mauritius.⁵⁴ He added:

- ‘3. I wish to inform the House that my Office is currently working on a Mauritian version of the English Police and Criminal Evidence Act (PACE). Our legislation will probably be known as the Criminal Investigations, Proceedings and Evidence Bill and will introduce the concept of spent convictions in Mauritian law. It is anticipated that convictions will be treated as spent if they are over 10 years old and relate to minor offences carrying as maximum penalty fines which will be prescribed.
4. I also wish to inform the House that my Office is also reviewing the legislation relating to certificates of morality – the Certificate of Morality Act 2006. With the introduction of the concept of spent conviction in our law, the Certificate of Morality Act will be revamped to take on board this major development in our law.’

On 20 April 2013 the Police and Criminal Evidence Bill⁵⁵ was published in the Government Gazette.⁵⁶ The Explanatory Memorandum of the Bill states the main objects of the Bill⁵⁷ and that ‘the Bill...introduces the concept of spent convictions for the purposes of sentencing.’⁵⁸ Clause 48 of the Bill read together with the third Schedule thereof inserts s 189B in an unnamed⁵⁹ piece of legislation. Section 189B provides:

‘Where a Court convicts a person of any offence, that Court shall not, for sentencing purposes, take into account the previous convictions of that person for – (a) any contravention; (b) a crime or misdemeanour, other than an offence specified in the Second Schedule to the Certificate of Character Act 2012, for which he was given only an absolute discharge, or a conditional discharge and complied with the terms and conditions of that conditional

⁵³ Fifth National Assembly. Parliamentary Debates (Hansard). First Session 12 April 2012: Parliamentary Question B/176 at 44. Emphasis removed.

⁵⁴ Fifth National Assembly. Parliamentary Debates (Hansard). First Session 12 April 2012: Parliamentary Question B/176 at 44.

⁵⁵ Bill 4 of 2013.

⁵⁶ Government Gazette of Mauritius 34 of 20 April 2013.

⁵⁷ The Explanatory Memorandum states that ‘[t]he main objects of this Bill are to – (a) bring together in one enactment, subject to certain exceptions, the provisions which relate to – (i) the exercise by police officers of the powers to stop, enter, search, seize, arrest and detain; and (ii) the treatment and questioning of detainees; (b) provide for a statutory basis for provisional informations; and (c) amend certain provisions relating to evidence in criminal proceedings.’

⁵⁸ See paragraph 4(e).

⁵⁹ See clause 48 of the Bill which provides: ‘The enactments set out in the first column of the Third Schedule are amended in the manner specified in the second column of that Schedule.’ However, no enactment is mentioned in the Third Schedule. In my opinion this was an oversight because the relevant enactments in the first and second Schedules are mentioned and the extent to which they are retained or repealed.

discharge; or (c) a crime or misdemeanour, other than an offence specified in the Second Schedule to the Certificate of Character Act 2012, dating back to more than 5 years prior to such conviction, for which that person has been – (i) given only a fine of up to 5,000 rupees; or (ii) make the subject of a probation order only, and has complied with the terms and conditions of the order.’

There are five categories of people who would qualify to have their convictions spent for sentencing purposes on the basis of s 189B. Firstly, a person found guilty of any contravention; secondly, a person who was convicted of a crime or misdemeanour for which he was given only and absolute discharge; thirdly, a person who was convicted of a crime or misdemeanour for which he was given a conditional discharge and complied with the terms and conditions of that conditional discharge; fourthly, a crime or misdemeanour dating back to more than five years prior to such conviction, for which that person has been given only a fine of up to 5,000 rupees; and fifthly, a crime or misdemeanour dating back to more than five years prior to such conviction, for which that person has been made the subject of a probation order only, and has complied with the terms and conditions of the order. Section 189B should be read with the second schedule to the Certificate of Character Act which provides for people whose convictions cannot be spent. It is clear that a person who has been convicted of a crime or misdemeanour and sentenced to imprisonment, however short the prison term, will not qualify to have his conviction spent. It is argued that there are many questions that remain unanswered by s 189B, and for these questions to be answered Mauritius will need to enact a comprehensive piece of legislation on spent convictions. Legislation in other countries on spent convictions will be used to highlight these questions, and to recommend what could be done in Mauritius to answer them.

4 Issues that need to be addressed

The first issue relates to the fact that a person will not qualify to have his conviction spent if he was sentenced to prison, irrespective of the period that he spent in prison.⁶⁰ Courts in Mauritius sentence people to terms of imprisonment ranging from less than a month to

⁶⁰ The same approach is followed in New Zealand. Section 7(1)(b) of the Criminal Records (Clean Slate) Act 2004 provides that '[a]n individual is eligible under the clean slate scheme if... no custodial sentence has ever been imposed on him or her.'

penal servitude for life.⁶¹ Statistics from the Mauritius Prison Service show that hundreds of people have been sentenced to short prison terms of less than one month,⁶² between one month and less than three months,⁶³ between three months and less than six months,⁶⁴ and between six months and less than 18 months.⁶⁵ The danger with this approach is that a person convicted of a minor offence who is sentenced to imprisonment may never have his conviction spent, whereas a person convicted of a relatively serious offence but not sentenced to prison may have his conviction spent. It is argued that whether or not a person's conviction should be spent should not depend on whether or not there was a prison sentence. It should depend on the seriousness of the offence of which the person was convicted. In some countries people who have been sentenced to prison qualify to have their sentences spent. In South Africa, for example, a person convicted of murder but sentenced to imprisonment from which he could be placed under correctional supervision qualifies to have his conviction spent after 10 years.⁶⁶ In Seychelles only three categories of sentences are excluded from being spent – a sentence of imprisonment for life, a sentence of imprisonment for more than 60 months and a sentence of

⁶¹ For a discussion of the sentence of penal servitude for life in Mauritius see JD Mujuzi 'The evolution of the meaning(s) of penal servitude for life (life imprisonment) in Mauritius: The human rights and jurisprudential challenges confronted so far and those ahead' (2009) 53 *J Afr L* 222–248.

⁶² The year of conviction and the number of prisoners (adult male) are indicated as follows (with the number of prisoners in brackets): 1990 (149); 1991 (162); 1992 (79); 1993 (65); 1994 (56); 1995 (51); 1996 (20); 1997 (65); 1998 (58); 1999 (101); 2000 (162); 2001 (479); 2002 (762); 2003 (674); 2004 (281); 2005 (230); 2006 (181); 2007 (359); 2008 (477); 2009 (815); 2010 (876); 2011 (860); and 2012 (390). See Mauritius Prison Service Statistics, Table (6) showing the total number of convicted detainees (adult male) from 1990 to 2012 as per length of sentence, available at [http://prisons.govmu.org/English/statistics/Pages/convicted-detainees-\(adult-male\)-as-per-length-of-sentence.aspx](http://prisons.govmu.org/English/statistics/Pages/convicted-detainees-(adult-male)-as-per-length-of-sentence.aspx), accessed on 16 July 2014.

⁶³ 1990 (303); 1991 (253); 1992 (249); 1993 (256); 1994 (314); 1995 (311); 1996 (364); 1997 (460); 1998 (424); 1999 (182); 2000 (265); 2001 (344); 2002 (371); 2003 (465); 2004 (530); 2005 (465); 2006 (615); 2007 (503); 2008 (593); 2009 (545); 2010 (457); 2011 (339); and 2012 (633). See Mauritius Prison Service, Statistics, Table (6) op cit (n62).

⁶⁴ 1990 (191); 1991 (234); 1992 (169); 1993 (269); 1994 (286); 1995 (270); 1996 (449); 1997 (293); 1998 (319); 1999 (248); 2000 (293); 2001 (296); 2002 (336); 2003 (354); 2004 (447); 2005 (254); 2006 (277); 2007 (330); 2008 (233); 2009 (279); 2010 (281); 2011 (292); and 2012 (298). See Mauritius Prison Service, Statistics, Table 6 op cit (n62).

⁶⁵ 1990 (160); 1991 (180); 1992 (216); 1993 (232); 1994 (274); 1995 (279); 1996 (327); 1997 (285); 1998 (148); 1999 (296); 2000 (358); 2001 (266); 2002 (271); 2003 (262); 2004 (289); 2005 (232); 2006 (253); 2007 (202); 2008 (208); 2009 (249); 2010 (233); 2011 (270); and 2012 (292). See Mauritius Prison Service, Statistics, Table (6) op cit (n62).

⁶⁶ See ss 271A and 271B of the Criminal Procedure Act 55 of 1977.

detention during the President's pleasure.⁶⁷ In South Australia a person is eligible to have his conviction spent if a non-custodial sentence or a sentence of not more than 12 months' imprisonment was imposed.⁶⁸ In Jamaica a person is eligible to have his conviction spent if the sentence imposed was not more than three years' imprisonment.⁶⁹ In Finland a person sentenced to prison for not more than five years may have his criminal record deleted.⁷⁰ It is recommended that Mauritius should consider extending the category of offenders whose convictions may be spent to include those sentenced to short prison terms provided they have been rehabilitated. This will ensure that as many people as possible benefit from the law on spent convictions.

Another issue that is not addressed by s 189B is that of people convicted of offences when juveniles or children. It should be noted that in Mauritius a child may be sentenced to imprisonment if convicted of a 'grave crime'.⁷¹ Statistics from Mauritius show that some children have been convicted of offences⁷² and others have been imprisoned.⁷³ Should they also have to wait for five years before their convictions are spent? Different approaches have been adopted on the issue of expunging the criminal records of children who have been convicted of offences. In South Africa the criminal record of a child has to be expunged after five or ten years depending on the offence of which the child was convicted.⁷⁴ In Seychelles the period that a child who has been convicted of an offence has to wait before the conviction is spent is half that of an adult convicted of an offence.⁷⁵ As mentioned earlier, in South Australia an adult who has been sentenced to more than 12 months' imprisonment is not eligible to have the conviction spent.

⁶⁷ Section 2 read with Part I of the Schedule of the Rehabilitation of Offenders Act 2 of 1996 (Seychelles).

⁶⁸ Section 3(1) of the South Australian Spent Convictions Act 2009.

⁶⁹ Section 5 of the Criminal Records (Rehabilitation of Offenders) Act 1988 (Jamaica).

⁷⁰ Section 10 of the Criminal Records Act (770/1993; amendments up to 505/2002 included) (Finland).

⁷¹ See s 16 of the Juvenile Offenders Act Cap 186 – 6, April 1935.

⁷² Ministry of Gender Equality, Child Development and Family Welfare 'Statistics in Mauritius: A gender approach' (February 2013), 84, available at <http://gender.govmu.org/English/Documents/Statistics%20in%20Mauritius%20-%20A%20Gender%20Approach%2024.07.13.pdf>, accessed on 16 July 2014.

⁷³ Statistics from the Mauritius Prison Service show the number of offenders between 17 and 21 years old who were imprisoned between 1990 and 2011 as follows: 1990 (55); 1991 (41); 1992 (34); 1993 (49); 1994 (51); 1995 (50); 1996 (74); 1997 (74); 1998 (116); 1999 (89); 2000 (146); 2001 (141); 2002 (154); 2003 (240); 2005 (155); 2006 (177); 2007 (177); 2008 (231); 2009 (238); 2010 (264); and 2011 (197). See Mauritius Prison Service, Statistics, Table (13) showing the total number of convicted male detainees from 1990 to 2011 per age group.

⁷⁴ Section 87 of the Child Justice Act 75 of 2008.

⁷⁵ Section 4(8) of the Rehabilitation of Offenders Act 2 of 1996.

The convictions of children who have been sentenced to more than 24 months' imprisonment cannot be spent.⁷⁶ It is therefore necessary that Mauritius enacts a law that specifically caters for the expungement of the criminal records of those convicted of offences while still children.

A further concern that is not addressed in s 189B is that of mutual recognition of criminal records. The question that may arise in practice is whether a Mauritian who has been convicted of an offence in a foreign country is considered to have a criminal record in Mauritius. If the answer is in the affirmative, would this be the case only in respect of conduct which is punishable in Mauritius or would it also be applicable to conduct that does not amount to an offence in Mauritius? Section 6 of the South Australian Spent Convictions Act addresses that issue by providing:

- (1) This Act applies to convictions for offences against the laws of this State and convictions for offences against any other law.
- (2) In the case of convictions for offences against the laws of a recognised jurisdiction, the mutual recognition principle applies.
- (3) In the case of convictions for offences against the laws of any other jurisdiction (including the laws of an overseas jurisdiction), this Act applies with the changes necessary to enable its provisions to apply to those convictions in a way that corresponds as closely as possible to the way in which it applies to convictions for offences against the laws of this jurisdiction.
- (4) However, if an offence against the laws of another jurisdiction (including the laws of an overseas jurisdiction), other than a recognised jurisdiction, has no correspondence to an offence against a law of this jurisdiction, then the conviction of the person for the offence is immediately spent for the purposes of this Act.'

Section 2 of the Seychelles Rehabilitation of Offenders Act defines a conviction to include '(i) a conviction by or before a court outside Seychelles in respect of a conduct which if it had taken place in Seychelles would constitute an offence under a written law in Seychelles' and provides that 'a sentence imposed by a court outside Seychelles shall be treated as a sentence mentioned in this Act which most nearly corresponds to the sentence imposed.' In Canada a person who was convicted abroad and transferred to serve his sentence in Canada may make an application to have his criminal record suspended.⁷⁷ For a foreign criminal record to be considered in Jamaica two conditions must be met: 'there is kept and maintained in the Criminal Records Office of Jamaica particulars of that conviction and sentence; and (b) the circumstances constituting the offence would if they had

⁷⁶ Section 3 of the South Australia Spent Convictions Act 2009.

⁷⁷ See s 3 of the Criminal Records Act (R.S.C., 1985, c. C-47).

occurred in Jamaica constitute an offence against Jamaican law.⁷⁸ It is recommended that the law in Mauritius should also deal with the issue of those convicted of offences in other countries so that they are not treated as first offenders in Mauritius unless their criminal records in foreign states are expunged.

Another matter that is not addressed by s 189B is that of a second conviction before a person's first conviction has been spent. For example, a person is convicted of an offence, is ordered to pay a fine of 5000 rupees, and pays the fine. He commits an offence four years after paying the fine – a year before he qualifies to have his conviction spent. Statistics from the Mauritius Prison Service show that thousands of offenders in prisons between 1990 and 2012 had previous convictions falling into five categories: first previous conviction;⁷⁹ second previous conviction;⁸⁰ third previous conviction;⁸¹ fourth previous conviction;⁸² and fifth and more previous conviction.⁸³ Different approaches have been adopted to address such a situation. Section 7(2) of the South Australia Spent Convictions Act provides:

'If during the qualification period for a conviction (the *first conviction*) the person is convicted of another offence (the *second conviction*), the time that has run as part of the qualification period for the first conviction is cancelled and the relevant day for the second conviction becomes a new relevant day for the first conviction (and a conviction for a third offence within the period that then applies will have a corresponding effect on the first and second convictions, and so on for any subsequent conviction or convictions).'⁸⁴

Section 4(6) of the Seychelles Rehabilitation of Offenders Act provides:

'Subject to subsection (7), where during the rehabilitation period applicable to a conviction – (a) the person who was convicted is convicted of another offence; and (b) sentence is imposed on the person in respect of the later conviction, if the rehabilitation period applicable to either of the convictions would end earlier than the rehabilitation period applicable to the other conviction, the rehabilitation period which would end earlier shall be extended to end at the same time as the other rehabilitation period.'

⁷⁸ Criminal Records (Rehabilitation of Offenders) Act 1988.

⁷⁹ 1990 (315); 1991 (258); 1992 (228); 1993(305); 1994 (347); 1995 (344); 1996 (398); 1997 (486); 1998 (475); 1999 (318); 2000 (360); 2001 (538); 2002 (709); 2003 (820); 2004 (378); 2005 (326); 2006 (498); 2007 (427); 2008 (573); 2009 (511); 2010 (516); 2011 (178); and 2012 (234). See Mauritius Prison Service, Statistics, Table (6) op cit (n62).

⁸⁰ 6070 offenders. See Mauritius Prison Service, Statistics, Table (6) op cit (n62).

⁸¹ 6523 offenders. See Mauritius Prison Service, Statistics, Table (6) op cit (n62).

⁸² 7313 offenders. See Mauritius Prison Service, Statistics, Table (6) op cit (n62).

⁸³ 14511 offenders. See Mauritius Prison Service, Statistics, Table (6) op cit (n62).

⁸⁴ Emphasis in the original.

Clause 4 of the Irish Criminal Justice (Spent Convictions) Bill⁸⁵ states:

‘Where a person is convicted of an offence in respect of which a relevant sentence is imposed on him or her and, during the relevant period that applies to that sentence, the person is convicted of another offence (in this section referred to as the “other offence”) in respect of which a relevant sentence is imposed on him or her, the relevant period that applies to the first-mentioned offence shall be extended to the end of the relevant period that applies to the other offence if that is later.’

Section 9 of the Jamaican Criminal Records (Rehabilitation of Offenders) Act also caters for subsequent convictions before the first conviction is spent. Section 8 of the New Zealand Criminal Records (Clean Slate) Act also deals with the issue of a subsequent conviction before the first eligible conviction is spent.⁸⁶ Related to the above is the issue of a person who has been convicted of, for example, two offences at the same time. Should he wait for five years for each conviction to be spent or will both convictions be considered spent after five years? Section 4(4) of the Seychelles Rehabilitation of Offenders Act provides:

‘Where there are more than one sentence imposed in respect of a conviction and – (a) the rehabilitation periods specified for the sentences are the same, the rehabilitation period applicable to the conviction is the rehabilitation period specified for any of the sentences; (b) the rehabilitation periods specified for the sentences differ, the rehabilitation period for the conviction is the longest of the rehabilitation periods specified for the sentences.’

Closely related to the above is the question of subsequent convictions after the first conviction becomes spent. This is an issue that is not addressed in s 189B, and which has to be addressed. Section 9(1) of the South Australian Spent Convictions Act provides that ‘[a] conviction of a person for an offence (the *first offence*) that is spent is not revived by the subsequent conviction of the person for another offence (the *later offence*).’

⁸⁵ Criminal Justice (Spent Convictions) Bill 2012.

⁸⁶ Section 8 provides [[that]]: ‘8(1) If, at any time after becoming an eligible individual (either under section 7(1) or as a consequence of an order made by the court under section 9, section 10, or section 12), an eligible individual is convicted of an offence, he or she is no longer an eligible individual.

(2) An individual referred to in subsection (1) again becomes an eligible individual if he or she— (a) completes a rehabilitation period beginning on the day after the date on which he or she was sentenced for, or the specified order was made in relation to, that conviction or is an individual in relation to whom an order has been made under section 9 or section 10(2); and (b) is otherwise eligible under section 7(1) to have the clean slate scheme apply to him or her.’

5 Conclusion

This article has dealt with the issue of spent convictions in Mauritius. Cases have been discussed highlighting the principles that the Supreme Court has developed. It has been illustrated that the Supreme Court is yet to provide concrete guidelines regarding what should and should not be considered in concluding that a conviction has been spent for purposes of sentencing. The author has referred to legislation from different countries to highlight how s 189B could be improved to address some of the issues that it does not. Although, as discussed above, there are many issues which s 189B does not resolve, one should not lose sight of the fact that the introduction of the concept of spent convictions in Mauritius will impact on sentencing in different ways. First, courts, prosecutors and offenders will have clear guidance when determining which convictions should be considered as spent. This will mean that courts will no longer have the discretion to decide which conviction should be considered as spent and which conviction should not. Secondly, the number of people who may not benefit from the spent convictions law is likely to increase. This is so because the question of whether or not a previous conviction is spent is going to be answered by looking at the type of sentence imposed on the offender. The result is that whoever is sentenced to imprisonment, irrespective of the offence of which he or she was convicted, is never likely to have that conviction spent. This will also mean that a judicial officer is obliged to consider a previous conviction (one not spent) for the purpose of sentencing in the future.⁸⁷ Apart from the fact that this could exclude many people convicted of minor offences from having their convictions spent, it could also be a factor that some judicial officers may have to consider in determining which sentence to impose on the offender.

The practice of countries such as Singapore and Canada shows that some judicial officers have considered the impact a sentence will have on the offender before deciding whether or not to impose that sentence. For example, in Singapore, which has a legislative provision which is more or less like the one proposed in Mauritius, some judicial officers have tailored their sentences in such a manner that a person will have his or her conviction spent.⁸⁸ In Canada, where sentencing an offender to prison for a given number of months could lead to automatic deportation, some courts have imposed sentences which are, for example, a day less than the sentence that would have led to the offender's deportation, in order to ensure that the offender is not

⁸⁷ The same position prevails in South Africa. See s 271(4) of the Criminal Procedure Act.

⁸⁸ *HKSAR v Lo Chung Hang* 2002 WL 2366 (CFI), [2002] HKEC 73 at para [9]; *HKSAR v Choi Yiu Wai David* 2011 WL 5506451 (CFI), [2011] HKEC 1658.

deported.⁸⁹ In both countries courts have reacted in the way that they have because they consider the law to be unfair. In the light of the fact that courts in Mauritius have sentencing discretion, one cannot rule out the possibility that some judicial officers may tailor their sentences to circumvent what they may consider to be a harsh spent conviction provision which may have many unbearable consequences for some of the offenders who may not even re-offend. It should be noted that if a conviction is not spent, apart from the fact that it will be considered for purposes of sentencing, it will also impact on the offender in other ways irrespective of the fact that he was rehabilitated and does not pose a danger to society. For example, it will be difficult for such a person to find employment, to travel abroad, to start some businesses, or to practise some professions. This is so because in Mauritius there are many pieces of legislation or regulations which prohibit a person with a criminal record from taking part in many activities.⁹⁰ It should also be noted that many employers in Mauritius require potential employees to submit certificates of character obtained from the Director of Public Prosecutions' office. Where a person's conviction has been spent, such a certificate will show that he or she has never been convicted of an offence in Mauritius. However, where the conviction is not spent, the certificate will show the offences of which he or she was convicted.⁹¹

Section 189B also reduces the period for the spent conviction from 10 years 'to more than 5 years prior to such conviction.' This is likely to change the sentencing approach as far as it relates to spent convictions as courts will be obliged to consider any conviction, as provided for in s 189B, that is more than five years old as spent. This will of course cover convictions, those 10 years and more old. This could be the case whether or not the conviction is related to the offence of which the person has been convicted. In some countries, such as South Africa,⁹² Botswana,⁹³ Namibia,⁹⁴ Malawi,⁹⁵ Zimbabwe,⁹⁶

⁸⁹ *R v Nassri* 2015 ONCA 316 (CanLII); *R v Schwartz* 2015 BCCA 56 (CanLII).

⁹⁰ See generally, JD Mujuzi 'Disregarding criminal records for the purpose of employment in Mauritius: The making of the Certificate of Character Act and issues that need to be addressed' (2015) 36 *Statute LR* 59-85.

⁹¹ Section 5 of the Certificate of Character Act 18 of 2012.

⁹² *Hotane v S* (CA 13/15) [2015] ZANWHC 20 (29 May 2015) at paras [4]-[6]; *S v Willemse* (SS64/2007) [2007] ZAWCHC 101 (7 November 2007).

⁹³ *S v Modise* (GRAF-113-04) [2007] BWHC 352 (7 March 2007) at paras [14]-[16]; *S v Ndou* (CLCLB-029-08) [2008] BWCA 60 (24 July 2008) at para [30].

⁹⁴ *Nghipandulwa v S* (SA 39/2008) [2009] NASC 14 (26 October 2009) at para [1]; *Katangolo v S* (CA 45/2012) [2014] NAHCMD 28 (30 January 2014) at para [16]; *Uunona and Another v S* (SA 37/2008) [2009] NASC 12 (23 July 2009) at para [45].

⁹⁵ *Republic v Zuangeti* (Confirmation Case No. 245 of 2001) [2002] MWHC 48.

⁹⁶ *S v Gomana* [2004] ZWHHC 196 (28 January 2004); *S v Zimba* [2010] ZWBC 94 (2 September 2010).

Lesotho,⁹⁷ and Swaziland,⁹⁸ courts will consider a previous conviction for the purpose of increasing the offender's sentence if it is relevant to the offence of which he has been convicted, that is, if it is a 'relevant previous conviction.'

⁹⁷ *R v Poto* (CRI/A/13/86) [1986] LSCA 41 (21 April 1986).

⁹⁸ *King v Mkhwanazi* (125/1998) [2001] SZSC 31 (27 November 2001).