E-MANTSHI

A KZNJETCOM Newsletter

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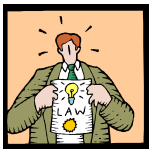
Welcome to the thirty eighth issue of our KwaZulu-Natal Magistrate's newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments and suggestions – these can be sent to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or faxed to 031-368 1366.



New Legislation

1. The *National Road Traffic Amendment Act*, 2008, Act 64 of 2008 has been published in Government Gazette No. 31097 dated 17 February 2009. The purpose of the amendment is to insert certain definitions and to amend others; to prohibit the unauthorised use of an authorised officer's infrastructure number; to provide for visible display of nametags by traffic officers; to prohibit the impersonation of traffic officers and the wearing of a traffic officer's uniform without official written permission; to create new offences; to empower the Minister to prescribe training procedures and qualifications of persons appointed as national inspectors at driving licence testing centres and testing stations; to make new provision regarding the process by which driving licences are issued; to recognise documents relating to roadworthiness issued in a prescribed territory; to empower the Minister to prescribe the manner and form of accident reporting; to provide for circumstances when emergency vehicles may ignore road traffic signs and speed limits; to provide for liability of managers, agents and employees; to empower the MEC to set fees; to delete obsolete provisions; and to provide for matters connected therewith.

   Of particular interest to magistrates is the following amendment of section 35 of Act 93 of 1996. (This is the section that deals with the minimum period for which a learner's or driver's licence shall be suspended and the offences which are applicable.)

   Section 35 of the principal Act is hereby amended –
   (a) by the insertion in subsection (1) after paragraph (a) of the following paragraph:

"(aA) section 59(4), in the case of a conviction for an offence, where –

(i) a speed in excess of 30 kilometers per hour over the prescribed general speed limit in an urban area was recorded; or

(ii) a speed in excess of 40 kilometers per hour over the prescribed general speed limit outside an urban area or on a freeway was recorded;" and

(b) by the substitution for subsection (3) of the following subsection:

"(3) If a court convicting any person of an offence referred to in subsection (1), is satisfied, after the presentation of evidence under oath, that circumstances relating to the offence exist which do not justify the suspension or disqualification referred to in subsection (1) or (2), respectively, the court may, notwithstanding the provisions of those subsections, order that the suspension or disqualification shall not take effect, or shall be for such shorter period as the court may **[deem]** consider fit.".

The Act will come into operation on a date to be fixed by the President by Proclamation in the Gazette.

2. The *Judicial Matters Amendment Act*, Act 66 of 2008 was published in Government Gazette No. 31908 dated 17 February 2009. Amongst others, the Act now makes provision for the Minister of Justice to determine admission of guilt amounts in terms of section 57 of the Criminal Procedure Act, 51 of 1977. The amendment has not been put into operation yet. The amendment to section 60 of the Criminal Procedure Act, 51 of 1977 has however already become operative on 17 February 2009. The amendment reads as follows:

Section 60 of the Criminal Procedure Act, 1977, is hereby amended by –

(a) the insertion after subsection (2A) of the following subsection:

"(2B) (a) If the court is satisfied that the interests of justice permit the release of an accused on bail as provided for in subsection (1), and if the payment of a sum of money is to be considered as a condition of bail, the court must hold a separate inquiry into the ability of the accused to pay the sum of money being considered or any other appropriate sum.

(b) If, after an inquiry referred to in paragraph (a), it is found that the accused is -

(i) unable to pay any sum of money, the court must consider setting appropriate conditions that do not include an amount of money for the release of the accused on bail or must consider the release of the accused in terms of a guarantee as provided for in subsection (13)(b); or

(ii) able to pay a sum of money, the court must consider setting conditions for the release of the accused on bail and a sum of money which is appropriate in the circumstances."; and

(b) the substitution for subsection (13) of the following subsection:

"(13) The court releasing an accused on bail in terms of this section may order that the accused –

(a) deposit with the clerk of [the] any magistrate's court or the registrar of [the] any High Court, as the case may be, or with a correctional facility where the accused is in custody or with a police official at the place where the accused is in custody, the sum of money determined by the court in question; or

(b) shall furnish a guarantee, with or without sureties, that he or she will pay and forfeit to the State the amount that has been set as bail, or that has been increased or reduced in terms of section 63(1), in circumstances in which the amount would, had it been deposited, have been forfeited to the State."

Recent Court Cases

1. S v EGGLESTONE 2009(1) SACR 244 SCA

In indecent assault matters the accused's intention is more important than the act

"It is appropriate to start by briefly considering what amounts to indecent assault. An authoritative discussion of the nature and meaning of the offence is found in *S v F en 'n Ander* 1982 (2) SA 580 (T) where it was held that indecent assault is committed even though the violence is not directed at the complainant's sexual organs. It is the accused's intention, manifested in words or conduct, that is important and not necessarily the act. In order to constitute the offence, it is not necessary, however, that the complainant's sexual organs should actually have been touched. Any action whereby the accused aims with some part of his or her body at the sexual organs of the complainant is sufficient. In this regard Ackermann J stated that (at 585C):

'Ek is gevolglik van mening dat daar wel gekyk kan en moet word na die uitgesproke bedoeling van 'n beskuldigde soos oorgedra aan die klaer (hetsy deur woorde, gedrag of by implikasie) om vas te stel of 'n aanranding 'n onsedelike aanranding daarstel.'

2. S v MDALI 2009(1) SACR 259 CPD

A magistrate's failure to explain an accused's rights to cross-examination and to allow him to call a witness violates his fair trial rights

The accused, who was unrepresented at trial, was convicted of assault with intent to do grievous bodily harm and sentenced to six months' imprisonment, conditionally suspended for three years. It appeared, on automatic review, that there had been certain irregularities in the trial: the accused's right to cross-examine witnesses had not been explained to him properly, and he had been denied the opportunity to call a witness on the basis that the witness concerned had been present in court throughout the trial.

Held, that a presiding officer had an obligation to assist an unrepresented accused at all stages of a criminal trial in order to give effect to the notions of basic fairness and justice. He or she was obliged to inform the accused of his or her procedural rights – including the rights to cross-examine, to testify, to call witnesses, and to address the court – and to explain in comprehensible language the purpose and significance of these rights. *In casu*, the magistrate had not adequately explained the right to cross-examine, how it should be conducted, the purpose and scope thereof, and the consequences of a failure to cross-examine. This constituted a breach of the accused's fundamental right to a fair trial. (Paragraphs [7] and [8] at 261d-e and 261f-g.)

Held, further, that in ruling that a person who had been present in court could not be called as a witness, the magistrate had made the elementary error of confusing the admissibility of evidence with the probative value thereof. It did not follow automatically that, simply because a witness had sat in court during proceedings, the witness was to be disbelieved. The court should determine, instead, whether the witness had tailored his or her evidence to fit what he or she had heard. The refusal to allow this witness to be called was a gross violation of the accused's right to adduce evidence. (Paragraphs [9] and [10] at 261g-I and 61i-j.)

Held, further, that the magistrate's failure to afford the accused and the State an opportunity to address the court on sentence constituted a fatal defect in the proceedings. Sentencing procedure was a crucial part of criminal proceedings, and an accused person was entitled to put forward facts that would mitigate his or her sentence and assist the court in arriving at a just and fair sentence. (Paragraph [11] at 262a-b.)
Conviction and sentence set aside.

3. S v HOHO 2009 (1) SACR 276 SCA

Criminal defamation is still an offence and is consistent with the Constitution

The appellant was convicted of 22 charges of criminal defamation, stemming from his having published various leaflets defaming certain political office bearers and officials in the Eastern Cape. On appeal to the Supreme Court of Appeal the only two questions requiring determination were: (1) whether or not the offence of criminal defamation had been abrogated by disuse, and if not, (2) whether or not it was consonant with the Constitution of the Republic of South Africa, 1996.

As to question (1)

Held, that the basis of the doctrine of abrogation by disuse was tacit repeal 'through disuse by silent consent of the whole community'. It was therefore necessary to consider whether it could be said that the South African community had tacitly accepted that defamation should no longer constitute a criminal offence. (Paragraph [9] at 281c-e.)

Held, further, that the fact that no such convictions under the common law had been reported since 1953 was not indicative of abrogation, since it was unlikely that the prosecutions would have been instituted in the High Court. In any event, there had been reported prosecutions – in 1979, 2002 and 2006 – none of which had resulted in conviction; on the other hand, though, an unsuccessful attempt by a prosecutor who might not even have considered whether the crime existed or not to secure such a conviction could hardly constitute conclusive proof of the attitude of the community. More significant was a report of the South African Law Commission in 1982 which touched on the issue, and which contained no suggestion that the crime had been abrogated. Subsequently, the crime of criminal defamation had been extended in terms of Schedule 2 to the Electoral Act 73 of 1998, which prohibited the publication of false or defamatory allegations in connection with an election in respect of, *inter alia*, a party or candidate. Finally, there was no suggestion from academic quarters that the crime had been abrogated by disuse, even where the writers concerned were themselves in favour of its abolition. (Paragraphs [10]-[14] at 281 e-283b.)

Held, accordingly, that it could not be said that criminal defamation had been repealed as a crime by silent consent of the whole community. (Paragraph [15] at 283c.)

As to question (2)

Held, the court having reviewed judicial and academic authority, that the degree of seriousness was not an element of the offence. Neither was it so that the practice of confining criminal proceedings for defamation to serious and aggravated cases had hardened into a legal rule. If a prosecution were instituted for a non-serious defamation, the lack of seriousness would be reflected in the sentence. It could be concluded, therefore, that the crime of defamation consisted of the unlawful and intentional publication of matter concerning another which tended to injure his reputation. The State would have to prove the unlawfulness and the intention. Intentional publication required proof that the accused knew he was, or might possibly be, acting unlawfully. However, it did not follow that the State would have to negative merely hypothetical defences. It would be necessary, for example, for an accused whose defence was that the allegedly defamatory publications were true and made for the public benefit, to plead that defence as required by s 107 of the Criminal Procedure Act 51 of 1977. (Paragraphs [21]-[26] at 285d -287d.)

Held, further, regarding the constitutionality of the offence, that although freedom of expression was fundamental to a democratic society, it was not a paramount value. It must be considered in the context of other values, such as that of human dignity. The law of defamation, both criminal and civil, was designed to protect the reputation of people, and in doing so it clearly limited the right to freedom of expression. While

it was so that a criminal sanction was more drastic than a civil remedy, the disparity was counterbalanced by the fact that the requirements for succeeding in a criminal matter were more onerous than in a civil one. Although a criminal conviction and the sanction arising therefrom might be more severe than an order to pay damages, the limitation of the right to freedom of expression was not. In any event, to expose a person to criminal conviction where it was proved that he had acted unlawfully, and had known that he was acting unlawfully, was a reasonable limitation on the right to freedom of expression. (Paragraphs [29]-[33] at 288c-290b.)

Held, accordingly, that the crime of defamation was not inconsistent with the Constitution. (Paragraph [36] at 290h.) Appeal dismissed.

4. MOKONOTO AND OTHERS v REYNOLDS NO AND ANOTHER 2009(1) SACR 311 TPD

It is sufficient for an accused to have his plea altered to not guilty if he alleges that he is not admitting or had incorrectly admitted an allegation in the charge sheet

The four applicants were charged with 1 800 counts of fraud, alternatively, of contravening, inter alia, s 40(1)(d) of the Medical Schemes Act 72 of 1967, alternatively s 66(1)(d) of the Medical Schemes Act 131 of 1998. They initially pleaded not guilty in a regional court, but after the State's evidence had been led they changed their pleas to guilty on the respective statutory contraventions. They were then convicted and the matter was postponed for purposes of obtaining pre-sentence reports. On resumption, the applicants' attorney informed the court that he had been instructed to request the court to record pleas of not guilty in terms of s 113 of the Criminal Procedure Act 51 of 1977, on the basis that the applicants had lacked knowledge that fraudulent medical aid claims had been submitted on their behalf. The court, having questioned the attorney, concluded that the applicants' explanation for wanting to change their pleas was false, that they had properly understood the plea of guilty, and that they had intended to admit the relevant facts. Accordingly, the court refused to alter their pleas. The applicants then approached the High Court, arguing that this refusal constituted a misdirection on the part of the regional court magistrate.

Held, that the principal issue was whether or not a court was obliged to record a plea of not guilty when an accused, after entering a plea of guilty, simply alleged that he or she did not admit an allegation in the charge-sheet. Before s 113 had been amended by s 5 of the Criminal Procedure Amendment Act 86 of 1996, the test was one of reasonable doubt: if the court had a reasonable doubt whether the accused had actually or correctly admitted the allegations in the charge, or whether the accused had a valid defence to the charge, it was obliged to enter a plea of not guilty. Similarly, an accused who wished to withdraw a plea of guilty had to give an explanation as to why he or she had pleaded guilty and now wished to change that plea; if the explanation was reasonably possibly true, the accused would be allowed to withdraw the plea. (Paragraphs [16]-[19] at 317j-320c.)

Held, further, that, since the amendment, however, the requirement of reasonable doubt had been replaced with a lighter test. It was sufficient if it were *alleged* that the accused did not admit, or had incorrectly admitted, an allegation in the charge, or that the accused had a valid defence to the charge. (Paragraph [20] at 320d-f.)

Held, further, that *in casu* the inference was unavoidable that the applicants had decided to request the trial court to act in terms of s 113 only when it became apparent that the consequences of their conviction would be more serious than they had anticipated. However, that was irrelevant in terms of the section as it now read, since all that was required to bring s 113 into operation was an allegation. (Paragraph [21] at 320g.)

Held, accordingly, that the matter must be referred back to the trial court for a plea of not guilty to be recorded in respect of each applicant, and for the trial to be proceeded with. (Paragraph [22] at 320h.)
Application granted.

5. S v MIA AND ANOTHER 2009(1) SACR 330 SCA

Theft by false pretences is a competent verdict on a charge of robbery

Held, that authority to the effect that 'fraud in the form of theft by false pretences was not the type of theft contemplated by the legislator as a competent verdict in s 260(d) [of the Criminal Procedure Act 51 of 1977, on a robbery charge]' was wrong. No such distinction was implicit in the section. It was clearly competent for a court to convict on the competent verdict of theft where the charge was one of robbery, and theft was a generic offence that encompassed theft by false pretences. (Paragraph [16] at 336d-337b.)

From The Legal Journals

1. Mokotong, M

'A note on the customary law right of extra-marital children to bury the deceased'

De Jure – 2008, v41(3), p.616

2. Kelly-Louw, M

'The prevention and alleviation of consumer over-indebtedness'

2008 SA Mercantile Law Journal 200.

(Electronic copies of any of the above articles can be obtained from gvanrooyen@justice.gov.za)

Contributions from the Law School

Bribery revived?

The history of the common-law crime of bribery stretches back to the Roman law. In terms of a series of enactments in the late Republic, most notably the *Lex Julia repetundarum* (see D 48.11), officials were liable to be punished for accepting any consideration for acting or failing to act in their official capacity (see generally on the historical development of the crime of bribery: Hunt *South African Criminal Law and Procedure Volume II: Common-law crimes* (1970) 206ff). The Roman-Dutch law focused on various Dutch enactments. The two most important enactments of the Roman-Dutch period on bribery are the Placaaten of the States-General of the United Netherlands of 1 July 1651 and 10 December 1715. The former enactment provides in part as follows:

'…*[W]e…do most expressly interdict and forbid any person of whatever rank and condition he may be, at any time to present, give or promise, directly or by any arrangement, purchase, exchange, or otherwise, any gifts or presents of any things, however small these may be, either in the way of liquor or foodstuffs, to any person in the previously mentioned Government, or other of the Colleges General, the Courts of Justice of Brabant and Flanders, their ministers or officials, the magistrates or judicial officers acting under the States General, without exception, their wives or children, or the wives or children of their relations, in order to obtain, or for having obtained, for themselves or for anyone else, directly or indirectly, any posts, offices, benefices or dispositions in regard to any kind of matter, or for the despatch thereof under any pretext whatever*.' (translation from *S v Benson Aaron* (1893) Hertzog 125 at 130-1).

It was accepted that the Placaats were part of South African law (see *R v Sacks* 1943 AD 413 at 422-3), and thus in the three Appellate Division cases of *Sacks*, *R v Patel* 1944 AD 511, and *R v Chorle* 1945 AD 487 the decisions dealing with bribery were all largely founded on the Placaats (Hunt 209, who is at pains to point out that although forming the basis of common-law bribery, the Placaats should neither be restrictively construed, nor be regarded as a complete statement of the law). The enactment of the Prevention of Corruption Act 6 of 1958 by the legislature did not do away with the common-law crime, but provided an alternative, possibly clearer, definition of corruption. The common-law crime of bribery and the statutory offence

of corruption co-existed until the enactment of a new statute governing corruption: the Corruption Act 94 of 1992. In terms of s 4 of this Act, the common-law crime of bribery was repealed, the first time that this had occurred in South African legal history (see Milton (1993) 6 *SACJ* 90). Whilst this Act was very brief in substance, containing only 5 sections, it sought to 'penalize corruption in the widest sense and in all its forms' (Milton 'Corruption' in Milton, Cowling & Hoctor *South African Criminal Law and Procedure Vol III: Statutory Offences* (2ed) (1988- , loose leaf) D3-1). Since the broadly defined new statutory crime subsumed the content of the common-law crime, the continued existence of the common-law crime was deemed unnecessary.

Twelve years later, the crime of corruption assumed yet another form with the commencement of the Prevention and Combating of Corrupt Activities Act 12 of 2004. The statute seeks to 'provide for the strengthening of measures to prevent and combat corruption' within the context of the Bill of Rights, South Africa's international legal obligations, and the current scourge of corruption. Instead of the brevity of the 1992 Act, the 2004 Act is both lengthy and prolix. This is as a result of the fact that it is deemed 'desirable to unbundle the crime of corruption, in terms of which, in addition to the creation of a general, broad and all-encompassing offence of corruption, various specific corrupt activities are criminalized' (Preamble to the 2004 Act).

One of the questions that has arisen out of the coming into force of the 2004 Act is this: given that the 2004 Act has repealed the 1992 Act, which in turn had repealed the common-law crime of bribery, does this mean that the common-law crime of bribery is now revived? Burchell has argued that this must follow, as 'by implication, the repeal of an Act that repealed the common law must reinstate the common-law (sic) of bribery, unless there is anything in the 2004 repealing Act that indicates to the contrary' (*Principles of Criminal Law* 3ed (2005) 891). This is disputed by both Lambrechts ('The Prevention and Combating of Corrupt Activities Act as an investigative instrument pertaining to bribery and corruption' 2004 17(3) *Acta Criminologica* 106) and Roberts ('The Prevention and Combating of Corrupt Activities Act 12 of 2004: Cure for Cancer?' in Glover (ed) *Essays in honour of AJ Kerr* (2006) 319 at 332). Both authors argue that such a conclusion flies in the face of s 12(2) of the Interpretation Act 33 of 1957, and Roberts further adds that Burchell's argument is unsupported by authority.

Section 12(2) (*a*) of the Interpretation Act provides as follows:

> '12. Effect of repeal of a law-
> (2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not-
> (a) revive anything not in force or existing at the time the repeal takes effect…'.

What are the implications of this provision? Du Plessis ('Statute law and interpretation' in Joubert (ed) *LAWSA* Vol 25(1) first reissue (2001) at par 295) states that the word 'anything' in the provision includes both statutory provisions

repealed by the repealed legislation (see *R v Maluma* 1949 (3) SA 856 (T) at 858) and contracts that it nullified (see *Pietermaritzburg Corporation v Union Government* 1935 NPD 36). However, whether the precepts of the common law altered or abrogated by the repealed legislation are also included in the meaning of 'anything', is according to Du Plessis 'uncertain'. Steyn (*Uitleg van Wette* 5ed (1981) 176-7) points out that the answer to this question depends on the intention of the legislature – in the event of wholesale abolition of a set of statutory rules regulating a particular area of the law, it would generally make no sense to assume a legal vacuum, and so one would be justified in concluding that the common law would revive (and implicitly, that this is the legislative intent).

It is perhaps instructive to advert to English law. The South African Interpretation Act was plainly modelled on the English equivalent, and the current English statute, the Interpretation Act of 1978, retains much of the same wording as its predecessor. Hence s 16 of the 1978 Act provides that

> '…where an Act repeals an enactment, the repeal does not, unless the contrary intention appears, -
> (a) revive anything not in force or existing at the time at which the repeal takes effect…'

The similarity in wording between the English and South African provisions is obvious. In relation to statutory provisions repealed by, and contracts rendered void by, the repealed legislation, the same position holds good in English law: these do not revive (Bennion 'Statutes' in Lord Hailsham (ed) *Halsbury's Laws of England* Vol 44(1) 4ed reissue (1995) at par 1306). Despite citing a case (*D v D* [1979] 3 All ER 337) where it was held that the repealed common law rules did not revive, Bennion (at par 1306n4) argues that 'this seems contrary to principle', and cites a case where repealed prerogative powers were held to revive upon the repeal of the occluding enactment (*R v Secretary of State for Foreign and Commonwealth Affairs, ex p Council of Civil Service Unions* [1984] IRLR 309).

Returning to the crime of corruption, Snyman (*Criminal Law* 5ed (2008) 410 notes a significant difference between the 2004 and the 1992 Acts:

> 'the provisions of the 2004 Act is (sic) applicable only to cases in which X gives a gratification or benefit to Y (or Y accepts it from X) in order to persuade Y to act in a certain way *in the future*. In terms of the rules relating to bribery and corruption which applied before 2004, the crime could also be committed if X gives a gratification or benefit to Y (or Y accepts it from X) in order to compensate Y (or as a *quid pro quo*) for something which Y had already done *in the past*.' (original emphasis)

Snyman (at 410 - justifiably, it is submitted) finds it 'surprising' that the 2004 provision does not extend to compensation for past deeds, as this rule 'has formed part of the crime for centuries', and indeed formed part of the 1651 Placaat (see above), which is the basis of the common-law crime of bribery. Given that the 2004 Act, which has been enacted to strengthen and not weaken the fight against corrupt

activity, has omitted an entire category of conduct previously held to be unlawful, could it not be argued, in the light of the above reasoning relating to s 12(2)(*a*) of the Interpretation Act, that it was indeed the intention of the legislature to revive the common-law crime of bribery when it repealed the 1992 Act? In this way the corruption law is no poorer than before, whereas the alternative interpretation simply means that the new legal regime seeking to counteract corruption is more narrowly defined, and thus weaker, than in the past. The courts must have the final word on this matter, but it may just be appropriate to welcome back the common-law crime of bribery, and with it those persistent Placaats.

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If you have a contribution which may be of interest to other Magistrates could you forward it via email to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or by fax to 031 3681366 for inclusion in future newsletters.

Matters of Interest to Magistrates

South Africans' perceptions of the police and the courts
Results of the 2007 National victims of crime survey (NVS)

Michael O'Donovan

Occasional Paper 176, December 2008 (Published by the Institute for Security Studies)

The court system and public perceptions

While a relatively high percentage of respondents were able, through direct and other interaction, to form an opinion on the local police, the same cannot be said about the court system. Although people go to court for many reasons – as witnesses, complainants in civil cases, or in support of friends and family, they are far more likely to interact with the police than they are with the court system. In fact only one in five respondents reported having been to court in any capacity within the last four years. By contrast 45 per cent of respondents indicated that they had 'official' contact with the police at least once in the preceding four years.

Less than one-in-five (17 per cent) of the respondents who had been to court in the preceding four years went to court to testify as a witness. Thus, while twenty per cent of all respondents had been the victim of a crime in the last 12 months only four per cent had been to court to testify as a result of that, or another criminal offence. This indicates that impressions regarding the performance of the court system, in so far as they are determined by personal experience, are influenced mostly by an involvement other than as a victim of a crime. Such 'other' involvement includes traffic offences, maintenance hearings as well as divorce or other civil matters. The NVS shows that twice as many people went to court as 'a party to a case' than as the result of having to testify as a witness.

When the analysis is limited only to those households who reported a crime in the preceding 12 months it would appear that one-in-five (21 per cent) had been called to court as a witness. It should also be noted that victims are not necessarily called to testify in all cases and whether or not they are called depends partly on the nature of the offence. Regardless, the survey does suggest that a small minority of cases result in a court hearing within a year. Other data from the National Prosecuting Authority (NPA) indicates that case cycle times are indeed long and constantly increasing. By mid-2006 over 40 per cent of cases on regional court rolls had taken longer than six months to finalize. This figure has almost certainly increased since then. As the wheels of justice do grind slowly it would seem that many respondents were yet to be called as witnesses and that their cases had not necessarily been closed without a court hearing.

Although half (48 per cent) of all respondents thought the courts were performing their duties adequately, the level of approval varied greatly. For example, the level of approval depended in part on whether or not the respondent had been to court in the recent years. Less than half (43 per cent) of respondents who had not been to court in the preceding four years thought the courts were performing adequately. By contrast, two thirds of respondents who had been to court in this period thought they were performing adequately. It would thus seem that exposure to the court system (as in the case of exposure to the police) generally improves public perceptions of the institution. When the analysis is restricted to only those respondents who had reported a crime in the preceding 12 months virtually identical results are apparent. Two-thirds of victims who had been to court in the preceding four years thought that the court system was functioning satisfactorily. Victims of crime thus held similar opinions about the performance of the court system as respondents who had been to court for other reasons.

As could be expected, respondents who thought the court system was functioning adequately were generally of the opinion that both the prosecution and magisterial services were satisfactory. In other words, neither arm of the criminal justice system tended to be singled out for praise or criticism. To gain insight into service shortfalls we have to examine the opinions of those who thought that the court services were not satisfactory. When doing this we find that most (57 per cent) of these respondents thought that prosecution services were not satisfactory. Similarly 57 per cent of these respondents believed that judicial services were unsatisfactory. It

seems that neither critics nor supporters of the court system make a clear distinction between prosecution and judicial services in their assessment. Thus, if an individual gave prosecution services a 'satisfactory' rating he invariably also gave judicial services a 'satisfactory' rating. Conversely, dissatisfaction with one of the two services almost universally corresponded with a 'dissatisfied' rating with the other. This pattern is also evident in the 2003 NVS.

Respondents were also asked how they thought perpetrators were dealt with by the courts. It appears that this question was largely interpreted in terms of the appropriateness of sentences passed. The single largest group of respondents (41 per cent) thought perpetrators were 'satisfactorily' dealt with by the courts. By contrast only a third of respondents thought they were not satisfactorily dealt with. One-in-five respondents (21 per cent) did not hold an opinion on the issue. When the analysis is limited to only those respondents who had been to court in the preceding four years (i.e. when limited to those more informed about the operation of the courts) satisfaction with the way in which perpetrators were dealt with jumped from 41 per cent in 2003 to 61 per cent in 2007. The marked increase in satisfaction levels was, however, not the result of a reduction in the proportion of respondents expressing dissatisfaction – this remained constant at 33 per cent. The increase in the 'satisfied' proportion of respondents comes as a result of a reduction in the proportion of respondents stating they 'did not know' how courts deal with perpetrators. This figure dropped from 21 to 5 per cent.

When the analysis is further restricted to those respondents who had reported a crime in the preceding 12 months, satisfaction with the way in which perpetrators are dealt with dropped back to 43 per cent. This disillusionment is possibly due to their own cases not having been resolved.

The reasons given for dissatisfaction in the way perpetrators were dealt with by the courts were relatively consistent. Two thirds of those respondents who were satisfied with the way in which perpetrators were dealt with gave, as justification, the fact that 'they pass sentences appropriate to the crime'. Those who were not satisfied with the way in which perpetrators were dealt with cited two primary reasons for their dissatisfaction. The most frequently cited reasons (53 per cent) were the 'leniency of sentence' and (42 per cent) the frequent 'unconditional release' of perpetrators.

It should be remembered that in South Africa sentences passed for serious offences tend to be punitive. This is particularly the case where minimum sentences are specified by legislation. As a result any victim that was given the opportunity to testify in court would most probably have been party to both a conviction (see below) and is likely to have seen a punitive sentence being handed down. It is thus with some reservation that the opinions of respondents should be taken to represent the performance of the criminal justice system in general.

Indeed the high ratings accorded the court system are surprising given that even senior court officials describe the system as 'fragmented and dysfunctional' (de Lange 2008). In general court proceedings are typified by frequent and lengthy

delays and a very high rate of cases being withdrawn. The high rate of withdrawal has contributed to prisons enrolling ever fewer convicts. In the second quarter of 2007 the number of admissions to prison had fallen to less than half of the corresponding period in 2003. This drop is far more dramatic than is warranted by the decline in the official crime rate. Given the still high crime rate, many would view this drop as cataclysmic. At this stage it is unclear to what extent the drop can be attributed to the conclusion of fewer cases and to what extent it can be attributed to the passing of non-custodial sentences. The question then arises as to how the NVS studies result in such a positive assessment of the court system – particularly by those who have been exposed to it.

An examination of the flow of cases reveals that a very high proportion of cases that appear in court are concluded with a guilty verdict. However, the high conviction rate (typically in excess of 85 per cent) is achieved by prosecutors withdrawing questionable cases before a plea is entered. High conviction rates are thus achieved by effectively dropping most cases. Those victims who did get to court were thus almost certain to witness a conviction and, in the case of serious offences, a punitive jail sentence. The result is a high satisfaction level with both the performance of the system and the way in which perpetrators are treated (as reflected by NVS respondents who have been to court as victims). However the vast majority of cases are never enrolled on the court system because perpetrators were not identified and arrested or the prosecution did not enroll the case because of 'insufficient evidence'.

The criminal justice system is ultimately weakest where there are no interactions with the aggrieved i.e. when the prosecution declines to enroll a case because the poor quality of the investigation, congestion of the court roll or because the detectives are unable to identify or locate suspects. Unfortunately, NVSs largely ask about the quality of respondents' interactions with agencies of the state while ignoring what goes on behind the scenes i.e. beyond the purview of respondents. The opinions of this cohort would invariably offset the high opinions offered by those respondents most exposed to, and best served by, the system. To use a culinary analogy – the analytically tasty bit between the functioning of the criminal justice system and what respondents say is lost in the slip between cup and lip.

A Last Thought

"*If the things we face are greater and more important than the things we refuse to face, then at least we have begun the re-evaluation of our world. At least we have begun to learn to see and live again.*
But if we refuse to face any of our awkward and deepest truths, then sooner or later, we are going to have to become deaf and blind. And then, eventually, we are going to have to silence our dreams, and the dreams of others. In other words, we die. We die in life."

(Ben Okri, 1997)
