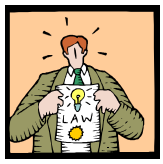
e-MANTSHI

A KZNJETCOM Newsletter

March 2011 : Issue 62

Welcome to the sixty second issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search all the issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.

Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to gvanrooyen@justice.gov.za.



New Legislation

1. The Minister of Transport has published a notice in the Government Gazette no 34065 dated 1 March 2011 in which amendments to the regulations of the *National Road Traffic Act* which were published on 25 November 2010 in Government Gazette no 33796 were revoked.

2. The Minister of Justice and Constitutional Development has published a notice in Government Gazette no 34060 dated 1 March 2011 under section 23 of the *Debt Collectors Act*, 1998 (Act No. 114 of 1998), in which the regulations of the *Debt Collectors Act* has been amended. The amendments deal with an increase in the tariffs which debt collectors are allowed to charge.

3. In Government Gazette no 34091 dated 15 March 2011 an isiXhosa translation of the *Magistrates Court Rules* was published.

4. The Minister of Transport has published Regulations in terms of section 75(6) of the *National Road Traffic Act, 1996* for general comment within four weeks after publication. This was published in Government Gazette no 34117 dated 16 March 2011. One of the proposed amendments relates to Regulation 332A which is formulated as follows:

“Presumption regarding calibration or verification certificate for equipment used for road traffic law enforcement purposes

332A. Where in any prosecution for an alleged offence in terms of this Act, it is necessary to prove that any equipment used for road traffic law enforcement purposes, was calibrated or verified to establish the accuracy and traceability, of such equipment, a certificate issued by a laboratory that is accredited for the purpose of issuing such certificates and conducting the tests required for such calibration or verification, by the South African National Accreditation System (SANAS), shall in absence of evidence to the contrary, by mere production thereof be prima facie evidence as to such calibration or verification."."

Recent Court Cases

1. Minister of Safety and Security v Van Der Merwe 2011 (1) SACR 211 SCA

In the issuing of a search warrant it is important to determine whether the information placed before a magistrate sufficiently discloses a reasonable suspicion that an offence has been committed and whether the terms of the warrant are clear.

Three search and seizure warrants were issued by a Cape Town magistrate, and a fourth by a Bellville magistrate. All four authorised the search for, and seizure of, documents from premises connected with the respondents. On application by the respondents the three Cape Town warrants were set aside by the High Court on the grounds, essentially, that they did not specify the offences to which the documents were related. Since the Bellville warrant did specify the offences, the application for its setting-aside was dismissed. With the leave of the High Court, the appellants appealed against the setting-aside of the Cape Town warrants, while the respondents cross-appealed against the dismissal of their application for the setting-aside of the Bellville warrant, arguing that its scope was vague and overbroad.

Held, that a challenge to the validity of a warrant called for scrutiny of the information that was before the officer who had issued it. By such scrutiny it could be determined whether the information sufficiently disclosed a reasonable suspicion that an offence had been committed; and whether it authorised no more than was strictly permitted by the statute in terms of which it was issued. In relation to the second issue, two questions generally arose. Firstly, whether the warrant was sufficiently clear as to the acts it permitted, for if it were vague, it would not be

possible to demonstrate that it went no further than what the statute permitted. Secondly, even if the warrant was clear in its terms, a second question arose: whether the acts it permitted went beyond what the statute authorised, in which case the warrant could be said to be overbroad and thus invalid. (Paragraphs [13]-[14] at 216g—2l7a.)

Held, further, that, while it was correct that the validity of a warrant must be tested against the particular statute under which it was issued, there were nonetheless some universal criteria. One was that the warrant must be intelligible, in the sense that its terms must be neither vague nor overbroad. The Constitutional Court in *Thint (Pry) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others* had laid down unequivocally that intelligibility required that the alleged offences had to be specified in the warrant. In this respect there was no material distinction between a warrant that was issued under the Criminal Procedure Act 51 of 1977 (as those *in casu* had been) and one issued under another statute. Accordingly, since the Cape Town warrants had failed to specify the relevant offences, the court a quo had been correct in finding them invalid, and the appeal against its decision must fail. (Paragraphs [30]-[33] at 221i-223a.)

Held, further, regarding the cross—appeal, that, since the BeIlville warrant had listed the items to be searched for and seized, there was no difficulty in determining what those items were, and the warrant could thus not be said to have been vague. As to whether it had been overbroad, in all but one paragraph the articles sought were expressly linked to the specified offences. Concerning the remaining paragraph, once it was read with an annexure specifying the offences under investigation, the target of the search became apparent. In the context of the warrant as a whole, the items listed in that paragraph could not reasonably be seen as extending to documents that were not related to the offence. Accordingly, the BeIlville warrant could not be faulted and the cross-appeal had to fail. (Paragraphs [34]-[38] at 223b-h.). Appeal dismissed with costs. Cross-appeal dismissed with costs.

2. S v Acting Regional Magistrate, Boksburg and Another 2011 (1) SACR 256 GSJ

There is a material flaw in the transitional provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 which render them unconstitutional.

The absurd limiting effect of the words ‘which were instituted prior to the commencement of this Act’ in s 69(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, and the words ‘which was initiated before the commencement of this Act’ in s 69(2), is that, where as in the present case, no investigation or prosecution or other legal proceedings relating to a common-law crime referred to ins 68(1)(b) of that Act had been initiated before the date of commencement of the Act, ie 16 December 2007, no criminal proceedings,

investigation or prosecution can be concluded, instituted or continued, despite the fact that the alleged conduct plainly constituted the common-law crime of rape at the time of the commission thereof. It is clear from the preamble to the Act, as well as the provisions of s 12(1) and (2) and s 28(1)(d) of the Constitution of the Republic of South Africa, 1996, that such a state of affairs could never have been intended by the legislature. (Paragraphs [15], [16] and [17] at 260f-261c.)

Severance of the quoted words in s 69(1) and (2) above will render it possible for the required criminal proceedings, investigations or prosecutions or other legal proceedings in respect of common-law crimes committed prior to the commencement of the Act, but only reported thereafter, to proceed in terms of the law; such severance is consistent with the Constitution and its fundamental values, and that the result achieved will not interfere with the intention of the legislature in terms of the Act. (Paragraph [20] at 262c-d.)

3. S v Maake 2011(1) SACR 263 SCA

It is in the interest of open and proper administration of justice and important for the maintenance of public confidence in same that courts publicly state reasons for their decisions.

"[19] It is not only a salutary practice, but obligatory for judicial officers to provide reasons to substantiate conclusions. The magistrate did not do so in respect of the maximum sentence imposed by him. In an article in the *South African Law Journal*, entitled 'Writing a Judgment', former Chief Justice MM Corbett pointed out that this general rule applies to both civil and criminal cases. In civil cases it is not a statutory rule, but one of practice. In *Botes and Another v Nedbank Ltd* 1983 (3) SA 27 (A) at 27H--28A, this court held that, in an opposed matter where the issues have been argued, litigants are entitled to be informed of the reasons for the judge's decision. See also *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) ([2003] 2 All SA 148) at 171E—172C in regard to the obligation to provide reasons.

[20] When a matter is taken on appeal, a court of appeal has a similar interest in knowing why a judicial officer who heard the matter made the order which he did. Broader considerations come into play. It is in the interests of the open and proper administration of justice that courts state publicly the reasons for their decisions. A statement of reasons gives some assurance that the court gave due consideration to the matter and did not act arbitrarily. This is important in the maintenance of public confidence in the administration of justice.

[21] Before the matter was dealt with statutorily the same general rule of practice applied in criminal matters, both in regard to conviction and sentence. In this regard see *R v Majerero and Others* 1948 (3) SA 1032 (A) where, at 1033, the following appears:

'We are aware that there is no provision in the Criminal Procedure Code for the delivery of a judgment . . . but in practice such a judgment is invariably given and we wish now to say that it is clearly in the interest of justice that it should be given.'

See also *R v Van der Walt* 1952 (4) SA 382 (A) at 382H—383A and *R v Huebsch* 1953 (2) SA 561 (A) at 564G—565E.

[22] In *S v Immelman* 1978 (3) SA 726 (A) at 729B-D the following was said in respect of sentence:
'It seems to me that, with regard to the sentence of the Court in cases where the trial Judge enjoys a discretion, a statement of the reasons which move him to impose the sentence which he does also serves the interests of justice. The absence of such reasons may operate unfairly, as against both the accused person and the State. One of the various problems which may be occasioned in the Court of Appeal by the absence of reasons is that in a case where there has been a plea of guilty but evidence has been led, there may be no indication as to how the Court resolved issues of fact thrown up by the evidence or on what factual basis the Court approached the question of sentence.'

[23] It bears mentioning that, in the article referred to in paras [18] and [19] above, the learned Chief Justice states that the practice of providing an order with reasons to be supplied later, is one that should be used sparingly.

[24] Section 146 of the Criminal Procedure Act 51 of 1977 now provides that a judge presiding in a 'superior court' shall, when he decides any question of law or fact, give reasons for the conclusions reached by him.

[25] In terms of s 93ter (3) (c), (d) and (e) of the Magistrates' Courts Act 32 of 1944, it is incumbent on a magistrates' court to give reasons for its decisions of fact or law."

4. S v Mthembu 2011(1) SACR 272 KZP

The fact that a trial judge did not inform the defence that a higher sentence than the minimum is being contemplated does not constitute a defect in the proceedings.

The appellant was convicted in the High Court on one count of murder. The trial judge considered that the offence, which stemmed from an incident of 'road rage', was deserving of a higher sentence than the minimum 15 years prescribed for an offence falling within Part II of Schedule 2 to the Criminal Law Amendment Act 105 of 1997, and sentenced the appellant to 18 years' imprisonment. He appealed against both conviction and sentence. The full bench found that there was no merit in the appeal against conviction, the trial judge having correctly rejected the appellant's version of events— including the assertion that he had shot the

deceased accidentally not once, but three times—as false beyond reasonable doubt. As to sentence, it was submitted, on behalf of the appellant, that the trial judge had failed to indicate that he had in mind the possibility of imposing a sentence higher than the statutory minimum, and that, in light of the decision in *S v Mbatha* 2009 (2) SACR 623 (KZP), this constituted a defect in the proceedings.

Held, the court having analysed the *ratio* in *Mbatha* in detail, that, although the prescribed minimum sentence should be the starting point, this was solely for the purpose of deciding whether a sentence less than the prescribed minimum should be imposed. The discretion, to impose a sentence greater than the prescribed minimum, did not have to be justified by reference to that minimum. In prescribing minimum sentences, the intention of the legislature had been to limit the discretion of the courts only in one direction—namely the imposition of sentences below the prescribed minimum; the courts' discretion in the other direction had not been limited. If it were the case that the legislature had prescribed that the minimum sentences should be imposed as appropriate sentences, rather than merely prescribing appropriate minimum sentences, that would border upon the unjustifiable prescription of mandatory sentences. (Paragraph [19] at 277g-279f.)

Held, further, that there was no need for a presiding officer to identify the circumstances that impelled him or her to impose a sentence greater than the prescribed minimum, other than the reasons that would ordinarily be given to show that the sentence was just and appropriate in all the circumstances. Accordingly, the fact that the trial judge had not informed the defence that a higher sentence than the minimum was being contemplated, was not a defect in the proceedings, and there being no other defect in the sentence, the appeal against it fell to be dismissed. (Paragraph [19], [21] and [22] at 279 g, 279i-j and 280b-c.)

From The Legal Journals

Mtshengu, S

"Parental responsibilities and rights agreements and parenting plans"

De Rebus March 2011

Boonzaaier, T and Hoosen, F

"The establishment of civil courts for a regional division"

De Rebus March 2011

Sharrock, R D

"Judicial control of unfair contract terms: The implications of Consumer Protection Act "

SA Mercantile Law Journal 2010 295

Barrie, G N

"The best interests of the child : Lessons from the first decade of the new millennium"

TSAR 2011 126

Otto, J M

" Statutêr verbode bedinge in kredietooreenkomste "

TSAR 2011 38

Meintjies-van der Walt, L

"The chain of custody and formal admissions"

SACJ 2010 371

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

Contributions from the Law School

Fingerprint evidence: A discussion of aspects of S v Nduna 2011(1) SACR 115 SCA.

1. Background:

The appellant was convicted on two counts of robbery with aggravating circumstances, and sentenced to 20 years imprisonment. He appealed

unsuccessfully against his convictions in the High Court, and brought a further appeal to the Supreme Court of Appeal (SCA).

2. The Issue:

The SCA (per Ebrahim AJA - Lewis JA and Bosiela JA concurring) stated that the main issue in the appeal was the probative value of the fingerprint evidence which was the basis for the conviction of the appellant. There were really three main issues to be determined in assessing whether the appellant had been properly convicted or not – all of which were closely bound up with the fingerprint evidence. The three main issues were:
Firstly, whether the 2 partial (latent) prints could be regarded as conclusive evidence of the appellant's identity.
Secondly, whether the two robberies could be regarded as admissible 'similar fact' evidence to prove the appellants modus operandi, and
Thirdly, whether there was sufficient circumstantial evidence to justify the inference that the appellant was guilty of the two robberies beyond any reasonable doubt.

3. The Facts:

The two robberies took place 8 years apart, in different locations. In both cases, the robberies took place in daylight after the complainants had drawn cash from the ATM nearby, and had returned to their places of business. In each case, the robber/s had appeared in a vehicle, had alighted from the vehicle and had threatened the complainant with a gun/s. These similarities between the two robberies played a big role in the SCA's decision to dismiss the appeal.

There were also however significant differences between the two robberies, which the SCA did not highlight. In the 1999 incident, the ATM was located on the street, and R 4 000.00 was drawn. In the 2007 incident, the ATM was in the N1 shopping centre, and R 54 000.00 was drawn. In the 1999 incident the complainant was a passenger in the vehicle; while in the 2007 robbery, the complainant he was the lone driver of the car. In the 1999 incident only one robber approached the complainant, and this was after he had left his vehicle once he had arrived back at his workplace, and the robber only drew his firearm when he was directly in front of the complainant. The complainant handed over the money, and he was not hurt. In the 2007 incident, three robbers ran towards the complainant while he was still in his car, and all three robbers had their firearms in their hands while running towards the complainant's vehicle. The robbers surrounded the vehicle and broke the windows to gain access to the money which they retrieved from the cubbyhole of the vehicle. The complainant was hit on the shoulder after the robbers had taken the money. In the 1999 incident the vehicle used by the robbers was a stolen vehicle which was abandoned by the robbers and recovered by the police within 15 minutes of the reported robbery. In the 2007 incident, I must assume that the vehicle used by the robbers was not recovered, nor identified as stolen, because this is not mentioned in the judgement, and the lifted print relied upon to implicate the alleged perpetrator was from the complainant's vehicle.

The only evidence linking the appellant to the robberies were two partial prints. The first, a thumbprint lifted from the vehicle used in the first robbery. The second, a palmprint lifted from the vehicle used in the second robbery. The SCA does not distinguish between the finger and the palm print – calling them both fingerprints. In the international literature, palmprints and finger/thumbprints are shown to be distinguishable in a number of important respects relevant to reliability.

It is not clear from the judgement how the thumbprint lifted from the stolen vehicle linked to the 1999 robbery was identified as that of the appellant. All that is mentioned in the judgement is that the fingerprint expert produced a photographic enlargement of the print taken from the vehicle and compared it to the left thumbprint from a set of fingerprints marked as those of the appellant. The SCA notes that "as a further test…[the expert] took a fresh set of thumbprints from [the appellant] and compared them with the others] and found that all three sets were identical. It is extremely unlikely that the three prints were actually identical. A latent print (ie: one lifted from a surface touched by the individual) is never identical to one taken in a controlled environment, due (inter alia) to the technique used to take the print in the controlled environment. Even two prints taken in a controlled setting are very seldom actually identical. One of the major criticisms leveled against the science behind fingerprints has been the fact that professional societies have generally insisted that there is a zero error rate in the matching of fingerprints. That is, it is an ethical rule in some professional fingerprint societies that if an identification is to be made, it must be asserted as it is 100% accurate. This has easily been proven to be blatantly false. Fingerprint matching has been shown to be a subjective exercise, and there is certainly a margin for error in matching fingerprints. Another criticism is that it has never been scientifically proved exactly what the margin of error is. Proved errors in real life as well in experiments have been shown to be linked to a wide range of factors including the competence of the fingerprint examiner and the clarity of the prints. Fingerprint examiners are also subject to psycho-cognitive errors such as the well known 'confirmation bias' where hard evidence shows that where an examiner is presented with two sets of prints for which a match is expected, the rate of 'false positives' spikes. Even the mere fact that the examiners know that they are being tested impacts on the results, as does the degree of 'pressure to make a match' to which the examiners are exposed – such as in high profile cases.

A different expert processed the palm print linked to the 2007 incident. Here we do know how he linked the print to the appellant. He was asked to compare the print he had just lifted with a set of prints provided by the investigating officer, and concluded that they "were identical, having identified 7 points of similarity". The expert had lifted a total of ten prints from the vehicle and none of the others were identified as belonging to the appellant. The seven points of similarity traditionally accepted in South Africa as being sufficient to conclusively match fingerprints is low by international standards. The number of points of similarity accepted from jurisdiction to jurisdiction varies, but it is not uncommon for sixteen points of similarity to be required to suffice as identification for purposes connected with legal proceedings.

The appellant did not challenge the expert's testimony. However, he argued that the prints had limited probative value because the state had not led evidence as to the

age of the prints found on the two vehicles nor of how long they would have remained on the vehicles after he had touched them. He testified in his own defence and was able to provide explanations as to how his prints could have come to be on the two vehicles. Both vehicles were or had been in places he visited regularly, and he explained how he could have touched them casually and/or accidentally. The expert testified that the nature of the palmprint was such that it had not been made by casual contact but by exerting full pressure on the vehicle. The SCA stated that it did not find the appellant's explanations as to how his prints came to be on the vehicles to be credible, but gave no reasons for this finding.

4. The basis of the appeal

The appellant appealed against his conviction on the basis that the state had not proved his guilt beyond a reasonable doubt, because of the paucity of evidence against him – specifically the low probative value of the thumb and palm print evidence. He argued that the prints did not justify the inference that he was involved in the crimes because of the long time lapse between the two incidents particularly since the state could not show how old the prints were, nor of how long they would have remained on the vehicles after he had touched them. The appellant argued further that it was impermissible for the court to use the evidence led on the first count to support a finding of guilt on the second, as this would be impermissible similar fact evidence.

5. The reasoning of the court

5.1Circumstantial evidence
There are two well known rules of logic which must be complied with in order to draw a justifiable inference from circumstantial evidence (*R v Blom* 1939 AD 188).

First, the inference that the appellant committed the two robberies must be consistent with all the proved facts. The SCA held that this part of the test 'was clearly met.' Second, the inference that the appellant committed the two robberies must be the only reasonable inference to be drawn from the evidence. The SCA held that this depended on what the probative value of the thumb and palmprint were, as well as the significance of the 'coincidence' of his prints being lifted from two vehicles proved to have been involved in robberies.

The appellant argued that;

a) his explanations for the prints found on the two vehicles were equally consonant with an innocent explanation as with a guilty one. Thus, the probative value of the two prints was low.
b) because the state didn't lead any evidence as to the age of the prints or their likely lifespan in the particular places where they had been found, the probative value of the prints was diminished still further.
c) In any event, it was impermissible reasoning to use the evidence relating to the first count to prove the commission of the second count, in terms of the rules of evidence regulating similar fact evidence.

The SCA confirmed that it was impermissible to use similar fact evidence to prove the commission of a crime – or to act as "confirmatory material on another count" . However, it held that it was permissible to invoke similar fact evidence to "establish the cogency of the evidence of a systematic course of wrongful conduct in order to render it more probable that the offender committed each of the offences…" – such as where the evidence establishes the accused's modus operandi.

In other words, it is impermissible to take account of evidence relating to the propensity to commit a crime to support the inference that the accused is in fact guilty thereof, but it is admissible if there is another legitimate reason for considering the evidence relevant.

In casu, the SCA held that "each offence has been established independently, but the cumulative effect of the similar conduct on both counts must weigh heavily against the appellant." (para 19). The SCA held further that "[i]t is highly unlikely that 2 robberies, committed in the same fashion…where the fingerprints of one person are found on different vehicles would be entirely unconnected. Even though so far apart in time, the coincidence especially when regard is had to the fact that the fingerprints of the appellant were lifted in each case from a vehicle proved to have been involved in each robbery, is explicable only on the basis that the appellant participated in each robbery."

Leaving aside whether the SCA was correct in its application of the rules relating to similar fact and circumstantial evidence, it is clear that the state's entire case rested on whether the thumbprint and palmprint found on the two vehicles did in fact come from the accused ; and whether they could only have come to be there by virtue of the fact that he was involved in the robberies.

As to the first point, it is puzzling why the appellant did not challenge the authenticity or reliability of the fingerprint evidence. Even so, I find it worrying that the SCA simply accepted that "[t]he probative value of fingerprint evidence is undoubtable," referring to the case of *S v Legote en 'n ander* 2001 (2) SACR 179 SCA para 3 as authority for its statement. The paragraph referred to in *S v Legote* (supra) is to the effect that "normaalweg verskaf dit nie alleen prima facie getuienis nie maar dikwels is dit beslissend. "

Internationally there is a tremendous questioning of both the science behind fingerprint evidence, as well as its reliability. This comes in the wake of huge scandals where fingerprint evidence presented and relied upon as being conclusive evidence implicating the accused has been shown to have been wrong. In the UK, the Law Commission was instructed to look into this (and other miscarriages of justice based on flawed forensic evidence), and has made recommendations to change the entire landscape of forensic expert testimony. See www.lawcom.gov.uk : Expert Evidence in Criminal Proceedings Report. The final version of the report, published after the conclusion of a public consultation process, was released on 22 March 2011. In a nutshell, the recommendation is that the judge will have the power to declare forensic testimony inadmissible if it does not meet pre-specified reliability

indicators. The Commission's cautionary words on the commencement of its task seem very applicable to the case under discussion, even though South Africa does not share the jury system with the UK:

> "The current judicial approach to the admissibility of expert evidence in England and Wales is one of laissez-faire. Too much expert opinion evidence is admitted without adequate scrutiny because no clear test is being applied to determine whether the evidence is sufficiently reliable to be admitted. This problem is exacerbated in two ways. First, because expert evidence (particularly scientific evidence) will often be technical and complex, jurors will understandably lack the experience to be able to assess the reliability of such evidence. There is a danger that they may simply defer to the opinion of the specialist who has been called to provide expert evidence. Secondly, in the absence of a clear legal test to ensure the reliability of expert evidence, advocates do not always cross-examine experts effectively to reveal potential flaws in the experts' methodology, data and reasoning. Juries may therefore be reaching conclusions on the basis of unreliable evidence. This conclusion is confirmed by a number of miscarriages of justice in recent years."

A similar movement is afoot in the USA. In 2009 the National Academy of Sciences issued a report entitled "Strengthening Forensic Science in the US: A Path Forward (53) 2009" in which similar concerns are explored and addressed (see www.ncjrs.gov). There are many excellent sites on the internet making available pertinent, authoritative and reliable resources– both primary and secondary-for anyone interested. See, for example, the resource section on the site of the Scientific Working Group on Friction Ridge Analysis, Study and Technology (www.swgfast.org).

There is also a vast wealth of academic writing on the topic, some of which is referred to by Lirieka Meintjies-Van Der Walt in her recent article "Fingerprint Evidence:Probing Myth and Reality"(published in the South African Journal of Criminal Justice 2006(2) at p 152).In this article, Meintjies-Van der Walt concludes that there are multiple bases on which fingerprint evidence could be challenged by the defence and says that there "are aspects of traditional forensic science evidence which could make legal decision making unsafe."

Last but not least, and on a most visceral level, who could possibly forget the lessons that were learnt from the case of *S v Van der Vyver* (SS 190/06) [2007] ZAWCHC 69 (29 November 2007) where the SAPS and forensic fingerprint experts (as well as other forensic experts) were shown to have fabricated, falsified, manipulated and distorted the evidence to their ends. The case made front page news, and the story was reported in the popular book "Fruit of the Poisoned Tree" by Anthony Altbeker.

Therefore, in the light of international concerns and trends (which have been found to be legitimate by a leading South African author on forensic evidence – Meintjies-Van der Walt) as well as local experience, I find it puzzling (to say the least) that the appellant in the case of *S v Nduna* (supra) made no attempt to challenge the

fingerprint evidence allegedly implicating him. I find it even more worrying that the SCA accepted that evidence with no enquiry whatsoever into its authenticity and reliability.

Then again, with nothing more than a partial thumbprint, and a partial palmprint found on two vehicles involved in robberies 8 years apart – and where the appellant could provide an explanation as to how they came to be on each of the vehicles - who would have thought he would be convicted?

Nicci Whitearnel
University of KZN
Pietermaritzburg

Matters of Interest to Magistrates

Why Apartheid planning continues to undermine Efforts at crime reduction

09 March 2011

There are no shortage of theories, hypotheses and even unfounded beliefs about what drives crime and what is the best approach to solving the problem. Approaches to the problem fall into two broad categories. One calls for the social risk factors for offending to be addressed. According to this approach the intervention required to address crime is essentially developmental in nature, focused on improving the 'health' of individuals, family and neighbourhood. The second approach focuses on improving external social control. This includes increasing the number of police, putting more people in prison, and applying longer and harsher sentences with the aim of deterring would be criminals and thereby reducing crime.

In the face of high levels of violent crime the popular view tends to be in favour of the harsher, retributive approach to crime. This is the approach that South Africa has favoured since 1994. There is a tremendous gulf between the two approaches and even within each of these are nuances and debates that rage about how and what to prioritise.

It is trite, but true, that the individual factors that contribute towards the motivation and justification to commit crime, as well as the circumstances that hinder or facilitate the commission of crime are enormously complex and individualised to each person and crime type. Both approaches to dealing with the problem of crime also have varying degrees of merit. The challenge is to find a middle path that addresses factors that facilitate criminal behaviour at both micro and macro levels.

Professors Keith Soothill (Emeritus Professor of Social Research) and Brian Francis (Professor of Social Statistics), both at Lancaster University in the United Kingdom have analysed huge datasets in order to unpack the contribution of a range of factors on the propensity of an individual to commit crime. They have also considered the various theories put forward by those seeking to explain why crime rates in the United States fell dramatically in the early 1990s (at the same time as crime rates fell in Canada and Europe). They reach the conclusion that “the pivotal issue is whether one can develop a society in which all persons feel that they have a stake and, thus, develop internal controls to resist crime. The development of more prisons and more intrusive policing is a sad measure of the failure to do this.”

If social capital is one of the factors which has to be part of any solution to the problem of crime then finding solutions to the problem in South Africa is going to be complicated, indeed bedevilled, by apartheid spatial planning and development, and the post-1994 perpetuation of the spatial separation on the basis of class.

Inequality is one of the social factors that has been identified as contributing to high rates of crime, especially homicide, both nationally and internationally; it is also a factor that reduces the development of social capital. Quite simply put, social capital is about shared interests and values. Michael O’Donovan, a South Africa researcher and independent consultant, has shown through a statistical analysis of income levels and crime rates that there is a “correlation between average precinct income and crime rates – with low income rates corresponding to low crimes rates (both violent and non-violent)”.

Taken further, the analysis shows that while inequality within an area does not contribute to crime levels, inequality between precincts does do so significantly. In other words, when people with different and even highly unequal levels of income live in the same place there is less likelihood of a high rate of violent and property crime, than if you have two communities situated close to one another with vastly different income levels. Throw in the fact that the differences between the two communities are likely to be differences of race or ethnicity as well as class and you have a situation in which building social capital - or shared interests - is close to impossible. There is no doubt that this kind of analysis is intuitive – it won’t come as a big surprise to either community that it is the differences between them that contribute to high levels of crime.

Yet, if this is one of the primary factors driving high levels of crime, then it should be brought to the attention of spatial development planners at provincial and local level. A recent local structure plan for the development of peri-urban areas in the Western

Cape shows how entrenched the notion of separate development is. The plan refers to an area that has the classic characteristics of apartheid town planning: a small town or village where wealthy and middle class whites live, bordered by a township of mainly working class blacks and coloureds.

The plan makes several disturbing proposals; one being that people who have been living in two informal settlements that are seen to sully nearby neighbouring middle class developments be moved to the township outside the village (this is despite the fact that all three communities have previously rejected this idea). Furthermore, the plan treats the two communities (the middle class village and the working class township) as separate entities and emphasises different interests and needs. It plans for different business centres for each of the two communities; identifies different roles for the communities in terms of attracting and servicing tourism; and different transport nodes. The plan neglects shared interests and therefore fails to identify initiatives that could build social capital between the two communities. Yet, it is in precisely in these kinds of small towns that it would be much easier to redress the past through more sensitive, informed and creative planning, than it might be in urban centres.

It is deeply concerning that structure plans, such as this, will form the basis for future development and as such will work to reinforce the divisions of the past and bequeath these divisions to future generations. This does not create the basis for growing healthy, safe, equitable communities. Nor does it address the need to leave a legacy that breaks with the destructive social engineering of apartheid. The future of these communities should instead lie in integrated development, where rich, poor and middle classes will live in close proximity to one other and share services and amenities. Such an approach will contribute to building the social capital that is necessary not only to overcome prejudice and racism, but also crime.

Chandre Gould, Senior researcher, Crime and Justice Programme, ISS Pretoria Office

A Last Thought

A man's castle was his home

In 2011 (Jan/Feb) *DR* 59, 'A man's castle was his home – "all property is theft"', Graham Theunissen opined that he had read Judge Willis' judgment of *Emfuleni Local Municipality v Builders Advancement Services CC and Others* 2010 (4) SA 133 (GSJ) with great satisfaction.

It is a strange observation as the judge vilified the highest court of the country with statements such as: 'Quite how the Constitutional Court could have come to this conclusion is one of the great unfathomable mysteries of my life.' The judge also ignored constitutional protections and legislation in that regard, doubted the higher courts' emphasis on socio-economic rights and asserted his own personal views and theories on economic values and the right to property. In citing economic 'success stories' in developed countries that had no bearing to the pleadings of the matter, he even praised Tony Blair.

Personalised politicised judgments are not what lawyers expect from judges. No wonder his view was severely criticised from various quarters.

Dan Badenhorst,
attorney, Cape Town

(The above letter appears in the April 2011 issue of *De Rebus*.)