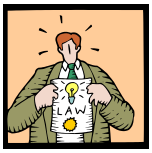
e-MANTSHI

A KZNJETCOM Newsletter

October 2013: Issue 93

Welcome to the ninety third 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 back 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 Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Rules Board for Courts of Law has, under section 6 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), with the approval of the Minister of Justice and Constitutional Development, amended the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa . The amendment was published in Government Gazette no 36913 dated 11 October 2013. The amendments are to rule 33 and to Annexure 2 to the Rules. The rules come into operation on the 15th of November 2013.

The Amendment of rule 33 of the Rules reads as follows:

Rule 33 of the Rules is hereby amended by the substitution for subrule (5) of the following subrule:
"(5) *(a)* In district court civil matters, the scale of fees to be taken by attorneys as between party and party shall—
(i) be that set out in Table A of Annexure 2 in addition to the necessary expenses;
(ii) in relation to proceedings under [section] sections 65, 65A to 65M, inclusive, and 72 of the Act and all matters ancillary thereto be that set out in Parts I and II, respectively, of Table B of the said Annexure; and

(iii) in relation to proceedings under [section] sections 74 and 74A to 74W, inclusive, of the Act and all matters ancillary thereto be that set out in Part III of Table B of the said Annexure.
(b) The scale of fees referred to in paragraph (a)(iii) of this subrule shall also be the scale of fees to be taken between attorney and client in relation to proceedings under [section] sections 74 and 74A to 74W, inclusive, of the Act.
(c) In regional court civil matters, including [divorce or matrimonial] matters in respect of causes of action in terms of section 29(1 B)*(a)* of the Act, the scale of fees to be taken by attorneys as between party and party shall be that set out in scale D of [table] Table A of Annexure 2 in addition to the necessary expenses [scale C of Table A of Annexure 2 being applicable: Provided that the applicable scale of fees to be taken by attorneys as between party and party in civil claims whose monetary value falls within the jurisdiction of district courts shall be the one contained in paragraph *(a)* of this subrule, notwithstanding such claims having been instituted in the regional court]."

2. The regulations in terms of the National Road Traffic Act, Act 93 of 1996 has been amended. The amendments were published in Government Gazette no 36911 dated 9 October 2013. Regulation 284 and schedule 1 have been amended.

Regulation 284 of the Regulations is amended by the insertion of the following definitions after the definition of emergency vehicle:
"'e-road' means a toll road declared as a toll road in terms of section 27(1)(a)(i) of the South African National Roads Agency Limited and National Roads Act, 1998 (Act No. 7 of 1998), where liability to pay toll for use of the road is recorded at a toll plaza exclusively by means of any electrical or electronic device;
'e-tag' means an electronic device that is fitted to a specific motor vehicle as contemplated in the Specification Regulations published in terms of section 58(1)(dB) of the South African National Roads Agency Limited and National Roads Act, 1998 (Act No. 7 of 1998) to identify that motor vehicle when it passes under a gantry; and
'e-toll' means toll that is collected by means of an electric or electronic collection system where a motor vehicle is identified by electric or electronic equipment and the liability to pay toll is incurred when the user of the motor vehicle passes through a toll plaza and must arrange to pay toll as determined in terms of section 27 and 58 of the South African National Roads Agency Limited and National Roads Act, 1998 (Act No. 7 of 1998).".

3. The Dangerous Weapons Act, 2013 (Act No. 15 of 2013), will come into operation on 2 January 2014. The notice was published in Government Gazette no 36949 dated 21 October 2013.

Recent Court Cases

1. S v KUMKANI 2013 (2) SACR 360 (WCC)

The failure of a magistrate to inform an unrepresented accused of his rights of review and appeal infringes his rights to a fair trial.

Mantame, J

"1. This matter came before me on 12 February 2012 in terms of Section 304 of the Criminal Procedure Act 51 of 1977.

2. Upon perusing the record, I noted that the proceedings were mechanically recorded. The accused was charged with contravening the provisions of Section 65(2)(a) read with Section 1, 65(3), 65(4), 65(8), 65(9), 69(1), 73 and 89 of the National Road Traffic Act 93 of 1996, that is, driving with excessive amount of alcohol in blood. Accused drove the vehicle whilst the concentration of alcohol in his blood was not less the 0,05 gram per 100 millilitres, to wit, 0,28 gram per 100 millilitres.

3. On 3 January 2013, accused pleaded guilty to the charge and made a statement in isiXhosa in terms of Section 112(2) of the Criminal Procedure Act 51 of 1977. In the said statement, accused pleaded guilty and admitted all the elements of the crime. The magistrate then found him guilty in terms of the plea and sentenced accused as follows*:*

"*R6000.00 fine or twelve (12) months imprisonment of which R3000.00 or six (6) months is suspended for five (5) years on condition that the accused is not convicted of contravening Section* 65 Act 93 *of 1996 committed during the period of suspension. In terms of Section 35(3) suspension of drivers licence shall not come into effect. Deferred fine granted*".

4. At page 11, at the end of the sentencing proceedings, the magistrate asked a question: "*Do you understand?*"- and would glean from the record that she was referring to the accused payment of deferred fine as the prosecutor broke down the monthly payments into specific dates. At line 16 the magistrate said something on record, but was captured as inaudible.

5. It therefore appeared that the accused was not advised of his rights after sentencing. On the same day, I returned the record back to the magistrate with the following remarks:-

"*The record does not reflect that the accused person was advised of his rights after sentencing. Magistrate is requested to explain if that explanation ever took place*".

6. The response took quite some time to get to my chambers. On 20 May 2013, I received the magistrates' response dated 16.04.2013 with a cover letter from the Judicial Head Strand – A Farber, explaining the reasons for the delay on responding back. Mr Faber explained that Ms Mpande, the magistrate, was a contractual appointee whose contract ended on 11 January 2013 at Strand Magistrates' Court. The magistrate has since been appointed at Cape Town Magistrates' Court as a magistrate, also on contractual basis. That resulted in their communication not being easy, hence the delay. In my view, such explanation is reasonable in the circumstances.

7. I now turn to deal with the magistrates' response that reads as follows:-

"*Re-review*

I refer to the query, dated 12 February 2013 by the Honourable Judge.

I confirm that as appears in the records, no explanation was made to the accused person, regarding his rights to review and/or appeal. I accept that this was a mistake from my side. Should it be the Honourable Judge's opinion that this amounts to the irregularity of the proceedings, I will leave it in her hands to deal with this matter accordingly.

I will therefore be amenable to whatever decision the court deems appropriate in this case, i.e. to let the matter start de novo.

Yours truly,

Ms N Mpande."

I have taken due notice of the fact that though the magistrate had intimated that if there are any irregularities in the proceedings, she is leaving it in my hands to deal with the matter. In the next line, the same magistrate advises that she is amenable to whatsoever decision the court deems appropriate in this case i.e. to let the matter start *de novo*.

8. Section 304 lays down the procedures to be followed in automatic reviews. Even where sentences were competent and regularly imposed, a reviewing court may intervene wherein subsequent events, if no interference occurs, would lead to a miscarriage of justice – See S v Z & 23 similar cases 2004(1) SA 400 E.

9. In the present matter, the magistrate, on her own admission, has failed to explain to the accused of his rights of review and appeal after sentencing. This error or mistake infringes upon accused rights as entrenched in The Constitution of the Republic of South Africa, 1996, Chapter 2 of the Bill of Rights, Section 35(o) which reads as follows: "*Every accused person has a right to a fair trial, which includes the right to appeal to, or review by a higher court*".

In my view, if these rights are not adhered to that would be tantamount to a travesty of justice.

10. In my view, accused has been deprived the constitutionally entrenched right by the magistrate. This was an unrepresented accused who knew nothing about the rule of law. It was therefore incumbent upon the magistrate to inform the accused of his rights, so as to make up his mind both on conviction and sentence. It is my judgment that the accused cannot be double penalised due to the error committed by the magistrate. It would be unfair for this court to refer the matter to the magistrate's court for the proceedings to start *de novo* due to no creation of the accused.

11. Consequently the proceedings in this case appear not to be in accordance with justice. In the interest of justice, the conviction and sentence is set aside and the accused is entitled to a refund of his deferred fine already paid."

2. S v GXALEKA 2013(2) SACR 399 (ECB)

It is a serious irregularity not to deal with a child in terms of the Child Justice Act 75 of 2008 in criminal proceedings.

The accused was being tried in a Magistrates' court on a charge of assault with intent to do grievous bodily harm. During the course of cross-examination of the complainant it came to the attention of the court that the accused was under the age of 18 years. The magistrate stopped the proceedings and referred the matter to the high court, requesting that the proceedings be reviewed and set aside.

The court held that the failure to deal with the accused as a child in terms of the Child Justice Act 7S of 2008 was a serious irregularity that had the potential to lead to a miscarriage of justice. The court remarked that it was inexplicable how the question of the age of the accused had escaped the notice of the members of the police and public prosecutor, and that the accused's only legal representative had failed to disclose this fact to the court. The court stressed that legal practitioners also had a role to play in ensuring that the objectives of the Child Justice Act were achieved. The court held that the present case was one of those unusual and rare cases in which a high court was called upon to review unconcluded criminal proceedings where a failure to intervene would result in great injustice to a child accused. The proceedings were set aside and the matter remitted to the magistrates' court for the institution of proceedings de novo. (Paragraphs [18] at *40Sg-h* and [20]-[23] at *40Si-406h.)*

3. S v SINGH 2013(2) SACR 372 (KZD)

A special review in terms of section 304(4) of Act 51 of 1977 is not intended to be a cheap alternative to an appeal.

The accused was convicted in a magistrates' court of negligent driving and was sentenced to a fine. A number of days after the proceedings had ended, his counsel wrote a letter to the chief magistrate complaining of the conduct of the presiding officer during the trial. As a result of this complaint the presiding magistrate submitted the proceedings on review, purportedly on the basis of the provisions of s 304(4) of the Criminal Procedure Act 51 of 1977.

Held, that a magistrate who approached the high court in terms of s 304(4) should at least specifically submit that the proceedings were not in accordance with justice. The magistrate's decision in the present matter was not only unfortunate but disturbing in that he had allowed himself to be used as an agent for the accused in not only submitting the matter on special review but also in procuring the transcript of the proceedings at state expense and supplying the defence with a copy thereof. (Paragraphs [13] at *374e* and [14] at *374f-g.)*

Held, further, that the practice of magistrates submitting matters on special review in the absence of any grounds had to be deprecated. What should have occurred in the present matter was for the accused to apply for leave to appeal or institute review proceedings if he were dissatisfied. In that event the court would not have to adjudicate on informal allegations made in a letter from counsel for the accused, that were denied by the presiding magistrate. (Paragraphs [15] at *374h* and [16] at *375b.)* The matter was remitted to the magistrate without any further order.

Stevens, P

" Decriminalising consensual sexual acts between adolescents within a constitutional framework: *The Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional development and Others case:* 73300/10 [2013] ZAGPPHC 1 (4 January 2013)"

SACJ 2013 41

Naude, B C

"The substantive use of a prior inconsistent statement"

SACJ 2013 55

Carstens, P

"Revisiting the relationship between *dolus eventualis* and *luxuria* in context of vehicular collisions causing the death of fellow passengers and/or pedestrians: *S v Humphreys* 2013(2) SACR 1(SCA)"

SACJ 2013 67

Hoctor, S

" Death on the roads and *dolus eventualis – S v Humphreys* 2013 (2) SACR 1 (SCA)"

SACJ 2013 75

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

Contributions from the Law School

Is there a duty to retreat for abused woman in the law of Self-Defence?

Abstract

Despite various rationales underlying the law of self-defence, it is not entirely clear whether an abused woman is expected to flee. It is submitted that there should be a duty to retreat. In the case of the abused woman, her situation is adequately catered for within the reasonableness neutrality perspective.

On the basis of the two rationales underlying self-defence in South African law, the question remains as to whether an abused woman is required to retreat from her home. According to the upholding of justice theory, if in the event of an unlawful attack it is possible for the defender to flee from the attacker without the defender giving up her protected interest and without exposing herself to harm, the defender has no duty to flee (Snyman "The two reasons for the existence of private defence and their effect on the rules relating to the defence in South Africa (2004) *South African Journal of Criminal Justice* 184). When acting in private defence, the defender acts as one who upholds the law, since the state authority is not present to protect her (Snyman *Strafreg* 5th ed (2006) 184). The issue is not balancing the value of autonomy against the value of the aggressor's life, but whether the defender enjoys autonomy at the outset. If this is the case, then the notion of autonomy entails a right forcibly to reassert one's rightful position (Snyman *supra* at 184).

Case law creates the impression that in circumstances of abuse, the attacked party is expected to flee (*R v Zikalala* 1953 (2) SA 568 (A) 571-572; *R v Dougherty* 2003 2 SACR 36 W at 50). It may be that under the influence of Anglo-American law, South African law expects the attacked party to flee, in order to avoid the attack. English law has expressed this sentiment well in *R v Julien* [1969] 2 All ER 586 where it was held that "a duty to flee in reality amounts to a duty to demonstrate an unwillingness to fight…to temporize and disengage and perhaps to make some physical withdrawal". In *R v Bird* [1985] 1 WLR 816 it was held that whether the abused woman could have fled is one of several factors that are taken into account in deciding whether the defensive action was necessary, and whether the extent of the defence was reasonable. In *S v Engelbrecht* 2005 (92) SACR 41 (W) Judge Satchwell was of the view that bearing in mind the "hidden" or "concealed" nature of domestic violence which is frequently confined to the privacy of the home, she was cautious about requiring the abused woman to vacate their home leaving the spouse in full occupation (at par [354]). The judge further held that flight may be thought to encompass efforts made, not only to leave the home but also to approach State authorities such as the SAPS, the family violence courts, shelters, family etc (at par [355]). The judge further pointed out that the court must, in this context, be extremely cautious in seeking to rely upon examination of the efforts taken by an abused woman to extricate herself from the abusive situation or to escape the abusive spouse or partner. Judgment should not be passed on the fact that the battered woman stayed in the abusive relationship. Still less is the court entitled to conclude that she forfeited her right to private defence for having done so (*S v Engelbrecht supra* at par [356]).

Some theorists such as Beale are of the view that the laws task is to provide the aggrieved party with a remedy for the violation of their rights and this does not include protecting the aggressor's rights. If the right to use force is a derivative of the state's control of force, then regulating the defence consistently reflects the interests both of the aggressor and the defender (Beal "Retreat from Murderous Assault" (1868) *Harvard Law Review* 581). One suggestion in respect of the duty to retreat is to recognize putative self-defence. However, it is submitted that by recognizing battered woman syndrome as being pertinent to the question as to why the battered woman did not retreat, other factors will also have to be taken into account to satisfy the court that she had no option but to act in a particular way. Such a standard is functionally equivalent to the subjective standard. This is in clear contradiction to the view that reasonableness must be facially neutral (Unikel "Reasonable Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence" (1992) *North Western University Law Review* 355).

A comparable argument could be made for the fact that the duty to retreat, must, from an objective viewpoint, be necessary. Where an attack is not imminent, the battered woman is required to retreat. Such a position does not take into account the fact that the battered woman is more likely to be killed by her abuser when she leaves an abusive relationship and that the women who flee often have no safe place to go (Aggergaard "Criminal Law-Retreat from Reason: How Minnesota's New No-Retreat Rule Confuses the law and cries for alteration" (2002) *William Mitchell Law Review* (2002) 671. Walker notes that a woman who is repeatedly battered by her mate will eventually accept the situation and develop a feeling of learned helplessness (*The Battered Woman* (1979) 87). This psychological paralysis can be so severe that even if an avenue of escape presents itself the woman might be unable to act on it or unable to even perceive that it exists.

In respect of South African law, the duty to retreat should be maintained in self-defence law. In the case of the battered woman, her situation can be adequately catered for within the reasonableness neutrality perspective. This means that since the requirement of imminence is political, rather than moral, the element of self-defence known as an imminent attack must actually occur in the real world. The relationship status between parties (the fact that one party is dominant and the other subordinate) should not matter. However, where there is a gap between state protection and the abused woman's reality of the police's unresponsiveness, it essentially becomes more difficult to assess whether the courts should be required to recognize a broader than usual right of self defence (Fletcher "Domination in the theory of Justification and Excuse" (1006) *University of Pittsburgh Law Review* 553 at 571). The problem is to formulate a precise test of how poorly the police have failed in their duties and to determine a proportionate adjustment in the law of self-defence (Fletcher *supra*).

South African courts have difficulty in seeing confrontational cases as confrontational because of the normative assumptions about what parties relationships entail, the structure of the parties relationships will determine the objective view not only of any temporal transactions but also of its confrontational character (Nourse "Self-Defence

and Subjectivity (2001) *University of Chicago Law Review* 1235 at 1268). However, such cases challenge the dichotomy in fundamental ways since they require the courts to understand a more complex version of social reality, one that is constrained by social experience, failure of state responsibility and the allocation of social resources (Schneider "Resistance to Equality (1996) *University of Pittsburgh Law Review* 477 at 523). However, Snyman has suggested, the question at issue will not usually be whether the person should have fled, but whether she was entitled to go to the lengths she did in defending herself, in light of the surrounding circumstances, such as the nature of the threat and of the attackers weapon (if he had one), the nature of the interest threatened and the ages and physical powers of the respective parties (Snyman *supra* 107-108). Thus by recognizing the number of attempts made to escape, her abuser as well as the issue of separation assault, the court can view the threat as continuous, not from the abused woman's view but objectively speaking (Snyman *supra* 108).

Conclusion

In the case of the abused woman, her situation is adequately catered for within the reasonableness neutrality perspective. That is the fact that she is suffering from battered woman syndrome is not a factor that should be given consideration. Rather, the issue will be not whether the person should have fled, but whether she was entitled to go to the lengths she did in defending herself, in light of the surrounding circumstances.

Samantha Goosen
School of Law UKZN
Pietermaritzburg

Matters of Interest to Magistrates

Does South Africa's criminal justice system deter offenders?

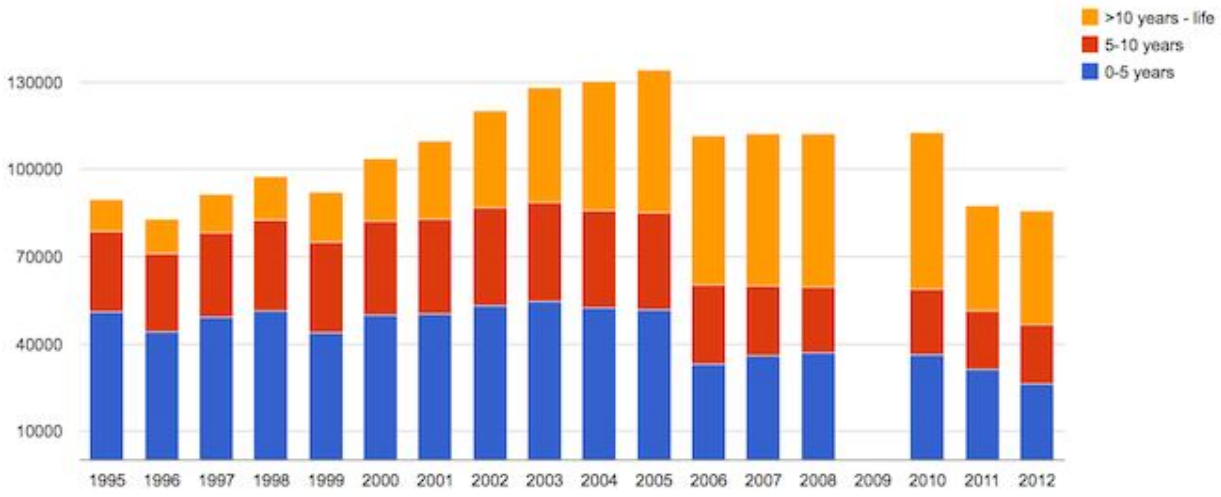
Conventional wisdom holds that the threat of harsh punishment acts as a deterrent against crime. This view is based on the assumption that criminals weigh the potential benefit of committing a crime against the potential cost of being caught and punished. This theory of criminal behaviour has largely been discredited, because in

the real world criminals often tend not to think that they will get caught. Nevertheless, the view persists.

Evidence from a large body of research, conducted primarily in the United States, suggests that long sentences and harsh punishment on their own have very little deterrent effect. The research also shows that the prison experience can even make matters worse. Someone who has been imprisoned is just as likely, if not more likely, to commit a crime than someone who has not gone to prison. However, there is some evidence that increasing the certainty of being caught by having an effective and visible police service may help. Criminologists such as Steven Durlauf (University of Wisconsin) and Daniel Nagan (Carnegie Mellon University) argue that it is the certainty of being caught and punished (even if that punishment is not a lengthy prison sentence) rather than the length of the sentence that is important in deterring crime.

The approach in South Africa has been to increase the length of sentences for serious crimes. So while the country's prison population has declined over the seven years from 1995 to 2012 (see the graph below), the proportion of prisoners serving long sentences increased between 1999 and 2010, declining slightly in 2011 and 2012. However, the effect of this approach cannot be properly assessed as it is currently not possible to determine how many of the people who are arrested end up in court and receive sentences.

Sentence lengths 1995–2012 (data for 2009 unavailable)



Being able to track individuals and cases through the criminal justice system (consisting of the police, courts and prisons) is essential if we want to know how many people who are arrested make their way to court, and how many are convicted and sentenced. This was identified as a priority in the late 1990s, and substantial investments were made in the necessary technology. However, South Africa still

seems no closer to getting the data that will allow us to keep track of people and cases as they move through the system. Not knowing what happens to these individuals means that we cannot assess whether laws such as those mandating long prison sentences have the desired effect.

Currently, analysts have to rely on annual reports by criminal justice agencies in an attempt to understand the extent to which the system is working. However, it is not possible to compare data presented in the reports of the South African Police Service (SAPS), the National Prosecuting Authority (NPA) and the Department of Correctional Services (DCS). One reason for this is because there are delays throughout the process from arrest to incarceration. Someone arrested in 2011 may be held as a remand detainee (waiting for trial) for between two and five years before the case against him/her is finalised. A single case will therefore contribute to the statistics of different annual reports in different years. This does complicate the process of tracking cases, but the three departments do have basic information that could make it possible to track cases.

The SAPS' Annual Report for 2012/13 tells us that the police arrested 1 682 763 people that year (slightly up from the previous year). Of these, 806 298 (47,9%) were for 'serious' crimes (ranging from shoplifting to murder) and 876 465 (52,1%) were for crimes less serious than shoplifting. Most of the cases for crimes less serious than shoplifting would be unlikely to result in a court case, let alone a prison sentence, so those can be set aside for the moment.

The only indication of what might happen to those people arrested for serious crimes is that the police report having 369 204 cases ready for court. However, here we encounter the first difficulty. In cases where more than one person is arrested (for example, when five people are arrested for a house robbery), only one docket is prepared.

This means that we cannot say that almost half of the people who are arrested fall out of the system even before they get to court. To know this, the police would need to indicate the number of suspects arrested in these 369 204 cases. This would allow analysts to assess how many arrests result in cases before the courts.

We run into another difficulty as soon as we turn to the NPA report. We need to know how many of the 369 204 cases that the SAPS says are court-ready are accepted and processed by the NPA. What we do know is that 143 410 cases were finalised by the NPA through alternative dispute resolution, and that there were verdicts in 323 309 cases. This means that the NPA finalised 512 614 cases in 2012/13, more than the SAPS sent to it, because of cases already sent the previous year. It would seem that if one adds up the number of convictions in all the courts, the NPA had a total of 290 834 convictions in the year. We don't know if this number represents cases or individuals.

Summary of total prosecutions as reported in the Annual Report of the NPA 2012/13

	Actual achievement 2011/12	**Actual achievement 2012/13**
Number of criminal cases finalised through alternative dispute resolution measures	132 695	143 410
Number of criminal court cases with a verdict	316 098	323 390
Convictions in high courts	963	1 045
Convictions in regional courts	28 665	28 198
Convictions in district courts	251 030	261 591
Total number of convictions in all courts	280 658	290 834

When it comes to prisons, we need to know how many people were sent to prison by the courts. While this information is not contained in the DCS's annual report, it is available on request. According to the DCS, 291 578 sentenced offenders were admitted to prison during 2012/13. Thus, 744 more people were sent to prison than were convicted. That can be explained by the fact that the NPA reports on convictions by case, rather than by individuals (i.e. a single case may result in more than one person being incarcerated). This brings us no closer to understanding the throughput of the criminal justice system.

The existing annual reports by criminal justice departments are important and useful tools for assessing the departments and for holding them to account. However, they don't enable analysts to make the kind of assessment necessary for establishing whether South Africa's approaches to crime and criminal justice are working.

A reporting system that encompasses the whole criminal justice system would help us to determine how many people who are arrested end up in court, and how many of those are sent to prison. The addition of a shared report providing some basic information, which each of the departments already have, would go a long way towards helping us assess whether the country's criminal justice policies are indeed effective.

Chandre Gould, Senior Research Fellow, Governance, Crime and Justice Division, ISS Pretoria.

A Last Thought

'It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the Court will summarily restore the *status quo ante*, and will do that as a preliminary to any enquiry or investigation into the merits of the dispute.'

Per Innes CJ in *Nino Bonino v De Lange* 1906 TS 120 at 122.