THE BLACK SASH
NATIONAL CONFERENCE 1989

CAPE WESTERN REGION

5 LONG STREET
MOWBRAY 7700

TELEPHONE
021 6853513

Title:

COURT MONITORING REPORT 1989

Author:

MURIEL CREWE

Abstract:

This report strives to give an overview of the monitoring of the courts and the press by court monitors in the Western Cape Region during 1988.

It looks at 1) Human Rights, and the Judiciary

2) Court Experience
   (a) Section 29
   (b) Hunger Strikes
   (c) Inquests
   (d) Children
   (e) Treason Trials

3) Other Cases Of Special Interest

4) Statistics

5) Conclusion

COURT MONITORING REPORT....1989

HUMAN RIGHTS AND THE JUDICIARY

Court monitoring in our region has steadily developed new dimensions as time has gone by: when, as Professor Ackermann (Stellenbosch University) has said, "Personal opinion has displaced the Rule of Law," and respect for the Courts has steadily diminished. We have continued to monitor the Press in respect of cases outside our region to see what bearing these might have upon our experience. We have also tried to follow in a small way, some of the moves that are being made by the legal profession to strategise in this emergency.

One monitor attended the National Bar Council Conference in April 1988; two attended the conference set up by Idasa in October 1988, entitled Democracy and the Judiciary; and in January 1989 three monitors attended a conference at Stellenbosch University set up by the National Directorate of Lawyers for Human Rights - entitled Human Rights in a Diverse and Divided Society.

Each of these meetings was used as a forum of discussion for concerned legal men to consider the position in which they find themselves, especially when the Appellate Division has consistently chosen to interpret the law and the Emergency Regulations in favour of the State rather than the individual. It was agreed at the Idasa Conference that the legislature and the courts, themselves, have, in fact, never been democratic, for neither represents nor speaks for the majority of the people. Moreover, it was held that there is a complete absence of relation between judges/magistrates and the society they judge ... 80% of whom are black.

This led to the discussion of the position of the "moral" judge. The question was asked: "Should judges refuse to lend the appearance of legality to a system where laws are unjust, immoral and abnormal?" The unanimous answer was that they are required to maintain the ideal of fairness - no detention without trial - no arbitrary banning or restriction - no denial of free speech and association; and, in respect of all these, it was felt that it was necessary to remain in office consciously to salvage human rights, and to try to persuade others to do the same. Improved performance was required, not resignation.

The Lawyers for Human Rights Conference dealt with the need for a new Constitution for a post-apartheid South Africa and a Bill of Rights. It was emphasised by several speakers that neither of these could be viable unless all the members in a society understand them, believe in them, live by them and subscribe to them. "The first step was to develop a Human Rights culture and ethos," was the view again expressed by Professor Ackermann.

COURT EXPERIENCE

The monitoring team has been able to help in the field of para-legal chores - assisting both lawyers and accused. Particulars in respect of accused have been collected for the use of the attorney when a large number was involved and the time and effort needed made it extremely difficult for the lawyer to handle. Monitors have assisted in getting legal defence for people appearing in court and who are ignorant of how to set about this. On several occasions the monitor has negotiated with the Prosecutor to reschedule the case, when a lawyer has been delayed. In addition, there has been the on-going putting people in touch with organisations from which they can get specialised help; checking on and visiting prisoners; or assisting families and friends to visit those detained or imprisoned. All this has served to deepen and widen our contacts; and it has been interesting to see how much better known the Black Sash has become in those troubled communities at the receiving end of apartheid legislation.

As we look back at another year of the main focus of our work - the actual monitoring of the courts, we can only report a continuing picture of punishment by process ... prolonged detention and solitary confinement: allegations of assault or torture on arrest or under interrogation: frequent remands because no charge sheet has been prepared or State witnesses have gone astray: plus all the other hardships for the accused and their families in job loss, school drop-out, financial stress (especially when a wage-earner is detained, but also simply in the costs involved in transport). We heard one wretched account where it was said visitors to detainees/prisoners at a particular prison were made to speak in English or Afrikaans, as no 'interpreter' was available to speak Xhosa. It is not difficult to imagine the distress caused, especially to visiting children who speak neither language. These hardships and harassment all lead to disruption of family life, since there may be anger and resentment at the family's involvement in police enquiries and court appearances. (On the other hand, many families and communities, once conservative, have become politicised in solidarity with those detained.) The catalogue of injuries that may be inflicted, physically and psychologically, is well established - not least by the number of successful damages claims that have been brought against the police and the Minister of Law and Order. Worst of all, is the damage done by the provisions of Section 29.

SECTION 29

There have been occasions when we have attended court to find that the accused do not turn up, and warrants are issued for their arrest. Later it emerges that they are being held under Section 29. If they appear in court they will be in contact with their lawyers - the denial of this right being one of the provisions of Section 29. So this provides a further reason for a case to be remanded again and again. In one case, the police actually withdrew the charge - of furthering the aims of the ANC - which haD been laid against the accused who had been held under Section 29 for three months. This,

the attorneys suspected, was in order to keep them the full six months allowed under Section 29; and then, if the Security police so wished, to renew the detention for a further period, without the attorneys being able to intervene.

Ex-Section 29 detainees tell of the horror of that experience - the isolation when all contact with family, friends, lawyer, priest or one's own doctor is being denied - when no letters may be written or received - where there is no access to reading material other than the Bible or Koran - where no extras may be received from outside the prison - where there is complete sensory deprivation. Add to that the constant fear of what, it is alleged, may happen in the process of interrogation. One detainee reported that, after reading the Bible through three times, the day came when the mind went numb and it was impossible to read another word. After three weeks of looking fruitlessly at the same page, the detainee had a visit from a senior prison officer who said, "You're all right, aren't you? You're being well treated ...?"

Small wonder that these detainees emerge psychologically damaged and need to undergo psychotherapy. Small wonder that families live in agony when they hear that someone of theirs is detained under Section 29. To quote an ex-Section 29 detainee: "It is an indescribable experience. I wouldn't wish it on my worst enemy - not even my interrogator!"

Section 29 provides that detainees may be held until answers to questions put to them are satisfactory to the interrogators. Allegations of varying degrees of duress surface again and again; and more often than not it is claimed in court that statements handed in as evidence were obtained in this way. (This claim is also made by accused other than Section 29 detainees.) The claim may lead to a "trial within a trial" to determine the validity of the "confession". Occasionally we have seen a magistrate refuse to acept its use as evidence. More often, the policeman's word that there was no duress is accepted.

HUNGER STRIKES

The massive hunger strike of February this year has brought some relief to some people. But many are still detained who have had long periods in detention, and have had the experience more than once. Any many who are released have such punitive restrictions placed upon them that their lives remain crippled. And all this without any charges having been brought against them in a court of law. According to the Weekly Mail 9/2/89, there have been 37 hunger strikes since the Emergency began - the last desperate weapon of desperate people to have their voices heard. And, above all this, the public may not protest about the plight of detainees. Professor Mureinik (Wits) spoke movingly on this issue at the Idasa conference: "How much further can Executive go when it not only denies liberty but even the right to talk about the denial of liberty?" he asked, and added, "How could the Appeal Court uphold this monster?"

In two of the cases we have monitored this year the accused went on humger strikes - against prison conditions. The one brought some amelioration; the other was unsuccessful and was discontinued.

INQUESTS

In December 1987 an inquest was opened into the death of three children in the "Trojan Horse" incident. This continued into 1988. Two of the children were shot in the back and one at an open window. The commanding officer of the "ghost truck", Lt Vermeulen, admitted he had given no warning, and had fired seven shots as fast as he could, emptying his magazine. In May 1988 the inquest magistrate said there was not a shred of evidence that the dead boys had thrown stones. He found that Vermeulen and his eight-man task force were negligent and caused the death of the three victims. In an out of court settlement the Minister of Law and Order agreed to pay legal costs and funeral expenses!

As the Attorney-General of the Cape refused to prosecute the policemen involved in this killing, the parents of two of the boys have now instituted a private prosecution, and charges of murder will be heard in the Supreme Court.

Reverend Cameron Kani: In July we monitored the inquest into the death of Rev. Kani, a preacher with the Reformed Methodist Church in New Crossroads. A police patrol fired 15 shots at him in his garage, where he was repairing his car, following a shot having been fired from the garage. Advocate Gauntlett, for the Kani family, felt there were "very unfortunate aspects" to the investigation into Rev. Kani's death.

He asked why a 52 year-old man with an atrophied leg, who was short-sighted and tubercular somehow forgot his vocation that night and ambushed police from his own garage? The magistrate found the evidence of the family contradictory and unreliable, that the police had acted lawfully, and that no offence had been committed.

George De'Ath: In August 1987 the inquest was held into the death of ITN cameraman, George De'Ath, who died of injuries received during the fighting at Crossroads in 1986. The magistrate found he died of "a head injury and the consequences thereof after he was extensively assaulted by a person or persons unknown".
In March 1988 the sister of the dead man applied to the Supreme Court to set aside the inquest findings; and she asked that the enquiry be reopened on the grounds that the inquest magistrate had not heard oral evidence. The attorney acting for the family said there had been absence of important evidence and material disputes in fact at the inquest.

The Supreme Court granted the request but ordered that oral evidence be heard only from De'Ath's soundman, Andile Fosi. The family's attorney said also, in an affidavit, that the film made before the fatal assault - which had been in police custody for some time - had a "freeze frame" superimposed from a certain point. Yet evidence was

that De'Ath had filmed "to the very last", and the disappearance of the last minutes of the film called for an explanation (Argus 18/6/88).

An appeal has been lodged against the Supreme Court finding, and this appeal is pending. The questions that arise in this case are: "What possible objection can there be to hearing the evidence from the one man who was accompanying De'Ath at the time of the assault?
Any why should so much legal time and expense be squandered to avoid his being heard?
(The argument against oral evidence etc. at inquests is that these are not trials, and it is necessary to avoid the time and expense of turning them into lengthy court proceedings!)

Ashley Kriel: The fourth inquest we are following still is that into the death of Ashley Kriel, who was shot in the head from behind at point blank range, according to the report of the pathologist. This report described other injuries - a laceration on the forehead, bruised right side of the head, and abrasions on the right upper arm, left shoulder and chin (Cape Times 26/8/87).

Again there was argument about the hearing of oral evidence. Advocate Gauntlett argued that oral evidence was necessary in this case because there was a conflict of facts between the affidavit of one of the policemen involved in the shooting and the forensic expert.

In the hearing on December 14 the magistrate agreed to the hearing of oral evidence from the two policemen in the case and from the forensic expert. He also granted leave to apply for further oral evidence to be led during the course of the inquest.

CASES INVOLVING NUMBERS OF CHILDREN

We followed two cases in 1988 in which large numbers of children were initially involved. One of these was not "political" as it arose from gang warfare in Guguletu. One of our monitors was alerted to it by a Sash member whose employee is the mother of one of the accused children. When the monitor arrived at Athlone court, she found a milling crowd of distraught people in the corridor. What she learnt was that a group of 65 people (55 of them juveniles) had been arrested at the funeral of a gang member, where a member of rival gang had been murdered in apparent reprisal. We have heard a great deal lately about gangsterism in the townships around Cape Town, and it seems clear that a war of terror is being waged, while they fight each other, for territory and conscript youngsters by threats and force.

What we found disturbing about this case, however, was that two of the boys' parents claimed to have letters from their employers vouching for their presence at work at the time of the murder. Others claimed that headmasters and teachers were prepared to vouch similarly for their children. The 55 children, said to be between 13 and 17, had been held in Pollsmoor for three months before being brought to court in July. The monitor discovered that none had legal representation and so no appeal for bail had been lodged. She went to work on the

issue and finally all had legal representation, but there was a protracted struggle to get bail.

In October, charges were withdrawn against 21 of the accused. In November all but two of the remaining children were allowed bail of R100 each, and allowed out in the custody of their parents. Sadly, the two left behind were the youngest, aged 13, and one who is slightly retarded, to the great distress of their families. They, too, were released on bail two weeks later.

What emerges from the confusion of this case is the awful face of a legal system which allows children to remain in jails for long periods, and which does not automatically grant them legal assistance. It is true that alternatives to pre-trial detention such as bail, release into the custody of parents or guardians, or referral to a place of safety are not necessarily alternatives in practice, as Fiona McLachlin has pointed out in her publication: Children: Their courts and institutions in South Africa. This may be due to poverty, absence of parents or no available place of safety. As we saw in this case, ignorance of what might be done is also a pertinent factor. And, if it is deemed necessary to arrest a large number of children, places of safety should be provided.

The other case involving a group of children concerns what the Minister of Law and Order called the Bonteheuwel Military Wing. He argued in the face of an outcry against the detention of children that they could be as villainous as adults. The B.M.W. he said had been arrested in connection with 300 serious crimes, involving arson, attempted sabotage, attacks on the homes of policemen, and some had received weapons training (Cape Times 6/11/87). In the event, 17 children were arrested, and we were told their ages ranged from 14 to 18. The alleged crimes were said to have been committed between 1985 and 1987, when they would have been much younger.

They appeared in January, March, May and June - when all but three were discharged. The three members of the B.M.W. who remain have had their cases separated and there have been three more court appearance pending the fixing of a regional court date.

It would be idle to dispute that children can be and are guilty of serious offenses; but in this case the allegations have fallen away for 14 out of 17 youngsters, who nevertheless (with their families) were put through the punishment process for several months.

TREASON TRIALS

We monitored two treason trials during 1988.
The trial of Ashley Forbes and 14 others began in March and lasted until 14 December, when 14 accused were sentenced for treason or terrorism. One had been discharged earlier. When sentencing, Justice Williamson said he was aware of the grievous hurt caused by apartheid, and the evidence before him helped to place in sharper focus what it feels like to be at the receiving end of injustice. Yet no court could condone violence in pursuit of political objectives. The

sentences, though severe, were less so than those meted out at the trial of Lizo Ngqungwana and 12 others in 1987.

Two features are common to all these trials, in Cape Town and elsewhere; the explicit focus on the injustices flowing from apartheid policy, and the trialists' view of themselves as soldiers fighting in a war which is being waged against their people. The plea for P.O.W. status was not advanced this time (as it had been in the trial of Edward Petane in 1987); but the claim to being soldiers in a war not of their making, is given some standing when the Chief of the Air Force is prepared to argue (as he did in the ECC trial) that a state of Martial Law exists in South Africa, that this extends beyond "the operational area" to the townships, and that the courts therefore have no power to intervene in what would otherwise be illegal acts committed by the SADF against South African citizens.

The second treason trial only went through the preliminary stages in 1988 in the magistrates court in Wynberg. This is what the Weekly Mail has called a "melting pot trial", as the 15 accused come from diverse backgrounds, representing each sector of our divided society. It seems to be getting press coverage as the Yengeni/Schreiner trial. Usually a trial is referred to only by the name of the first accused - in this case, Tony Yengeni. But the involvement of a white woman has led to press emphasis on allegations against Jenny Schreiner - to the extent of a virtual trial by media before one shred of evidence has been produced in a court of law.

Most of the accused have been imprisoned since September 1987 and have spent up to six months under Section 29. Their appearance in Wynberg was marked by anger and protest when, at the first appearance, the court gallery was packed out by policemen or officials, and friends and family were told the court was full. Subsequent hearings were marked by misunderstanding, and visitors and friends were denied entrance to the court, while the street was barricaded and policed.

The first day of the trial in the Supreme Court this year was markedly different. As many people as possible were allowed into the public gallery; the Judge allowed the trialists to sit through the preliminaries; and he forbade the use of video cameras in court. (These were used in previous trials to photograph people in the gallery). It was gratifying to see how easy it is for the dignity of the court to be maintained when there is mutual respect. What was also very different from past reason trials was the low profile of the police outside the court. Previously Keerom Street has looked like a battle zone

OTHER CASES OF SPECIAL INTEREST

Mzamke and Others vs Minister of Law and Order KTC case

This is the case in which 21 families and the Methodist Church in Africa are claiming R200 000 damages for the burn-out at KTC in June 1986 and the burning a month earlier of three satellite camps in Old

Crossroads. It is being claimed that the police were responsible for this destruction, in that they either took part in or failed to stop the vigilante attacks which caused death and mayhem. A further R5m. in claims by 3198 families are pending, depending upon the outcome of this case.

The hearing began in September 1987 and dragged on throughout 1988. We attended whenever there was a monitor to spare, heard claims that video tapes had been tampered with; how vigilantes were to be recognised by their wearing of white armbands (Khayelitsha police station information book: Argus 19/10/88); and that Major Odendaal, former second-in-command of the Peninsula unrest unit, believed the KTC trial was "part of the total onslaught"

The illness of Mr Justice de Kock in December caused an indefinite adjournment and the renewal of the case in 1989 was then contingent upon the judge's health. This possibility caused serious alarm, as about 70 witnesses are still expected to testify, 10,000 pages of proceedings have already been recorded and costs are astronomical. However, the case was resumed at the beginning of February this year, and we shall continue to follow it.

ECC vs Minister of Defence

Mr Justice Selikowitz granted an order restraining the SADF from harassing and interfering with the ECC, with costs. He said that the deliberate use of false statements about the ECC made by the SADF in their covert campaign to counter their efforts went beyond lawful opposition. This was the case in which Lt.-General van Loggerenberg, Chief of the Air Force, contended that the court had no jurisdiction to hear the matter and the actions of the SADF were lawful because a state of war existed in South Africa. Counsel for the ECC, Mr Sydney Kentridge S.C., replied: "There has seldom been a more dangerous assertion of power by the army ... it is without precedent". The sad footnote to the case we all know ... the ECC is amongst the many organisations that were severely restricted during 1988.

SADF vs Ivan Toms

On 2 February 1988 conscientious objector Ivan Toms was sentenced to the maximum possible 630 days imprisonment for refusing to serve in the SADF. The magistrate said he had no discretion in passing sentence and he regretted Dr Tom's action as "he was not a criminal". The appeal against the sentence was heard 8 months later and in November his sentence was reduced in the Supreme Court to 18 months. He was given leave to take the case to the Appeal Court, and was then released on bail of R1000. An unpleasant sidelight in this case is that Dr Toms during his imprisonment appeared in court in leg irons at the hearing of a fellow prisoner who allegedly assaulted him in Pollsmoor prison. A spokesman for the Prison Service said: "Necessary measures were taken when prisoners leave prison, depending on factors such as the security classification and risk of a prisoner escaping ..." (Cape Times 26/11/88). Such factors are hardly applicable here.

State vs Mary Burton and twenty eight others

During lunch hour on 16 March 1988, 29 Black Sash women stood in silent protest at the bottom of Government Avenue in Cape Town behind a banner wich read: "Clemency for the Sharpeville Six". They were arrested and released, to appear again in April on a possible charge of attending an illegal gathering outside Parliament. While they were in the charge office, the news came through of the last minute stay of execution for the Sharpeville Six.

The reprieve of the Sharpeville Six which followed was greeted with relief by the families involved, in spite of the long prison sentences imposed on people found guilty under the doctrine of common purpose. Moreover, a state witness has confessed to giving perjured evidence at the instigation of the police, and the legal representatives felt a re-trial should have been ordered.

This reprieve was clearly the result of unprecedented international pressure. Lawyers for Human Rights speak for all who oppose the death penalty when they deplore the fate of other prisoners less fortunate; and they make the point that "The subjectivity of these processes, when it involves the lives of people is totally unacceptable."

At the time of the reprieve, 273 people were still on death row; and, of these, about 80 were convicted for political or unrest-related crimes. "Most of these are faceless, nameless and forgotten by the public." (Human Rights Focus, Weekly Mail 10/12/88)

STATISTICS

We know from figures given in Parliament that prisons throughout the country are severely overcrowded, and that the possibility of community service for short-term prisoners is being considered. While this is a positive approach to the problem, one wonders if it doesn't serve to make accommodation more readily available for those long term/no charge detainees who oppose the "system"?

While detention has continued throughout 1988, we have seen a fall-off in the courts in the numbers of those charged with "political" offences. In 1986 (the year of the children) we attended court 347 times: in 1987 there were 296 visits: in 1988 we recorded 245. The figures we took out at the end of that first year showed that 80% of those charged were found not guilty or had the charges against them withdrawn. It would be surprising if the police were not anxious to avoid such embarrassing statistics; and our feeling is that when charges are brought now, they are better substantiated. However, the obverse of this is the large number of detainees not being charged, and possibly being released eventually without ever having been charged - since no case against them can be substantiated. Nevertheless, in the cases that are brought before the court a substantial percentage of those accused are still being found not guilty or are having the charges against them withdrawn. We estimate this figure at about 60% as against 80% in 1986.

I had hoped to give this conference a full and accurate set of statistics, as we have during 1988 been putting our records of the last three years through a computer. But, for a variety of reasons, complete entries and a wholly successful program have eluded us. There are still too many unknowns appearing in the printout, and a good deal of careful work still needs to be done. When we have overcome the present snags, an annual update and tables of comparison should be easy to obtain. What we can say as a result of a manual count, is that between October 1985, when this work began, and December 1988 we monitored 506 cases, involving approximately 1828 individuals, and the monitoring group notched up about 890 court attendances. The work has continued to cover nine courts in Cape Town, plus those in Worcester, Paarl, Somerset West and Stellenbosch. Our records also include some cases from Southern Cape monitors.

CONCLUSION

The continued hammering being given to the Rule of Law, to the people of this country, and to the courts themselves - as reflected in these reports year after year - must continue to be exposed and resisted. We realise that what we can see here is only a micro view of country-wide repression and injustice, plus the violence these bring in their wake.

It has been encouraging to see, particularly in this last year, the stand being taken more and more by the legal profession, at all levels, in criticism of and opposition to Draconian legislation and arbitrary official action.

The appointment of Mr Justice Corbett as Chief Justice has been welcomed, and many believe that this appointment should repair damage done to the Judiciary in recent years, done because we have a society where what matters is not the law but "sheer, unbridled power" (Mr Justice Didcott at Wits, October, 1988).

There is hope when judges express themselves in this way, and many of them do. It is to be hoped that they will check the anti-legal culture of the State, which so many have come to accept as the norm. The Argus, in an editorial in October 1988, pointed to the danger inherent in what the politicians have done to the law ... that to weaken it today when it should protect those who may be against them, will render it weak tomorrow when they may require and want its protection ...

Muriel Crewe 1989