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Title

COURT MONITORING REPORT
CAPE WESTERN REGION

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1 Political trials in the broader political context

Court monitoring continues to enable us to gain an insight that penetrates beyond the stifling effects of the state of emergency and it has kept our perceptions firmly grounded in the broader political reality of the day. Over most of last year the cases we witnessed in the courts ran counter to the government's apparently progressive moves in certain fields. A few cases that demonstrate this point:

a) In early December 1988, V. Handula, a drama student, was arrested, interrogated and had his house searched. He was subsequently charged for wearing a SWAPO T-shirt, i.e. being in possession of banned literature. At much the same time South Africa finally agreed to the implementation of the U.N. plan for Namibian independence. Yet Handula had to go through seven court appearances over a period of four months before the charges against him were finally dropped on 26 April. It angers one to think of the money and time wasted on what the prosecutor himself referred to as a "trivial matter".

b) In July last year Nelson Mandela met with P. W. Botha at Tuynhuis for tea; and there was the general impression that a more relaxed and open attitude towards the ANC was developing in government circles. However, at the end of July, a university student, Xolile Jaxa, was sentenced to 18 months in prison with nine months suspended, for being in possession of a tape recording of a speech by Oliver Tambo. Prior to being charged with this "crime", he had also endured two lengthy sessions, totalling nine months, in solitary confinement under Section 29. He was permitted bail pending appeal (to be heard in March).

c) A case in Athlone in September 1989 involving seven restrictees charged with breaking their restriction orders, brought home the contrariety of the continuing state of emergency at a time when ANC leaders were being released without restriction. After several appearances, the charges against the restrictees were withdrawn. However, their restriction orders remained in force and so, although the police turned a "blind eye" to any contraventions, they had the means at their disposal to crack down and prosecute the restrictees whenever they so chose.

This ambiguous type of situation simply breeds further contempt for the law and so the lifting of these restrictions, as a result of the announcements on Friday, 2 February 1990, was a relief but long overdue. However, similar ambiguous situations, which make a mockery of the law, will continue to abound for as long as the government's actions and the laws still on the statute book continue to be inconsistent with the announcements of reform.

It was only in November/December that we felt the outcome of certain cases started to reflect that the courts were taking cognisance of the changing political climate. A case that illustrates this was the trial of Linda Tsotsi and Veliswa Mhlauli - both charged under a main charge of terrorism. After intensive negotiation with the prosecutor the defence

team, in agreement with the accused, decided to lodge "admissions" by the accused. On the basis of these admissions both were convicted: Linda on charges of receiving military training outside the country from *Umkhonto we Sizwe* and for recruiting members for the ANC; Veliswa on four counts of harbouring members of the ANC. In mitigation of sentence the defence council gave details of the apartheid ravaged lives of the two women. Several references were made to the recent change of attitude of the government - for example towards protest marches - and that had such opportunities for expressing grievances existed before the two women may have taken different courses of action to the ones they had. However, the two still stood their ground in their statements before the court in which they reiterated their beliefs which are embodied in the Freedom Charter. Tsotsi and Mhlauli were each given a five-year suspended sentence. Earlier in the year, as in the case brought against Mary Mgentu and others, similar offences met with effective prison sentences of three years and more.

2 Police action

In many court cases this year, evidence has been led containing allegations that verify the current exposure of the excessive and unjustified use of force by the police. Of particular concern is the manner in which police violence continues to evade any form of just retribution, even when the courts strongly condemn the police action and behaviour. Three well-publicised cases this year provide examples of this:

In the Rockman case, two riot police officers were charged with assault as a result of the brutal force applied by men under their orders. They were found not guilty because they themselves had not actually inflicted the blows, which the magistrate castigated as "utterly reprehensible". So far no further action has been taken in the courts in respect of this "utterly reprehensible" behaviour.

In the private prosecution brought against the 13 security policemen involved in the "Trojan Horse" killings, Justice Williamson acquitted them on a charge of murder. The acquittal seems to be more the result of a legal technicality than the logical conclusion resulting from evidence led. The judge referred to the response of the police as being "clearly excessive" and that "there is a substantial body of evidence which points to the existence of a sinister and illegal purpose" to the operation - that of a punitive expedition. In spite of this, he ruled that, since "the cornerstone of the prosecution case has not been proved (i.e. a moral certainty that each and every accused shared a prior common purpose to use excessive force) the accused are entitled to their acquittal".

At the inquest into the death of Ashley Kriel the magistrate rejected argument by counsel for Kriel's family that W/O Benzien's shooting of Kriel had been deliberate and while he found that Benzien had acted in the bounds of his duty, he was critical of some of the security policeman's actions. The court heard that on the wall of Benzien's office there had been a poster with Kriel's picture and the words "Victory or death - Freedom is certain". Under it

Benzien had written: "Not for you". The magistrate described Benzien's action as "tasteless, disgusting and disturbing" (*Weekly Mail*, 28.07.89, 04.08.89; *Cape Times* 22.07.89)

To allow the police to get away with this "reprehensible", "excessive" and "disturbing" behaviour unchecked, unpunished and with no more than a scolding is surely in effect a *carte blanche* for them to continue in such a way.

3 Police action over the election period and the public-violence cases that followed

The outrage of the people of Cape Town over the shooting and killing of people at the time of the tricameral elections in September, culminated in the march of 40 000 through the streets of the city.

In Mitchell's Plain one of the court monitors monitored the repression over this period extensively, as well as the numerous court cases that followed. In Mitchell's Plain alone, police action in response to protest actions over the elections resulted in over 80 people, mainly juveniles, being arrested and charged with public violence. In the course of their arrest, many were allegedly assaulted and injured by the police. On election day some 25 children were injured by birdshot used by the police. Largely due to the active, diligent work of the lawyers concerned, over 15 of the public violence charges have been withdrawn to date. However, while there is obvious delight and relief at this withdrawal, there lies a twist in that when a case is withdrawn these charges can be reinstated by the police should they see fit, which they might well do should counter charges for damages be brought by parents, for injuries sustained by their children during arrest. The police might construe the evidence in these counter charges as proof of the child's involvement in an "unrest incident". However, if the case in fact went to trial and was completed and the accused found "not guilty", the charges could not be reinstated later and safer ground would exist for bringing claims against the Minister of Law and Order. However, who involved would choose to endure a trial that, in all likelihood and judging from numerous precedents, would be drawn out; and in a situation where the courts are seen to be heavily loaded in favour of police evidence?

In addition to the cases in the Mitchell's Plain courts we recorded 25 public-violence cases in Goodwood and over 30 in Paarl. Our few monitors from Somerset West battled to cover a representative number of these Paarl cases while coping with the numerous election and defiance-campaign related cases in Strand, Somerset West and Stellenbosch.

4 Public violence

4.1 Cases concluded

Several long-standing public-violence cases reached their conclusion last year. In October 1987, 17 Bonteheuwel children aged between 14 and 17, allegedly members of a certain "Bonteheuwel Military Wing", were arrested in connection with what Vlok described as "over 300 serious crimes"

alleged to have been committed between 1986 and 1987. Some of the children, including two 14-year olds, were held in jail for over three weeks. In June 1988 charges against 14 of the accused were dropped - after they had been through the trauma of arrest, detention, interrogation and in some cases alleged assault and intimidation. Separate cases were then brought against the remaining three. Finally, 18 months to two years after initially being charged their trials were concluded. All three had made confessions to the police, allegedly under duress. However, the confessions of two of them were found to be admissible and each was found guilty on the basis of these confessions.

The one youth, John de Vos, received a particularly hard sentence - an effective five years imprisonment with a further five years suspended, having been found guilty on two counts of public violence. Appeal has been lodged against sentence but he has started to serve his prison term. It is worth noting, by contrast, that a "white" university student was recently sentenced to one year of community service having been found guilty on a public-violence charge.

Another of the youths, Jeremey Swartz, aged 17, received a four-year suspended sentence. He comes from an impoverished background and his only family support was an elderly, unwell grandmother who has since died. He had been held in custody for most of the trial (since he broke bail conditions earlier in the trial), yet on his release he did not reflect relief but rather an attitude of defiance and bravado: "I was ready to go to jail - you must sacrifice for the struggle." After four months of searching in vain for work, with no family to support him, Swartz found himself back in jail on a theft charge. From this tragic case it can be seen that political, community and service organisations have a responsibility to facilitate the reabsorption of political prisoners back into their communities.

The third youth, 17-year-old Colin de Souza, and his family have endured an extremely protracted trial during which time they have allegedly experienced endless harassment and intimidation at the hands of the Security Branch police. The magistrate noted that a confession Colin had made was made as a result of "undue influence" by the police and therefore dismissed it as evidence. However, a "pointing out" done by the accused while in custody was accepted as evidence, the magistrate ruling that this had been done voluntarily. Finally, just short of his 18th birthday, Colin was convicted on four counts of malicious damage to property, two of arson, one of attempted arson and one of public violence committed when he was 14 and 15 years old, during the heavily repressive period in 1986 and 1987. Colin was sentenced to six years imprisonment with four years suspended for five years.

In each of these cases the boys had spent between two and three of their teenage years in police cells, prison cells, facing interrogation (allegedly accompanied by torture and intimidation) or on trial in court. It is sadly ironic to look back on Vloks statement that 300 serious crimes had been committed (at the time justifying the incarceration of children) while in the end a total of 12 charges were brought home against three teenagers.

4.2 Problems around public violence in a political context

We are concerned that with emergency regulations that have muzzled the press and exonerated the police, the general perception of public violence omits an understanding of public violence that arises out of a situation of extreme political oppression. Through our court experiences we have generally found that those convicted on such charges identify strongly with the struggle against apartheid injustices. It seems that whenever the state's repressive machinery is operating in full force, as at the time of the 1989 tricameral elections, there is a spate of public violence cases.

In monitoring such cases, the majority of which involve the youth, we are shocked by the realisation of the extent of violence that such young people are subjected to both in their daily lives and in the course of seeking redress for their grievances.

In spite of de Klerks announcements on Friday, 2 February 1990, it is evident that, to the majority of political prisoners, freedom is not around the corner. This is certainly the case for those serving sentences for public violence since there is no differentiation made between politically motivated public violence and public violence of a purely criminal nature. Those sentenced for public violence are regarded as common-law prisoners and are imprisoned with common criminals.

With a view to campaigning for the release of all political prisoners our court monitoring group, together with RMG (Repression Monitoring Group) and NADEL and LHR lawyers are presently attempting to compile a comprehensive list of all such prisoners. All those serving sentences for crimes deemed to have been politically motivated will be included.

5 Terrorism trials

Last year we monitored over ten separate cases which fell under a main charge of "terrorism". These have included terrorism cases where : the accused is charged with having the intent to commit or has committed an act of violence against the state (e.g. "planting" of an explosive device), cases where the accused is charged with receiving military training outside the country; charges of storing or being in possession of arms, ammunition or explosive devices; through to cases where the accused is charged simply for harbouring, assisting or failing to report someone they ought to have had reason to suspect had the intention to commit, or had committed an act of violence against the state.

Loza, Loza and two others: The inhuman aspect of the latter category was brought home to us in a trial where three women and a man were charged for failing to report and for harbouring a suspected guerilla. Two of the women (mother and daughter) were close relatives of the suspect, Solly Loza. The third woman was his girlfriend, the man a friend. At 4 a.m. on 5 July 1988 police came to Mrs Loza's house to arrest Mr Solly Loza. In the course of action Mrs Loza, her 19-year-old daughter Maureen and four children (aged 5 months, 4 years, 10 years and 15 years) were taken to a Casspir at gunpoint. The police then fired on the house and in the course of events Solly Loza died inside the

house. The house was extensively damaged. (An inquest into the cause of his death will be held on 27 March.) The children were taken to grandmother Loza's home and Mrs Loza and Maureen were taken to separate police stations and detained. They were kept in detention under Section 29 for two weeks. During this time both women made statements which they both claimed were made under pressure (the promise of bail and release if they cooperated and the threat of further detention if they did not). The other two co-accused, Ms Dlagwu and Mr Mini, were arrested and detained separately. Mini lost his job as truck driver as a result of his detention. All four were released on bail of R1 000 each. On the basis of statements made, the three women were charged and found guilty of failing to report and of harbouring Solly Loza who they "ought to have had reason to suspect of being a guerilla". The friend, Mini, was found not guilty and the women were given a suspended sentence of five years. While there was obvious relief at the suspended sentences there was also much pain felt for the suffering the three women had endured simply for failing to report a family member and loved-one to the police on the basis of a suspicion.

Robert Maliti: Another "terrorism" trial which we found particularly distressing, both in terms of the circumstances out of which it arose and in its outcome, was that of Robert Maliti.

Picked up by police on 22 October 1988 in the proximity of an opening ceremony for a New Crossroads police station, he was admitted to hospital later the same day with a brain haemorrhage, for which he underwent surgery. Police allege that they found him to be in possession of an explosive device carried in a plastic bag, in the vicinity of the opening ceremony, which Vlok was attending. They also charged him for possession of a banned publication which they claim they found at his home in a subsequent search. He pleaded not guilty and a statement in support of his plea, signed by Maliti, was read out in court. The monitors attending the trial commented on how unwell, dazed and bewildered Maliti looked throughout the trial. The court found Maliti guilty on both charges. A doctor's report was submitted as evidence in mitigation; in which it was confirmed that Maliti had suffered brain damage as a result of the haemorrhage and his mental ability had been adversely affected. The defence pleaded against a jail sentence on the grounds that the accused had; in the course of events, suffered and been punished enough already. Maliti received an effective five-year sentence. A civil claim against the Minister of Law and Order has been lodged and this will proceed once an appeal against sentence has been heard.

Mamba: The terrorism/murder trial of ANC cadre Allen Mamba in April/May 1989 brought into focus the conflict of violent acts performed for principled beliefs in a struggle for justice. Mamba was convicted of murder and terrorism after admitting that he had placed a limpet in a refuse bin outside Volkskas Bank in Wynberg on 15 June 1988. According to his statement, submitted to the court, it was intended that the explosive should detonate at 4 a.m. on 16 June - specifically at a time when no-one was likely to be on the scene. However, the explosive only went off later, tragically killing an innocent passer-by who, it seems, had been probing in the bin. In giving evidence in mitigation Mamba

described how an incident on 16 June 1978, when he was severely beaten by police, led to his decision to join the ANC who he believed were "fighting for the freedom of all South Africans and for an end to oppression, slums and exploitation" (*Weekend Argus*, May 1989). He stated that while he still regarded himself as a member of *Umkhonto we Sizwe*, and would continue with it's activities until South Africans had obtained their "rights", he did regret that his actions had cost a life.

In passing sentence, Judge van Schalkwyk said that Mamba had made a good impression on the court and that it was clear that he was sincere and regretted causing a death. He noted that Mamba had strong political beliefs and the court wanted to emphasise that he was not being punished for his political beliefs but for his actions. He sentenced Mamba to 12 years on the murder count, nine years of which would run concurrently with a 15-year sentence for the count of terrorism - an effective 18-year sentence. In the light of existing laws this was generally thought to be a reasonable judgement. The irony lies in that while the judge acknowledged Mamba's right to his political beliefs it was the repression and prohibition of such beliefs, and the denial of the right to their representation in government, that led to Mamba's choice of action.

<u>Yengeni and 13:</u> The terrorism trial of Yengeni and 13 others resumed in the Supreme Court on 10 March 1989. The start was marked by the refusal of the trialists to plead. Instead an impressive statement was read by Yengeni, on behalf of the group. Briefly, the view eloquently expressed was that Apartheid is condemned as a crime against humanity and as a heresy, and the courts are enjoined to apply this unjust legal system. To quote: "Since the regime has treated the courts of this land with disdain, we cannot have confidence in those courts ... therefore we do not feel it necessary to plead to the charges brought against us."

A formal plea of "not guilty" was entered, and the case proceeded, relying heavily on the evidence of Bongani Jonas, a "turned" member of the ANC - whom the police hoped to recruit as an Askari. (This is where the existence of the Askaris first surfaced: we have heard a good deal of them since then!)

Jonas shocked the prosecution by refusing to give evidence against the group, saying he had only agreed to do so in order to survive, but that it was never his intention to do so once he got to court and could get protection. (He was sentenced to three years for refusing to give evidence.)

We heard the gruesome details of the interrogation of Jenny Schreiner and her attempted suicide. In respect of several of the other accused there were also allegations of hideous torture (psychological and physical) during interrogation - in which a number of Security Branch policemen were involved. Prominent among these was W/O Benzien (whose name has appeared in similar allegations in several other cases). The court was electrified in early November when Adv. de Villiers announced that, "not only had complaints against this officer been laid with the police in this country, but steps have been taken on behalf of two of the accused with a view of prosecuting this witness outside the borders of S.A. on internationally recognised crimes against humanity".

Apparently the International Society of Jurists have agreed to handle this.

And now we have come to the unbanning of the ANC and the freeing of its leaders, plus a possibility of amnesty for exiles. Where does that leave this case? Several of the accused should qualify for immediate release. Those against whom charges of sabotage have been made, will no doubt still be tried on those counts. At the moment the chief prosecutor says the trial will continue in full. This follows his having asked for a week's recess to study the implications of F. W. de Klerk's speech; however, he used the time to try to get some of the trialists to make admissions - presumably pending release. These were, predictably, not forthcoming and the trial continues.

Visits to the gallery by Kathrada and Sisulu have boosted the morale of the trialists, which generally seems to be high, for they are faithfully supported by families and friends. They believe that their cause is just. As Yengeni said, at the conclusion of the statement read in court: "... we here, together with the rest of the people of South Africa, black and white, ... will strive together, sparing nothing of our strength and courage, until a just and democratic society is achieved".

6 Section 29

In his statement before the court Yengeni commented on Section 29 which "exposes the detainee to dehumanising and degrading treatment, lengthy interrogation and months of solitary confinement ...". Many people brought to trial last year had spent lengthy sessions being held under Section 29. I will focus here on some of the women who endured this inhumane form of detention:

Noma-India Mfeketo (36) was released in March 1989 after spending five months held under Section 29, together with her small baby who was two-and-a-half months old at the time they were detained. While Section 29 detention exists specifically for the purpose of interrogation, Noma-India was questioned only during the fourth week of her detention. Yet she was only released four months after that and was never charged. Being cut off from any news of her family and her eight-year-old son was particularly painful for her because during a previous period of Section 29 detention her eldest son Kenneth had died in a car accident.

Buyiswa Jack was pregnant when she was detained and was charged and released after six months in Section 29 detention, two-and-a-half weeks before the birth of her baby. During her subsequent trial it emerged that she had made a statement while in detention, allegedly under pressure as a result of her particular emotional and psychological vulnerability being exploited (pregnancy while in solitary detention).

Veliswa Mhlauli (37), a Crossroads journalist and mother of three children, was detained in October 1988, seven weeks after losing an eye after being shot at by an unknown gunman. At the time of her detention she was still suffering from fits of depression and sleeplessness. She appeared in court on 16 March 1989 after five-and-a-half months in detention and was released on bail of R2 500. Due

to address an audience at the launch of the Association of Democratic Journalists she announced to the audience that she would be unable to do so: "Perhaps I underestimated what Section 29 does to you", she said in a voice trembling with emotion, "but I am sure I will gain the strength to write about what happens there, in the detention cells during interrogation." (Quote from a report in *Save the Press* publication.) Her subsequent trial was reported on earlier on in this report.

In the FEDSAW publication *Women in Prison* comment is made about how terribly the children suffer from the forced separation from their mothers. "The children often get nervous and scared and stop trusting people. It is a great strain for a detainee to worry about this and to cope with the child's problems when she is released." The article further notes that Section 29 gives the police total power over the detainees as they are cut off from the outside world and that it is used to break the spirit of activists.

7 Claims against the Minister of Law and Order

There have been five separate claims against the Minister of Law and Order for damages as a result of injuries allegedly inflicted by the police. Of these, three were lost; one settled out of court and the other continues. (This one being the marathon case in which 21 KTC residents and the Methodist Church in Africa are claiming damages of R312 000 for the "burn-out" at KTC in June 1986.) I include details of two of the other cases:

Patrick Nyuka, a reporter for *Saamstaan* newspaper was shot while on an assignment. He and two others who were injured in the incident (in which kitskonstabels were involved) laid a claim against the Minister of Law and Order for damages. The case was settled out of court with the Minister of Law and Order paying out R31 500 plus costs of R25 000.

Yusuf Lakay, who was left partially paralysed after allegedly being shot by a policeman at a funeral in Observatory, lost his claim for damages - with costs. Earlier, he had turned down an offer of an out-of-court settlement of R30 000 because it was decided that the case needed exposure. The judge ruled that Mr Lakay had not proved, on the balance of probabilities, that Constable Farmer had of his own volition fired the shot that caused the damages.

Notice has recently been served on the Minister of Law and Order of a R350 000 damages suit for injuries sustained by a 14-year-old, Xavier Robertson, from Strand. It is alleged that Xavier was shot in the head with a rubber bullet when police took action against groups of people after a protest against beach segregation during the Defiance Campaign. After two operations at Groote Schuur Hospital brain clinic, Xavier is recuperating at home but is still partially paralysed down his left side.

One of our monitors became involved with the family through her court and repression monitoring activities in the area, and she has subsequently continued to be a source of much needed support to them.

8 Other cases followed

Other cases we have followed have included charges of furthering the aims of the ANC, possession of banned literature or prohibited material, illegal gathering, resisting arrest, resisting eviction (squatter communities) and inquests. The reopening of the "Guguletu 7" inquest, brought home the heart rendering aspect of these hearings - the mothers of the dead men went to court day after day (when they can ill afford the transport costs or the time) and listened to detailed accounts of the exact manner in which their sons died with their only hope being that culpability would be brought home. Even this consolation eluded them since the Magistrate found that the police action, which had resulted in the death of their sons, had been in self-defence.

"Upington 26" trial: The verdict in the well publicised case of the Upington 26 highlights the need for the continuation of the campaign to abolish the death penalty. The manifest injustice in sentencing 14 people to death under the dubious common-purpose doctrine, shocked the world. It remains to be seen whether the appeal will result in belated justice. Three members from the Cape Western region attended the trial at different times and valuable, meaningful contact was made.

9 Other areas of involvement - "CAPI"

As a result of the initiative of the interim Committee Against Political Imprisonment (CAPI) several meetings and a regional workshop have been held to identify problem areas and needs of on-trial, serving and released prisoners and to see that these problems and needs are effectively addressed. To this end attention is being given to improved coordination between service organisations, lawyers and all groups working around political imprisonment. The need for these groups to meet more frequently with families of prisoners and ex-prisoners has also been stressed. The emphasis of work now is on campaigning for the release of all political prisoners and preparing for their releases.

Involvement in this initiative has been a natural extension of court-monitoring work where we were already finding ourselves increasingly drawn into the broad sphere of political imprisonment - general repression monitoring, campaigning around hunger strikers and detentions, "networking" - putting trialists and their families in touch with the relevant service organisations, and strengthening our own links with these organisations and crisis centres.

10 Conclusion

Questioned recently as to whether de Klerk's recent announcements would result in a reduction of political trials we were unfortunately unable to answer in the affirmative. To date there has not been a drop-off in cases and a review of the third week of February, as compared to the same time last year, in fact indicates an increase. Many of these arose out of last year's repression so perhaps there is hope that as these are concluded they won't be replaced by a

stream of new ones. However, in the light of the large number of public-violence and terrorism cases we followed last year there is a deep concern that the "criminalising" of cases of political origin is escalating. Government announcements of reform will be meaningless if they are not enacted by changed legislation and if they are not accompanied by a reinstatement of the rule of law. The onus is on all of us to campaign vigorously for this and for the right of all South Africans to have the means at their disposal to bring into being a truly representative democracy. Only then, when people are no longer charged and criminalised for their fight against injustice and inequality, will political trials cease to be such a dominant feature of our courts.

Rosalind Bush
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