THE BLACK SASH
NATIONAL CONFERENCE 1988

CAPE WESTERN REGION

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Title:

COURT MONITORING REPORT 1987
CAPE WESTERN

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Abstract:

THIS REPORT STRIVES TO GIVE AN OVERVIEW OF THE EXPERIENCE OF COURT MONITORS IN THE WESTERN CAPE REGION DURING 1987.

IT LOOKS AT 1) DIMINISHING LEGAL RIGHTS IN SOUTH AFRICA

2) CLAIMS AGAINST THE MINISTER OF LAW AND ORDER

3) CASES: STATE VS MEMBERS OF THE SAP

4) TERRORISM TRIALS

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6) SPECIAL POLICE (KITSKONSTABELS)

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8) RURAL OUTREACH - THE LAW COURTS AND YOU

COURT MONITORING REPORT
MARCH 1988

DIMINISHING LEGAL RIGHTS

All of us who try to follow court proceedings daily – either by attending cases in court or by monitoring the Press reports – will have felt increasing gloom as 1987 drew to a close. The regulations of the second State of Emergency further diminished legal rights . . . In particular, Regulation 3 allowed the Minister of Law and Order alone to determine the fate of detainees, who may be incarcerated for as long as he chooses without being given any reasons or being allowed to make any representations. This seems to offer little hope of success for the "urgent" applications for release brought forward last July on behalf of six U.D.F. and Cayco leaders (held in detention between 12 and 19 months to date) and eventually heard in the Cape Town Supreme Court on 2 December. At the end of the hearing judgment was reserved, and the outcome is awaited.

We need to recall, on this issue, that the Appelate Division ruled last year (by 4 votes to 1) that the State President has virtually unchecked discretion to issue any regulations, however "drastic" or "harsh". The Judges admitted that this denies normally accepted fundamental rights – specifically hearing the other side and access to detainees by their lawyers. But they held it to be an "Emergency measure that was intended to apply only to an Emergency situation". Prof. John Dugard of Wits. University, who once defended the "positive" role judges could play, said he now wondered whether resignation might not be the only option open to the "moral" judge! (Star, Jan. '88).

A gloomy sense of the odds against them is evident in conversations we have had with progressive lawyers in Cape Town. But there is also a dogged determination to carry on. We have seen this in persistent efforts to obtain interdicts against police/vigilante harassment of individuals and communities. They have had considerable success in getting courts to rule in their favour; but we have seen too with how little regard for the law such ruling is flouted and ignored.

DISREGARD OF RESTRAINING INTERDICT – CROSSROADS

The worst case of this kind we witnessed was the burning of the Crossroads satellite camps last year, in spite of a restraining interdict. The sequel to this massive destruction (with its loss of life and rendering of an estimated 60 000 people homeless) is a case being brought against the Minister of Law and Order in the Cape Town Supreme Court at the moment, and expected to run for a year. Damages of R312 000 are being claimed in the matter of P. Mzamke and 20 others, including the Methodist Church of Africa. It has been agreed that some 3 000 other suits will await the outcome of this hearing. Claims could total over R5 000 000. The evidence brought before the court so far by a number of responsible witnesses is utterly shocking.

CLAIMS VS THE MINISTER OF LAW AND ORDER

We have monitored several cases involving claims against the Minister of Law and Order / S.A.P., and many more throughout the country have been reported in the Press. Very many of these are settled out of court – with the result that the harsh facts behind the claim are not aired in court and so never reach the public. The Minister pays costs and damages "without admitting liability and without admitting directly or indirectly the correctness of the allegations."

Payment is nevertheless tantamount to an admission of liability, and it is at least partly this factor which caused policemen to lie in order to protect the Minister in two cases we have monitored. Indeed the magistrate's comment at the end of one of these cases makes the situation quite clear. He said he believed the incident would cost the Minister of Law and Order 'a few rands'. In truth, millions of rands of taxpayers money have been paid to victims of wrongful arrest and for assault, maiming and death at the hands of policemen.

CASES: STATE VS MEMBERS OF THE S.A.P.

Several cases against policemen have been heard in Cape Town in the past year. These have involved serious assault, culpable homicide, attempted murder, theft and defeating the ends of justice. In one case the policeman was found guilty of culpable homicide for assaulting a farm labourer and then dragging him behind a tractor. In another the policeman was found guilty of culpable homicide after a man died when a Casspir was driven over his shack. The sentencing in these cases deserves comment. In all cases there was the option of a fine . . . R2 000 (or 500 days) in the first case detailed here; and R1 000 (or 2 years), of which half was suspended for 3 years, in the second.

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Another truly shocking case was heard in the Cape Town Supreme Court in Aug/Sept last year when two policemen were accused of the murder of one young woman and the attempted murder of three others in an ambush in Bellville South. The head of the riot police unit there had ordered the men to hide behind a hedge and so form a 'surprise party' and then to 'eliminate' people causing trouble. About seven shots were fired at a fleeing crowd. One young woman was killed and three were injured – one lost an arm. Under cross-examination one of the accused said he realised that those shot had not been guilty of any crime. In summing up at the end of this trial Mr Justice Howie found the two policemen Guilty, but was over-ruled by the assessors who found them Not Guilty on the grounds that they believed that they were acting legally under the orders of a superior officer. The Judge and assessors agreed that Capt. van Schalkwyk, who gave the orders, and his superior officer Col. Mans (who signed van Schalkwyk's false report on the case) were guilty of perjury and defeating the ends of justice. The Commissioner of Police has ordered an enquiry and we await the outcome. The victims are suing for R250 000 damages. A footnote to this case was the appearance of an article in the Cape Times 16.10.87 in which Gerald Gordon Q.C. looked at the legal history of 'superior orders' defence, and found that world courts do not absolve those who are ordered to kill.

Capt. van Schalkwyk has featured in earlier cases. In April '87 Mr Acting Justice Viljoen criticised this man for the use of 'unreasonable force', when awarding R15 000 to a Bellville South schoolboy who was 14 when he was shot in the back in Sept. 1985. In July '87 Mr Justice Rose-Innes denounced this police officer's conduct as 'high-handed and unacceptable'. Barely two months later we find him being held responsible for the ambush case. Situations like this make it very difficult for the public to have any faith in the power of the courts to restrain those policemen who so defiantly ignore them.

STATE VS TONY WEAVER: THE GUGULETU "TERRORISTS"

Another can of worms was opened in a Wynberg Court when the Minister of Law and Order charged a Cape Times reporter, Tony Weaver, with making untrue statements about the police to the B.B.C. in respect of the shooting of seven alleged A.N.C. guerillas in Guguletu in March 1986. The evidence of the witnesses of the incident suggested execution rather than any attempt at arrest. The magistrate said medical evidence contradicted evidence of the State witnesses; and Mr Weaver was acquitted since the magistrate found there were reasonable grounds for him to believe that what he had told the B.B.C. was true. The P.F.P. spokesman on law and order, Mr T. van der Merwe, described the prosecution of Mr Weaver as "part of a huge cover-up", and he hoped that the judgment would lead to further investigation so that the truth could be established. The Attorney-General has ordered a full investigation into all the questions raised. Mr Weaver is suing the Minister for R115 000 for "wrongful and malicious prosecution".

TERRORISM TRIALS

In 1987 we monitored two terrorism trials, which aroused major interest. The first involved a group of eloquent, intelligent young men who were found guily of terrorism or of harbouring or assisting terrorists. They were given long jail sentences, varying from life for their leader, Lizo Ngqungwane, 25 years for two others, to between three and fifteen years for the remaining ten. Statements of mitigation were handed in by some of them – very moving accounts of the experiences that had brought them to support the A.N.C. and its Freedom Charter in seeking a just society. Only one limpet mine incident, in which damage was caused, but no one was injured, was actually brought home to the accused. But their allegiance to the A.N.C. was clear, and indeed proudly acknowledged in their wearing of track suits in A.N.C. colours on the day that judgment was delivered. Counsel for the State found them "arrogant" and showing "no sense of remorse". Defence counsel said the trial was "tragic" because 13 people of "intelligence, integrity and principle" who had not "raped, robbed, stolen or killed" were on trial. They were not criminals in the usual sense of the word, he said, nor had they acted from personal motives of gain, revenge or self-aggrandisement.

The second terrorism trial was that of Edward Petane, accused of attempted murder and planting a car bomb outside a shopping centre in Parow. He claimed it was not set to explode – that it was a gesture to demonstrate the vulnerability of South Africa society. The interesting feature of this case was that he refused to plead to charges of terrorism, claiming he should be treated as a prisoner of war. His counsel, Adv. Donen, invoked the Geneva

Protocol of 1977 on his behalf. The A.N.C. is a party to this document but South Africa is not, as it could not accept Article 1(4) which deals with conflicts "in which peoples are fighting against racist regimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations." Mr Justice Conradie ruled that South Africa was not bound by the Protocol as he found that it had not become part of international customary law. What was interesting was the Judge's view that, nevertheless, the Protocol could be described as "an enlightened, humanitarian document". He added that "if the strife in South Africa should deteriorate into an armed conflict we might all find it one day cause for regret that the ideologically provocative tone of Section 4 made it impossible for the Government to accept". Finally, when counsel suggested that Petane was likely to contribute to a future South Africa as much as other public figures sentenced for violence – such as Smuts, Louis Botha and Vorster – the Judge replied, "It is my own feeling that he is likely to do so" (Weekly Mail, 11/12/87) He was sentenced to 17 years in jail.

Another terrorism trial is scheduled to commence on March 22. Fifteen young people, 14 men and one woman are on trial. Their appearance last year, after 3 to 6 months in detention, was greeted by demonstrations of support from the public gallery and in the street outside the Regional Court. After the hearing was postponed for trial in the Supreme Court, the accused left the courtroom singing "I'm proud to be a soldier". Shall we have more claims for P.O.W. status when the trial begins at the end of this month?

PUBLIC PERCEPTION OF SENTENCING

The Not Guilty finding of the policemen in the Bellville South shooting was not the only case whose outcome caused shock and dismay in Cape Town. Several other cases in which sentences have roused not only local but also international protest involved teenagers who were given sentences of one to three years in jail for stone-throwing during the schools' unrest in 1985 when they were still minors. In all instances, and in a blaze of publicity, the young people went to prison in 1987 convinced they were suffering in a just cause. And in all these cases, that of the group known as the "Wynberg Seven", and those of four other young men tried individually the sentences were upheld on appeal to the Supreme Court. There was no question of the option of a fine, nor is there any hope of remission in "political cases". Public petitions for clemency mustered up to 30 000 signatures. The importance of this public support was summed up in a Cape Times editorial of 9 June 1987:

> "When youngsters go defiantly to prison for politically related offences with the powerful support of their parents and others who see it as a sacrifice for the liberation struggle, society should take stock."

And stocktaking should also involve an awareness of the public perception of the unevenness of sentencing. If we refer back to the cases involving policemen who were sentenced for particularly violent offences and who in every case were given the option of a fine, while youngsters who threw stones in the heat of the unrest situation are denied an alternative to a prison sentence, it is easy to see how this diminishes the community respect for the law.

REDUCTION OF SENTENCES

A glimmer of light during 1987 was the success of Adv. Whitehead's plea for his clients to be given the opportunity to do community service instead of being sent to prison. The case involved four Zolani men who were found guilty on charges of Public Violence – stoning a house and car, and burning another car during a period of community-vigilante confrontation. Judge Williamson took into account the circumstances prevailing at the time. He told the accused "I have decided to give you the opportunity to pay for your misdeeds in a way that does not involve destructiveness of prison". The accused's sentence of 6 years imprisonment was suspended for 5 years. They were to pay compensation to the people whose property they had harmed, and to render service to the community by working every Saturday for 2 years from 8 a.m. to 4 p.m. It is to be hoped that this sort of ruling will apply to other cases in the future – but it offers cold comfort to the imprisoned youngsters who threw stones without causing any serious damage.

Another area where relief was afforded to prisoners has been the reduction in a few cases of sentences judged too severe. The most notable follows on our report last year which highlighted a case from Zolani (Ashton) – similar to that in this report for which community service was prescribed. In the appeal in respect of last year's case, the sentences were cut in the Supreme Court, Cape Town. three people who had been sentenced to ten years had half the sentence suspended for five years. The 29 others (original sentences 7 to 8 years, and including five juvenlies) were now ordered to serve six years, three years suspended for three years.

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"KITSKONSTABELS" – SPECIAL POLICE

This has also been the year of the kitskonstabels (instant police) who have been deployed, fully armed, in the townships after a six week crash course. We have monitored four cases involving these men. Two are still proceeding. In the third the charges were withdrawn against a man accused of murdering and robbing a policeman. In the fourth case, the policemen admitted to wrongful shooting of a youth running away from them. There have been reports of shooting by "kitskops" in Nyanga when four youths were injured (South 30.7.87), and of students being indiscriminately beaten and kicked at I.D. Mkize School (Cape Times 30.7.87). But the reports from the rural areas allege a sustained reign of terror there. Allegations of horrifying offences appear in affidavits used in order to secure undertakings from the police not to "unlawfully arrest, assault or threaten" residents in the townships in Aberdeen and Oudtshoorn. In spite of such undertakings, documents filed in the Supreme Court, Cape Town, last December gave detailed descriptions of brutal violations by "kitskops". Equally serious allegations have come from Beaufort West, Hofmeyr and Hanover. What emerges clearly from their attitude is that they believe they are exempt from prosecution by virtue of the Emergency Regulations . . . a misconception which also surfaced in the Bellville South murder case . . . so it is not confined to "kitskops"!

The creation of this auxiliary police force (as well as the municipal guards or "greenflies") makes it possible for the S.A.P. to reduce the numbers of white policemen in the townships. But inadequate training and the recruitment of illiterates (most of them are unable to read and write, according to the station commander at Hofmeyr in a magistrate's court hearing in Dec. '87) makes it a virtual certainty that poor, uneducated people, suddenly armed and empowered, are likely to compensate for past inferiority with bullying tactics. In the urban settlements a backlash occurs; e.g. it is reported that 15 of these men were injured in Khayelitsha in the last three months (Cape Times 17.2.88).

As long ago as September last year, in replying to questions from Mrs Suzman, Minister Vlok confirmed that "several" kitskonstabels had been charged with serious offences and that there had been "several" instances in which firearms issued to them had been used in the commission of crimes. (Mrs Suzman regretted that no statistics had been given.) Mr Vlok continued that daily it was brought to the attention of special constables that they, like ordinary citizens, should not act beyond the limits of the law . . . their behaviour indicates that the message is not clearly understood; and the allegations in the affidavits accuse their superiors of failing to react to charges of reprehensible conduct laid against them.

STATISTICS

From the matters reported here it will be seen that the monitoring in the Western and Southern Cape has handled a variety of cases no longer covered by the omnibus P.V. charge – although there are still many of these. We have sat in on labour-related cases, inquests and many others where serious crimes are alleged: assault, illegal possession of firearms/explosives, murder and attempted murder, arson, terrorism, and furthering the aims of the A.N.C. This last charge may cover a multitude of sins – from painting "A.N.C." on the back of a milktruck by a 15 year old boy – graffiti on walls, possession of posters or stickers, or banned literature – to harbouring or failing to report the presence of a "terrorist" – and finally those who admit to giving active support to the A.N.C.

The murder / attempted murder / arson charges relate to township conflict with community counsellors, kitskonstabels or vigilante groups – i.e. violence or alleged violence against those who are seen as agents of repression, e.g. the case in which accused were sentenced to community service.

Nevertheless, many of these serious charges fail, e.g. in 13 cases involving 65 individuals accused of attempted murder / murder (4 people died), only 19 accused were found guilty. In 16 cases involving arson / malicious damage, in which 74 people were charged, 31 were found guilty.

Between Oct. 1986 (when the figures used in last year's report to Conference were taken out) and Dec. 1987, we monitored approximately 200 cases, involving 418 court visits.

Adults charged	407		Juveniles charged	147	
Found Guilty		117	Found Guilty		41
Charges withdrawn		122	Charges withdrawn		36
Found Not Guilty		168	Found Not Guilty		70
		407			147
Adults found guilty		29 per cent	Juveniles found guilty	28 per cent	

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In figures given in Parliament last year Minister Vlok dealt with charges brought against Emergency detainees – only 1,22 per cent of the detainee population was found guilty in the period June '86 to Feb. '87 and of those charged the police had a conviction rate the same as the one we have arrived at, 29 per cent (W M 19.2.88). The large number of "charges withdrawn" is generally due to police evidence failing because of being contradictory or unreliable. It is also due to the fact that magistrates eventually lose patience when remand follows remand because no charge sheet has been completed.

The salient fact is that in the cases monitored, 71 per cent of the accused were found Not Guilty or the case against them could not be sustained. It is necessary to point out, as we did last year, that notice of the cases we monitor comes to us from the attorneys, i.e. all have the benefit of defence. Nevertheless, we see a very large number of innocent people continuing to be put through the trauma of arrest, possible assault, struggle for bail, and protracted legal proceedings – costly and time-consuming – all of this causing pain and anxiety to the accused, their families and the community.

The figures we have given here must be very different nation-wide, where – especially in the rural communities – most accused are undefended. (Indeed, Prof. McQuoid-Mason of Natal University has estimated that 150 000 South Africans are jailed annually without legal representation. (Cape Times 28.9.87)). This disturbing figure, of course, refers to all cases, while our monitoring focuses on those seen as 'political'. Many of these are undefended in the rural areas, and it is painful to think of the large numbers of people, many of them very young, being swallowed each year by the country's jails without the comfort that must come from the kind of support given to the jailed teenagers in Cape Town; and also without the careful counselling given in advance to prepare them for the potentially destructive prison experience.

"THE LAW COURTS AND YOU"

In order to try to respond to the need of those who have little or no chance of securing legal defence, we have produced a pocket-size booklet, "The Law Courts and You", in which we try to give simple advice on the question of making (or not making) statements. We have tried also to explain court procedure, which is bewildering and intimidating even to sophisticated people. And we have tried to make clear what the accused can do on his/her own behalf. In addition, the booklet contains a list of offices and organisations where help may be sought. We earnestly hope this will go some way towards filling a desperate need, although we realise how much courage may be needed to follow the advice given.

We are still monitoring some cases in Worcester, Paarl, Stellenbosch, Strand and Grabouw. We have one willing monitor in Colesberg and our dedicated Southern Cape branch tries to cope with Oudtshoorn, George and Knysna. We are still covering the courts in the greater Cape Town area, as far as our woman-power will allow. But we must make every effort to extend the rural outreach this year.

CONCLUSION

Monitoring is usually a rewarding experience and an educative one. It can often be frustrating when cases are suddenly remanded without a hearing, or when we have received information which proves to be incorrect. Nevertheless, what has often seemed to be an abortive journey actually offers the opportunity for some unexpected contact. We have followed a large number of cases through many remands. The highest number recorded is 21 for a case against four young men in George, charged with arson and found Not Guilty. But during this protracted experience they had actually spent six months in jail, while attorneys struggled to get bail. Our records contain many cases involving hardship of this kind. We do try to have one monitor follow a case from remand to remand, and this allows for a specially strong bond to be established between the monitor and the family of the accused.

We record our court experiences, and figures have been given here, derived from those records. We are given figures in the press, as well as from D.P.S.C., from Hansard and from other sources – figures which give some idea of the enormous numbers of people affected by the regulations of the State of Emergency. Court monitoring helps us to remain aware of the people behind the statistics. We see their courage in frightening and bewildering circumstances and are often moved by their warm response to any concern shown them.

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In spite of the shackles of ever-increasing Draconian legislation, the Law Courts remain virtually the only arena where State injustice and violence can be openly and safely challenged. Here the harsh realities of such legislation can be exposed to the public view . . . Our Black Sash dedication enjoins us to preserve the ideals of peace and justice for all persons and people and to resist any diminishment of these. As long as there are those in the legal profession who also subscribe to these ideals, the struggle for justice will continue.

Mr Justice Berman pronounced clearly on the role of the courts in a summing-up delivered in the Supreme Court in April last year. He quoted first from Lord de Villiers' view, 107 years ago, that the troubled state of the country ought not to influence the court, "for its first and most sacred duty is to administer justice to those who seek it". He went on to say:

> "Where it is sought to control, in troubled times, the exercise of the fundamental rights of free men, the function of the court is to act as a watchdog and not as a lapdog."

We have seen the lapdog syndrome in operation, but there are fortunately also the watchdogs who remain vigilant custodians of justice.

Muriel Crewe
23 February 1988