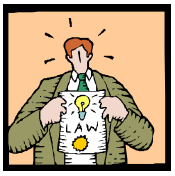
E-MANTSHI

A KZNJETCOM Newsletter

February: 2007: Issue 11

Welcome to the eleventh issue of our KwaZulu-Natal Magistrate's newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments and suggestions – these can be sent to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or faxed to 031-368 1366.



New Legislation

1. Draft National Credit Regulations which contain draft rules for the National Consumer Tribunal have been published in Government Gazette No. 29477 dated 15 December 2006. The closing date for submissions is 26 January 2007.

2. A Draft Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill, 2006 was published for public information and comment in Government Gazette No. 29501 dated 22 December 2006. One of the interesting proposed amendments is that provision is now made to state specifically that the Act does not apply to a person who occupied land as a tenant, in terms of any other agreement or as the owner of land and continues to occupy despite the fact that the tenancy or agreement has been validly terminated or the person is no longer the owner of the land.

3. A Draft Rental Housing Amendment Bill, 2006 was published in Government Gazette No. 29503 dated 22 December 2006. A proposed amendment to section 13 of the Rental Housing Act, 50 of 1999 is to allow Rental Housing Tribunals to make a ruling that a person must comply with the provisions of the Act, and to provide that rulings by the Rental Housing Tribunals must be enforced in terms of the Magistrates' Court Act, 32 of 1944.

   Both the Draft Bills can be accessed on the Parliamentary Monitoring Group website at www.pmg.org.za .

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Recent Court Cases

1. S v MOSHOEU 2007(1) SACR 38 (TPD)

The appellant was the investigating officer in a matter that was remanded for further investigation. The court instructed her to obtain certain evidence, to arrange for an identification parade, and to obtain statements from the officers conducting the parade. When the matter next appeared on the roll the appellant was not present; a warrant for her arrest was issued and she was thereafter summarily convicted of contempt of court. She was sentenced to a fine of R300 or three months' imprisonment.

Held, that it was a well-established and salutary principle that, before a presiding officer could hold a summary inquiry concerning a contempt of court charge, he or she must put the charge to the accused, explain its nature and import, and ensure that the accused understands the charge. This duty existed despite any experience the accused might have. The magistrate's assumption *in casu*, that the appellant, as a police officer of 12 years' standing, would have known that her failure to appear would lead to a charge of contempt of court, was unwarranted; there was a duty on the court to explain to a witness the implications of a failure to appear after having been warned to do so. (At 40 *g* -*i*.)

Held, further, that it was clear from the plea explanation offered on behalf of the accused that she had been in another court attending to other cases, and that her absence had been inadvertent. It appeared, therefore, that her conduct had not been wilful, disrespectful or contemptuous. The apparent conclusion of the court *a quo*, that mere dereliction of duty constituted contempt of court, was unfounded; wilfulness on the part of the accused was required. Accordingly, the court a quo had misdirected itself in convicting the appellant. (At 40 *j* -41*c*.)

Held, further, that the duty to prosecute lay with the prosecutor, who was *dominis litis*. A presiding officer should not coach or advise the prosecutor on the conduct of his or her case; neither should the presiding officer instruct an investigating officer on the nature, form or extent of the investigation. To do so would create the impression that the presiding officer had taken the side of the prosecution, implying a lack of impartiality and causing a loss of public confidence in the criminal-justice system. It was also in the interests of justice that it be administered in a cultured and civilised atmosphere; all persons appearing in courts, whether accused, witnesses or members of the public, deserved to be treated with dignity and respect. With this in mind, the impetuous conduct and absolute lack of respect for people exhibited by the presiding officer *in casu* could not the countenanced. (At 41*e* -42*b*.)

Appeal upheld; conviction and sentence set aside.

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2. S v VAN DER VYVER 2007(1) SACR 69 (CPD)

A court considering an application for an adjournment should be guided by two principles. Firstly, it was in the interests of society that guilty persons should not evade conviction by reason of an oversight or because of a mistake that could be rectified. Secondly, that an accused person, deemed to be innocent, was entitled, once indicted, to be tried with expedition. The critical question was whether the lapse of time was reasonable; taking into consideration the nature of the prejudice suffered the nature of the case, and the systematic delay. The court had a discretion which was to be exercised judicially on consideration of the particular case's facts and circumstances. The areas of prejudice raised by the defence relating to finance, career advancement, widespread media coverage and social pressures on him and his family were not trial-related; they impacted on him personally, as they would on any accused involved in a high-profile trial. (Paragraphs [7]-[9] at 7 *i* -72*e*.)

Held, further, that the defence had also raised trial-related prejudices. It was possible that the accused's legal representatives and expert witnesses would not be available if the trial were to commence on a postponed date; the accused would probably incur substantial additional costs; and with the passage of time the memories of witnesses could dim, which could negatively impact on the trial and on the administration of justice. However, the delay could not be ascribed to a particular person or instance. It was due to a combination of factors, including the practice of continuing rolls, the overcrowding of rolls, the fact that certain matters had not been completed during the previous Court term, the fact that certain prosecutors were unable to take on new matters, and the priority to be given to matters which were age-related or where the accused were in custody. (Paragraphs [11]-[12] at 72*g* -73*h*.)

3. S v GUNDA 2007(1) SACR 75 (NCD)

The appellant had pleaded guilty to a charge of driving a vehicle without a licence. On conviction he was sentenced to periodical imprisonment for a period of 300 hours. On appeal against this sentence, the court held that, in convicting the appellant, the magistrate had acted in terms of s 112(1) (a) of the Criminal Procedure Act 51 of 1977. The section provided that 'no sentence of imprisonment or any other form of detention' would be competent upon a conviction on this basis. There was no doubt that a sentence of periodical imprisonment was, as its name suggested, a 'sentence of imprisonment'; and it was, at the very least, a 'form of detention'. This misdirection being sufficient to set aside the sentence, it was unnecessary to consider the argument that the sentence was shockingly inappropriate. It sufficed to say that the magistrate should have been more rigorous in determining the appellant's ability to pay a fine, and in considering his back ground and personal circumstances. (Paragraphs [6]-[8] at *76 j* -77*d*.) Appeal upheld. Sentence set aside and the matter remitted to the court *a quo* for sentence to be imposed afresh.

4. S v SLABB 2007(1) SACR 77 CPD

The accused had unlawfully entered a house but was disturbed before he could

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steal anything. He was convicted in a district magistrates' court of housebreaking with intent to steal, and having an extensive criminal record, was referred to the regional court for sentencing. There the magistrate was of the view that it could not be found on the evidence that the only inference was that he had had the intention to commit theft or any other offence. Relying on authority, the regional-could magistrate concluded that the accused had not committed any offence and that the conviction ought to be set aside. Accordingly, the matter was referred to the High Court on special review.

Held, that the regional-court magistrate's reliance on authority had been misplaced, and that the comments of academic writers could not be regarded as authority for disregarding the provisions of s 262 of the Criminal Procedure Act 51 of 1977. While the definition of the crime of housebreaking with the intent to commit an offence unknown might seem questionable, the crime of housebreaking as commonly understood constituted a major invasion of the private lives and dwellings of citizens. There were numerous instances where perpetrators broke into premises and committed heinous crimes. (Paragraphs [11] and [12] at 80*f* -81*c*.)

Held, further, that, where perpetrators were caught after unlawfully breaking and entering into premises and the evidence was overwhelming that their intention was to commit crime(s), but the prosecution could not prove which crime(s) were intended, the allegation that they intended to commit an offence unknown, and to pronounce a verdict accordingly, was the proper course. To do otherwise would be to force the State to resort to trespass prosecutions or to speculate in respect of known offences. This, in turn, could lead to questionable decisions, would place the prosecution in an untenable position, and would render s 262 redundant. (Paragraph [13] at 81*c*-*e*.)

Held, further, that a perusal of the record in the district court led to the inescapable conclusion that the accused had gained unlawful entry to the premises in order to commit a crime. The only inference to be drawn from the facts, however meagre they were, was that the accused had intended to commit theft. Accordingly, he had been correctly convicted of housebreaking with the intent to steal. (Paragraph [14] at 81*f*.) Conviction confirmed.

From The Legal Periodicals

HOEXTER, C.

"'Administrative action' in the courts" – ACTA JURIDICA – 2006 p 303.

CURRIE, I.

"What difference does the Promotion of Administrative Justice Act make to Administrative Law?" – ACTA JURIDICA – 2006 p 325.

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KLAAREN, J.

"Three waves of administrative justice in South Africa": ACTA JURIDICA – 2006 p 370.

LOUW, A.

"Intercountry adoption in South Africa: have the fears become fact?" DE JURE 2006, v39 (3) p 503.

VAN HEERDEN, C.M.

"Perspectives on the procedure for pre-trial exchange of expert evidence" DE JURE 2006, v 39(3) p 555.

ROBINSON, R.

"Parents refusing their children medical attention on grounds of religion: a brief constitutional perspective:" DE JURE 2006, v 39(3), p 610.

KEMP, G.

"Mutual Legal assistance in criminal matters and the risk of abuse of process: a human rights perspective" SALJ – 2006, v 123(4) p 370.

ROOS, R.

"Executive disregard of court orders: enforcing judgments against the state" SALJ – 2006; v 123(4), p 744

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(If you would like a copy of any of the above articles please send your request to gvanrooyen@justice.gov.za)

Contributions from Peers

THE WITNESS – THE CINDERELLA OF THE TRIAL?

I am often surprised by the sometimes unfounded attacks leveled at the credibility, dignity and demeanour of witnesses by attorneys, prosecutors and worst of all, presiding officers.

In 1862 *Anthony Trollope* wrote the following:

"But why should there be no seat of honour, for the witnesses? To stand in a

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box, to be bawled after by the police, to be scowled at and scolded by the judge, to be browbeaten and accused falsely by the barristers, and then to be condemned as perjurers by the jury – that is the fate of the one person who during the whole trial is perhaps entitled to the greatest respect, and is certainly entitled to the most public gratitude." **(Anthony Trollope: Orley Farm (1862) 11 Chapter XXV).**

A study of the case law revealed some of the most popular attacks or criticisms leveled against witnesses and how their evidence was approached by Judges, by a simple understanding of human frailty.

1. <u>THE WITNESS WAS EVASIVE AND ARGUMENTATIVE</u>

"The fact that they (witnesses) may have exhibited exasperation or impatience on one or two occasions in the manner that I have described does not in my view demonstrate unreliability as such, but rather the layman's reaction to persistent and detailed questions as to matters which have already been answered or cannot be more fully described ….."

(*<u>Theodorides v A A Mutual Assurance Association Ltd</u>* 1986(3) 906 at 912 G – H).

2. <u>THE WITNESS DID NOT GIVE COGENT EVIDENCE</u>

"There are however circumstances which affect the cogency of their evidence in this regard. That evidence was given more than four and a half years after the date of the duration. Human memory is inherently and notoriously liable to error. One knows that people are less likely to be complete and accurate in their accounts after a long interval than after a short one. It is a matter of common experience that, during the stage of retention or storage in the memory, perceived information may be forgotten or it may be modified, or added to, or distorted by subsequent

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information. One is aware too that there can occur a process of unconscious reconstruction."

(*Commissioner for Inland Revenue v Pick 'n Pay Wholesalers* 1987(3) SA 453 AD at 469 F-G).

3. THE WITNESS WAS UNTRUTHFUL

"It was not my impression that any of these people were deliberately untruthful, but on the other hand I was not convinced that any one of them was wholly reliable in his or her estimates of times, speeds or distances or in his or her recollection of fleeting events. They were speaking for the most part of impressions received by them well over 3½ years ago; and in addition, it is not uncommon that an urge for self justification colours the evidence of drivers who have been involved in an accident and that the recollections of their friends, relations or passengers tend to be distorted by partisanship.

That can even happen with honest people, and I received the impression, while listening to the evidence in this case, that all of it had been affected in some measure by emotional factors of the kind to which I have referred."

(*Pienaar and Another v Commercial Union Assurance Co.* 1969(3) TPD 62 D – F).

4. THE WITNESSES GAVE CONFLICTING EVIDENCE

"Furthermore, should some part of such evidence conflict in certain respects only with some other witness on the same side, it would be wrong for the Court simply to say that because of such conflict the evidence in respect of that portion of both witnesses must be discarded, when it is clear that one of the witnesses only is in error. Evidence of the opposing litigant or objective matter may well confirm the version of one or other witness."

(*Lambrechts v African Guarantee and Indemnity Co. Ltd.* 1955(3) SA 459 (A) at 465 E).

5. THE DEMEANOUR OF THE WITNESS

"A crafty witness may simulate an honest demeanour and the Judge had often but little before him to enable him to penetrate the armour of a witness who tells a

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plausible story. On the other hand an honest witness may be shy or nervous by nature, and in the witness box show such hesitation and discomfort as to lead the court into concluding, wrongly, that he is not a truthful person."
(*Estate Kaluza v Bruever* 1926 AD 243 at 266).

6. THE WITNESS CONTRADICTED HIM / HERSELF

"The contradictions related to events which had happened some eight months previously. Moreover the contradictions were of a trivial nature. I am always surprised that witnesses can, or think they can, after a passage of weeks and months, recollect how they were seated in a motor car, what route they traveled and at what time they reached their venue. I am not surprised, however, when they fall into contradiction. The wise Judge knows that human memory is only too fallible; perhaps he should bear in mind the Spanish proverb "memory, like women is usually unfaithful"
(*S v Nyembe* 1982(1) AD at 842).

7. THE WITNESS ADMITTED OR CONCEDED IT IN HIS /HER OWN EVIDENCE

"Counsel also submitted that it appears from Schmidt's own evidence that he did not keep a proper look-out. During cross-examination it was put to Schmidt that the only possible explanation for his failure to observe the appellant timeously was that he had been looking too closely in front of the van. Schmidt replied as follows: "That must have been so that I looked too closely in front of me."
It should be stressed, however, that the cross-examiner had been questioning Schmidt from the premise, derived from the evidence of Hurwitz, that he (Schmidt) had a range of vision of at least 40 metres when the lights of the van were on dim. Schmidt's above quoted reply was clearly given on the assumption that he should have seen the appellant at a distance of 40 metres. In other words, all that Schmidt intended to convey was that, if he had such a range of vision, a possible explanation for his failure to observe the appellant was that he had been looking too closely in front of him."
(*Rodrigues v SA Mutual and General Insurance Co* 1981(2) AD at 280 A – C).

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8. THE WITNESS OMITTED SOMETHING IN HIS EVIDENCE

"Why did the witness only mention this at such a late stage?

I do not think that one must read more into this than the record justifies. After all, Mr. Xabe was answering questions. He did not volunteer his statement. It was not his task to decide what was relevant and what was important. He was in the hands of counsel and I do not think that this by itself attracts the criticism which Mr. Holtz contended for."

(*Tshikomba v Mutual and Federal Insurance Co. Ltd 1995(2) TP 124 at 130 C – D*).

9. THE EVIDENCE OF THE WITNESS IS INCONSISTENT WITH STATEMENT TO POLICE

"She, too, gave evidence inconsistent with the information in her statement to the police, but this statement was also made in the English language, which is not her mother tongue, and I am not disposed to make any adverse credibility finding on this score."

(*Mabona and Another v Minister of Law and Order and Others* 1988(2) 654 SECLD at 663 C - D).

10. THE WITNESS HAD SAID SOMETHING IN HIS EVIDENCE WHICH HE HAD NOT IN FACT SAID:

"It cannot be emphasized to strongly that it is extremely disconcerting for any witness, let alone an accused, to be told dogmatically by a prosecutor or a cross-examining lawyer, or the court that he had said something which he had not in fact said.

The presiding officer should remain alert to this particular brand of unfairness and curb it when it arises."

(*S v Tswai* 1988(1) SA 851 at 858 E).

11. THE WITNESS IS LYING:

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"Another tendency which appears to be growing is for prosecutors and practitioners to personalize their cross examination and inflict their own opinions upon the witness and the court.

Remarks such as* "I find that answer unacceptable"** ***or cruder variations such as **"now you are lying" are** ***not permissible. The humbler the station in life of the witness the more important it is to avoid this kind of hectoring."***

(*S v Tswai* 1988(1) SA 851 at 858 G).

12. THE WITNESS' STATEMENT TO THE POLICE

"Evidence – assessment of – deviation by State Witness from police statement – the purpose of the statement is to obtain details of offence in order to decide whether or not to institute prosecution. The statement is not intended to be precursor to witness' court testimony.

It is often written in a language other than that of the witness and tending to be a summary of what the witness said to the police officer. It is neither unusual nor surprising that discrepancies occur between witness' evidence and contents of that witness' police statement."

(*S v Govender and Others* 2006(1) SACR 322 ECD).

13. FORM OF ADDRESSING WITNESSES:

As a matter of courtesy and the acknowledgment of fellow humans, address them respectfully.

(*S v Madigage* 1999(2) SACR 420 W).

14. RUDE CROSS-EXAMINATION:

"In fact I must say that in reading this record I was shocked at the conduct of this

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attorney in cross-examining these witnesses.

I think it must be made clear to him, and perhaps to others, that witnesses who come into court, be they police witnesses or any other kind of witnesses, are entitled to the ordinary courtesy one extends to decent people. Witnesses who give evidence are assisting the court in arriving at the truth and in carrying out the administration of justice. No cross-examiner is entitled to insult a witness or to treat him in the manner in which these witnesses were treated, without there being a very good reason for it. Witnesses must be treated with courtesy and respect. They are doing a public duty in coming to court. That must be borne in mind by both cross-examiners and by presiding officers. It was clearly the duty of the magistrate here to protect these witnesses. I do not wish to be understood to say that a witness may never be attacked, but before you can attack a witness you must at least lay a foundation to the satisfaction of the presiding officer that you have grounds for attacking the witness. Otherwise witnesses must be treated with respect and with the same courtesy that you would extend to a man in civilized society. One is not rude to people when you speak to them during ordinary social intercourse, so why should it be any different in a court of law? Here this cross-examiner really shocked me in regard to the manner in which he treated these respectable men. He starts off by attacking them without any reason. He seems to assume that they are dishonest and that he is entitled to attack and insult them. When the magistrate intervenes to protect them he does not hesitate to attack even the magistrate. I cannot find any justification for his conduct and I think that the magistrate's strictures of him were fully justified."

(*S v Azov* 1974(1) SACR (T) 808 at 810 G).

15. CROSS-EXAMINATION

"I remarked earlier in para [26] on the inordinate, tiresome and protracted cross-examination of Pichulik. The same is true for the cross-examination of De Villiers. Proper cross-examination does not consist, under the guise of testing credibility, of rehashing with a witness, repetitively and obstinately, his evidence-in-chief in an apparent attempt to wear him down so as to unearth discrepancies that

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can then become the source of a submission that the witness should for that reason be disbelieved. Cross-examination is not supposed to be a test of stamina. I do not believe that I am being unfair to counsel for the plaintiff if I say that his questioning of De Villiers and Pichulik, even in the face of remonstrations from the Bench, was the personification of that particular style of cross-examination."
(*Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002(4) SA 681 at 699 B – D).

The right to human dignity is one of the core constitutional rights. According to O'Regan J: *"recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings; human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched on the Bill of Rights."*

The average witness did not ask to come to court and sacrifices a lot in doing so. They do not qualify for the fees of an expert witness and sometimes cannot even claim any expenses. He or she is simply there to assist the court in coming to a fair decision. Sometimes even their lives are in danger, but they are compelled to give evidence.

Let us respect their dignity and afford them all the protection and respect they need.

"Fill the seats of justice
With good men, not so absolute in goodness,
As to forget what human frailty is."
(*SirThomas Moon Talfourd Ion V3. – A play*.)

C J Schoeman
Additional Magistrate: Scottburgh

If you have a contribution which may be of interest to other Magistrates could you forward it via email to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or by fax to 031 3681366 for inclusion in future newsletters.

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Matters of Interest to Magistrates

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22 January 2007: South Africa: The Interminable Fight Against Violent Crime: A Police Responsibility?

On 8 November former President PW Botha was buried in the quiet hamlet of Hoekwil, near the town of George. That same evening, just after darkness fell, I was attacked, stabbed and almost killed by three young men outside a small village shop, less than 200m from the grave. The youngest of my attackers was 16, the oldest in his early 30s. Far from being strangers, these three men had spent almost an hour in the shop talking to me, assisting me to carry tables into the shop before closing time. One had even come in to stand with me while he listened to his special song on the radio while he related how the song warmed his heart.

Although my instincts had been alerted when the three walked in that evening, I had mediated my concern, putting it down to some lurking prejudice. There was nothing that indicated that they meant any harm. We had joked, laughed about the fact that I had refused to sell cigarettes to the youngest of the three.

I walked out of the shop at half-past eight, my hands full of the papers and maps I was intending to take with me to Pretoria the next day, as I was to fly up to participate in a meeting of the Nonproliferation Council. As I walked towards my car the sound of running footsteps shocked me into the realisation that I was under attack. I shouted but was struck forcefully to the ground where the three stabbed me and tried to stifle my screams by shoving a hand into my mouth. In the struggle I managed to pull the pin from a small gadget that let off a loud alarm-like sound. It was this that frightened them off, but not before they grabbed my handbag and ripped it from my arm. When the attackers ran off I stood up and brushed a cigarette butt they had put out on my back to the ground and found my hands covered in my own blood. Their trophy, a meagre R200.

In the first few hours after the attack the most shocking thought was that the three men had tried to take my life. Their knife missed my heart by a centimetre, but had severely cut my wrist, punctured my lung and made a deep, damaging cut in my leg that would take months, probably years, to heal fully.

As I write this, I am acutely aware that my experience is no different from the thousands of South Africans who have suffered similar violent attacks and who daily have to deal with the fear that they are unsafe.

There is no question that police incompetence is largely to blame for the failure to arrest my attackers more than a month later, which gave the one man enough time to commit another crime late in December. Yet, the police cannot be blamed for the fact that so many criminals in South Africa daily cross the line from normal citizen to violent rapist and attacker. The youngest of the three, at sixteen, had never known security and love. His mother, by all accounts was negligent and frequently drunk.

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While analysts frequently and tritely blame the state for violent crime on historical aberrations and failures of the criminal justice system, I cannot help believing that we are missing the point. Certainly we can lay the blame on the past, in so far as the majority of violent crimes are perpetrated by those between the ages of 18 and 30, in other words children who were born to parents whose schooling was interrupted by the 1976 uprisings, the school boycotts of the 1980s, detention, and whose families were victim of harassment by apartheid security forces. That, no doubt, will be an unpalatable argument to many. Yet, seeing the problem from this point of view is what led economist Steven Levitt to explain the high levels of violent crime that troubled the United States in the early 1990s. Indeed, such an analysis may lead us to more lasting solutions, albeit that the effect of these interventions may only be felt after several years.

Increasing the functionality of the police and criminal justice system is important, yet it will not solve the problem of insecurity and violence. Nor, in fact, is any social welfare intervention going to have any immediate results; but interventions to improve schooling, ensure the safety of children after school hours and provide state support to the large number of single mothers may show results by the time the children being born now, or who are under the age of five, are old enough to become involved in the crimes their fathers are engaged in now.

It would therefore appear that there are two main problems. The one is the unacceptable tendency of criminals to use unnecessary violence in the perpetration of their crimes. The other—and a more worrying one in my view—is the inability (or unwillingness?) on the part of the police to enforce the law when these people are caught. While a focus on social crime prevention mechanisms could help in fostering long-lasting solutions as I argued above, such efforts need to complemented by certainty of facing the law.

Postscript

Since November when the attack took place and the time of writing this article I have come to understand that the three, all who live in a nearby community, have been well-known to the police as housebreakers and violent criminals. Yet, despite the police having identified the three men shortly after the attack, none were arrested. My handbag was recovered, as was the knife with which I was stabbed, still covered with blood. The eldest of the three attackers was apprehended only about a month after my attack, after having subsequently raped a woman and stolen a firearm. Quite inexplicably a week ago he had still not been arrested, even though the police were aware of the rape and firearm theft. It was only after I pointed him out in an identity parade and had made several calls to the investigating officers and prosecutors that he was finally arrested. On 17 January, more than two months after the attack, he appeared in court for a bail hearing, the outcome of which is still uncertain.

Chandre Gould, Crime and Justice Programme, ISS Tshwane (Pretoria)

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