The problem of attrition in rape cases

One of the greatest problems with the criminal justice system’s response to rape is that most cases do not make it through the system to trial. A 1998 study, drawing on a sample of 394 rapes illustrates the extent of this attrition. Of the 394 rapes committed 272 (69%) were reported to the police. Only 17 (6%) of these became ‘rape cases’. 5 were referred to court for prosecution and 1 resulted in a conviction. To understand the problem of attrition in the criminal justice system it is necessary to recognize that at every stage of the process there are multiple opportunities for discretion to be exercised by police, prosecutors and magistrates, and incentives for exercising them in a particular way.

Reporting
Most rapes in South Africa are never reported to the police. While the decision to report a rape is a complex and personal one, there are aspects of the criminal justice response to rape that impact on this decision. Rape victims who have not reported their cases to the police express fear that they will not be believed, the perpetrator will retaliate against them, they will be blamed for the attack, and that they will be unable to cope with the court process. Many victims believe that even if they report the attack the police will not respond effectively or will turn them away, especially where the perpetrator is known to the victim. As a rural South African woman observes:

Sometimes husbands listen (to intervention from their family) but they mostly say it is nonsense and if the women do not like it they must leave the house. What must we do? Go to the police? Even if you are raped by a stranger they don’t believe you, and

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now you must tell them that your husband is raping you? They are just as bad as the husbands. They ridicule you too and tell you that you are full of shit and you are wasting their time. You can have scars on your face, bleeding ... and the police will send you home to ‘sort it out with him’. Rape by your husband is only real in the law.5

At least some police officers in South Africa appear to distinguish on a basis other than law what is rape and what is not.

Police investigation
Once a rape victim gains access to the criminal justice system, there is no guarantee that her case will be properly investigated or ultimately prosecuted. There are four categories - undetected, unfound, withdrawn by complainant and warrant issued - under which a case may be disposed of without being referred to court. The SAPS Standing Orders on the Closing of Dockets4 specify that a case may be ‘filed’ as undetected when the complaint appears well-founded, but investigation fails to reveal the identity of the perpetrator. Logically no acquaintance rapes should be filed under this category. Where the perpetrator is known, but cannot be traced, a warrant is issued for his arrest and the case filed. In a case of ‘no consequence’ on affidavit from the complainant requesting the charge to be withdrawn, a police officer may close a case and designate it ‘filed due to complainant’. In practice this category also includes cases where the complainant, after laying a charge, cannot be found. Finally, where the police believe the complainant has lied about the alleged rape, they will file the case as ‘unfounded’. While these categories are often conflated due to poor administration, it is important to note that police have a perverse incentive to file cases as unfounded. All cases referred to court, cases in which warrants are issued, cases in which the complaint is withdrawn and all cases categorized as unfounded are counted together as unsuccessful investigations.5 In contrast, cases closed as ‘undetected’ constitute unsuccessful investigations.

Prosecution and trial
Once a suspect is identified the matter is referred to the prosecutor’s office for a decision whether to prosecute. This is another attrition point in the process. A substantial number of cases (in some jurisdictions as many as 60% of reported cases) are closed nolle prosequi, while in other cases a prosecution may be instituted and later withdrawn in court. This occurs sometimes where the State no longer has an interest in the matter, but more often because the investigation has not been concluded and the magistrate refuses to grant further postponements. Finally, there are a small number of cases that make it to trial and judgment. In 2000 of 52,975 rape cases reported countrywide only 8,297 went to trial, with fewer than half

continued on page 2
of those (7% of reported cases) resulting in a guilty verdict. Internationally, predictors of a successful prosecution have been shown to include the victim's sexual inexperience, her respectability, absence of consensual contact with the accused before the assault, resistance and injury, and early complaint.7

Given the enormously high levels of sexual assault in South Africa and low prosecution rates it is important that all role-players in the criminal justice system critically consider the reasons for attrition "on their watch". In this respect magistrates have an important role to play in not only thinking about the nature of the rape cases that are successfully prosecuted in their courts, but in placing what pressure they can on other actors in the criminal justice system to properly investigate and prosecute these cases.

Notes
2. It should be noted that some of the 'excluded' cases may result from relabeling of the offence to, for example, indecent assault. A substantial portion reflects, however, police decisions to close the matter or victims that decide (or are persuaded) to drop the case.
Peer learning - shaping policy

Louis Radyn
Magistrate, Em laz i

From the beginning of 2003 there were suddenly new buzz words doing the rounds. Those words were "Case Flow Management"; lately generally referred to as CFM. Initially I thought, like many others, that this was something new thought of by the Americans, which would soon blow over. I was wrong. It did not. Instead it soon became clear that if I was not going to do something serious about it, all my "subordinate magistrates" and I were going to fall from the bus.

Consequently, in consultation with my Cluster Head, I organised a fully-fledged seminar to be held on this topic on 20/4/04. In addition, I consulted with all the other magistrates in my area of responsibility and identified 32 real problem areas regarding CFM.

We then convened the seminar at one of the local restaurants. It was attended by 29 of the 33 magistrates involved. We had the Chief Magistrate of Durban as opening speaker. From thereon I led the process and we as a team workshoped through these 32 items for a full day. All of them were thrashed out at length by way of group discussions and a proper feedback session. At the end of the day we prioritised 10 very important aspects which we were going to concentrate on in our various districts.

The following day these 10 items were embodied (by the Cluster Head) in a circular sent out to all the area clusters under his control, with the instruction that our suggestions should be implemented throughout the entire region. At a later provincial seminar on CFM our 10 suggestions were incorporated in a policy document which was implemented for the entire province of KZN.

The very positive outcome of this whole exercise was that at the end of the next month we recorded almost 350 less outstanding criminal cases than the previous month in our area cluster. This was indeed a very fruitful exercise in which we learned together about a very important aspect of our work and also learned from one another.

What would you do?

By Anashri Pillay
Public Law Department, UCT

The applicants approached the Cape Provincial Division of the High Court asking that the magistrate's decision not to recuse himself from a matter be reviewed and set aside. The matter was a criminal one, dealing with a contravention of the Drugs and Drugs Trafficking Act 140 of 1992. The magistrate, who was later to act as presiding officer in the trial, had issued two search warrants during the investigation of the case. The warrants were issued on the basis of an affidavit made by a police informant. The magistrate had access to the affidavit, in its entirety. The affidavit was also made available to the defence but the prosecutor had deleted certain information from it. She said that the only information which was deleted was that from which the identity of the informant could be gleaned. Counsel for the applicants argued that the magistrate should have recused himself because the merits of the case had already been placed before him, in the form of the affidavit. Furthermore, the fact that the magistrate had granted the search warrants indicated that he had already formed the view that there was some merit in the case. What would you do? Should the magistrate have recused himself?

Answer on page 8.
 SOUTH AFRICA has a dual legal system of succession in so far as it recognises and enforces at least two systems of personal law. The one is based on Roman-Dutch law, amended by statute under influence of interna English law; the other system comprises a number of closely related customary laws. Substantial differences mark these two systems. It is a standing practice in a dual legal system to allow for choice of law rules.

Historically the application of common or customary law depended on a person’s race, and more specifically the form of marriage and patrimonial consequences of such marriage. As a result, the policy of dualism gave every appearance of racial discrimination. Over the years legislative initiatives to update the laws of succession were mainly confined to the common law. However, seemingly little was done to keep customary law of succession in line with progressive social practices or human rights, with the result that the customary law was often (whether wrongly or rightly) conceived as a second-rate system of law (see South African Law Reform Commission Draft Report Customary Law of Succession (2004) 46). Moreover, very little was known about the origins of the customary system. In their submissions to the Constitutional Court, counsel for the applicants in Blue and others v The Magistrate and others (Case CCT49/03; see News and Views July 2004) contended that the rule of male primogeniture had its origin in traditional tribal society where succession was not primarily concerned with the administration and distribution of the estate of the deceased, but with the preservation and perpetuation of the family unit. The heir was understood to inherit the property of the deceased only in the sense that he assumed control and administration of this property subject to his rights and obligations as head of the family unit. The rules of customary law of succession were consequently mainly concerned with succession to the position and status of the deceased family head rather than the administration and distribution of his personal assets (par 32). The rationale for the exclusion of females from inheritance was uncertain, other than that it must have appeared “to be suitable to tribal society as it was many, many years ago” (Kerr, as quoted in [par 33]). Counsel subsequently contended that the male primogeniture rule was “clearly one of the manifestations of the deeply embedded patriarchal society which ... permeates many aspects of customary law as it has been developed and applied in the courts over the past century’.” In this sense it was regarded as a “relic of the pre-constitutional order when customary law was lamentably marginalised and allowed to degenerate into a vitiﬁed set of norms alienated from its roots in the community’.” (par 33).

Thus, the view has been expressed that the customary law and accompanying choice of law rules with which we now have to deal with are, in many respects, both inequitable and out of date (see South African Law Reform Commission Draft Report Customary Law of Succession 46).

Choice of law rules
What, then, are these choice of law rules? A person dies intestate when s/he did not execute a will. In the case of intestate succession, the deceased’s property may devolve either in terms of the common law as contained in the Intestate Succession Act (81 of 1987), or customary law. The choice of law rules governing the intestate succession of Black estates are prescribed by section 23 of the Black Administration Act (38 of 1927), read with Reg 2 of GN R 200 of 1987.

Section 23(1) of the Black Administration Act provides that house property (within the particular meaning thereof after the creation of a “House” by the conclusion of a customary marriage) must devolve according to customary law; section 23(2) provides that land held under quitrent tenure (in parts of the former Transkei and Ciskei) devolves according to a special statutory table of succession. Whether customary or common law applies to other categories of property is provided for by further choice of law rules laid down in Reg 2 of GN R 200 of 1987. This regulation primarily utilises the type of marriage contracted by the deceased as an indicator of the legal system to be applied. The relevant provisions provide as follows:

2. If a Black person dies leaving no valid will, so much of his property, including immovable property, as does not fall within the purview of subsection (1) or subsection (2) of section 23 of the Act shall be distributed in the manner following:

(a) If the deceased was, during his lifetime, ordinarily resident in any territory outside the Republic other than Mozambique, all movable assets in his estate shall be forwarded to official administering the district or area in which the deceased was ordinarily resident for disposal by him.

(b) If the deceased was at the time of his death the holder of a letter of exception issued under the provisions of section 31 of the Act, exempting him from the operation of the Code of Zulu Law the property shall devolve as if he had been a European.

(c) If the deceased, at the time of his death was —

(i) a partner in a marriage in com-
sion

munity of property or under antenuptial contract; or

(ii) a widower, widow or divorcée, as the case may be, of a marriage in community of property or under antenuptial contract and was not survived by a partner to a cus-
tomary union entered into subsequent to the dissolution of such marriage, the property shall
devolve as if the deceased had been a European.

(d) When any deceased is survived by any partner -

(i) with whom he had contracted a marriage which, in terms of sub-
section 6) of section 22 of the Act, had not produced the legal con-
sequences of a marriage in community of property; or

(ii) with whom he had entered into a customary marriage; or

(iii) who was at the time of his death living with him as his putative
spouse;

or by any issue of himself or any such partner, and the circum-
stances are such as in the opinion of the
Minister to render the application of
Black law and custom to the devolu-
tion of the whole, or some part, of his
property inequitable or inappropriate,
the Minister may direct that the said
property or the said part of it, as the
case may be, shall devolve as if the
said Black person had been a
European.

(e) if the deceased does not fall into any
of the classes described in para-
graphs (a), (b), (c) and (d) above, the
property shall be distributed accord-
ing to Black law and custom.

From the above it is obvious that the
form of marriage, as well as the date it
was concluded, play a decisive role in
determination of the applicable system.
To illustrate; if the deceased concluded a
custodial marriage before 15
November 2000 (when the Recognition
of Customary Marriages Act 120 of 1998
came into force) and he is survived by
his spouse or issue of the union, Reg 2(d)
would apply. However, if the marriage
was concluded after 15 November 2000,
it would have the consequences of a
marriage in community of property and
thus be subject to Reg 2(c). Similarly, if a
civil marriage was concluded before 2
December 1988 (when the Marriage and
Matrimonial Property Law Amendment
Act 3 of 1988 came into force) without a
declaration in terms of section 22(6) of
the Black Administration Act (28 of
1927), the devolution of the estate would
take place in accordance with Reg 2(d),
but if the marriage was concluded there-
after, Reg 2(c) would apply. The short-
cumings of these rules will be consid-
ered in the next issue of News and Views.

The African Judicial Network

The African Judicial Network (AJN) is an international partnership to foster effi-
cient and effective judicial systems in members’ respective countries and to pro-
mote beneficial relationships among members. Through AJN, members will discuss
the challenges they face, share best practices and lessons learned, and apply those
lessons to their own contexts.

Why AJN?
Rule-of-law issues have posed an impediment to development on a number of lev-
els in African countries. In some countries, the executive branch of government has
dominated the judicial system. In others, access to justice has impeded the uniform
application of law. In still others, the judiciary struggles to operate effectively in their
resource-starved environments. All of these situations create environments where
business contracts are not enforced, breeches of civil rights sometimes go unad-
dressed, and legal decisions become unpredictable and untimely. Despite this, and
against overwhelming odds, there are outstanding members of the judiciary and
other professionals working in judicial systems across the African continent who
have advocated — and sometimes won — significant improvements in their
countries.

There are currently no other regional multi-lingual networks in Africa designed to
bring together the key actors in African judicial systems. AJN is intended to be an
African-led forum for reform-oriented African jurists and judicial professionals to
share opinions, information and experiences from country to country. Through the
network, members will discuss the challenges they face, share best practices and
lessons learned, and apply those lessons to their own contexts. AJN target coun-
tries reflect a cross-section of linguistic and institutional backgrounds including
Angola, Burundi, Ghana, Kenya, Mali, Rwanda, Senegal, South Africa Malawi,
Mauritius, Tanzania, and Uganda.

The website can be found at http://ajn.rti.org
LRG launched a two-pronged programme on the intersectionality of HIV/AIDS and gender-based violence and how this impacts on the decisions magistrates make earlier this year. (see News and Views, July 2004)

The workshops aimed at assisting magistrates develop skills to deal effectively with people affected by HIV/AIDS in the context of gender-based violence, bail and sentencing. Magistrates were also trained so that through their judgements they could demonstrate an understanding of the link between gender-based violence when violations of protection orders occur. This knowledge would also equip them to raise awareness with the broader public and their colleagues.

Each participant was required to complete an assignment between March and June which could either be an information gathering exercise or a community intervention exercise. The information gathering exercise aimed at keeping track of the cases that a magistrate heard in one month, noting down relevant information in relation to HIV/AIDS. For example, the number of cases heard in a month, the kind of case, those which contained HIV issues etc. The community intervention required magistrates to initiate some sort of training or information session with their colleagues, community members, school groups etc.

Information gathering interventions
All the magistrates who had chosen to engage in this exercise reported making more informed decisions when issues of HIV/AIDS arose in their courts, not only in the context of gender-based violence but also in the context of civil and criminal trials. They placed much emphasis on the importance of knowledge of medical facts on HIV/AIDS as this enabled them to ask more questions relating to the stages of the illness.

In almost all instances where HIV has been raised as an issue in court, a woman was the victim. For instance, from a court in Tzaneen, a man mercilessly chopped his wife with an axe on the head. On a subsequent charge of assault, he claimed that he assaulted her because she had AIDS and was a shame to the family. The magistrate intervened by not only granting a protection order but also educating the parties about how HIV is contracted, and demystifying the myths associated with HIV/AIDS.

Similarly, a magistrate from Johannesburg noted that there had been a steady increase of maintenance applications instituted by grandmothers. When she investigated further she noticed that many death certificates mention the cause of death as natural causes, and further that the deceased were born between 1965 and 1970. She then conducted interviews with the parents of the deceased and was alarmed to realise that all the deaths were related to HIV/AIDS.

Before the training it was difficult to link the impact of HIV/AIDS to the work that magistrates do. All the magistrates who recorded the information from their courts on HIV/AIDS felt very strongly that the need does not stop with the collation of statistics but rather starts with what they can do intervene or show a better understanding of how HIV affects their work.

Community interventions
A report from Warmbaths confirmed the research finding that women, because of the inability to negotiate safe sex are always caught in the intersection between HIV/AIDS and gender-based violence. In this instance, an applicant wanted a protection order prohibiting her husband from emotionally abusing her by having extra-marital affairs. She reported that she lived in constant fear of contracting HIV. Because she appeared to be emotionally traumatised, the court advising her to seek counselling and intervened by explaining the medical facts on HIV and why women are more susceptible than men as well the importance of having protected sex.

A Naboomspruit magistrate decided to reach out to the broader community and translated medical facts on HIV/AIDS into Northern Sotho, a language used by the majority of the court clientele. The information was then given to all people visiting the courthouse. He is now trying to raise funds for the publishing of the translated version so that it can be distributed widely in the community.

In African culture, there is a well-known practice of consulting with traditional healers. In this process there is usually a need for some cuts to be made on the body as a traditional ritual. The Bushbuckridge magistrate used the
medical facts on HIV/AIDS to explain the transmission of the virus through contaminated razor blades.

Because church leaders play a prominent role in society, the Thoboyandou court decided to address a church congregation highlighting the intersectionality between HIV/AIDS and domestic violence and the role that religious leaders can play in destigmatising popular myths and perceptions about HIV and AIDS. The platform was also used to explain the role that religion has played in subordinating women. Members of the congregation were challenged to test for HIV in a ‘Walk to a Test Campaign’. The campaign proved to be effective in destigmatising HIV/AIDS. A video of the presentation is available at LRG.

The Benoni magistrate launched a similar programme in his church and invited other churches to a discussion on HIV/AIDS and gender-based violence as well as the impact AIDS has on families because of the inevitable death of parents living many children to fend for themselves. The various congregations are now voluntarily helping Hospice in taking care of terminally ill people. They have also established a feeding scheme for children who have lost their parents to AIDS.

A workshop participant from Somerset West convinced JOASA to invite the Treatment Action Campaign’s Zachie Achmat to their Annual General Meeting to share with its members his experiences of living with HIV. A survey on whether magistrates needed training on HIV/AIDS was conducted. The overwhelming response for such training gave rise to our next workshop on HIV/AIDS, Bail and Sentencing on 10-12 September 2004 at Stellenbosch.

We could not include all the interventions in this publication but if you want to know what your colleagues are up to the rest are available at LRG. LRG appreciates your efforts to make a difference in your communities and in your judgements. Should you need resources or any help initiating a project (within our means) please do not hesitate to contact us.

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**Court by surprise**

**Ubombo Court**

By Vanja Karth

(with the assistance of
Magistrate Mkhwanazi, Ubombo)

The Ubombo Magistrates Court was established in 1892 and is situated in the beautiful Maputaland part of Zululand in KwaZulu-Natal. In many ways, the region remains largely unchanged since the 1994 elections and most of the people in the district are very poor and uneducated with a large percentage of unemployed people depending on social grants to survive. HIV/AIDS is a big problem, with some 35% of women dying of AIDS-related illnesses.

The Court services a large area - some 1662km2 with a population of about 174 714. It is a mainly rural farming area including the villages of Jozini, Mkuzu and Mbayzweni and is surrounded by huge tracts of sugar-cane farmlands and luxury game reserves. The vast difference between the 'have' and the 'have-nots' in Maputaland is glaring. Employment opportunities are scarce for the community and service delivery from the State is so lacking that basic amenities such as water, electricity and roads are not accessible to the large majority of the community.

The court is headed up by Mr Mkhwanazi who has been there since April 2001, and staffed by one other magistrate, 3 prosecutors, 7 administrative clerks and 5 cleaners. It deals with approximately 30 cases daily, the main charges being assault, housebreaking, theft, robbery and fraud. The periodic court some 60 km north, sits on Thursdays and deals only with criminal cases.

The day I visited the court, I was pleasantly surprised by the obvious care and pride taken in its appearance - a well-tended flowerbed, neat lawns and red polished floors. And most impressively, the public toilets were spotless! But, as with many of our courts, scratch below the surface, and things are not all well. The court is not adequately infrastructured and the water supply is sporadic. Public Works has promised a 10 000 litre water tank but it has still not arrived. The courtroom at the periodic court is very small and falling apart. The dock accommodates three accused and the Bench is about a metre long and dilapidated. The ceiling is broken and solid waste from the bats that live in there falls on to the court officials! On hot days, bees which live in the Benc take over the courtroom and attack people.

From Port Elizabeth's rats (see *News and Views*, August 2003) to Ubombo's bats, it seems structural transformation of the judiciary is a long time coming!
Gender-based violence resource

The Centre for the Study of Violence and Reconciliation has recently produced a National Directory of Services Addressing Gender-Based Violence. The directory comes in a file with a CD from which the details of services can be printed up and put in the file. If you would like a copy, please contact Towa at the CSVn at 011 4034350 or email her at genderdirectory@csvn.org.za

WELL DONE JUDGE PILLAY!

Congratulations to Judge Kate Pillay - ex-regional court magistrate from Durban Court (and LRG Intensive Course Graduate) who has made the history books by becoming the first magistrate to be appointed as a judge as well as the first Indian woman appointed to the High Court. And that is not her only first: she became the first Indian woman prosecutor in Port Shepstone once she had obtained her LL.B. and then she was the first Indian woman magistrate in Pinetown. Let's hope we see more of you following in your footsteps!

A toast to Hermann Buhr

Hermann Buhr of the George Regional Court (another LRG Intensive Course Graduate) has recently been elected Toastmaster of the Year. Hermann was largely responsible for instigating the recent initiative of the Western Cape ARMSA magistrates together with toastmasters in training disadvantaged youth in communication skills. Hermann's commitment to his court and community definitely deserves its recognition. Well done.

Volunteers needed for research project

I am currently completing my Masters degree in Justice and Transformation and I am writing my thesis on transformation of the magistracy. I want to interview about 20 magistrates who have been in service since before 1994 and who are currently based in the Western Cape or who are/were in the former Transkei or Ciskei. Anonymity and confidentiality are guaranteed. The interviews will take place towards the end of the year and early next year. If you are willing to participate please contact Vanja of LRC at 021 6503080 or vkarth@law.uct.ac.za.

Congratulations

To Cagney Musi who has been appointed as acting judge in the Kimberley High Court. Also to Jakkie Wassels (Pretoia), Soma Ndlovu (Durban) and Belinda Moiamu (Justice College) who were appointed to the executive of the South African Chapter of the International Association of Women Judges.

Online News and Views

It has become exceedingly expensive to post news and views and thus we would like, where possible, to email it to those of you with internet access. If you are willing to receive it online, please call Hilary with your email address or email her, at (021) 6503914 or burricks@law.uct.ac.za.

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