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IMPRISONED BEFORE BEING FOUND GUILTY: REMAND DETAINEES IN SOUTH AFRICA

Jeremy Gordin & Ingrid Cloete**†*

“Conditions for awaiting trial prisoners are much worse than for sentenced offenders. You just sit in your cell and rot. You eat and you sleep, you eat and you sleep and you try to sleep, sleep, sleep. People live like that awaiting trial for years.”¹

Thus, Bridget Makhonza recounts her experience as a remand detainee (RD) in Johannesburg Prison, where she spent more than three years behind bars before eventually being acquitted. Makhonza’s case is simply one among many. In August 2010, more than two thousand RDs had been in prison for more than two years, some having spent more than seven years in prison awaiting trial.² When one considers that all RDs are to be presumed innocent until proven guilty³ and that an estimated sixty-five percent of those who are detained awaiting trial are eventually acquitted,⁴ it becomes apparent that to refer to the South African criminal “justice” system, is, at present, a misnomer.

Innocence Projects around the world concern themselves with the plight of those who have been imprisoned for crimes they did not commit. Generally, this means fighting for the exoneration of people who have been wrongfully convicted. In South Africa, however, the problem is less an issue of wrongful *conviction* as such, and more one of lengthy periods of incarceration of people who have *yet to be convicted*. Although South African law recognizes that accused persons are to be treated in accordance with the presumption of innocence, the reality is

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1. Bridget Makhonza, *I Will Always Carry the Scars*, SATURDAY STAR, Feb. 19, 2011, at P15, available at <http://witsjusticeproject.files.wordpress.com/2011/03/makhonza-and-raphaely-write-for-the-saturday-star.pdf>.

2. *Briefing by the Justice, Crime Prevention and Security Cluster Departments to the Parliamentary Portfolio Committee on Correctional Services on Remand Detainees*, PARLIAMENTARY MONITORING GROUP (2010), available at <http://www.pmg.org.za/files/docs/101103jcps.ppt> [hereinafter *Briefing by the Justice*].

3. S. AFR. CONST., 1996 § 35(3)(h).

4. *Presentation by Legal Aid South Africa to the Portfolio Committee on Correctional Services*, LEGAL AID S. AFR. (2010), available at <http://www.pmg.org.za/files/docs/101103legalaid.ppt>.

that a startling number of people are incarcerated in South Africa—in terrible conditions and for long periods of time—before even having been found guilty. It is for this reason that the Wits Justice Project focuses its energy on issues relating to these people: South Africa’s remand detainees.

I. WHAT IS A REMAND DETAINEE?

Penal Reform International describes remand detainees as follows: “Prisoners in pre-trial detention, or on remand, are those who . . . are awaiting legal proceedings. They are also known as untried or unconvicted prisoners.”⁵ RDs, then, are people who have been arrested and charged but whose trials have not been completed. RDs are people who have not yet been found guilty.⁶ Yet in South Africa, RDs are held in custody because they either have been refused bail or cannot afford bail. In May 2010, RDs comprised roughly a third of South Africa’s prison population—a staggering 49,030 people.⁷ It has been calculated that two in five RDs will eventually be acquitted.⁸ Thus, of those people presently awaiting trial in South Africa’s prisons, about 22,000 are likely to be set free. RDs are incarcerated although they are technically “innocent” of any wrongdoing, and deprived for weeks, months and sometimes years of liberty, education, and the opportunity to make a living.

Ironically, accused persons in South Africa are, legally speaking, well protected. Section 35(3)(d) of the South African Constitution provides that detained persons have their trial begin and conclude without unreasonable delay. Furthermore, section 12 protects the right not to be detained arbitrarily or without just cause. In addition, section 342A of the Criminal Procedure Act⁹ purports to protect accused persons from unreasonable trial delays by providing for action courts make take to eliminate such delays. However, there is a significant gap between the legal position and reality.¹⁰ Further, RDs as a group are ill-equipped to vindicate their rights. They are, on the whole, poor and uneducated members of society, unaware of the law’s protections, labeled by an unsympathetic society as criminals, and entirely dependent on

5. *Pre-trial Detention*, PENAL REFORM INT’L, <http://www.pri.ge/eng/Pre-trialDetention.php> (last visited May 15, 2012).

6. Jeremy Gordin, *Waiting for Godot: Awaiting Trial Detainees in South Africa*, 1 NEW S. AFR. REV. 412 (2010).

7. Deon Hurter van Zyl, JUDICIAL INSPECTORATE FOR CORRECTIONAL SERVICES ANN. REP. FOR THE PERIOD OF 1 APR. 2009 TO 31 MARCH 2010, <http://www.pmg.org.za/files/docs/101116jics.pdf>.

8. Gordin, *supra* note 6 at 413.

9. Criminal Procedure Act of 1977, No. 51 (S. Afr.).

10. Gordin, *supra* note 6 at 410.

overworked legal aid lawyers for advice. Therefore, at present, the law's protections are inadequate to protect the rights of RDs in a meaningful way.

II. WHY ARE SO MANY PEOPLE DETAINED WHILE AWAITING TRIAL?

Under International Law, people awaiting trial may be detained pending trial only in exceptional circumstances. There must be reasonable grounds to believe the person committed the alleged offense and a real risk of the person absconding, posing a danger to the community, or interfering with the course of justice.¹¹ The South African Constitution also provides for a general right to be released on bail.¹² However, in South Africa, about a third of all remand prisoners who are granted bail are unable to afford the amount set, effectively excluding people from being released on bail on grounds of poverty.¹³ Others are legally excluded from bail because of the seriousness of their alleged crimes. Additionally, bail hearings themselves are often postponed,¹⁴ and it is clear that the right to bail does not do enough to keep accused persons out of prison pending trial.

According to the Judicial Inspectorate of Prisons, there is at present an over-reliance on pre-trial detention:

Should an accused not be in a position to pay or to guarantee payment of bail and release on warning is inappropriate, it is suggested that increased use could, and should, be made of placement under supervision of a probation officer or correctional official in accordance with the provisions of section 62(f) of the Criminal Procedure Act.¹⁵

It seems then, that South Africa's RD problem begins with an over-reliance on pre-trial detention. Although alternative measures are available to ensure that an accused person appears at his trial, the courts tend to resort to detention as the default position.

III. LIFE AS A REMAND DETAINEE

South Africa's prisons are notorious for their horrifying conditions. According to the report of the Inspecting Judge of Prisons, the average

11. Mark Shaw, *Reducing the Excessive Use of Pretrial Detention*, OPEN SOCIETY JUST. INITIATIVE, 1–2 (2008), available at http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/pretrial_20080513/Justice_Initiat.pdf.

12. S. AFR. CONST., 1996 § 35(1)(f) (providing that everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions).

13. Shaw, *supra* note 11, at 29.

14. Gordin, *supra* note 6, at 416.

15. Van Zyl, *supra* note 7, at 18.

level of occupation of South Africa's prisons is 139%.¹⁶ Nineteen correctional centers are considered "critically" overcrowded, with occupation levels of 200% and over. Medium A (the RD prison) in Johannesburg, for example, is 246% overcrowded. This means that a structure designed to hold 2,630 men has in it 6,480 men. In a communal cell designed for 80 men, there are 200. This means that about half of them have to sleep on the floor and that 200 men have to use two shower heads and one toilet. Overcrowding brings with it a host of other problems. For example, the strain on other prison infrastructure, such as kitchens, hospitals, electricity usage and water reticulation is increased. Overcrowding also contributes to the levels of violence in prisons, as warders are less able to monitor inmates, and the competition for scarce resources heightens tension among inmates.

At the nineteen critically overcrowded centers, on average 33,749 people are detained, 17,458 of whom are RDs.¹⁷ This means that 52% of the prisoners in the most overcrowded correctional centers are RDs. The conditions under which they are detained are clearly unacceptable. In fact, the Inspecting Judge starkly states that "the conditions . . . are shockingly inhumane and do not remotely comply with the requirements set forth in [section] 35(2)(e) of the Constitution."¹⁸

In some centers, the effects of overcrowding are mitigated by allowing inmates to spend large parts of the day outside their cells, working or engaging in recreational or rehabilitation programs. However, RDs have no access to rehabilitation or work programs, and are often incarcerated in overcrowded cells for up to 23 hours a day.¹⁹ In Johannesburg Correctional Centre, for example, staff shortages mean that RDs are not even allowed their one hour's exercise each day, as there are insufficient prison officials to provide adequate supervision. This exacerbates the effects of even slight levels of overcrowding. According to Van Zyl J: "The fact that awaiting-trial detainees, who have not yet been convicted by a court of law on the charges against them but are nevertheless detained under such inhumane conditions, creates a serious ethical dilemma which warrants urgent attention."²⁰

Essentially, under the status quo, the people who are being incarcerated in the most inhumane conditions are those whose guilt has not yet been established. In a letter to the newspaper *The Star*, Marion

16. Van Zyl, *supra* note 7, at 11.

17. Van Zyl, *supra* note 7, at 12.

18. Van Zyl, *supra* note 7, at 11. Section 35(2)(e) provides that everyone who is detained has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.

19. Van Zyl, *supra* note 7, at 13.

20. *Id.*

Goldberg, mother of RD Lawrence Goldberg asks, “What kind of prison system affords more rights to convicted prisoners than it does to those who are innocent until proven guilty?”²¹ In a society that ostensibly values the presumption of innocence, this situation is unacceptable.

*A. “Wear Plastic Bags over Your Feet”: Laurence Cramer’s Story*²²

Laurence Cramer was arrested for contempt of court on July 16, 2008, and was taken to Johannesburg Prison, also known as Sun City, as a remand detainee. In the admissions area, Cramer was told, “You will be locked up with career criminals, murderers, rapists, and gangsters. You will be attacked, stabbed, sodomized—and you can try and fight, but when five men come at you, in the night, in the yard, every day, you will give in to what they want: being tough is what it takes to survive Sun City. Get a lawyer to get you out of here.”

Cramer was given an orange overall, no socks, and no jersey. A warder told him he would get a jersey, blanket, toothbrush, and soap. Cramer received none of those things. His fellow inmates gave him useful advice, such as: “Wear plastic bags over your feet in the shower—these guys like to shit in the shower. Ask your family to send cigarettes and phone cards. You can use these to trade with—a place to sleep, a blanket, protection.”

On his first night Cramer found himself in a cell designed for twenty; there were fifty-six prisoners in the cell. It was about 20m by 5m, with a toilet area to one side. This consisted of one toilet (no toilet paper), a urinal, two shower heads, and two basins. Because there were so many of them, prisoners showered from two o’clock to five o’clock in the morning, thus making it difficult to sleep. Of course, wrote Cramer, because everyone had been fed at the same time, everyone wanted to use the one toilet at the same time.

Once they were locked in, in the late afternoon, out came the marijuana and Mandrax. Thirty-four of the fifty-six slept on the icy floor, so jammed in that they could not sleep on their backs. Cramer had no cup or bottle so could not access water—and all around him heaved and coughed. The smell of the cell with the smoke, stale sweat and bad breath was nauseating. In the middle of the night, Cramer was woken by an emissary of a group of men gathered in the toilet area. Cramer realized this could be trouble for him and that he was, in all likelihood,

21. Jeremy Gordin, *Goldberg Trial Saga Draws to a Close*, SATURDAY STAR (Feb. 26, 2011), <http://www.journalism.co.za/index.php/administrative-affairs/189-wits-journalism-new/wjppublishedcases/3918-goldberg-trial-saga-draws-to-a-close.html>.

22. Laurence Cramer, *Time to Kill*, MAIL & GUARDIAN (Aug. 14, 2009), <http://mg.co.za/article/2009-08-14-time-to-kill>.

about to be raped. He attacked the man, and luckily, Cramer's cell mates helped him and the group of men in the toilet area did not intervene. (Cramer, it should be noted, is an ex-special forces soldier.)

Cramer's family had him released urgently, and he was out by six in the evening on the day after he went in. Most other RDs do not have such luck or families with money and know-how.

IV. DURATION OF DETENTION WITHOUT TRIAL

On 17 August 2010, 2,006 RDs had been awaiting trial for more than 24 months.²³ This is clearly unreasonable, considering that, on average, most criminal cases take only 5 days of actual court time. According to the Legal Aid Board, approximately 65% of the cases it defends are withdrawn after a few months.²⁴ Add to this the fact that the majority of postponements are in order to allow for further investigations, and it becomes clear that many RDs are detained unnecessarily, on charges that are unlikely ever to be proved.

One of the primary reasons for the delays is that many people are arrested by the South African Police Service on insufficient grounds.²⁵ Arrestees are then detained to await the outcome of their trials. The Judicial Inspectorate of Prisons found that charges are frequently withdrawn after the accused has been detained for, on average, three months; in cases that do proceed to trial, many are found not guilty for lack of evidence.²⁶ Other factors that contribute to the delays include poor representation, a lack of the proper documentation, lost documents, and long postponements caused by an overburdened police-force and court system.

There is, and has been for some time, a considerable backlog of cases, particularly in the lower courts—the district and regional courts. In November 2006, a specific Case Backlog Reduction Project Intervention was implemented in order to identify which areas required focused attention with additional capacity. However, the system remains clogged, and as more people are arrested but fewer trials completed, the system is becoming ever more congested.²⁷

The latest statistics on remand detainees according to the Justice, Crime Prevention, and Security cluster departments show that over two thousand RDs have been in prison awaiting trial for more than two

23. *Briefing by the Justice, supra* note 2.

24. Presentation by Legal Aid South Africa to the Portfolio Committee on Correctional Services, *supra* note 6.

25. Van Zyl, *supra* note 7, at 16.

26. Van Zyl, *supra* note 7, at 16–17.

27. Gordin, *supra* note 6, at 417.

years.²⁸ 1,516 have been imprisoned for two to three years; 488 for three to five years; 73 for five to seven years and three for more than seven years. Even more worrying is that, since 2009, there has been an increase in the number of people awaiting trial for more than two years in South Africa's prisons.

REMAND DETAINEES IN DETENTION FOR 24 MONTHS AND ABOVE				
>2-3 Years	>3-5 Years	>5-7 Years	>7 Years	Total
1516	488	73	3	2080

As section 35(3)(d) of the Constitution safeguards the right of arrested, accused or detained persons to have their trial begin and to conclude without unreasonable delay, the question that arises is how long an RD must spend in prison before the delay becomes unreasonable. At present, section 342A of the Criminal Procedure Act leaves the determination of a "reasonable time" to the courts.

Section 342A(1) reads as follows: "A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness." The section then goes on to cite various factors, which the court must take into account when determining whether or not a delay is unreasonable. The factors include the reason for the delay, prejudice resulting from the delay, and whether or not either party can be blamed for the delay. However, the number of RDs detained for more than two years shows that this option is not always available. The question of what constitutes an "unreasonable" delay is open to interpretation and is largely left to the discretion of the presiding officer.

A. Three Years to Be Acquitted: Lawrence Goldberg's Story²⁹

Lawrence Goldberg and his wife, Margarita Reed, were arrested and charged with fraud in April 2008. They spent close to three years in prison before eventually being acquitted. The couple, who had left London in 2007 to live in South Africa, had been arrested in March 2008 on allegations that they had fraudulently misrepresented their financial position to Investec Bank, defrauding the bank in the process.

Ultimately, the court held that the prosecution had failed to adduce

28. *Briefing by the Justice, supra* note 4.

29. Gordin, *supra* note 21.

evidence on which any court could reasonably convict the couple. But, although the regional magistrate eventually closed the state's case, it was three years before the couple was released. Goldberg described his thirty-four months in detention as "pure, unadulterated hell." Goldberg, previously a mentally and physically strong person, had been at the bottom depths of depression during his time in prison, especially during the early days of his incarceration, stating:

"In the beginning, in 2008, I was deserted by everyone except my own family and Margarita. The trouble is that when *allegations* are made against you, no one remembers that you are innocent until proven guilty. Everyone assumes that the allegations are true and that the stories going around that have been out by your accusers, are true." Goldberg said he had been suicidal. "I wanted to kill myself. I cried like a baby at the drop of a hat. I lost 20 kg in weight. I was completely traumatized—in my first three months, I had no clothes, no money, nothing."

Initially held with sixty-nine others in a cell meant to hold forty-four, one night Goldberg awoke from sleep. He was sleeping on his side, to find his hands tied, his legs held open, and his body being held in a spread-eagled position. A gang of men were trying to rape him. He managed to free one hand and to hit out, but not before a broom handle had been rammed into his rectum. Goldberg was also assaulted a number of times by gangs—he is missing about half his teeth. Lawrence's younger brother, Mark, said, "A man and his wife were incarcerated for nearly three years because the state simply couldn't come up with enough evidence. A child was separated from her parents, and a mother lost out on her child's teenage years. Why is the South African justice system so unjust?"

V. SOLUTIONS

The obvious solution to South Africa's RD problem, it seems, would be to release on bail as many RDs as possible.³⁰ Provided that the detainees are not accused of crime serious enough to warrant pretrial detention and do not pose a flight risk or a risk to the administration of justice, this would be one way of alleviating the problem. Minister of Justice Jeff Radebe commented on March 4, 2010, at a parliamentary media briefing given by the Justice, Crime Prevention and Security cluster group that a newly-appointed ministerial task team in the Department of Correctional Services (DCS) would conduct an audit of certain categories of offenders so as to alleviate overcrowding. Furthermore, Radebe said, DCS officials had been mandated to put into

30. Gordin, *supra* note 6, at 422.

action the “controlled release” of RDs who had been given bail of R1,000 or less but had been unable to pay it. Whether all or any of these changes will indeed happen, and how quickly, in an environment in which the amelioration of harsh conditions for RDs and other prisoners is not a government priority—and in which “fighting crime” *is* one—remains to be seen.

Besides releasing RDS on bail where possible, numerous other suggestions have been made. Muntingh,³¹ for example, has recommended that the SAPS avoid unnecessary arrests for minor offenses—a sentiment echoed by the Inspecting Judge.³² Further, Muntingh suggests that cases be properly screened to ensure there is a *prima facie* case. The habit of postponing cases “for further investigation” needs to end.³³

A. The Correctional Matters Amendment Bill

In an effort to reduce the time RDs spend in jail awaiting trial, new legislation has recently been enacted which aims to better regulate the situation of RDs in South Africa’s prisons. The Correctional Matters Amendment Act sets two years as the maximum period of incarceration for remand detainees.³⁴ However, this does not necessarily mean that all detainees who have been in prison awaiting trial for longer than two years will have to be released. The Act does allow for the extension of this two-year period; however, this may be done only if the head of the relevant prison refers the case to court, and the court orders that the period of incarceration be extended. If the case is still delayed by the courts, the case must be referred back to the courts on a yearly basis.

Although the Act is to be welcomed as a positive step, it must be noted that the Department of Correctional Services can only do so much to eradicate the problem of RDs in South Africa’s prisons. The DCS cannot control the length of court processes—and if the problems in the other branches of the criminal justice system persist, it is uncertain whether or not the proposed legislative changes will actually lead to a

31. Lukas Muntingh, *The Prison System*, CRIMINAL (IN)JUSTICE IN SOUTH AFRICA: A CIVIL SOCIETY PERSPECTIVE (2009) at 210–13.

32. Van Zyl, *supra* note 7.

33. Muntingh, *supra* note 31.

34. Correctional Amendment Act 5 of 2011 § 49(g); *see also id.* § 1 (defining a detainee by stating, “[A] person detained in a remand detention facility awaiting the finalisation of his or her trial until being convicted or acquitted, inclusive of the period during which the conviction or acquittal are subject to review or appeal, if such person has not commenced serving such sentence or is not already serving a prior sentence . . .”).

reduction in the trial delays for RDs.³⁵ If, for example, cases are routinely referred back to court in order to extend the maximum period of detention, the legislation will have little effect on the problem. Whether or not the Act will in fact have any meaningful effect on the delays suffered by RDs, remains to be seen.

VI. CONCLUSION

An important factor in bringing about change in the remand detention system is increasing public awareness of the problem—and increasing public pressure on the relevant organs of government to institute change. The problem, however, is that the public is largely unconcerned about the plight of RDs. In February 2011, a South African newspaper reported the story of a man who had been in prison awaiting trial for five years.³⁶ In a country with a history of resistance to prolonged detention without trial, one would expect such news to spark the fires of public outrage. However, the tone of public comment on the article was, on average, unconcerned. One reader summarized public opinion neatly by commenting, “I don’t care how long the case takes and I believe that he committed those crimes. Stay in jail whether you are guilty or not.” RDs may be innocent in the eyes of the law; but the eyes of the average South African see a different picture entirely.

In a society where violent crime is rampant, it is perhaps understandable that there is little sympathy in South Africa for anybody perceived to be a criminal.³⁷ The perception that there cannot be smoke without fire is widespread and hampers attempts to mobilize civil society to bring about change in the criminal justice system. Thus, one of the most important tasks of the Wits Justice Project is making the public believe that not every person who is arrested is guilty.

The problems with remand detention in South Africa are numerous and deeply ingrained. Director of Johannesburg Medium A, Willie Pretorius, says, “We do our best but I’m forced to contravene the law every day. I could be charged with not complying with the Correctional Services Act, the Criminal Procedure Act and the Labour Act. It’s not possible to exaggerate the reality of these circumstances.” At present, it is clear that the presumption of innocence has little real meaning for many accused persons in South Africa. Detained for long periods of

35. Tizina Ramagaga *The Conditions of Awaiting Trial “Prisoners” Look Set to Improve in South Africa*, INST. FOR SEC. STUD. (Mar. 7, 2011), <http://www.polity.org.za/article/the-conditions-of-awaiting-trial-prisoners-look-set-to-improve-in-south-africa-2011-03-07>.

36. Ananias Ndlovu & Carolyn Raphaely, *Accused Being Punished Before Being Found Guilty*, SOWETAN (Jan. 19, 2011), http://journalism.co.za/index.php?option=com_content&Itemid=100104&catid=160&id=3817&view=article.

37. Gordin, *supra* note 6, at 415.

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time in shocking conditions, remand detainees are effectively punished before being found guilty. Although various laws provide for extensive protection for the rights of remand detainees, in reality, the legal standards are simply not met—nor does it seem that compliance is likely to happen in the near future. As Pretorius puts it, “We respect human rights—but sometimes we just can’t comply.”