

Masipa was wrong: the criminal justice system can cost the poor everything

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IT WOULD be a sad day if the impression is created that one law counts for the poor and another for the rich and famous," Judge Thokozile Masipa told the world last Tuesday when she sentenced Oscar Pistorius to five years behind bars.

She listened carefully to the testimony of acting National Commissioner of Correctional Services Zach Modise and concluded she "had no reason to believe SA prisons would not be able to cater to the needs of a disabled person".

After dismissing the testimony of social worker Annette Vergeer, who painted a dismal picture of correctional facilities, in scathing terms as "sketchy, outdated and uninformed", Masipa described Modise as a "reliable and credible" witness.

Listening to the picture he painted of our jails as places of safety and rehabilitation, informed observers were left wondering if the court was made aware of the annual report of governmental prison watchdog – the Judicial Inspectorate for Correctional Services (JICS).

It was presented to the parliamentary Portfolio Committee on Correctional Services last Tuesday, with Modise in attendance. The Department of Correctional Services' (DCS) own annual report also suggests a rather different situation.

Though Vergeer's information may indeed have been outdated, the JICS's report, for example, details a worrying rise in the use of force in correctional facilities. In 2013/14 a total of 4 203 complaints alleging assaults on inmates by officials were received by JICS representing a 25 percent increase compared to 2012/13.

The Inspecting Judge of Prisons, Vuka Tshabalala, also voiced grave concerns about the methods used by DCS's Emergency Support Team (EST), with the report specifically noting the mass assault of inmates by the team during a search for contraband at St Albans earlier this year.

"There is prima facie evidence," the report stated, "that inmates were assaulted and tortured during the EST operation."

The department itself noted several worrying trends in its 2013/14 annual report; 7 370 inmates, for example, were assaulted.

While it fails to mention by whom – wardens or inmates – it does detail that only 130 internal disciplinary procedures were instituted against wardens. There were 61 unnatural deaths – not caused by illness or age – in prisons in 2013/14 with 21 being suicide, nine dying as a result of an assault and 24 whose cause of death was "unknown".

Furthermore, 15 percent of remand detainees are in custody despite having been granted bail. And nearly a third of the inmate population is in jail awaiting their trials. These presumed-innocent prisoners await the finalisation of their trials in severely overcrowded cells.

Yet Masipa told the court she had "no doubt that if prisons fell below standard the ever vigilant human rights organisations in this country would take action". The Wits

Oscar Pistorius was lucky. His wealth ensured his dignity was respected. There are countless examples of indigent prisoners who wait too long for a fair trial if, indeed, they ever get one



CASE IN POINT: Oscar Pistorius is led away as crowds and media chase the Nyalas outside the high court in Pretoria to begin his jail term. The writers say that contrary to what Judge Thokozile Masipa claimed last Tuesday, there is rich justice, and then there is poor justice.

PICTURE: BONGIWE MCHUNU

Justice Project regularly receives, investigates and writes about profound human suffering in our jails in both local and international media. The stories are in line with the statistics in JICS and DCS reports.

With a focus on miscarriages of justice and human rights abuses related to the criminal justice system, the Wits Justice Project has conscientiously exposed issues like the fate of disabled prisoners, torture in prisons, the spread of deadly diseases like TB and severe overcrowding, to name just a few serious issues Modise glossed over while testifying at the trial.

Perhaps the judge was unaware of the fire Modise came under from the Parliamentary Portfolio Committee on Correctional Services the previous day regarding DCS's investigation into allegations of widespread human rights violations – including electroshocking and forced injections of psychotropic drugs – at Mangaung prison in Bloemfontein. A year after the investigation ordered by former minister of correctional services Sbu Ndebele, Modise said he was unable to produce the report.

Luckily for Pistorius, his fame and wealth mean he'll probably inhabit a privileged and protected parallel prison uni-

verse, not that of ordinary inmates. If the "trial of the century" emphasised one thing, it was that the justice system operates very differently if you are poor, black, male and without fame or notoriety.

Was Pistorius's trial for the killing of his girlfriend, Reeva Steenkamp, truly representative of how criminal justice is typically practised here? The facts suggest this was not the case. Pistorius's charge, trial and sentencing were completed in a remarkably speedy 20 months.

The trial was exceptional, not only for its shock value and media attention, but for the manner in which criminal procedure unfolded and this began with bail.

The ability to hire and pay for a private lawyer – as in Pistorius's case – to argue in a three-day bail hearing, is certainly not the case for the majority of South Africans who must rely on over-extended lawyers provided by the state via Legal Aid SA, which tackles more than 380 000 criminal cases a year with a budget of less than half that of the National Prosecuting Authority.

The heavy burden of such a large case load makes the kind of arguments that convinced the court of Pistorius's appropriateness for bail less likely. The Parlia-

mentary Portfolio Committee on Justice and Correctional Services has called this situation "economic apartheid".

Accused of a violent crime and demonstrably able to move about freely aided by hi-tech prosthetics, Pistorius was granted bail and a subsequent relaxation of his bail conditions enabling him to holiday in Mozambique and drink alcohol.

Compare that to the case of nappy-wearing paraplegic Ronnie Fakude, paralysed from the waist down after being the victim of a botched hijacking. DCS was unable to supply fraud-accused Fakude with the rudimentary comfort of a wheelchair.

He was denied bail for 28 months before he was released with an electronic monitoring tag attached to his paralysed leg.

This speaks volumes about equality before the law.

Three years after Fakude's initial incarceration in Bloemfontein's Grootvlei prison, his trial is far from over while Pistorius's trial was done and dusted in fewer than seven months. Over 2 000 South Africans have been awaiting trial for over two years.

DCS is making a concerted effort to reduce this number – including a compulsory case review for remand detainees

awaiting trial for more than 24 months and the electronic monitoring project designed to relieve over-burdened facilities.

Nonetheless, justice delayed is justice denied and the wait can have horrific consequences for those who can't afford costly counsel. South Africa's longest serving remand detainee, Victor Nkomo, awaited his trial for nearly eight years in Joburg's notorious Sun City prison while repeatedly attempting to challenge his unconstitutional lengthy incarceration.

Eventually, he saw no option other than to plead guilty to a lesser charge, received a suspended sentence and was released earlier this year.

Or take the case of David Mkhwanazi who, when late for work and running for his train, was arrested, supposedly sprinting away from the scene of a recent murder. After six years behind bars (where he contracted TB), Mkhwanazi was released when the judge deemed the evidence against him non-existent.

Thuba Sithole is currently doing time in Leeuwkop prison. His crime? The fact that his girlfriend's name is Ayanda. Convicted of an attempted hijacking that his Pick n Pay employee log shows he was

incapable of committing, he had the misfortune to have a girlfriend who shared a name with the real culprit, who was also rounded up: Ayanda Nene.

His phone records showed "Ayanda" in the contacts list, which was highly suspect, according to the presiding magistrate, Phaniel Mudau. The police didn't bother to phone the Ayanda listed on his phone and phone records were not submitted as evidence. Nonetheless, Sithole was sentenced to 15 years in prison, which was confirmed on appeal.

Perhaps the most shocking example of Lady Justice turning a blind eye to the indigent is the experience of Fusi Mofokeng and Tshokolo Mokoena. Wrongfully convicted for shooting and killing a police officer in 1992, their four co-accused were granted amnesty by the Truth and Reconciliation Commission.

Mofokeng and Mokoena remained behind bars for 19 years because they refused to confess to a crime they never committed. Released on parole in 2011, the men are still bound by parole conditions and carry a criminal record.

Few South Africans have the acting national commissioner of correctional services enter their court record – further evidence of Pistorius's exceptional treatment. But while the state was persuasively explaining how Pistorius's disability will be carefully and ethically navigated – including a full medical exam within six hours of entering prison, a spot in the hospital wing, or the promise of a single cell – other disabled inmates have not been so thoroughly considered.

Former Kgosi Mampuru inmate Eric Viljoen, who has a prosthesis after losing a leg in a train accident, told the Wits Justice Project how he was forced to navigate 56 steps five or six times a day in the prison's E section where he spent the last 10 months in an overcrowded communal cell.

Even so, the likelihood of Pistorius facing overcrowding or inadequate medical attention is slim – particularly since Modise's promise that he would be accommodated in a single cell in the prison's hospital section was broadcast worldwide.

So where does this leave those without money, fame and power – some of whom have been wrongfully accused and nearly all of whom are poor, male and black?

Pistorius has received a fair trial, and the sentence he received is in line with the verdict that was handed down by Judge Masipa, even though the NPA now plans to appeal it.

His well-run trial does not automatically mean our criminal justice system is consistently high-functioning though; Pistorius's wealth and privilege have ensured his human rights were respected.

Those citizens who cannot afford to pay to uphold their human dignity are faced with a criminal justice system that is punitive towards the poor. Indeed, last Tuesday was a sad day in South Africa.

Robyn Leslie, Carolyn Raphaely and Ruth Hopkins work for the Wits Justice Project which investigates miscarriages of justice

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