‘BETWEEN A ROCK AND A HARD PLACE’

Bail decisions in three South African courts

Report prepared for the
Open Society Foundation for South Africa (OSF-SA)

Report compiled by Vanja Karth
Data and legal analysis by Michael O’Donovan and Jean Redpath

Open Society Foundation for South Africa

Published by the Open Society Foundation for South Africa, Colinton House, The Oval, Newlands, Cape Town, 7700, South Africa

© 2008 Open Society Foundation for South Africa

All rights reserved

Produced by Greymatter & Finch
www.greymatterfinch.com

CONTENTS

Acknowledgments iv

PART I: SUMMARY AND INTRODUCTION 1

Executive summary 1

Introduction 2

PART II: THE LAW 5

What are the basics of the South African law on bail? 5

How has the law on bail changed since 1994? 5

- The 1995 revisions 6
- The 1997 revisions 6

What are the technical differences in bail law since 1997? 7

- Accused persons may not simply be released if charges are going to be brought and must be brought to court for a decision on release or detention 7
- 'After-hours bail' is no longer an entitlement 7
- Bail applications may be postponed seven days at a time 7
- 'Police bail' offences expanded slightly 8
- 'Prosecutor bail' for some offences 8
- Release on bail only if the interests of justice permit 8
- Prosecutor to give reasons for not opposing bail 8
- Bail in respect of very serious (Schedule 6) offences only in 'exceptional circumstances' 9
- Bail in respect of serious (Schedule 5) offences has different onus 9
- Release of those detained on unaffordable bail 9
- Court must consider pre-trial report 9
- Accused must reveal previous convictions 9
- Cancellation of release on warning (cancellation of 'free bail') 10

PART III: THE 1997 PRE-TRIAL SERVICES (PTS) BAIL STUDY 11

What is 'Pre-Trial Services' ? 11

What happened to Pre-Trial Services? 12

What was the PTS Bail Study? 12

What were the findings of the PTS 1997 Bail Study? 13

PART IV: THE 2007 RESEARCH FINDINGS 15

Background 15

Methodology 15

Key findings from the large dataset 17

Detailed findings from the large dataset 17

- What kinds of people are appearing before the courts? 17
- What kinds of cases are appearing before the courts? 17
- What are the trends on outcomes of cases before the courts? 17
- What proportion were granted bail by first appearance? 18
- For which offences was bail granted by first appearance? 19
- What was the long-term take-up of bail? 19
- For which offences is bail granted or denied in the long term? 19
- Are bail amounts set too high? 20
- Does bail ensure the return of accused persons to court? 21
- Are there regional trends regarding bail and release on warning? 21
- Does legal representation affect the likelihood of bail? 21

The bail amounts dataset 23

- What are the average and median bail amounts set in the courts? 23
- Is there a relationship between bail amounts and the age of accused? 23
- Is there a relationship between bail amounts and crime categories? 24
- Is there a relationship between bail amounts and warrant rates? 24
- Is there a relationship between custody status awaiting trial and case outcomes? 24

The detailed dataset 26

- What are the trends specific to Mitchell's Plain? 26
- What are the trends specific to Durban? 27

Comparing 1997 to 2007 28

Trends in the un-sentenced prison population 29

PART V: CONCLUSION 31

Observations from the field 33

Bibliography 34

APPENDICES 35

Appendix A: Methodological challenges 35

Appendix B: Classification of offences 38

Appendix C: Schedule 5 43

Appendix D: Schedule 6 44

Appendix E: Section 50 45

Appendix F: Section 60 47

Acknowledgments

The authors would like to thank Tessa Govender, Anton Slabber and Christine Eloff who assisted with the collection and collation of the data in the three courts on this project, and Virginia Francis who managed the collection of data in Durban. Christine Eloff also assisted extensively with the linking of bail receipt data to court data. Thanks are also due to court personnel at the courts in question who facilitated the collection of data and answered numerous questions, as well as Gideon Morris and Joan Jacobs of the Office of the Inspecting Judge. The academics and magistrates, in particular magistrate Helen Alman, who answered questions regarding practice and law on an informal basis are also gratefully acknowledged. Any errors in the report are however the authors' responsibility.

PART I
SUMMARY AND INTRODUCTION

Executive summary

South Africa continues to struggle both with rising rates of violent crime and overcrowded prisons. Bail decisions are thought to be a key factor affecting both issues.

The public perceives that bail is granted too easily in respect of violent offences (with those released on bail thought to commit further violent acts). There is also a perception that magistrates set bail amounts too high for lesser offences (with a high proportion of accused thought to be unable to afford their bail). This, in conjunction with perceived long periods of detention awaiting trial, is thought to contribute to a high degree of overcrowding of prisons.

A research report published in 1998 by the Bureau of Justice Assistance sought to form a baseline for the roll-out of pre-trial services. This innovative project was designed to ensure bail decisions were well-informed and thus would tend to avoid release where this is not appropriate (in the case of high-risk offenders) or avoid continued detention where unnecessary (in the case of low-risk petty offenders).

However, pre-trial services were never rolled out and the law on bail has changed markedly since 1997, the year in which the previous study was conducted. Amongst other changes, the entitlement to bail after hours has been removed, bail applications may be postponed for seven days at a time, the onus has in general shifted onto the accused to prove bail should be granted, new grounds for denying bail have been codified, and exceptional circumstances have to exist in respect of the most serious offences for bail to be granted.

This report seeks to use the previous study as a baseline to investigate the impact of changes which have been wrought to the law on bail since 1997 as well as to investigate the common assumptions regarding trends on bail decisions taken in the courts. The same three courts were under consideration in 2007 as in the previous study.

The basic principle underlying the law on bail is that bail is not a punishment and that an accused is entitled to bail where the interests of justice permit. This is closely related to the principle within the adversarial criminal justice system that an accused is innocent unless proven guilty at trial.

The findings of this study suggest that the criminal justice system is unable to try the vast majority of its accused. The implicit effect of the operation of the system is instead to mete out 'punishment' through variation in the extent to which the accused remains in the system 'awaiting trial'. Those charged with less serious offences are 'punished' by being arrested and brought to court but the case is dropped on first appearance or soon thereafter, while the most serious offences are 'punished' by a significant time awaiting trial before the case is dropped.

This conclusion is based on the finding that, in the courts in question, 1 out of every 2 cases was withdrawn or struck off the roll – with the stage at which this occurs varying by the seriousness of the offence. A conviction was only obtained in approximately 1 out of 16 cases. Where there is a conviction, although imprisonment was more likely than an alternative sentence, most sentences of imprisonment were either partially or wholly suspended.

Unaffordable bail does not appear in general to be a key driver of prison overcrowding in the courts under consideration but a higher rate of unaffordable bail was found in one regional court (Durban) where 1 in 4 appeared unable to pay the amount set. Less serious offences are more likely to result in 'release on warning' otherwise known as 'free bail'. Long-term take-up of bail was low with only 1 in 8 having been released on bail before the conclusion of the case. However, 1 in 5 were released on warning.

Comparison with the previous study shows that by 2007 presiding officers appear to be finding less room to grant bail on serious offences but at the same time are loath to set any bail amount where release is possible. Criticism regarding bail being granted too easily or at too high amounts seems to have resulted in two divergent trends – release on bail becoming a relative rarity and release on warning more common. Magistrates seem to be caught between the proverbial 'rock and a hard place'. Significant delay in the stage at which bail decisions are made is also apparent by comparison to 1997.

A high warrant rate was found, suggesting that many accused fail to return to court at the stipulated time for trial in the event that they are released either on bail or on warning. The study found that releasing accused persons on bail (in comparison with release on warning) does have a significant (but still inadequate) deterrent effect on rates of failure to return to court. Furthermore no relationship was found between average bail amounts and warrant rates which suggests that there is no *systemic* bias in bail amounts being set too low.

Contrary to perception, the benefit offered by legal representation in relation to release awaiting trial is slight. The study found a slight positive effect – stronger with more serious crimes – on the likelihood of bail for those with legal representation for most offences, but found that legal representation seemed to work against anyone accused of theft (the most common offence before the courts) being granted bail.

Those released on bail and those retained in custody were equally likely (almost a 1 in 2 chance) to have the case against them ultimately withdrawn. However those in custody were slightly more likely to have their case end with a conviction. Because of the very low acquittal rate there was no significant difference in rates of acquittal.

Widely differing trends were observed for the three courts, suggesting that what happens to an accused person is highly dependent on location. Mitchell's Plain court seems to be focussed on speedy resolution, coming at the cost of a high rate of withdrawals. This court also has a tendency towards release on warning, resulting in a high rate of warrants being issued. By contrast Durban court makes more use of bail and while this court takes longer to finalise matters, these matters also frequently culminate in withdrawal. In Johannesburg bail and any kind of release is relatively rare, and when bail is granted, relatively high amounts appear to be set.

Provincial trends of the un-sentenced prison population show that there has been an overall reduction in time spent awaiting trial in the provinces in which the courts under consideration are situated. The findings of this study suggest this has been at the cost of a high rate of withdrawals (and other case outcomes other than convictions or acquittals) but this does raise the question as to whether the study period (2007) was anomalous.

Changes to the law on bail thus appear to have achieved their goal of making the granting of bail in respect of serious offences less common. Unaffordable bail also appears to be relatively rare. Disturbingly however the findings strongly suggest a system in need of major reform. Speedier and alternative means of resolution of cases are urgently required to avoid detention awaiting trial being used as an implicit proxy punishment. Tinkering with bail law is unlikely to achieve the extent of reform required.

Introduction

The law on bail has changed profoundly since 1997 largely in response to public concern in relation to crimes committed by accused persons while out on bail. A research report published in 1998 by the Bureau of Justice Assistance (the Pre-Trial Services (PTS) Bail Study)[1] is the first and only available study of bail decisions in South Africa. Although the report was published in 1998, the research was conducted during 1997, immediately prior to the implementation of major changes to bail law. Since this report there has been no direct evidence as to the impact of these changes on bail decisions.

South Africa continues to struggle both with rates of violent crime – rates of aggravated robbery in particular have increased by 50% since 1994[2] – and also with prison

1 Paschke, R. 1998. *Accused, their charges and bail decisions in 3 South African Magistrates Courts*. Bureau of Justice Assistance. For a detailed description of the PTS project, see Part III below.

2 See www.saps.gov.za.

overcrowding. Between 1995 and 2000, the main contributor to the prison population was the size of the un-sentenced prison population. Un-sentenced prisoners are those prisoners awaiting trial or convicted but not yet sentenced. Their number peaked in 2000 at an average in that year of 57 811.[3] While numbers of un-sentenced prisoners began to decrease after 2000, the latest available data indicates that the admission of un-sentenced prisoners may again be increasing in some provinces.[4]

Un-sentenced prisoners are not involved in rehabilitation programmes, do not receive training or schooling and seldom have access to recreational activities. About 250 000 un-sentenced prisoners are admitted and released each year.[5] The estimated cost of housing and feeding a single prisoner each day is R215.85.[6]

The Annual Report for 2005/2006 of the Office of the Inspecting Judge suggests that the major contributing factors to overcrowding in prisons are unaffordable bail amounts and restrictive conditions on the granting of bail. According to the Inspecting Judge about 11 000 (22%) of un-sentenced prisoners had been granted bail but could not afford to pay their bail as at 19 April 2007. Of those who could not pay, about 7 500 (70%) of them had been granted bail below R1 000. There is little other data available to help explain the periods of incarceration endured by accused persons while un-sentenced.

The aim of the 1997 PTS Bail Study was to provide a baseline for the PTS Project, an innovative project which, in brief, sought to ensure that magistrates were provided with adequate verified information about an accused person before making a bail decision. (Unfortunately PTS is no longer in operation except in Port Elizabeth.)

The aim of this report is to use the PTS Bail Study results as a benchmark by which to measure any changes in trends that may have taken place and to provide data on the impact, if any, of the changes that have been made to bail law since 1997. In particular this report hopes to provide current information about the length of time and reasons behind the continued incarceration of accused persons between first appearance and resolution of their cases. The study also sought to understand the relationship between bail decisions and case outcomes, for example, whether those denied bail were more likely to be convicted.

This report begins by considering bail law, in particular the content of the changes which have occurred to bail law in the last decade. A brief overview of the findings of the 1997 PTS Bail Study is then presented. The methodology and research findings of the current study are then discussed.

This is the second known scientific study of bail decisions in South Africa. It is hoped that the findings may be used to assist policy-makers, court managers, members of Parliament and civil society in understanding how bail functions in South African courts.

3 Office of the Inspecting Judge Annual Report for the period 1 April 2005 to 31 March 2006, compiled by the Office of the Inspecting Judge.

4 See Part IV for trends on the un-sentenced prison population.

5 Data obtained from the Office of the Inspecting Judge, December 2007.

6 Office of the Inspecting Judge Annual Report for the period 1 April 2005 to 31 March 2006, compiled by the Office of the Inspecting Judge.

PART II
THE LAW

What are the basics of the South African law on bail?

Bail is a legal mechanism used so that a person accused of a crime can be released from detention prior to the conclusion of their case if certain conditions are met. These conditions are designed to ensure that the accused returns to court for trial. They usually involve placing an amount of money as security with the court, which can be forfeited to the state should the accused fail to return to court at the appointed time and place. Conditions can also include additional control such as reporting to a police station. Most bail law is set out in legislation, subject to various provisions in the Constitution.[7]

Principles relating to the law on bail include that:

- Bail should strike a balance between the right of the accused to be presumed innocent until proven guilty and the interests of society and justice.
- The amount at which bail is set is not a punishment but a mechanism to secure attendance of an accused in court. Thus the amount is not determined by the severity of the crime but rather by an assessment of whether the prospect of forfeiting that amount is sufficiently severe to ensure that the accused returns to court.
- Denial of bail is not a punishment. Bail should be denied when it is assessed that the accused will fail to return to court, or will interfere with the interests of justice if granted bail.

Although bail is a simple enough concept, the law on bail is complex and frequently unclear. The many amendments to the law have contributed to confusion. Continued imprisonment which follows a decision to refuse bail is not a penalty or sentence[8] and nor is the granting of bail a judgment on the extent of guilt of the accused. This point is frequently misunderstood in the South African context, with statements such as 'the accused *got off* on only R300 bail' frequently being aired. The bail amount or denial of bail is consequently frequently seen as both a punishment and a reflection of the presumed guilt of the accused.

South African criminal courts are divided into high courts and magistrates' courts, also called the lower courts. Bail applications are usually heard in magistrates' courts. Although bail is predominately a judicial function, the law currently provides that in respect of less serious offences the police and the prosecution may grant bail. There are three main ways in which an accused may be released on bail:

- in respect of 'trivial' offences, by a police official of specified rank before first appearance, payable at the police station – in this report this is called 'police bail';
- in respect of less serious offences, by a prosecutor duly authorised to do so before first appearance – in this report this is called 'prosecutor bail'; and
- by the court at any stage prior to conviction, in respect of all offences – this is bail as it is usually understood.

An accused may also be released on warning, either by the police or by the court, in relation to the same offences for which they are empowered to grant bail.

How has the law on bail changed since 1994?

Possibly reflecting the state's continuing struggle to prosecute crime within a human rights framework, legal

7 Paschke, op. cit. p. 10.

8 Du Toit, E. et al. 2006. Commentary on the Criminal Procedure Act, 9–12. *Service* 36.

provisions regarding bail applications have changed frequently during 1995,[9] 1997,[10] 1998,[11] 2000,[12] and 2003.[13] The major amendments were effected in 1997, and came into effect in August 1998. The PTS Bail Study, discussed in Part III, is a reflection of the situation prior to these major amendments taking effect.

Generally speaking, the various amendments have progressively moved towards making it more difficult for an accused to be granted bail. Some analysts argue that this is a response to negative publicity around crimes committed by accused persons released on bail, coupled with perceptions of a lack of experience among prosecutors, and a response to perceptions among the public that accused persons have 'too many rights'.[14]

9 Criminal Procedure Second Amendment Act 75 of 1995.

10 Criminal Procedure Second Amendment Act 85 of 1997 preamble: 'To amend the Criminal Procedure Act, 1977, so as to further regulate the detention of arrested persons; to further regulate the hearing of bail proceedings; to empower an attorney-general or a prosecutor authorised thereto by the attorney-general concerned to grant bail outside ordinary court hours in respect of certain specified offences; to further regulate the release of an accused on bail who has been convicted of certain serious offences; to further regulate the factors which should be taken into account by a court in considering bail; to empower a court, in respect of certain serious , to detain an accused in custody unless the accused satisfies the court that exceptional circumstances exist why he or she should be released; to further define the said serious offences; to empower the attorney-general to issue a written confirmation to the effect that the offence with which the accused is charged is such a serious offence; to place a duty on an accused, or his or her legal adviser, at bail proceedings, to inform the court whether he or she has previous convictions or whether there are other charges pending against him or her; to further regulate the cancellation of bail and the release of an accused on warning; and to regulate the right of access to any information, record or document during bail proceedings; and to provide for matters connected therewith'.

11 Judicial Matters Amendment Act 34 of 1998: '... to amend the Criminal Procedure Act, 1977, so as to delete a definition; to further regulate the hearing of bail proceedings; to repeal an obsolete provision; to effect certain consequential amendments; and to further regulate the granting of bail.'

12 Judicial Matters Amendment Act 62 of 2000.

13 Judicial Matters Second Amendment Act 55 of 2003: '... to amend the Criminal Procedure Act, 1977, so as to ensure the consideration of a pretrial services report in respect of bail proceedings.'

14 See for example Schönteich, M. 2000. *Justice versus Retribution: Attitudes to Punishment in the Eastern Cape*. Institute for Security Studies Monograph No. 45

The 1995 revisions

Bail provisions were revised extensively in 1995, just before the final Constitution was passed.[15] The main purpose of these amendments was to ensure that the interests of an accused were balanced with the interests of justice and to make it more difficult for some accused to obtain bail, and to codify – put into statutory law – the factors which a court should take into account when considering a bail application.[16]

The 1997 revisions

In 1997 further amendments sought to make it more difficult for people charged with serious crimes to get bail. Persons alleged to have committed the most serious offences (listed in Schedule 6 – such as premeditated murder or gang rape),[17] should be denied bail unless 'exceptional circumstances' exist which satisfy the court that it is in the interests of justice to release them.[18] For other serious offences (listed in Schedule 5 – such as murder or rape),[19] the accused must be detained in custody unless the accused adduces evidence which satisfies the court that the interests of justice permit his or her release.[20] The burden of proof is thus on the accused to establish that release from custody is in the interests of justice.[21]

Prosecutorial policy also stipulates that no prosecutor may agree to the setting of bail where Schedule 5 and 6 offences are involved without prior authorisation from the Director of Public Prosecutions (DPP) (or Senior Public Prosecutor in certain divisions).[22]

15 Criminal Procedure Second Amendment Act 75 of 1995.

16 Du Toit, op. cit.

17 "Murder when it was planned or premeditated" and "rape when committed in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice" are offences listed in Schedule 6 of the Criminal Procedure Act, 51 of 1977 as amended, which includes, inter alia, various aggravated forms of murder, rape and robbery.

18 Criminal Procedure Act 51 of 1977, as amended, section 60(11)(a).

19 Offences listed in Schedule 5 of the Criminal Procedure Act 51 of 1977, as amended, including treason, and forms of murder, attempted murder, and rape and a number of drug and corruption-related offences.

20 Criminal Procedure Act 51 of 1977 as amended, section 60(11)(b).

21 See *Verwey & others v S [2006] JOL 17220 (W)* at para 9.

22 NPA Policy Directives, at Part 9 paragraph C.2, quoted (no publisher) *National Prosecuting Authority NPA* Awaiting Trial Detainee Guidelines (no date) at 20, http://www.npa.gov.za/UploadedFiles/ATD%20Guidelines%20(3c)%20doc%20final.pdf (accessed 26 June 2007).

In the section below we consider the law at the time of the PTS Bail Study (that is, after the 1995 amendments but prior to the 1997 amendments) in comparison with the law at the time of the current study (late 2007), in order to unpack the likely impact of these changes.

What are the technical differences in bail law since 1997?

Although the main changes since 1997 have been alluded to above, a consideration of the detailed changes which have been wrought since 1997 in the Criminal Procedure Act,[23] and a consideration of their likely impact, suggests what may be seen or can be tested for in the datasets.[24] These changes will be discussed in detail below. All references to sections of the law are to the Criminal Procedure Act 51 of 1977 (as amended), unless otherwise stated. Sections 50 and 60 of the Criminal Procedure Act (as amended) are attached as Appendix E and F respectively. Changes which have occurred over the last decade include:

Accused persons may not simply be released if charges are going to be brought and must be brought to court for a decision on release or detention

Whereas the duty was on the police to release or bring an accused before a court within 48 hours (as defined) the duty now on the police is to bring the accused before court within 48 hours.[25] The key difference is that the arrested person must be brought to court for possible release. In the past, it was possible for the police to release after the time period had lapsed even if charges were still going to be brought.

The likely impact on the courts is to increase the number of accused being brought to court on first appearance. The impact on the police may be to hasten the decision not to bring charges to the attention of the prosecution, as the decision to bring charges requires the transportation of an accused to court within the stipulated time period.

'After-hours bail' is no longer an entitlement

There is no longer an entitlement to after-hours bail applications. The likely impact is to increase the number of accused at first appearance who are still in custody (that is, they will not have been released after hours) and to increase the number of bail applications to be heard in ordinary court hours.

Bail applications may be postponed seven days at a time

At the same time as the entitlement to after-hours bail has been removed, strict time limits on delaying bail applications for further investigation have also been removed via the deletion of section 50(7), which appeared to provide a time limit of a day on delaying bail applications for the purpose of further investigations.[26] This deletion must be read with the insertion, by the Amendment Act 62 of 2000, of section 50(6)(d), which permits the postponement of a bail application for a maximum of seven days at a time if:

---

23 Criminal Procedure Act 51 of 1977.

24 A number of amendments relate to different procedures applicable to children in the criminal justice system. However procedures applicable to children are beyond the scope of this study. Children do however appear in the datasets relating to the courts under consideration, but form a small proportion of accused persons.

25 With the substitution of section 50(1)(a) by the Amendment Act 85 of 1997, a plain reading of the words suggests that the obligation on the police is now instead to bring the accused before a lower court within 48 hours, if charges are still going to be brought against the accused, that is the police may not simply release such an accused. The instruction to the SAPS personnel is certainly that such an accused person must be brought to court for the court to decide on release and may not simply release an accused. Training notes issued to prosecutors on the point dispute whether this is in fact a legal requirement of the legislation or simply a directive by police headquarters. However the legislation quite clearly provides that if a person has not already been released because no charges are to be brought, or because he has not been released because no police or prosecutor bail has been given, then he must be brought to court to be informed of the reasons for further detention, or to be charged and be entitled to apply for release on bail. If he is neither charged nor given reasons for detention then the court must release him.

26 1997 Section 50(7) (now deleted): If a person is arrested on suspicion of having committed an offence but a charge has not been brought against him or her because further investigation is needed to determine whether a charge may be brought against him or her, the investigation in question shall be completed as soon as it is reasonably possible and the person in question shall as soon as it is reasonably possible thereafter, and in any event not later than the day after his or her arrest contemplated in subsections (1) and (2), be brought before an ordinary court of law to be charged and enabled to institute bail proceedings in accordance with subsection (6) or be informed of the reason for his or her further detention, failing which he or she shall be released.

- the court thinks it has insufficient information to make a decision on bail;
- the DPP confirms the accused will be charged with a Schedule 5 or 6 offence;
- there is a need to provide the state with a reasonable opportunity to procure material evidence that may be lost if bail is granted;
- there is a need to provide the state with the opportunity to obtain fingerprints (and other similar functions); or
- the court thinks it is in the interests of justice to do so.[27]

The combined impact of these amendments is likely to be a significant delay in the hearing of bail applications, an increase in postponements for further investigation, and a reduction in the number who are granted bail at first appearance.

'Police bail' offences expanded slightly

The ambit of offences for which police bail (or police release on warning) may be granted before first appearance has widened slightly to include theft of goods up to the value of R2 500 (up from R200) and possession of small amounts (less than 115 grams) of 'dagga' [sic], and thus might be expected at first appearance to reduce the number in custody if used.

'Prosecutor bail' for some offences

Bail may now be granted by a prosecutor prior to first appearance in relation to a discrete set of offences, including culpable homicide and theft of goods up to the value of R20 000. Release on warning by this conduit is not however possible. The likely impact of this provision is to increase the likelihood of the granting of bail before first appearance in respect of these offences; however any impact is likely to be offset by the general removal of the entitlement to bail after hours.

Release on bail only if the interests of justice permit

There has been a general expansion of the factors to be taken into consideration when a decision on bail is made. The accused must now prove the interests of justice are served by release, whereas the earlier version of section 60 suggested that the state must prove the interests of justice are served by continued detention. Plain reading of the words shows that while the earlier version presumed release on bail the current version seems to link the entitlement to release to the court's satisfaction that the interests of justice are served by release. The impact of the change does however seem to be in the direction of reducing the likelihood of bail being granted. The impact is thus to increase the grounds which may be taken into account by a court, the majority of which appear to work against the release of the accused.

Prosecutor to give reasons for not opposing bail

The law now requires prosecutors to give reasons for not opposing bail in respect of serious Schedule 5 and 6 offences. The introduction of this provision (section 60(2)(d) is likely to have the effect of forcing the prosecution to apply its mind to the question. This may indirectly reduce the likelihood of bail being granted.

Bail in respect of very serious (Schedule 6) offences only in 'exceptional circumstances'

There has been a change in onus in bail applications: 'exceptional circumstances' for Schedule 6 and evidential onus for Schedule 5 offences. This provision places a formal onus on an accused charged with a very serious offence (such as premeditated murder or gang rape) to adduce evidence to satisfy the court that exceptional circumstances exist which, in the interests of justice,

27 The full text of s50(60(d): The lower court before which a person is brought in terms of this subsection, may postpone any bail proceedings or bail application to any date or court, for a period not exceeding seven days at a time, on the terms which the court may deem proper and which are not inconsistent with any provision of this Act, if— (i) the court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application; (ii) the prosecutor informs the court that the matter has been or is going to be referred to an attorney-general for the issuing of a written confirmation referred to in section 60 (11A); (iii) (deleted) (iv) it appears to the court that it is necessary to provide the State with a reasonable opportunity to (aa) procure material evidence that may be lost if bail is granted; or (bb) perform the functions referred to in section 37; or (v) it appears to the court that it is necessary in the interests of justice to do so.

permit release.[28] Nevertheless, for the purposes of this report, the provision decreases substantially the likelihood of an accused charged with a Schedule 6 offence of being released on bail.

Bail in respect of serious (Schedule 5) offences has different onus

Schedule 5 offences are serious offences such as murder and rape which have not been aggravated by additional factors (such as premeditation in the case of murder) which places them in the Schedule 6 category. For the purposes of this report the implication of the amendment is that bail is less likely to be granted in respect of Schedule 5 offences.

Release of those detained on unaffordable bail

Courts must consider release of those detained on unaffordable bail where overcrowding occurs in a specific prison. In 2001 the Criminal Procedure Act was amended by the Judicial Matters Amendment Act 42 of 2001 to insert section 63A, which provides that a head of prison, who is satisfied that overcrowding in his prison is constituting a material and imminent threat to the human dignity, physical health or safety of awaiting-trial prisoners who are unable to pay their bail amounts, may apply to court for their release under various conditions. It cannot be used where the charges are for serious offences. According to the 2006/2007 annual report of the Office of the Inspecting Judge, a pilot project was launched to facilitate the implementation of these provisions and the Inspecting Judge had reported in his 2001/2002 report that the introduction of Section 63A had not been successful in reducing overcrowding for a number of reasons and raised a number of issues regarding the workability of the provision. The Inspectorate suggests that to facilitate the use of the provision, Heads of Prisons should make a list of names of all people with unaffordable bail available to prosecutors on a weekly basis, thus playing a pro-active role in preventing persons with unaffordable bail from remaining in prison. For the purposes of this report, the extent to which this provision may affect the numbers held in custody depends on the extent to which bail amounts set are unaffordable.

28 Du Toit, E. et al. 2007. Commentary on the Criminal Procedure Act, 9–42. *Service* 37.

Court must consider pre-trial report

The belated insertion of this provision in 2007, which requires the court to consider a pre-trial services report if one exists, may result in more appropriate bail decisions in a limited number of matters. However given that PTS does not exist except in Port Elizabeth this provision is unlikely to have much impact. PTS is not operational in the three courts under consideration in this report.

Accused must reveal previous convictions

Section 60(11B), introduced by Act 85 of 1997, compels an accused or his legal adviser to inform the court of previous convictions and any other concurrent pending charges. The record of this information is to be excluded from the record of the trial; however if the accused elects to testify in bail proceedings such evidence is admissible at trial.[29] An accused who fails or refuses to comply is guilty of an offence and liable to conviction to a fine or imprisonment for up to two years. This section was introduced in order to avoid delays in obtaining fingerprint records which may or may not indicate previous convictions.[30] Commentators have submitted that this section cannot be reconciled with the constitutional rights of the accused.[31] However the Constitutional Court has considered the provision that such evidence is admissible where the accused testifies, and has held that provided trial courts remain alert to their duty to exclude evidence that would impair the fairness of the proceedings before them, there can be no risk that evidence unfairly solicited at bail proceedings could be used to undermine the accused person's right to be treated fairly.

The impact of this provision for the purposes of this report is likely to be in the direction of a reduction in postponements (assuming postponements were required to obtain fingerprint evidence). The impact on the extent of the granting of bail depends on the proportion of recidivists appearing in court; the earlier PTS Bail Study found a small proportion of accused had prior convictions.

29 S60(11B)(c).

30 Du Toit, E. et al. 2006. Commentary on the Criminal Procedure Act, 9–49. *Service* 35.

31 Du Toit, E. et al. 2006. Commentary on the Criminal Procedure Act, 9–50. *Service* 35.

Cancellation of release on warning (cancellation of 'free bail')

Section 72 provides for the release of an accused on warning in lieu of bail. This is often colloquially referred to as 'free bail'. Section 72(4) provides that a court may issue a warrant of arrest or sentence the accused in accordance with the relevant subsection where the accused fails to comply with the warning or a condition imposed with the warning (such as failing to appear for trial).[32] Section 72A, inserted by Act 85 of 1997, goes further and provides for the cancellation of the release on warning and the committing of the accused into custody until the conclusion of the relevant proceedings.[33] The impact of this provision for the purposes of this study is that accused previously released on warning who fail to appear may now immediately be held in custody.

32 Du Toit, E. et al. 2002. Commentary on the Criminal Procedure Act, 10–3. *Service* 28.

33 Du Toit ibid.

PART III
THE 1997 PRE-TRIAL SERVICES BAIL STUDY

What is 'Pre-Trial Services' (PTS)?

By the mid-1990s, there were increasing public concerns about crime, coupled with perceptions that the bail law was inadequate. This in turn led to controversial amendments to the Criminal Procedure Act.[34] These legislative restrictions to the right to bail were a part of a broader state strategy to enhance the government's 'tough on crime' image and to increase the ability of law enforcement agencies to deal with crime more effectively.[35] However at the same time serious problems were being experienced in prisons as a result of overcrowding.

In response to this climate Pre-Trial Services (PTS) was implemented in 1997 as a demonstration project by the Bureau of Justice Assistance (BJA), an NGO established as a joint project of the New York, USA-based Vera Institute of Justice and the Department of Justice and Constitutional Development.[36] The project aimed to assist judicial officers in making more informed decisions on bail. It did so through the provision of a report to the court about an accused person at first appearance. This 'bail recommendation report' contained information, checked by project personnel, about an accused person's community ties, employment, previous convictions, residential address, and other relevant information needed for a bail decision.

The office was staffed by both court officials (bail officers) and South African Police Service (SAPS) members (supervision officers) who interviewed detained accused persons at court prior to their first appearance. Information was verified telephonically or, when necessary, supervision officers would go out in person to confirm the information given by the accused. The PTS office was linked electronically to the SAPS criminal record database which provided information regarding any previous convictions prior to the accused person's first court appearance (this information would otherwise normally take up to eight weeks to obtain).[37]

The information enabled the court to make more appropriate bail decisions. It meant that high-risk, dangerous and repeat offenders were more likely to be detained while awaiting trial, but also that low-risk, petty, first time offenders could be released from custody. In order to facilitate this release, PTS attempted to strengthen supervision of bail conditions as a viable alternative to money-based bail.[38] PTS offered an alternative to the money-based bail system by encouraging judicial officers to make greater use of alternative bail conditions and the supervision of accused persons who were released from custody. So for example, an accused person released on 'free bail' would be required to report to the closest police station a certain number of times a week and the PTS supervision officers would monitor and enforce these reporting conditions.

An important innovation of the PTS office was the taking of digital photographs of all detained accused who went through the office. The Department of Correctional Services does not have photographs of the prisoners in its care and some prisoners do not answer when their names are called to attend court. Some hope in this way to extend the awaiting trial period so that the case will eventually be struck from the roll due to unreasonable delay. Others accused of serious and violent crimes have also exchanged

34 Paschke, op. cit, p. 9.

35 Ehlers, L. 2008. Frustrated Potential: The Short- and Long-term Impact of Pre-trial Services in South Africa. In *Justice Initiatives: Pre-trial Detention*. Open Society Justice Initiative. p. 121.

36 The author of this report, Vanja Karth, was a senior project planner with the BJA and responsible for implementation of the PTS project.

37 Ehlers, op. cit. p. 127.

38 Paschke, op. cit. p. 12.

identities with persons accused of minor offences and intimidated them into taking on their identities. Once taken to court, such accused are usually granted bail on the basis of the minor charges against them.[39] These practices result in unnecessary postponements as the required prisoners are not brought to court, or the incorrect prisoners are transported to court, or the ultimate injustice, the incorrect prisoners are released. The PTS photographs, printed on the back of the detention warrant which accompanies an accused back to prison, helped to prevent this occurring. In this way prison wardens could physically identify awaiting trial accused and did not have to rely on their answering to their name.[40]

What happened to Pre-Trial Services?

For a number of reasons, PTS was never embraced by the Department of Justice and Constitutional Development beyond the demonstration project phase. The reasons included the fact that PTS had not aligned itself within the broader objectives of the department, such as the planned technological infrastructure, and that there had been a lack of careful planning with regard to the proper institutionalisation of the project.[41]

Interestingly, Port Elizabeth Magistrates Court, while never a part of the original pilot phase of the project, incorporated a PTS Office as part of their Integrated Justice System (IJS) Court Centre. BJA staff running the demonstration project were consulted in the setting up and functioning of the PTS office, and the Port Elizabeth Court set up its own PTS Office independently of the BJA project. This office is still functioning today.

Although there is no recent evaluation data, a review of the Port Elizabeth Court Centre in 2001 revealed promising results. The implementation of the PTS Office resulted in a reduction in the time taken to prepare a docket for trial, facilitated bail applications, improved docket quality and consequently raised conviction rates, which together resulted in better bail decisions and a reduction in the number of awaiting trial prisoners.[42]

In addition, a valuable spin-off of the Centre has been its ability to identify persons who are wanted on other charges or are members of suspected crime syndicates. The Centre circulates the photographs and personal details of accused to local police stations and specialised police units in the province. With this information, investigating officers have been able to identify accused persons for whom a warrant of arrest had been issued or who were suspects in other cases. Such information can be crucial for the state to successfully oppose bail. The benefits this brings to the criminal justice system and the country as a whole are difficult to measure but are likely to be substantial.[43] The Port Elizabeth IJS Court Centre runs a number of other initiatives that focus on reducing the awaiting trial population and it could well be this integrated approach to the problem that has ensured the longevity of the PTS Office in this court.

Besides the benefits mentioned from the Port Elizabeth example above, an effective PTS programme could reduce the number of un-sentenced prisoners who have been granted bail at unaffordable amounts. It could ascertain the ability of an accused to access the money needed to pay bail and encourage judicial officers to increase their use of non-financial conditions of release on bail by the provision of verified reliable information.[44] It could have some influence on the average duration of detention by allowing judicial officers to conduct bail hearings more effectively. Finally, PTS has the potential to balance an individual's right to liberty with society's need for public security.[45]

What was the PTS Bail Study?

Although PTS was not ultimately rolled out, in 1997 the ultimate roll-out of such services was envisaged. Consequently, to measure the impact of this roll-out, a baseline study was carried out to provide a detailed picture of the status of bail in the early days of PTS. The PTS Bail Study was based on first appearances in all criminal

39 Ibid.

40 Schönteich, M. 2002. *Making Courts Work: A Review of the IJS Court Centre in Port Elizabeth*. Monograph No. 75. Institute for Security Studies, Pretoria.

41 Ehlers, op. cit. p. 130.

42 Schönteich, op. cit., 2002.

43 Ibid.

44 Ibid.

45 Ibid.

matters, excluding traffic offences in three magistrates' courts in which PTS was to be offered. The samples were based on all persons who had a first appearance in each court over a defined period, which ranged from 8–9 weeks. The sample included regional and district court matters as well as after hours and normal hours matters. Data was collected manually from court books and charge sheets and recorded on a standard form.

- A total of 7 188 records from the three courts were collected, with 44% from Durban, 32% from Mitchell's Plain and 24% from Johannesburg. Not every type of data could be recorded for every person, as data was frequently missing from these sources – for example, bail decisions on first appearance were available for 90% of the records, whereas bail amounts were only available for 35% of the records. Employment and income information was obtained from an unspecified sample of PTS interviews.

What were the findings of the PTS 1997 Bail Study?

The study found that a typical accused person was young, male, unemployed (or if employed earned very little) and had no legal representation at first appearance. He would most likely have been charged with a non-violent offence. More than 50% of accused persons were 25 years old or less and on average, 25% were younger than 20 years. Durban had the most youthful accused persons with 32% younger than 20 years old compared to 20% in Johannesburg, and 15% in Mitchell's Plain.

Key findings of the PTS Bail Study:

- The majority of accused persons (96%) were arrested before their appearance in court.
- Police bail and warning were used far less than legally permitted resulting in 80–90% of accused being in custody at first appearance.
- Most accused in all three courts (65–80%) were charged with non-violent crimes. Property crimes predominated in Durban and Johannesburg whilst Mitchell's Plain had a greater proportion of violent, drug-related and firearm-related charges. Public order charges were similar for all three sites.
- Theft was the main most frequent charge in all three courts, although it did not apply to the majority of the accused.
- Between 50% and 80% of accused in all three courts were released on warning or granted bail at first appearance.
- The few accused persons who could afford a lawyer at first appearance had more chance of being granted bail and less chance of being denied bail than unrepresented accused.
- Very few cases were finalised at first appearance. Only 7–10% of cases were finalised of which actual convictions and sentencing constituted less than 2% of this percentage. Most cases which were finalised were struck off the roll or the charges were withdrawn.
- None of the three courts appeared more lenient in their after-hours bail applications.
- Bail amounts were significantly higher in Johannesburg than in Durban and Mitchell's Plain.
- Less than half of accused persons in Johannesburg and Mitchell's Plain were able to pay at their bail at court and 76% were unable to pay at court in Durban and were subsequently sent to await trial in prison.
- Few accused persons absconded while awaiting trial on bail or on warning. Most warrants of arrest that had been issued were subsequently withdrawn after an explanation from the accused person resulting in only 7% of accused who were not in custody failing to appear.
- The results indicated that some courts are generally stricter than others in their bail decisions and that in fact the bail decision and amount is more dependent on the court making the decision than on the charge against them or their employment status or income. The results also indicated that the precedents within each court may have more impact on court decisions regarding bail than on the individual circumstances of the accused person.

PART IV
The 2007 RESEARCH FINDINGS

Background

The 2007 research project was conducted at the same three courts chosen for the 1997 PTS Bail Study, namely Mitchell's Plain, Durban and Johannesburg courts. These courts are located in the three largest cities in South Africa, but are very different from each other in character and size.

The largest court is Durban, which currently houses as many as 17 regional courts and 25 district courts (42 courts total). Johannesburg has 7 district courts (excluding branch courts) and 15 regional courts, while Mitchell's Plain is the smallest, boasting only 2 regional courts and 6 district courts (8 courts total). Johannesburg is anomalous in that it has more regional courts than district courts. Durban is thus a massive court, one of the largest in the country, drawing its cases from a large, mixed geographical area (urban and suburban), while Johannesburg draws its matters largely from the highly urban inner-city region. Mitchell's Plain by contrast is set in a suburban context with a defined residential community served by the court.

The best indicator of the differences among the three courts is that Mitchell's Plain is the most densely permanently populated area of the three sites, with a population of 282 589 persons and 62 062 households, while central Johannesburg has a residential population of only 40 287 with 13 016 households and central Durban has residential population of 34 663 with 11 947 households. However both Johannesburg and Durban have significantly higher daytime populations due to their central city location, which impacts on the rates of offending in these areas.

Methodology

The original intention was to replicate the PTS Bail Study as far as possible. However after piloting the methodology in Mitchell's Plain, the 1997 methodology was abandoned for a number of positive and negative reasons:

- Changes made to the law on bail since 1997 suggested that investigating bail at first appearance may provide an incomplete picture of the extent to which bail is granted. Bail may be granted at any stage of the proceedings and changes to the law since 1997 suggest bail at first appearance, which was explored in the PTS Bail Study, may be increasingly unlikely. Consequently bail at any stage should be explored.

- All three courts now store case information electronically. Mitchell's Plain and Johannesburg are courts on the 'eScheduler system' while Durban has its own 'Court Process System' (CPS). Bail receipts are also recorded on the Justice Deposit Account System (JDAS). The digital form of the court data introduced meant the number of records on which the study was based could be vastly increased.

- The piloting in Mitchell's Plain suggested that many records would be missing from a manually drawn sample and that those missing would all be of similar type, thus skewing the sample if it was collected manually. This is because, in comparison with the 1997 study, a large proportion of cases appeared to be at warrant[46] stage and the piloting team found it

46 'Warrants of arrest' referred to in this study are 'bench warrants', also known as J165s after the reference number of the form on which they are completed. These warrants are issued after an accused person (previously released on warning or on bail) fails to appear in court and the accused is then charged with this offence in addition to the original charge(s). The warrant is issued in court and goes to the relevant police station for execution and is not circulated beyond that magisterial district. Bail is provisionally cancelled and monies forfeited to the State. The accused person is granted 14 days leave in which to explain his/her absence and if s/he satisfies the court that it was not due to fault on his/her part, the warrant can then be cancelled and the bail not forfeited. By contrast a second type of warrant of arrest (not considered in this report)

difficult to locate these case files.[47] Furthermore, regional court matters still in progress are now filed in the regional court control office which is kept locked and is not readily accessible to the public. The 'after-hours' [sic] bail book was also found to travel with the authorised prosecutor on duty and it was also not a simple matter to obtain access to this book.[48]

- The terms of reference of the current study included an investigation into issues which could not be explored using information available at first appearance, such as outcomes in relation to bail decisions and reasons for postponements. A sample of 'closed' (completed) cases is required to investigate such issues.

- Information about the employment status of accused persons is no longer available. This data was only available in the 1997 study because it used a sub-sample of the PTS 'clients', that is accused persons were asked this question when interviewed by staff in the PTS office and the information was then verified. Courts do not currently record this information as a matter of course and PTS is no longer running in these courts.

The decision was consequently taken to make use of the electronic records used by the courts themselves. While the records selected were supposed to exclude traffic and maintenance courts, overflow from these courts into the other courts in the sample resulted in records of these offences appearing in the datasets.[49] Note that serious offences such as driving under the influence are not heard in traffic courts and consequently also appear in the datasets. Three sources of information were ultimately used to better understand the role of bail in these courts. These were:

- A large database of approximately 27 000 records describing who had appeared before courts in the three metropolitan areas in 2007 (*the large dataset*). This large database (drawn from the electronic records) reflected the age, crime type, outcome and bail and custody status of 'closed cases'. Unfortunately there were significant inconsistencies in the way in which cases were described between the three courts. In particular records from the Durban courts were 'closed' at finalisation of a matter, while in the other two courts a case was classified as 'closed' when a warrant was issued. Nevertheless this database did provide a reliable reflection of what cases appeared before the courts, and the extent to which bail was awarded.

- The second source of information were the bail receipt records on the JDAS system (*the bail amounts dataset*). These printed lists contained the court case numbers linked to bail amounts actually paid, allowing, at least theoretically, for the bail amount to be linked to the large dataset. Limitations in the system (and inconsistent data entry in particular) prevented this from working as well as anticipated. Difficulties were related mainly to the inability to link many records to case details as a result of inconsistent numbering. Consequently a third dataset was created.

- The third dataset was created by manual extraction of more detailed electronic records (with more detailed information unfortunately not available in list form) of over one hundred of the most recently 'closed' cases drawn from the relevant electronic systems in each court (the *detailed datasets*). This allowed for a slightly expanded information set to be drawn from the court records. Limited access to the Johannesburg court resulted in a full dataset of this type being derived for only the Cape Town and Durban courts.

A number of challenges with these datasets were experienced, and these are detailed in Appendix A.

is a J50 which is issued in terms of section 43 of the Criminal Procedure Act. This warrant is issued when a person is linked to a crime through fingerprints, DNA and the like. The prosecutor makes an application for the warrant which is authorised by a magistrate. This warrant is then circulated nationally to the police.

47 When a manual method is employed, case numbers are identified from daily court books for a defined time period. The case files then have to be traced using the case numbers identified in the court books. The case file may be located in a number of different places, including the filing cabinets where they are filed by the next postponement date (relatively easy to locate), in the archives if finalised (also relatively easy to locate) or in the 'warrant room' where they were difficult to locate due to a less rigorous filing method.

48 The terminology 'after hours' is still employed although the book presumably relates to instances of prosecutor bail.

49 Community court matters are currently not recorded on eScheduler at Mitchell's Plain.

Key findings from the large dataset

Basic details of almost 27 000 recently concluded cases were drawn from the various electronic systems. The number of cases drawn was limited only by the availability of a computer terminal at the courts. The final number of cases accessed from each court were as follows:

Number of records accessed from each court in the large dataset

Durban	14 449	(54%)
Mitchell's Plain	6 421	(24%)
Johannesburg	6 118	(22%)
Total	**26 988**	**(100%)**

Detailed findings from the large dataset

What kinds of people are appearing before the courts?

The vast majority of accused persons were male. The average age was 29 and the median age 27. This is somewhat older than was expected.

What kinds of cases are appearing before the courts?

The most common offence appearing before these three courts was theft – accounting for one fifth of all cases, echoing the findings of the PTS Bail Study. The next most frequent were drug offences (13%), robbery (11%), assault (8%) and assault with intent to commit grievous bodily harm (GBH) (7%). Driving under the influence, fraud and housebreaking each contributed another 5% of cases. Arms offences (usually the possession of an unlicensed firearm) made up almost 3% of all charges. The trends on case types (after categorising the cases into a smaller number of general cases – see Appendix B for how these cases were categorised) are summarised in Table 1.

What are the trends on outcomes of cases before the courts?

The outcome of these cases ranged from imprisonment to the dropping of charges.

In 21% of instances cases were 'closed' by being transferred to another (usually higher) court. If we exclude cases transferred[50] from the analysis the following trends are found:

Withdrawals the most common outcome
The single most likely outcome was for the case to be withdrawn or struck off the roll. Over half of all finalised cases (54%) were withdrawn (highlighted in grey in Table 2).

Warrants of arrest the second most common outcome
The next most likely outcome was the court issuing a warrant of arrest (14%) (highlighted in grey in Table 2). Warrants were presumably issued when the accused failed to appear in court and was presumed to have absconded.[51]

Imprisonment more common than fines or alternative sentences
A sentence including an imprisonment dimension (including those where the term was suspended or there was an option of a fine) was used 25 times more often than alternative sentencing or the imposition of a fine alone – in only a tiny fraction (less than 0.5%) of cases was a sentence of community service, correctional supervision or a diversion indicated. By contrast, in 12.6% of all cases a sentence with an imprisonment dimension was imposed.[52]

Most imprisonment sentences suspended or option of a fine available
But the majority of sentences with an imprisonment dimension also gave the accused the option of a fine or the term was fully suspended (57%). Thus only between 5.4% and 5.7% of all cases attracted some actual prison time.[53] Actual imprisonment was imposed at least as frequently as admission of guilt fines (5.4%). The net effect of the sentences passed in this dataset was to increase the prison population by approximately 1 200 sentenced persons.

50 Leaving a balance of 20 953 cases.

51 To reiterate, in Mitchell's Plain and Johannesburg such cases were classified as closed and reflected on a 'closed cases' database and, if the accused was brought to court at a later stage, the case was enrolled anew and placed on the 'open cases' database. In Durban such cases seem to have been kept open and thus would not have been counted in this dataset of 'closed cases'.

52 In 5% of cases the sentence was recorded as 'postponed'. These records emanated from Johannesburg court and recourse to a sample of the physical case files revealed that the data recorders apparently intended to record a suspended sentence.

53 The reason we cannot be precise as to the percentage sentenced to imprisonment is that in 0.3% of cases at least some of the sentence was suspended but the records do not specify how much.

Table 1: Summary of results from large dataset

Offence	Number of cases	% of cases
ABDUCTION	7	0.03%
ABORTION	5	0.02%
ABSCONDING/ESCAPE	10	0.04%
ALL OTHER	42	0.16%
ANIMAL CARE	20	0.07%
ARMS OFFENCE	754	2.79%
ARSON	19	0.07%
'AS ON J15'	448	1.66%
ASSAULT	2 268	8.40%
ASSAULT GBH	1 755	6.50%
BRIBERY/CORRUPTON	80	0.30%
CHILD CARE	33	0.12%
CONSPIRACY	6	0.02%
CONTEMPT OF COURT	50	0.19%
CONTRABAND	68	0.25%
CRIMEN INJURIA	163	0.60%
CULPABLE HOMICIDE	69	0.26%
DRUG	3 568	13.22%
DRIVING UNDER INFLUENCE	1 504	5.57%
EXTORTION	17	0.06%
FRAUD/FORGERY	1 650	6.11%
HARBOUR REGULATION	6	0.02%
HOUSEBREAKING	1 478	5.48%
IDENTITY	34	0.13%
IMMIGRATION	95	0.35%
INTIMIDATION	113	0.42%
KIDNAPPING	47	0.17%
LAWFUL ORDER	2	0.01%
MALICIOUS DAMAGE TO PROPERTY	535	1.98%
MURDER	800	2.96%
OBSTRUCTING JUSTICE	83	0.31%
POACHING	108	0.40%
POSSESSION	553	2.05%
PUBLIC ORDER	149	0.55%
RAPE	826	3.06%
ROBBERY	2 975	11.02%
ROBBERY AGGRAVATED	26	0.10%
SARS	24	0.09%
SHOPLIFTING	384	1.42%
THEFT	5 415	20.06%
TRADE	116	0.43%
TRAFFIC	535	1.98%
TRESPASSING	61	0.23%
UNAUTHORISED USE	69	0.26%
NOT STATED	19	0.07%
Total	**26 989**	**100%**

most common offences

Acquittals rare and conviction rate high

Only 2.7% of all cases enrolled resulted in an acquittal. Because the most likely outcome of any case was for it to be withdrawn or struck off, a high conviction rate was found – if conviction rates are calculated (as they are by the National Prosecuting Authority [NPA]) as a proportion of cases prosecuted to a verdict. Once the withdrawn and otherwise not-concluded cases are removed, there is a conviction rate of 92% (of cases actually prosecuted to conclusion). The practice of withdrawing cases thus seems to operate to keep conviction rates high.

Table 2: Outcome of cases from large dataset

Outcome	% of finalised cases
Acquitted	2.7
Warrant of arrest	13.4
Community service	0.01
Correctional supervision	0.3
Diverted	0.1
Finalised (but outcome not specified)	1.05
Fine only	5.4
Guilty (but sentence not specified)	3.7
Imprisonment with option of fine	3.2
Imprisonment	4.9
Imprisonment: partly suspended	0.5
Imprisonment: fully suspended	3.7
Imprisonment suspended (proportion not specified)	0.34
'Sentence postponed'	5.1
Accused warned	1.5
Case withdrawn / struck off	53.9
Total	**100.0**

What proportion were granted bail by first appearance?

The Durban court records did not distinguish between bail at or before first appearance and bail granted at a later stage. Thus only half the records in the large dataset, those from Johannesburg and Mitchell's Plain, can report whether or not bail had been granted to the accused at the stage of first appearance.[54] Bail was granted to only 3% of

54 The records are silent as to whether such bail would have been granted before or at first appearance. According to data recorders at court, they record the entry after first appearance in court. Thus police bail, prosecutor bail and bail at first appearance are presumably all counted here.

these accused.[55] This suggests a delay in bail decisions compared to the PTS Bail Study.

For which offences was bail granted by first appearance?

Table 3 shows that there was a small chance of an accused being granted bail on or by their first appearance unless they had been arrested for culpable homicide, driving under the influence, kidnapping, obstructing justice or the police, or a trading offence (typically offences like selling liquor without a licence). These offences are highlighted in grey in Table 3. All of these offences, save kidnapping, are offences where either police bail or prosecutor bail are possible, as they do not appear in Part II or III of Schedule 2 (police bail), while culpable homicide appears in Schedule 7 (prosecutor bail).[56] Even for these offences, over three quarters of the accused were not granted bail before or on their first appearance. Obviously the accused could apply for bail at a later stage.

What was the long-term take-up of bail?

Just before the conclusion of their cases almost two-thirds (65%) of accused were still in custody. Only 12% were on bail, some 20% were released on warning, and the remaining 2% were released into the custody of their parents.[57] This combined with the small proportion getting bail at first appearance suggests an overall delay in bail decisions and a decrease in the likelihood of bail being granted compared to the PTS Bail Study, which found 50% to 80% released on first appearance. Obviously whether bail is granted or not depends partly on the crime for which the accused appears in court.

For which offences is bail granted or denied in the long term?

Bail is most likely to be granted for serious driving-related offences including driving under the influence and

Table 3: Per cent granted bail on or by first appearance

OFFENCE	NO BAIL %	BAIL %
OFFENCE NOT STATED	100.0	0.0
ABDUCTION	100.0	0.0
ABORTION	100.0	0.0
ABSCONDING/ESCAPE	100.0	0.0
ALL OTHER	100.0	0.0
ANIMAL CARE	100.0	0.0
ARMS OFFENCE	93.7	6.3
ARSON	100.0	0.0
AS ON J15	98.6	1.4
ASSAULT	97.7	2.3
ASSAULT GBH	99.2	0.8
BRIBERY / CORRUPTON	100.0	0.0
CHILD CARE	100.0	0.0
CONSPIRACY	100.0	0.0
CONTEMPT OF COURT	100.0	0.0
CONTRABAND	100.0	0.0
CRIMEN INJURIA	98.5	1.5
CULPABLE HOMICIDE	85.7	14.3
DRUG	94.9	5.1
DRIVING UNDER THE INFLUENCE	89.9	10.1
EXTORTION	100.0	0.0
FRAUD/FORGERY	98.4	1.6
HOUSEBREAKING	94.9	5.1
IMMIGRATION	100.0	0.0
INTIMDATION	97.3	2.7
KIDNAPPING	75.0	25.0
MALICIOUS DAMAGE TO PROPERTY	98.9	1.1
MURDER	95.1	4.9
OBTRUCTING JUSTICE/POLICE	80.0	20.0
POACHING	94.4	5.6
POSSESSION	95.8	4.2
PUBLIC ORDER	100.0	0.0
RAPE	98.8	1.2
ROBBERY	98.4	1.6
ROBBERY AGGRAVATED	91.7	8.3
SARS	100.0	0.0
SHOPLIFTING	99.0	1.0
THEFT	98.0	2.0
TRADE	75.0	25.0
TRAFFIC	98.9	1.1
TRESPASSING	97.4	2.6
UNAUTHORISED USE	94.4	5.6

55 That is, of the 12 539 accused for which the information is available, only 363 were granted bail before or when they first appeared in court.

56 Kidnapping however falls under part III of Schedule 2 and does not appear in Schedule 7; consequently bail should only be granted by a court.

57 These percentages are of the 12 409 accused whose custody status was known.

culpable homicide.[58] Overall, those more likely to get bail (that is more than 20% got bail) include those accused of illegal abortion, arms offences (usually the possession of an unlicensed firearm), culpable homicide, driving under the influence, extortion, kidnapping, obstructing justice/police, and trading offences.

Release on warning was used almost twice as often as bail. Lesser traffic offences are most likely to result in release on warning as are those accused of drug offences and assault. High percentages (30% or more) of those accused of abduction, assault, contempt of court, *crimen injuria*, drug offences, intimidation, malicious damage to property, and traffic offences were released on warning.

Those cases where accused were very unlikely to be released either on warning or on bail (less than 20% released) include those accused of illegal abortion, absconding/escape, 'animal care',[59] arson, bribery/corruption, child care, conspiracy, immigration, murder, poaching, public order, rape, robbery[60] and tax offences.

Table 4 represents all the trends by crime category.

Are bail amounts set too high?

Are bail amounts being set higher than is affordable? Bail was granted at or by first appearance in only 3% of cases. Of these, only 5% were subsequently kept in custody. This suggests that at least 95% of those to whom bail was granted at first appearance were able to pay the amount and were released.[61] However this may relate to the dominance of

Table 4: Custody status at 'closing' of case by crime category

Offence	Care of guardian	On bail	On warning	In Custody
ABDUCTION	0.0	0.0	50.0	50.0
ABORTION	0.0	20.0	0.0	80.0
ABSCONDING/ESCAPE	0.0	0.0	16.7	83.3
ALL OTHER	0.0	0.0	0.0	100.0
ANIMAL CARE	0.0	0.0	0.0	100.0
ARMS OFFENCE	0.8	20.3	14.8	64.0
ARSON	0.0	0.0	16.7	83.3
AS ON J15	0.2	15.0	5.7	79.0
ASSAULT	2.6	7.0	38.9	51.6
ASSAULT GBH	1.7	10.9	16.9	70.5
BRIBERY / CORRUPTON	0.0	12.5	4.2	83.3
CHILD CARE	0.0	0.0	8.7	91.3
CONSPIRACY	0.0	0.0	0.0	100.0
CONTEMPT OF COURT	0.0	7.3	41.5	51.2
CRIMEN INJURIA	2.9	8.8	45.6	42.6
CULPABLE HOMICIDE	0.0	33.3	28.6	38.1
DRUG OFFENCES	2.4	14.6	31.8	51.2
DRIVING UNDER THE INFLUENCE	0.0	20.8	25.8	53.4
EXTORTION	0.0	33.3	0.0	66.7
FRAUD/FORGERY	0.1	10.6	14.2	75.0
HOUSEBREAKING	3.0	11.4	14.1	71.4
IMMIGRATION	0.0	14.3	0.0	85.7
INTIMIDATION	0.0	2.7	35.6	61.6
KIDNAPPING	0.0	25.0	25.0	50.0
MALICIOUS DAMAGE TO PROPERTY	4.5	2.3	31.3	61.9
MURDER	0.4	17.8	2.1	79.7
OBSTRUCTING JUSTICE/POLICE	0.0	20.8	16.7	62.5
POACHING	0.0	5.6	0.0	94.4
POSSESSION	0.4	11.3	18.1	70.2
PUBLIC ORDER	0.0	0.0	3.2	96.8
RAPE	0.4	9.4	1.6	88.6
ROBBERY	1.0	7.2	3.7	88.1
ROBBERY AGGRAVATED	0.0	16.7	16.7	66.7
SARS	0.0	0.0	0.0	100.0
SHOPLIFTING	8.9	2.9	28.0	60.2
THEFT	1.4	9.4	17.7	71.5
TRADE	5.0	30.0	20.0	45.0
TRAFFIC OFFENCES	1.1	9.2	51.7	37.9
TRESPASSING	5.3	5.3	28.9	60.5
UNAUTHORISED USE	0.0	16.7	22.2	61.1
ALL CASES	**2%**	**12%**	**20%**	**65%**

30% or more released on warning

20% or more released on bail

80% or more kept in custody

58 Culpable homicide is frequently but not always a charge arising from fatal motor vehicle accidents where there has been negligence on the part of a driver. Culpable homicide charges can also arise from other incidents where negligence caused a fatality.

59 Although some lesser offences (for example, those relating to the neglect or abuse of animals and children) are very likely to result in the accused remaining in custody, these high rates are largely the result of the outcome of a very small number of offences (6 and 23 offenders respectively). Consequently caution must be taken when generalising a trend in relation to these offences.

60 Although aggravated robbery (as compared to robbery) seems to have a high release rate (33%) this is based on a very small number of offenders (26) compared to the 2 975 offenders for which the trend in relation to robbery was stated. Consequently caution must be taken when generalising a trend in relation to aggravated robbery.

61 Remember however that this dataset refers only to the Johannesburg and Mitchell's plain courts.

district court cases in this sample, which does not include Durban cases. The later analysis of the detailed regional sub-samples – see the detailed dataset below – showed that by contrast, in the Durban regional court, as much as a quarter (24%) of all those given the opportunity to make bail failed to do so. This analysis suggests that increasing the *average* bail amount in the Durban regional court to over R2 000 resulted in a significant increase in accused persons failing to make bail.

Does bail ensure the return of accused persons to court?

Bail seems to be a better method of ensuring attendance at court than release on warning or release into parents' custody. As much as 80% of cases in which the accused was released into the custody of their parents and 55% of cases in which the accused was released on warning were closed with the issuance of a warrant of arrest – presumably as a result of the accused failing to appear in court. By contrast 'only' 29% of cases in which the accused was released on bail was a warrant issued. Thus although bail does dramatically reduce the warrant rate, a sizeable proportion of people on bail (almost a third) nevertheless fail to return to court at the appointed time. This suggests that releasing accused persons on bail has a *significant yet inadequate deterrent effect* as far as the accused failing to return to court is concerned.

Are there regional trends regarding bail and release on warning?

To compare all three courts with each other it is necessary to exclude cases 'closed' by way of issuing of a warrant (the above findings centred entirely on cases for Mitchell's Plain and Johannesburg).[62] Excluding cases ending in warrants, 75% of Johannesburg accused were in prison awaiting trial up to conclusion of the case, while only 43% and 49% respectively of Durban and Mitchell's Plain accused persons were. When compared to Johannesburg, twice the proportion of Durban accused were released on bail (31% versus 15%). This may be because the Johannesburg sample included a greater proportion of regional courts dealing with more serious offences. Furthermore, very different proportions of accused were released on warning, ranging from only 8% in Johannesburg to 24% in Durban and 37% in Mitchell's Plain. Table 5 below summarises the main findings.

Table 5: Custody status at finalisation (excluding finalisation by warrant)

Custody Status	Durban	Mitchell's Plain	Johannesburg
Care of guardian	2%	2%	0%
In custody	43%	49%	76%
On bail	31%	12%	15%
On warning	24%	37%	8%
Total	**100%**	**100%**	**100%**

Does legal representation affect the likelihood of bail?

The Durban data had information on legal representation which was not available in the data from the other two courts. Analysis of the Durban data showed that slightly fewer than one third (31%) of accused persons were released on bail. This ranged from 28% of those unrepresented to 37% of those with independent legal representation. Those represented by Legal Aid (a tiny proportion of the total)[63] were almost as likely as those with independent legal representation to be released on bail (35% versus 37%).

Table 6 below suggests that unrepresented accused were more likely to have been accused of minor offences, because they appear to have been more likely to be released on warning. A more useful comparison would be to compare rates of release within crimes of similar severity, which we do with those accused of assault, theft, robbery and murder.[64]

62 To reiterate, Durban cases were excluded because they used a different process of record keeping. Mitchell's Plain and Johannesburg classify cases as 'closed' once a warrant is issued. By contrast Durban officials seem to keep the case open, resulting in only a very small number of warrants issued appearing on their closed case roll (possibly in error). By contrast warrants accounted for 13% of the 'closed' cases from Mitchell's Plain and Johannesburg.

63 The figures relating to the use of Legal Aid are suspect and those recording the data do not seem to have diligently recorded every time a lawyer was appointed via the Legal Aid Board. The data recorders seem to have preferred to record lawyers appearing as if they were private representation.

64 These offences provided sufficient records for analysis.

Table 6: Custody status and legal representation (Durban)

Type of representation	Proportion on bail	Proportion released on warning
Unrepresented (73%)	28%	25%
Legal Aid (1%)	35%	10%
Independent representation (24%)	37%	20%

Table 7 below represents the proportion of Durban accused who received bail and who were released on warning according to the type of representation they had and within crime types. [65]

Table 7: Release on bail or warning and legal representation by crime type (Durban)

Case type	Type of representation	Bail	Warning	Total bail or warning
All cases	Unrepresented	28%	25%	53%
	Represented	37%	20%	57%
Assault	Unrepresented	30%	34%	64%
	Represented	38%	32%	70%
Assault GBH	Unrepresented	30%	33%	62%
	Represented	37%	35%	72%
Theft	Unrepresented	71%	22%	93%
	Represented	37%	5%	42%
Robbery	Unrepresented	18%	10%	29%
	Represented	25%	9%	34%
Murder	Unrepresented	22%	6%	28%
	Represented	36%	5%	41%

Represented accused slightly more likely to get bail

Within offence types, accused with legal representation increased their chance of being released on bail by between 7% and 9% Considering all offence types together, only 28% of unrepresented accused got bail compared to 37% of those with legal representation.

65 Although the figures are shown for Legal Aid in Table 6, we do not differentiate between types of representation in Table 7 because there were so few accused classified as having received Legal Aid.

Accused who represent themselves more likely to be released on warning

Generally speaking, unrepresented accused were more likely to be released on warning than those with legal representation. Presumably the absence of legal assistance is taken as evidence that the accused is unable to afford bail. Magistrates may then be more inclined to release unrepresented accused on warning even in reasonably serious cases. For example, one third of those accused of assault GBH were released on warning. However the chance of being released on warning drops to 6% or less for less for those accused of murder – irrespective of whether or not they had legal representation.

Legal representation has a stronger effect with more serious crimes

Thus the effect of 'release on warning' is to reduce the 9% advantage held by those with legal representation to a mere 4%. This advantage varies dramatically with the severity of the crime category. Among those accused of robbery or assault the advantage of legal representation is 5%, among those accused of murder the advantage rises to 13%.

Perversely, legal representation operates strongly against anyone accused of theft: those who are not represented have a 71% chance of being released on bail and a 93% chance of being released either on bail or warning. Theft accused with legal representation have only a 36% chance of being released on bail and a 41% chance of being released either on bail or warning. Presumably those with legal representation were accused of more substantial thefts and magistrates were loathe to release them either on bail or on warning.

Overall slight impact of legal representation

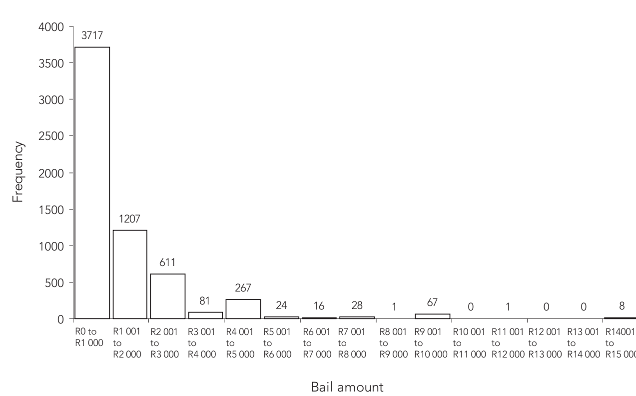
Thus accused persons with legal representation had a slightly greater chance of obtaining bail than those without legal representation. However about half of this advantage is offset by the increased use of 'release on warning' for those without representation. Thus legal representation offers some advantage in getting bail but reduces the chance of the accused being released on warning. This trend is likely to be reflected by an increase in the amount of bail set for those with legal representation. Obviously this raises the question as to what bail amounts are 'usually' set. This can be explored using the bail amounts dataset.

The bail amounts dataset

What are the average and median bail amounts set in the courts?

The average bail amount in the three courts was R1 736. The amounts set varied from R50 to R50 000. However the actual amounts were heavily concentrated on the R50 end of the spectrum. The graphic below displays how the bail amounts set were distributed.

Distribution profile of bail amounts



The average bail amount varied from R1 290 in Durban courts to R1 900 in Johannesburg courts. The average was R1 500 in Mitchell's Plain. The amount of bail set is affected by a number of factors including (presumably) the economic status of the accused and the severity of the offence. The averages, medians and extremes are summarised below.

Median bail amount only R1 000

The average (or the mean) is a poor indicator of the bail amount typically set by the courts, because the average is heavily influenced by a small number of very large values (the R50 000s). A more useful measure is the 'median' which represents the value that separates the top and bottom halves of bail amounts.

- In Durban the median was R500.
- In Mitchell's Plain the amount was somewhat greater at R800.
- The median value of bail in Johannesburg was R1 000.

Table 8 illustrates how widely the bail amounts vary. In Durban and Johannesburg the minimum was R50 – this is one thousandth of the maximum amount demanded.

Table 8: Bail amounts set in three courts

Area	Minimum	Median	Mean	Maximum
Durban	R50	R500	R1 287	R50 000
Mitchell's Plain	R100	R800	R1 498	R40 000
Johannesburg	R50	R1 000	R1 909	R50 000

Including release on warnings results in a median bail amount of less than R1

However even the use of median values for determining the amount of bail set by the courts can be considered misleading – because release on warning should be included. If we treat 'release on warnings' as equivalent to release on R0 bail then the median bail is essentially less than R1. This is because release on warning is far more prominent than bail. The mean (average) bail is, using the same method, reduced to approximately one third the amount indicated above, that is to about R380.

Is there a relationship between bail amounts and the age of accused?

Unfortunately the court records do not provide information on the economic or employment status of the accused. While the extensive use of release on warning suggests that magistrates believe that few can afford to pay any bail, it is not clear the extent to which those appearing in court are in fact unemployed or destitute. What the data does indicate, is that the average age of the accused is almost 30 years old. Thus, contrary to expectation, the accused are not predominantly youth who have recently entered economic activity. The median age of the accused was 27. If working life starts at 18, half the accused could have had nine or ten years of potential work years behind them.

No correlation between age and bail amounts

While it is not possible to investigate whether or not the accused are indigent, employed or unemployable it is possible to investigate whether their ages are associated with the ability to pay the bail amounts set by courts. However, there turns out to be no statistically significant correlation between bail amount and the age of the accused.

Is there a relationship between bail amounts and crime categories?

Do bail amounts depend on the type of the offence?[66] It seems there is a relationship between offence types and bail amounts.

The highest *median* bail amounts set were for commercial offences like fraud, and dealing in counterfeit goods. The lowest median bail levels were set for offences related to the courts themselves or animals (poaching, animal welfare). However the actual amount set could vary dramatically – especially for crimes like fraud and drug offences. For fraud the minimum bail demanded was R100 and the maximum was R50 000 – a ratio of 500:1.

For some offences there was very little variation on the bail demanded, for example, contempt of court, identity offences[67] and offences relating to the mistreatment of children, the bail amount seems to have been set at a given amount (R1 000, R300 and R2 000 respectively).

The highest *minimum* bail amounts were reserved for arson (R3 000) and kidnapping and identity offences (R2 000). Table 9 specifies the mean, median, minimum and maximum bail amounts by offence category.[68]

Is there a relationship between bail amounts and warrant rates?

Bail amounts should be high enough to deter accused persons from failing to return to court (and thus forfeiting the amount) – but should not be so high that accused persons are unable to pay. A statistically significant correlation between warrant rates and bail amounts would suggest bail amounts are in general too low. However when examined on a crime-by-crime basis it becomes clear that there is no statistical correlation between median bail amounts and warrant rates. Regressing the warrant rate on the median bail amount for each offence shows that the relationship is basically random. This suggests that there is no *systemic* bias in bail amounts in terms of it offering undue incentives for accused persons to abscond. This does not however rule out bail amounts being set too low (or high) in individual cases.

Is there a relationship between custody status awaiting trial and case outcomes?

Are those held in custody ultimately more likely to be found guilty?[69] Almost half (48%) of cases in which bail was granted and paid were ultimately withdrawn. This exactly equals the proportion of cases withdrawn against accused held in custody. Furthermore the acquittal rate was almost exactly the same for both groups. However, when compared to those held in custody, those released on bail where somewhat more likely to be fined or given a suspended prison sentence. Conversely those in custody for their trials were more likely to be sentenced to imprisonment (6% versus 1% for those released on bail).

Table 10 summarises the situation.[70]

Thus while those on bail were slightly less likely than those in custody to end up with a prison sentence, there was no difference in likelihood that the matter would instead end up withdrawn. Indeed, withdrawal was the most likely option for both these categories of accused.

The detailed dataset

A series of sub-samples of cases from the large dataset were also drawn manually from the Mitchell's Plain and Durban courts to expand on the findings. The main results are summarised below.

66 Linking the JDAS datasets (detailing the amount of bail paid) to the large dataset (detailing the offence and status of accused) allows for the relationship between bail amounts and the offence to be explored. The merging of these dataset results in a combined database of 1 904 entries. An examination, by crime category, of the median bail amount in this combined database shows that the amount of bail set varied from R300 to R3 000. The average bail amount spans a wider range of R300 to R6 400.

67 This category typically covers issues of impersonation and mis-representation.

68 Of the 1 904 offences in the merged dataset.

69 The linked dataset was also used for exploring the relationship between custody status and case outcomes.

70 Data issues and anomalous results arising from this table are discussed in Appendix A.

Table 9: Bail amounts by crime category

Offence category	Median	Mean	Ratio mean/ median	Minimum	Maximum	Ratio maximum/ minimum
Offence not specified	350	771	2.2	100	3 000	30.0
Animal care	350	771	2.2	100	3 000	30.0
Arms offence	2 000	6 446	3.22	200	30 000	150.0
Arson	3 000	3 000	1	3 000	3 000	1.0
As on j15	1 250	2 188	1.75	300	10 000	33.3
Assault	1 000	1 668	1.67	200	10 000	50.0
Assault GBH	1 000	1 148	1.15	100	10 000	100.0
Bribery / corruption	1 000	1 463	1.46	100	5 000	50.0
Child care	1 000	1 000	1	1 000	1 000	1.0
Conspiracy						
Contempt of court	300	300	1	300	300	1.0
Contraband	350	771	2.2	100	3 000	30.0
Crimen injuria	400	567	1.42	300	1 000	3.3
Culpable homicide	2 000	2 000	1	1 000	3 000	3.0
Drug	1 000	1 525	1.53	100	20 000	200.0
DUI	1 500	1 713	1.14	500	5 000	10.0
Extortion						
Fraud/forgery	2 000	4 839	2.42	100	50 000	500.0
Harbour regulation						
Housebreaking	1 000	1 488	1.49	100	5 000	50.0
Identity	2 000	2 000	1	2 000	2 000	1.0
Immigration						
Intimdation	1 000	1 488	1.49	300	5 000	16.7
Kidnapping	2 000	2 200	1.1	2 000	3 000	1.5
Malicious damage to property	1 000	2 632	2.63	500	20 000	40.0
Murder	3 000	2 818	0.94	1 000	10 000	10.0
Obstructing justice/police	500	500	1	500	500	1.0
Poaching	300	400	1.33	300	600	2.0
Possession	1 500	1 697	1.13	100	20 000	200.0
Public order						
Rape	2 250	2 332	1.04	300	5 000	16.7
Robbery	2 000	2 320	1.16	100	20 000	200.0
Robbery aggravated	1 000	1 000	1	1 000	1 000	1.0
SARS						
Shoplifting	1 500	2 089	1.39	200	8 000	40.0
Theft	1 000	1 667	1.67	100	10 000	100.0
Trade	2 000	2 000	1	2 000	2 000	1.0
Traffic	500	800	1.6	100	3 000	30.0
Trespassing	475	475	1	150	800	5.3
Unauthorised use	3 000	2 667	0.89	2 000	3 000	1.5

Table 10: Custody status and case outcomes

	Withdrawn	Prison sentence	Suspended sentence	Alternative sentence	Fined	Acquitted	Warrant	Other
Custody	48%	6%	3%	1%	4%	2%	22%	14%
Bail	48%	1%	8%	0%	8%	1%	27%	8%
Warning	29%	1%	16%	0%	3%	1%	46%	5%

What are the trends specific to Mitchell's Plain?

What is the profile of a Mitchell's Plain accused?

In Mitchell's Plain[71] all accused claimed to be South African citizens and almost all (93%) of the accused were male. The average age of the accused was 27 years old. This is fractionally lower than the 29 years cited previously with the difference primarily the result of an unusually high proportion of minors in the sample.

What are the Mitchell's Plain district court trends?

In Mitchell's Plain district court the vast majority of accused were in custody (70%) at the time their case was concluded – but 80% of district court cases were settled on the day of first appearance, suggesting that for the majority, short periods of incarceration in police cells rather than extended periods in Pollsmoor (the main prison serving Mitchell's Plain) is the norm. Almost all the remaining accused (27%) were released on warning. On average, accused appeared only 1.2 times before their cases were finalised. Many of the cases which were not immediately concluded took significantly longer – bringing the average duration to 3.3 days. This speed comes at a cost. The vast majority of cases (78%) were withdrawn, struck off the roll, or closed with the issuing of a warrant of arrest.

What are the Mitchell's Plain regional court trends?

By contrast, 63% of those appearing in the regional court were held in custody and 13% had been released on bail initially while 12% of accused in the regional courts had been released on warning. During the course of their trial a further 13% of those in custody were granted bail. Cases were finalised after an average of 3.4 appearances – twice the figure for the district courts. Only 15% of cases were finalised on the date of first appearance (as opposed to 80% in the district courts). The average number of days between first appearance and finalisation was 55 days. Several of the accused in the sample had been in custody for 164 days before their cases were finalised. Each case in the regional court experienced, on average, 2.4 postponements. Despite the more onerous bail trends in the regional court, more than half (53%) resulted in the cases being dropped or a warrant being issued for the accused. Only a third (34%) of the cases resulted in a verdict, with guilty verdicts outnumbering acquittals by 2:1.

What were the reasons for postponements in Mitchell's Plain?

The table below summarises the reasons cited for postponements in the Mitchell's Plain sub-sample.

Table 11: Reasons for postponements (Mitchell's Plain)

Reasons for postponement	%
Application for legal aid	7%
Bail application	2%
Docket missing/not in court	5%
Further investigation	40%
Continuance	18%
Plea	10%
Plea and trial	14%
Sentence	4%
Total	**100%**

The most frequently cited reason for a postponement was the need for 'further investigation'. This was cited in 40% of the postponements. The next most frequently cited reasons were to continue the hearing (18%) or set a trial date (14%). Postponing a case explicitly for a bail application was cited

71 In the Mitchell's Plain court the most recent (at the time the study was conducted) 130 finalised 'closed' cases were examined.

in only 2% of cases. Postponement to enable the accused to get legal aid was cited almost as rarely (7%).

What are the trends specific to Durban?

A similar sub-sample of cases was drawn from regional and district courts in Durban. These results make an interesting contrast to the Mitchell's Plain findings.

What is the profile of Durban accused?
Once again the accused were mostly male – 90% of the total.[72] The average age of the accused was equal to the average of the three courts – 29 years old. Although all the accused in Mitchell's Plain were South African citizens, foreigners played a slightly more prominent role in the Durban courts where 7% of accused were not South African citizens.

How is Durban different from Mitchell's Plain and Johannesburg on bail?
The previous dataset indicated that the bail rate of Durban courts differed significantly from the rates in Mitchell's Plain and Johannesburg. In particular, more use of bail was made in Durban. The accused were in custody 60% of the time. Less than a quarter of accused (23%) initially made bail and, in the strongest contrast to Mitchell's Plain, less than 10% of accused were released on 'warning'. However the most marked difference was that many (41%) of those initially in custody were later given an opportunity of being released on bail. This opportunity was taken up by most (but not all) of the accused. In Durban, a quarter (24%) of all those given the opportunity to make bail failed to do so – but none of those who failed to make bail appeared in the district courts, where the average bail amount was R890.

What are the trends in the Durban regional court on bail amounts?
By contrast the average bail amount in the regional courts (where all those who failed to make bail appeared) was R2 160. The central role played by the bail amount is further illustrated by contrasting the bail set for those accused who did subsequently make bail and those who failed to do so, and this is best done by looking at only those appearing in the regional court. The average bail paid by those who belatedly made bail was R2 200. The minimum bail set for those who failed to be released was R2 000 and the average bail amount was R2 700. It would appear that increasing the *average* bail amount to over R2 000 resulted in a significant increase in an accused failing to make bail.

How is Durban different on case length and case outcomes?
Other differences between the Durban and Mitchell's Plain courts lie in the length of cases and their outcomes. In the Durban district courts only 22% of cases were withdrawn. In the balance of cases (that is, those that were finalised) guilty verdicts outnumbered acquittals five-to-one. By contrast in the Durban regional courts 78% of cases were withdrawn. Withdrawing cases in the Durban regional court contrasts strongly with that of Mitchell's Plain district court, where the mechanism seems to meet different objectives. In Mitchell's Plain district court withdrawal appears to be used to reduce the court roll. In Durban regional court withdrawal appears to be used to avoid the case going to trial and ending in an acquittal. This is inferred from the fact that in the Durban regional courts, the average amount of time between first appearance and withdrawal of charges was 138 days – while the length of time between first appearance and guilty verdict was 143 days – an additional 5 days 'only'.[73] Similarly, in contrast to the surprisingly rapid turnaround of cases in Mitchell's Plain, the Durban Courts are significantly slower. Even in the district courts, cases are finalised after an average of 4.4 appearances and 86 days. In the regional court, cases are finalised after an average of 5 appearances or 135 days.

What were the reasons for postponements in Durban?
The main reasons for case postponement in Durban courts are presented in Table 12.

72 There were 118 cases in this sub-sample.

73 According to section 6 (Criminal Procedure Act), when a prosecution is stopped after the accused has pleaded, the accused is entitled to an acquittal. It is unclear whether the Durban courts are recording stopping of a prosecution after plea as a 'withdrawal', or whether the accused have not in fact yet pleaded where a withdrawal is recorded, despite the long passage of time since first appearance. According to section 105 (Criminal Procedure Act), the accused must plead to the charge before the trial commences.

Table 12: Reasons for postponements (Durban)

Reason for postponement	Count	%
Docket/officer not in court	13	2.86%
Accused not in court	36	7.91%
Application for legal aid	18	3.96%
Application for new attorney	6	1.32%
Awaiting analysis reports	13	2.86%
Awaiting psych/medical report	4	0.88%
Bail application	3	0.66%
For statements	36	7.91%
For trial date	33	7.25%
Further investigation	22	4.84%
Lawyer not in court	40	8.79%
Other	97	21.32%
Plea	14	3.08%
Trial	95	20.88%
Unknown	21	4.62%
Warrant of arrest issued	4	0.88%
All reasons	**455**	**100.00%**

The most frequently cited reason for postponement in Durban related to the conducting of the trial itself. Almost one third of reasons relate to setting dates for pleas or the next part of the trial. Very few of the delays were for bail applications (0.7%) or to give the accused an opportunity to obtain legal aid (4%).

Comparing 1997 to 2007

The methodology and data used in these two studies were not the same and the studies are consequently not strictly comparable. However some broad generalisations about changes in trends can be made comparing what was found in 1997 with 2007.

The profile of accused remains male and largely under 30 years of age.

Bail now appears even less likely at, or by, first appearance than it was in 1997, with 97% still in custody at first appearance compared to the 80–90% found in the 1997 study. This is most likely related to the abolition of after-hours bail and the requirement that accused be brought to court for release or continued detention.

It remains true that property crimes dominate in cases appearing before the courts (1997) with theft again the most prevalent crime in 2007.

By 2007 a far higher proportion remain in custody. In 1997 after first appearance 50–80% were released either on bail or on warning. In 2007 some 65% remained in custody up to the conclusion of their case.

However the 'conclusion of the case' is increasingly on first appearance. In 1997 less than 10% of cases overall in the three courts were finalised at first appearance, by 2007 a high proportion (80%) of cases in Mitchell's Plain in particular were finalised at first appearance – mostly by way of withdrawal. This echoes the 1997 finding that those cases finalised at first appearance were mostly finalised by way of withdrawal.

Like the 1997 study, legal representation still raises the likelihood of bail being granted, but only marginally, and it was further found that it seems to work against an accused being released in relation to the most prevalent crime before the courts – theft.

By 2007, the median amount of bail granted in Johannesburg had dropped from R2 000 to R1 000, whilst in Mitchell's Plain the median amount of bail has increased somewhat from R500 to R800. Durban remains unchanged at R500. Thus it would appear that on the whole, judicial officers have taken heed of concerns of unaffordable bail amounts being granted.

By 2007 a far higher proportion appeared able to pay the bail amounts set – 95% in Johannesburg and Mitchell's Plain could pay the amounts set at first appearance and 76% could pay the amount set at any stage in Durban. In 1997 less than half in Johannesburg and Mitchell's Plain could pay the bail amount set while 76% could not pay in Durban. This suggests either that bail amounts are now set at more realistic levels or alternatively that people now have more money available to them to pay bail.

However, the proportion of warrants issued appears to have increased since 1997.

Like the 1997 study the current study found clear regional trends. In particular by 2007 Mitchell's Plain court seems to be focussed on speedy resolution, coming at the cost of a high rate of withdrawals. This court also has a tendency toward release on warning, resulting in a high rate of warrants being issued.

By contrast Durban court makes more use of bail and while this court takes longer to finalise matters, these matters also frequently culminate in withdrawal. In Johannesburg, like in 1997, bail and any kind of release is relatively rare, and when bail is granted, relatively high amounts are set.

Trends in the un-sentenced prison population

Major amendments to the law on bail were passed in 1997 and were implemented in 1998. All three correctional centres relevant to the courts under consideration show that in 1998 the proportion of the total people admitted and subsequently released dropped well below a ratio of 1:1, that is proportionally fewer people were released than were admitted.

This suggests an immediate reduction in either the likelihood of release awaiting trial and/or a reduction in the speed of resolution of cases. However Johannesburg shows a slight change from the previous year, and little subsequent change until 2004 and 2005 (where increases took place) suggesting practice has not changed much in the courts feeding into that correctional centre. Durban shows a slight but continuous trend toward an *increase* since 1998

Figure 1: Releases as a proportion of admissions in three correctional centres

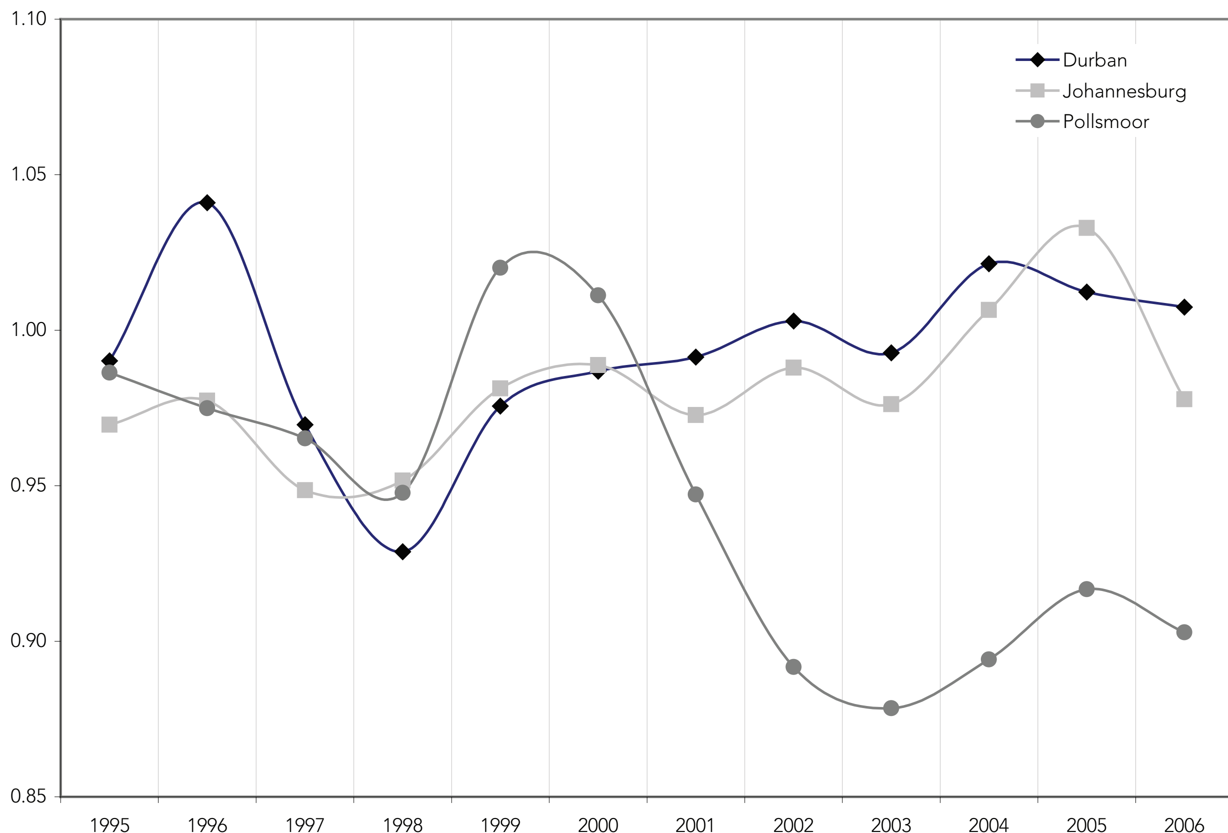
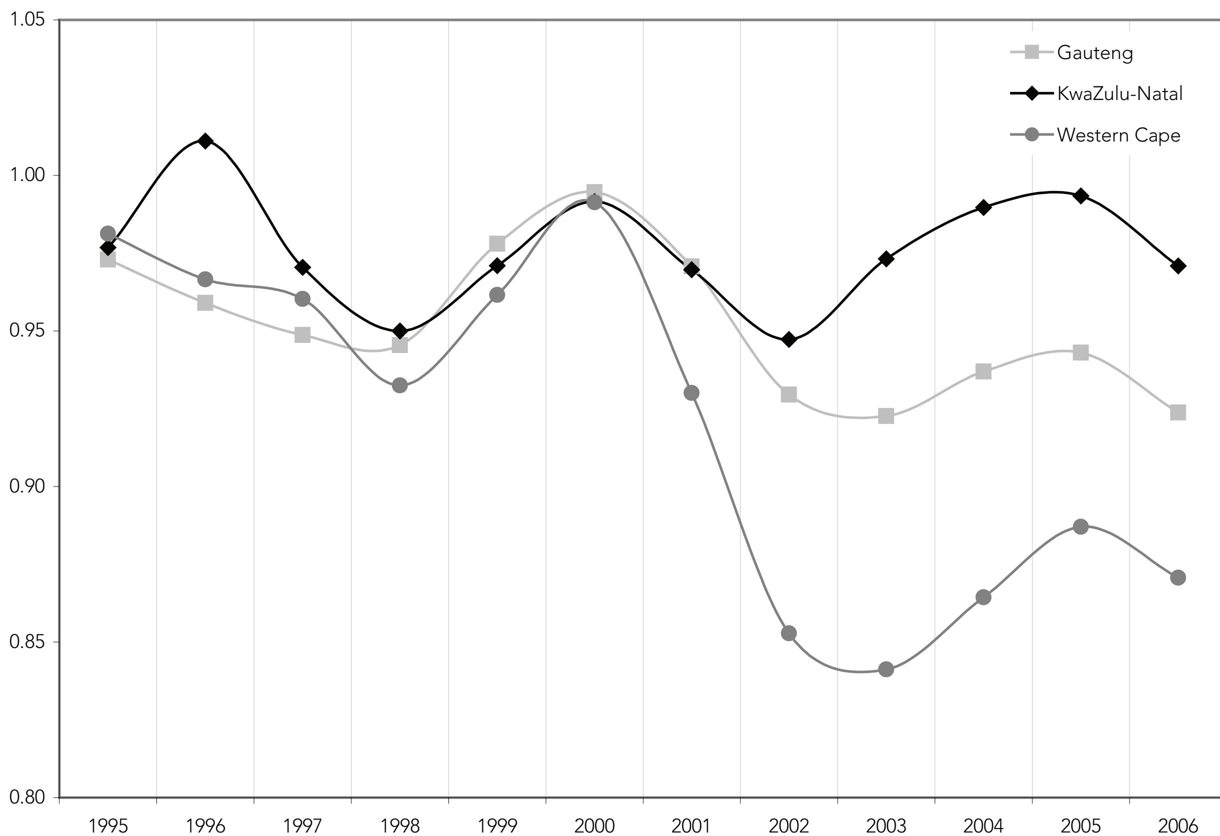


Figure 2: Releases as a proportion of admissions in three provinces



in this proportion, that is proportionally more awaiting trial prisoners being released than being admitted, suggesting that speed of resolution or releases awaiting trial may have increased in this court and associated courts feeding into that correctional centre.

Pollsmoor by contrast has shown a steady reduction in the proportion of releases (after an initial correction in 1999 and 2000 after the 1998 local low point) down to a low point in 2003 of about 87%. If practice in Mitchell's Plain is mirrored in the other courts which feed into Pollsmoor (such as Wynberg, Cape Town, and so on) this trend can be explained by the fact that the majority of district court offences are withdrawn on first appearance.

Such cases would not affect Pollsmoor as such accused would have been held in police custody up to that point. Thus the proportion of releases from Pollsmoor would tend to reflect the likelihood of release and speed of resolution of more serious regional court matters only. As we have seen in this study such matters have a reduced likelihood of release and longer periods of resolution – although these too have a high chance of ending in withdrawal.

An alternative interpretation is that what happens in Mitchell's Plain has little impact on Pollsmoor compared to the other courts feeding into Pollsmoor. Provincial trends are smoother and show a slight reduction for all three relevant provinces, with the Western Cape again showing a stronger trend of fewer releases of awaiting trial accused person in proportion to those admitted awaiting trial.

This reduced proportion of releases in the Western Cape has resulted in an accumulated increase over the 10-year period in an average number of un-sentenced prisoners in custody of more than 20 000 people (almost doubling the number of un-sentenced in custody).

PART V
CONCLUSION

The changes to the law on bail appear to have achieved their goal of making the granting of bail in respect of serious offences relatively rare compared to the situation in 1997. The majority (65%) of all accused now remain in custody until the conclusion of their cases, while in 1997 the majority of accused persons were released awaiting trial. The legislative amendments have also achieved delays in the granting of bail, with it now normally being granted at some stage after first appearance, while in 1997 bail was normally granted at first appearance. This suggests that a paradigm shift has occurred with release awaiting trial no longer being viewed as an automatic right of an accused person. Being held in custody awaiting trial is now the norm in the three courts under review.

Judicial officers continue to be caught between the proverbial rock and a hard place when it comes to decisions on bail. They face criticism regarding the setting of unaffordable bail and the consequent impact on overcrowding at the same time as competing criticism regarding any form of release for those of accused of serious offences. With respect to less serious offences, judicial officers appear to have responded to criticisms regarding the setting of unaffordable bail and accused are far more likely to be able to pay the amount set compared to 1997 – in two of the courts 95% were able to pay the amount set, while the Durban regional court three quarters were able to pay. By contrast in 1997 the majority could not afford the bail amount set. Widespread use is also being made of release on warning, possibly for the same reason. At the same time, with respect to serious offences very low rates of pre-trial release are now apparent – for example, 90% of rape and robbery accused remain in custody until the conclusion of their cases. The impact of this lower release rate for serious offences on the un-sentenced prison population is readily apparent in the three provinces concerned, where admissions of un-sentenced prisoners steadily outnumbers releases on a year-on-year basis.

Unfortunately an increased proportion of releases on warning is being accompanied by a correspondingly higher proportion of cases culminating in warrants being issued (when such accused fail to appear in court after their release). The research indicates that the highest warrant rates are observed where accused are released on warning (more than 1 in 2) but disturbingly high rates are also observed where bail is granted – almost 1 in 3. This suggests that respect for the justice system is low and that accused have low expectations of being re-arrested should they fail to appear in court at the stipulated time. This attitude may inadvertently be encouraged by the courts themselves – the highest release rates awaiting trial are observed for offences relating to respect for the courts, such as contempt of court – almost half of such accused persons are released awaiting trial, some 80% of these on warning. Given that the likelihood of accused persons presenting themselves at court should be a key consideration when making a decision on pre-trial release, it seems somewhat paradoxical that release rates should be highest where accused persons are charged with contempt of court.

There is however no association observed between average bail amounts set and warrant rates, which suggests there is no systemic bias towards bail amounts being set too low. The high warrant rates do in turn suggest that money bail alone is an insufficient means of ensuring that an accused returns to court. While bail does have a greater impact than release on warning, the loss of bail money alone appears to be an insufficient deterrent to failure to appear for trial. This suggests that other conditions should be attached to release on bail and that more attention should be paid to ensuring those who fail to appear are met with consequences, to ensure the courts are viewed with respect. One means of addressing the problem could be though a pre-trial services system. A pre-trial services system offers verified information acquired before an accused person's first appearance in court including the residential address

of the accused, work and community ties, and income. In addition, it offers supervision of bail conditions by court or SAPS officials, ensuring that the likelihood of abscondment is lowered.

Most disturbingly however, analysis of the datasets from the three courts indicates that the majority of accused brought before the courts are never tried. In the courts in question, 1 out of every 2 cases was withdrawn or struck off the roll – with the stage at which this occurs appearing to vary by the seriousness of the offence. The system persists in processing arrested persons in a manner which employs the fiction that they are eventually going to be tried – and then simply aborts the process (and releases the accused), with the length of time before that point occurs increasing with the increased seriousness of the offence. For less serious offences charges will most likely be dropped at first appearance while for the most serious offences they will be dropped only after an extensive period of detention awaiting trial. In other words, the process implicitly 'punishes' accused persons according to the seriousness of the charges they face.

Indeed, a conviction was obtained in only approximately 1 out of 16 cases enrolled in these courts. Where there is a conviction, although imprisonment was more likely than an alternative sentence, most sentences of imprisonment were either partially or wholly suspended. The scope of this study did not include an analysis of the reasons for cases being withdrawn or struck off the roll, but high withdrawal rates could be the result of a number of different factors such as: the sheer pressure of the volume of cases passing through the three courts; prosecutorial policy aimed at low acquittal rates; the changes to the bail laws which demand that accused persons are brought to court for a decision on release or detention rather than be released by the police; poor police work; or a desire to keep SAPS arrest statistics high. Reasons for and the impact of high rates of withdrawal requires further investigation.

The criminal justice system as represented in these three courts thus seems unable to try the vast majority of its accused. This begs the question though whether these research findings from three of the largest courts in the country are representative of all courts nationally. If that is the case it can be argued that the principles on which the justice system is based – that accused are innocent until proven guilty and that punishment should only be meted out after a conviction has been obtained – are being implicitly subverted.

The imposition of a punishment is an explicit function of the trial court via conviction and sentencing of an accused person and a bail decision should not be viewed as a judgment and punishment of an accused person. The public however recognises that release on bail or on warning may well result in the accused failing to return to court and further recognises that very often the arrest itself and the detention awaiting trial will be the only 'punishment' meted out in a system where the majority of accused are not convicted. These perceptions are observed regularly in the press with comments such as 'it seems really easy to get off on bail'.[74]

Both guilty and innocent are however caught up in this process of implicit punishment. Guilty or innocent, there is very little difference in the outcomes (including time spent in detention) for the majority of accused persons processed in our criminal justice system, resulting in a fundamentally unjust system.

Yet bail is only required in the criminal justice system because of the extensive delays in the hearing of trials and their burdensome nature. Questions of bail would not arise if matters could be dealt with speedily – for less serious offences preferably immediately after arrest of an accused. This is in effect what is happening by way of withdrawal – but withdrawals have a negative impact on respect for the criminal justice system. Speedy resolution is unfortunately not a characteristic of an adversarial system. Further exploration of ways in which to reform the criminal justice system in order to deal more speedily with offences is beyond the scope of this report but is urgently needed.

74 See *Cape Times* 1 April 2008. Suspects shocked as community out in force against bail.

OBSERVATIONS FROM THE FIELD

The recent introduction of an electronic case management system (eScheduler) heralded a step forward in understanding the burden on the criminal justice system, prosecution rates and the impact of bail. The system ensures that core data relating to cases is maintained and archived in electronic format.

While this data is essential for unpacking the number of cases appearing before the courts, the uptake of bail or the nature of the offence, etc., its promise is severely limited by a number of shortcomings. These shortcomings centre largely on how the data is entered into the existing systems. There appears to be no one language of choice for entering data so that there was a mixture of English and Afrikaans entries. Three other areas proved to be of particular concern:

1. The treatment of multiple accused and multiple offences

A 'case number' is given to each case . However in many cases several accused or several charges were involved, resulting in instances where there were multiple accused, multiple charges and multiple outcomes for a single case. It was generally not possible to track the progress of any one individual's charge from first appearance to finalisation.

2. When cases where the accused absconded are closed

In some areas absconding by the accused resulted in the closure of the case after a 'warrant of arrest' was issued. In other areas (notably Durban) the case seems to have been kept open. While the analysis of closed cases was called for (that way estimates of case length could be derived) if some courts closed cases on the issuance of a warrant while other courts kept them open the analysts end up 'comparing apples with oranges'. In such instances results are no longer comparable.

3. How charges and outcomes are classified

Those entering the data are not forced to classify cases according to a predetermined list resulting in (i) huge variations in the spelling of charges and (ii) inconsistent classification of offences and outcomes. Offences, for example, were classified in terms of the relevant act for example section (11) act … of …' or in terms of a verbal description for example 'murder'. The range of detail provided in describing the outcome was particularly challenging. A typical case resulting in a mandatory prison sentence could, for example, be classified in several ways such as 'finalised', 'guilty', 'three years imprisonment, suspended', or 'sentenced to three years imprisonment partly suspended'.

For the purposes of this study one key omission in the electronic data was the amount of bail set for the accused. The eScheduler system indicates whether or not bail was given. While it is also possible to infer whether or not the bail was paid it is not possible to determine how much bail was demanded. Nor, for that matter, is it possible to determine what the economic and social standing of the accused was when the bail was set.

BIBLIOGRAPHY

Dlamini v S; *Dladla and others v S*; *S v Joubert*; *S v Schietekat* [1999] JOL 4944 (CC).

Du Toit, E. et al. (various dates). *Commentary on the Criminal Procedure Act*.

Ehlers, L. 2008. Frustrated Potential: The Short- and Long-term Impact of Pre-trial Services in South Africa. In *Justice Initiatives: Pre-trial Detention*. Open Society Justice Initiative.

Judicial Inspectorate of Prisons. 2006. *Annual Report of the Office of the Inspecting Judge for the period 1 April 2005 to 31 March 2006*. Cape Town.

Judicial Inspectorate of Prisons. 2007. *Annual report of the Office of the Inspecting Judge for the period 1 April 2006 to 31 March 2007*. Cape Town.

National Prosecuting Authority. October 1999, *National Prosecuting Authority of South Africa Policy Manual*, at B.16–B.21.

National Prosecuting Authority. Undated. *NPA Policy Directives*, at Part 9 paragraph C.2, quoted in National Prosecuting Authority *Awaiting Trial Detainee Guidelines*, http://www.npa.gov.za/UploadedFiles/ATD%20Guidelines%20(3c)%20doc%20final.pdf (accessed 26 June 2007).

Novick v Minister of Law and Order 1993 (1) SACR 194 (W).

Paschke, R.1998. *Accused, their charges and bail decisions in 3 South African Magistrates Courts*. Bureau of Justice Assistance.

S v Du Preez 1991 (2) SACR 372 (Ck).

S v Jonas 1998 (2) SACR 677 (SEC).

Schönteich, M. 2000. *Justice versus Retribution: Attitudes to Punishment in the Eastern Cape.* Monograph No. 45. Institute for Security Studies, Pretoria.

Schönteich, M. 2002. *Making Courts Work: A Review of the IJS Court Centre in Port Elizabeth*. Monograph No. 75. Institute for Security Studies, Pretoria.

Twayie v Minster van Justisie 1986 (2) SA 101 (O).

Van der Berg, J. 2001. *Bail: A practitioner's guide* 2nd edn. Juta, Cape Town.

Verwey & others v S [2006] JOL 17220 (W).

APPENDIX A
METHODOLOGICAL CHALLENGES

The recent introduction of an electronic case management system (eScheduler) heralded a massive leap forward in understanding the burden on the criminal justice system, prosecution rates and the impact of bail. The system ensures that core data relating to cases is consistently maintained and is archived in electronic format. Such data typically maintained for every case is:

- the case number and the number of accused;
- the names and ages of the accused;
- the date of first appearance;
- whether bail was granted on the first appearances;
- the date, result and custody status of he accused at every subsequent appearance; and
- the date of finalisation and outcome of the case.

While this data is essential to unpacking the number of cases appearing before the courts, the uptake of bail or the nature of the offence, etc., its promise is severely limited by a number of shortcomings. These shortcomings centre largely on how the data is entered into the existing systems.[75] Three areas proved to be of particular concern:

- the treatment of multiple accused and multiple offences;
- the when cases where the accused absconded are closed; and
- how charges and outcomes are classified.

Each of these issues are explored very briefly below.

A 'case number' is given to each and every case before the court. As this case number does not change it can be used to track the progress of any case through the court system However in many cases several accused or several charges were involved. This resulted, ultimately, in instances where there were multiple accused, multiple charges and multiple outcomes for a single case. More often than not it was often not possible to track the progress of any one individual's charge from first appearance to finalisation. Consequently the method adopted in this paper was to concentrate exclusively on the first accused and the first charge (as if the case number belonged to that individual).

It appears that in some areas the absconding by the accused resulted in the closure of the case after a 'warrant of arrest' was issued. In other areas (notably Durban) the case seems to have been kept open. While the effect of the issuing of the warrant was the same for the accused this presents a particular problems for the analysis. While the analysis of closed cases was called for (that way estimates of case length could be derived) if some courts closed cases on the issuance of a warrant while other courts kept them open the analysts ends up 'comparing apples with oranges'. In such instances results are no longer comparable. The solution adopted was to, when required, disaggregate Durban courts from those in Johannesburg and Mitchell's Plain.

Inconsistent classification of offences and outcomes proved to be a particularly onerous problem. Offences, for example, were classified in terms of the relevant act for example 'section (11) act ... of ...' or in terms of a verbal description, for example 'murder'. This inconsistent nomenclature, coupled with the wide variety of ways in which the cases were described may have introduced additional errors into the ways in which cases were ultimately codified. For example assault cases could have been identified under any number of acts or described as 'assault', 'assault gbh', 'assault: domestic', 'indecent assault', and so on.

As the existing systems do not force those entering the

75 The Johannesburg and Mitchell's Plain courts used the eScheduler system while the Durban court appears to be using an older system called the Court Process System (CPS). Nevertheless comments made specifically about eScheduler almost always apply in similar measure to the one used in Durban.

data to classify cases according to a pre-determined list, additional error was introduced by the incredible variety with which charges were spelled. 'Culpable homicide' was spelled in literally dozens of different ways. One of the first orders of business was to consistently classify the charges using a consistent nomenclature prior to reducing the number of categories to a more manageable level.

Similar inconsistencies beset the classification of outcomes. The range of detail provided in describing the outcome was particularly challenging. A typical case resulting in a mandatory prison sentence could, for example, be classified in several ways. A typical classification could, in order of detail, be 1) 'finalised', 2) 'guilty', 3) 'three years imprisonment, suspended', or 4) 'sentenced to three years imprisonment partly suspended'.

The first outcome 'finalised' fails to indicate if the accused was guilty, acquitted or if the charge was withdrawn. It obviously fails to specify the sentence in the event that the accused was guilty. The second example 'guilty' fails to indicate what, if any sentence, was imposed and whether or not that sentence involved mandatory imprisonment. While 'finalisation' and 'guilt' can be assumed for the third example, 'sentenced to three years imprisonment suspended' the description fails to indicate if all or only part of the sentence was suspended. Only the fourth example 'three years imprisonment partly suspended' provides sufficient detail to classify the case as 'finalised', 'guilty' and that some prison time was required. This resulted in case outcomes (and to a lesser extent) charges being reported in terms of a hierarchy.

A case would thus be classified as specifically as possible based on a hierarchy of outcomes. This hierarchy was based on the likelihood of mandatory prison time. Thus 'sentenced to three years partly suspended' was further up the hierarchy than 'jail time suspended', which in turn was rated higher than 'imprisonment fully suspended'. All of these outcomes were rated higher up the hierarchy than fines, warnings, etc. The outcomes at the bottom of the hierarchy was 'case withdrawn'/SOR (struck off roll) followed by 'acquittal'.

While the eScheduler ensures that the custody status of the accused (in prison, on bail, etc.) is recorded it does not do so in a way in which mutually exclusive outcomes are prevented. A substantial proportion (20%) of accused for whom 'warrants of arrest' were ultimately issued are shown to be 'in custody' prior to the case being finalised. As warrants are issued when the accused absconds, none (or an insignificant proportion) of those in custody should have had warrants issued against them. This anomaly points to inconsistent updating of the custody status by those entering the data.[76]

For the purposes of this study one key omission in the electronic data was the amount of bail set for the accused. The eScheduler system, for example, indicates whether or not bail was given. While it is also possible to infer whether or not the bail was paid it is not possible to determine how much bail was demanded. Nor, for that matter, is it possible to determine what the economic and social standing of the accused was when the bail was set.

Fortunately the amount of bail set is recorded by the courts and maintained on a separate dataset. While this dataset did systematically link bail amounts to the case number the information could only be made available in hardcopy format. In order for the bail amounts to be linked to the other details available from the eScheduler (like the age of the accused, the charge faced, etc.) the printouts had to be scanned and the scan had to be converted to text using OCR (optical character recognition). The text output then had to be converted to a database format from which the case number recorded could be matched to the corresponding number on eScheduler.

The final matching rate (approximately 30%) was poor and it highlighted the inconsistency with which the case numbers were recorded. The data from Mitchell's Plain was particularly problematic in this regard. That court was one of the first to adopt the eScheduler system and the numbering of cases was the most varied.

Many of the earliest case numbers used in Mitchell's Plain are not unique and prevent the bail amount from being linked to case details. Once case numbering had evolved to meet the current format the matching rate improved

76 This may for example relate to when the information is updated. Payments of bail amounts are only updated after the file has been to court on the next postponement date. There may be neglect to change the custody status field where the main item to be updated is the outcome.

markedly. The typical case number now follows the format of ##/####/YY or AA####/YY. Where # represents a digit, YY the last two digits of the year, and A represents an alphabetical character (usually indicating a court).

However, alternative formats are still evident and it is among these formats that matching rates are particularly low. Fortunately the cases that were matched seem representative of cases in general and are taken to be a random sample of all cases. Part of the mismatching is undoubtedly derived from the fact that case numbers refer to instances where several accused appeared before the court on the same charge. When bail was paid by more than one accused the case number is repeated in the bail data printouts perhaps even with varying bail amounts. As these entries could be matched to only one eScheduler entry (that is, to one case) the matching rate was correspondingly reduced.

APPENDIX B
CLASSIFICATION OF OFFENCES

As mentioned in Appendix A above, the systems do not provide a predetermined list for classifying cases.
The first column below indicates the vast inconsistencies observed in the spelling and classification of the various crimes.

ABDUCTION	ABDUCTION
ABORTION AND STERILIZATION	ABORTION
ABSCONDING	ABSCONDING/ESCAPE
ESCAPE	ABSCONDING/ESCAPE
ESCAPING FROM CUSTODY	ABSCONDING/ESCAPE
CHILD PORNOGRAPHY	ALL OTHER
CIRCUMCISION ACT OF NORTHERN TRANSVAAL ACT 6 OF 1996	ALL OTHER
CONCEALMENT OF BIRTH: GENERAL LAW AMENDMENT ACT 46 OF 1935	ALL OTHER
FAILING TO PAY MAINTENANCE	ALL OTHER
FAILURE TO MAKE PAYMENTS	ALL OTHER
HUMAN TISSUE ACT	ALL OTHER
INCEST	ALL OTHER
OTHER	ALL OTHER
STALKING	ALL OTHER
TAMPERING OF MOTOR VEHICLE	ALL OTHER
ALLOW A DOG TO CAUSE INJURY TO ANOTHER PERSON	ANIMAL CARE
ANIMAL ACT	ANIMAL CARE
ANIMAL MATTERS ACT	ANIMAL CARE
ANIMAL PROTECTION ACT	ANIMAL CARE
ANIMALS – CAUSING UNNESSARY [sic] SUFFERING	ANIMAL CARE
ANIMALS: ALLOW ANIMAL TO INJURE ANOTHER PERSON DANGEROUS ANIMALS	ANIMAL CARE
ANIMALS: ANIMAL ABUSE/MALTREATMENT	ANIMAL CARE
CRUELTY TO ANIMALS	ANIMAL CARE
IMPORT ANY FISH OR ANY PART OR PRODUCT THEREOF WITHOUT A PERMIT	ANIMAL CARE
KEEPING A FEROCIOUS DOG	ANIMAL CARE
SELLING DOGFOOD [sic] WITHOUT REGISTERING	ANIMAL CARE
UNLAWFULLY ALLOWING ANIMAL TO CAUSE INJURY TO ANOTHER PERSON	ANIMAL CARE
ILLEGAL POSSESSION OF AMMUNITION	ARMS OFFENCE
POSSESSION OF UNLICENSED FIREARM	ARMS OFFENCE
LOSS OF FIREARM	ARMS OFFENCE
DISCHARGED FIREARM IN PUBLIC	ARMS OFFENCE
ARMS & AMMUNITION: OTHER OFFENCES ITO ACT 60 OF 2000	ARMS OFFENCE
BOMB THREAT	ARMS OFFENCE
FAILURE TO LOCK AWAY FIREARM	ARMS OFFENCE

POINTING FIREARM	ARMS OFFENCE
SECTION 36	ARMS OFFENCE
ASSAULT	ASSAULT
ASSAULT: ASSAULT COMMON	ASSAULT
DOMESTIC VIOLENCE	ASSAULT
INDECENT ASSAULT	ASSAULT
ASSAULT GHB	ASSAULT GBH
ASSAULT: INTENT TO DO GRIEVOUS BODILY HARM	ASSAULT GBH
ACCEPTING A BENEFIT	BRIBERY / CORRUPTON [sic]
ACT 12/04 CORRUPTION	BRIBERY / CORRUPTON [sic]
CORRUPTION	BRIBERY / CORRUPTON [sic]
RACKETEERING	BRIBERY / CORRUPTON [sic]
CHILD: ABANDONMENT	CHILD CARE
CHILD: FAIL TO GRANT OTHER PARENT ACCESS TO CHILDREN GENERAL LAW FURTHER AMENDMENT ACT 93 OF 1962	CHILD CARE
CHILD: ILL-TREATMENT/NEGLECT	CHILD CARE
ILL TREATMENT OF A CHILD	CHILD CARE
CONPIRACY [sic] TO COMMIT A MURDER	CONSPIRACY
CONSPIRACY/INCITEMENT/SOLICITING/INDUCEMENT TO COMMIT ANY OFFENCE	CONSPIRACY
CONSRIRACY [sic] TO COMMIT CRIMES AND OR OFFENCES	CONSPIRACY
CONTEMPT OF COURT	CONTEMPT OF COURT
CONTEMPT OF COURT: COMMON LAW	CONTEMPT OF COURT
CONTRAVENING OF A PROTECTION ORDER	CONTEMPT OF COURT
PERJURY: CRIMINAL PROCEDURE ACT 56 OF 1955	CONTEMPT OF COURT
STATUTORY PERJURY	CONTEMPT OF COURT
COPYRIGHT OFFENCES: COPYRIGHT ACT 98 OF 1978	CONTRABRAND [sic]
COUNTERFEIT GOODS: POSSESSION OF	CONTRABRAND [sic]
COUNTERFEIT GOODS: SELLING OF	CONTRABRAND [sic]
COUNTERFEIT MONEY: TENDERING OF	CONTRABRAND [sic]
DISTRIBUTING FILMS	CONTRABRAND [sic]
CRIMEN INJURIA	CRIMEN INJURIA
CULPABLE HOMICIDE	CULPABLE HOMICIDE
DEALING IN COCAINE	DRUG
DEALING IN DAGGA	DRUG
DRUGS: DEALING IN DRUGS (COCAINE) DANGEROUS/UNDESIRABLE DEPENDENCE PRODUCING SECTION 5(B) DRUGS AND DRUG TRAFFICKING ACT 140 OF 1992:	DRUG
POSS OF MANDEAX [sic]	DRUG
POSSESION [sic] OF HEROINE [sic]	DRUG
POSSESSION OF COCAINE	DRUG
POSSESSION OF DAGGA	DRUG
POSSESSION OF DRUGS	DRUG
POSSESSION OF ECSTACY [sic]	DRUG
POSSESSION OF TIK	DRUG
DRIVING UNDER THE INFLUENCE OF INTOXICATION LIQUOR AND BLOOD ALCOHOL CONCENTRATION MORE THAN 0.05 PER 100ML	DUI
DRUNKEN DRIVING	DUI

FORGERY	FRAUD/FORGERY
FORGERY & UTTERING	FRAUD/FORGERY
FRAUD	FRAUD/FORGERY
HOUSE BREAKING: INTENT TO STEAL AND THEFT	HOUSEBREAKING
HOUSEBREAKING	HOUSEBREAKING
HOUSEBREAKING WITH INTENT TO STEAL AND THEFT	HOUSEBREAKING
FAILING TO FURNISH NAME AND ADDRESS	IDENTITY
FAILING TO NOTIFY CHANGED CIRCUMSTANCES	IDENTITY
PRETENDING TO BE A SAP MEMBER	IDENTITY
SUPPLYING FALSE INFORMATION	IDENTITY
SUPPLYING FALSE INFORMATION FOR LICENCE	IDENTITY
ALIEN: ILLEGAL ALIEN	IMMIGRATION
C/S 46 IMMIGRATION ACT	IMMIGRATION
EMPLOYED ILLEGAL FOREIGNER	IMMIGRATION
ENTERING THE REP WITHOUT A VALID PERMIT	IMMIGRATION
REFUGEES ACTS	IMMIGRATION
INTIMIDATION	INTIMDATION [sic]
KIDNAPPING	KIDNAPPING
MALICIOUS DAMAGE TO PROPERTY	MALICIOUS DAMAGE TO PROPERTY
MALICIOUS INJURY TO PROPERY [sic]	MALICIOUS DAMAGE TO PROPERTY
MURDER	MURDER
MURDER: ATTEMPTED MURDER	MURDER
DEFEATING THE ENDS OF JUSTICE	OBSTRUCTING JUSTICE/POLICE
OBSRUCTING [sic] POLICE DUTIES	OBSTRUCTING JUSTICE/POLICE
OBSTRUCTING THE COURSE OF JUSTICE	OBSTRUCTING JUSTICE/POLICE
RESISTING ARREST	OBTRUCTING [sic] JUSTICE/POLICE
EXCEEDING BAG LIMIT	POACHING
FISHING WITHOUT PERMITION [sic]	POACHING
MARINE LIVING RESOURCES: SEA AND FISHERIES OFFENCES	POACHING
POSS OF SHAD	POACHING
POSSESSION OF MUDPRAWNS WITHOUT A PERMIT	POACHING
UNATHORISED [sic] FISHING	POACHING
POSS OF SSUPECTED [sic] STOLEN GOODS	POSSESSION
POSS OF STOLEN M/V	POSSESSION
POSSESSION OF CAR BREAKING /HOUSEBREAKING IMPLEMENTS	POSSESSION
POSSESSION OF SUSPECTED STOLEN PROPERTY	POSSESSION
POSSESSION/RECEIVING STOLEN PROPERTY: SECTION 36/37 GENERAL LAW AMENDMENT ACT 62 OF 1955	POSSESSION
RECEIVING STOLEN PROPERTY	POSSESSION
SEC 36	POSSESSION
UNLAWFUL POSSESSION OF RADIO APPARATUS	POSSESSION
DISRUPTIVE BEHAVIOUR	PUBLIC ORDER
ILLEGAL GATHERING	PUBLIC ORDER
INJURY TO TELEPHONE INSTRUMENTS	PUBLIC ORDER
LIOTERING [sic]	PUBLIC ORDER
LOITERING/BEGGING	PUBLIC ORDER

NUISANCE IN PUBLIC	PUBLIC ORDER
REMAINING IN THE STREET AFTER BEING WARNED TO LEAVE	PUBLIC ORDER
RAPE	RAPE
RAPE: ATTEMPTED RAPE	RAPE
RAPE: VICTIM 16 YEARS OR OLDER	RAPE
ATTEMPTED ROBBERY	ROBBERY
ROBBERY	ROBBERY
ROBBERY WITH AGGRAVATING CIRCUMSTANCES	ROBBERY
ROBBERY: ATTEMPTED ROBBERY	ROBBERY
ARMED ROBBERY	ROBBERY AGGRAVATED
CUSTOMS AND EXCISE ACT: OTHER	SARS
CUSTOMS AND EXCISE ACT: SERIOUS OFFENCES - SEC 80	SARS
EXCHANGE CONTROL ACT	SARS
FAILING TO PAY TAX	SARS
FALURE [sic] TO SUBMIT INCOME TAX RETURNS	SARS
INCME [sic] TAX ACT	SARS
INCOME TAX RELATED OFFENCES	SARS
SUBMITING [sic] FAKE TAX SATEMENTS [sic]	SARS
TAX EVASION	SARS
TAX-VAT EMPLOYEES	SARS
VALUE ADDED TAX	SARS
SHOPLIFTTING [sic]	SHOPLIFTING
ATTEMPTED THEFT	THEFT
BRANCH OFF / DIVERT ELECTRICAL CURRENT	THEFT
BRANCH OFF / DIVERT ELECTRICAL CURRENT	THEFT
THEFT	THEFT
THEFT BY FALSE PRETENCE	THEFT
THEFT OF MOTORVEHICLE [sic]	THEFT
THEFT OUT OF MOTORVEHICLE [sic]	THEFT
THEFT: ATTEMPTED THEFT OF MOTOR VEHICLE	THEFT
THEFT: OF ARMS OR AMMUNITION	THEFT
THEFT: OF MOTOR VEHICLE	THEFT
THEFT: OUT OF MOTOR VEHICLE	THEFT
DEAL IN SECOND HAND GOOD WITHOUT A LICENCE	TRADE
DEALING IN LIQUOR	TRADE
DEALING IN UNWROUGHT PRECIOUS METALS	TRADE
DEALING IN DIAMONDS	TRADE
DEALING LIQUOR	TRADE
DEALNG [sic] IN LIQUOR	TRADE
DELAING [sic] IN LIQUOR	TRADE
DELAING [sic] IN LIQUOR	TRADE
DIAMONDS: DEAL IN ROUGH AND UNCUT DIAMONDS	TRADE
FAILING TO RENEW PERMIT	TRADE
METALS ACT	TRADE
NO BUSINESS LICENCE	TRADE

POSSESSION OF COUNTERFEIT DVD	TRADE
SELLING LIQUOR OUTSIDE STIPULATED HOURS	TRADE
TENDERING OF COUNTERFEIT MONEY	TRADE
TRADE MARK [sic] ACT	TRADE
TRADING WITHOUT A LICENCE	TRADE
CROSSING RAILWAY LINE WHERE THERE WAS NO LEVEL CROSSING	TRAFFIC
FACING ONCOMING TRAFFIC	TRAFFIC
FAIL TO WEAR SEATBELT [sic]	TRAFFIC
FAILING TO PERFORM DUTIES AFTER ACC	TRAFFIC
FAILURE TO PRODUCE PD PERMIT	TRAFFIC
FAILURE TO WEAR SEATBELT [sic]	TRAFFIC
INCONSIDERATE DRIVING	TRAFFIC
NATIONAL LAND TRANSPORT TRANSITION ACT	TRAFFIC
NO DRIVERS LICENCE	TRAFFIC
OPERATE A ROAD BASED PUBLIC TRANS SERVICE WITHOUT A PERMITT [sic]	TRAFFIC
RECKLESS/NEGLIGENT DRIVING	TRAFFIC
SMOOTH TYRES	TRAFFIC
TRAFFIC: DRIVING A M/V WITHOUT A VALID LICENSE	TRAFFIC
TRAFFIC: EXCEED SPEED LIMIT	TRAFFIC
UNLICENCED [sic] MOTOR VEHICLE	TRAFFIC
TRESSPASSING [sic]	TRESPASSING
UNATHORISED [sic] BORROWING	UNAUTHORISED USE
USING A MOTOR VEHICLE WITHOUT CONSENT	UNAUTHORISED USE

APPENDIX C
SCHEDULE 5

(Sections 58 and 60 (11) and (11A) and Schedule 6)

- Treason.
- Murder.
- Attempted murder involving the infliction of grievous bodily harm.
- Rape.
- Any offence referred to in section 13 (f) of the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992), if it is alleged that—
  (a) the value of the dependence-producing substance in question is more than R50 000,00; or
  (b) the value of the dependence-producing substance in question is more than R10 000,00 and that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or
  (c) the offence was committed by any law enforcement officer.
- Any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament, or the possession of an automatic or semi-automatic firearm, explosives or armament.
- Any offence in contravention of section 36 of the Arms and Ammunition Act, 1969 (Act No. 75 of 1969), on account of being in possession of more than 1 000 rounds of ammunition intended for firing in an arm contemplated in section 39 (2) (a) (i) of that Act.
- Any offence relating to exchange control, extortion, fraud, forgery, uttering, theft, or any offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004—
  (a) involving amounts of more than R500 000,00; or
  (b) involving amounts of more than R100 000,00, if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or
  (c) if it is alleged that the offence was committed by any law enforcement officer—
    (i) involving amounts of more than R10 000,00; or
    (ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.
- Indecent assault on a child under the age of 16 years.
- An offence referred to in Schedule 1—
  (a) and the accused has previously been convicted of an offence referred to in Schedule 1; or
  (b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 1.
- The offences referred to in section 4 (2) or (3), 13 or 14 (in so far as it relates to the aforementioned sections) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004.

APPENDIX D
SCHEDULE 6

(Sections 50 (6), 58 and 60 (11) and (11A))

- **Murder**, when—
  - (a) it was planned or premeditated;
  - (b) the victim was—
    - (i) a law enforcement officer performing his or her functions as such, whether on duty or not, or a law enforcement officer who was killed by virtue of his or her holding such a position; or
    - (ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1;
  - (c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit one of the following offences:
    - (i) rape; or
    - (ii) robbery with aggravating circumstances; or
  - (d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.
- **Rape**—
  - (a) when committed—
    - (i) in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice;
    - (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
    - (iii) by a person who is charged with having committed two or more offences of rape; or
    - (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;
  - (b) where the victim—
    - (i) is a girl under the age of 16 years;
    - (ii) is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable; or
    - (iii) is a mentally ill woman as contemplated in section 1 of the Mental Health Act, 1973 (Act No. 18 of 1973);
  - (c) involving the infliction of grievous bodily harm.
- **Robbery**, involving—
  - (a) the use by the accused or any co-perpetrators or participants of a firearm;
  - (b) the infliction of grievous bodily harm by the accused or any of the co-perpetrators or participants; or
  - (c) the taking of a motor vehicle.
- Indecent assault on a child under the age of 16 years, involving the infliction of grievous bodily harm.
- **An offence referred to in Schedule 5**—
  - (a) and the accused has previously been convicted of an offence referred to in Schedule 5 or this Schedule; or
  - (b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 5 or this Schedule.
- The offences referred to in section 2, 3 (2) (a), 4 (1), 5, 6, 7, 8, 9, 10 or 14 (in so far as it relates to the aforementioned sections) of the **Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004**, section 2 (1) and (2) of the Civil Aviation Offences Act, 1972 (Act No. 10 of 1972), section 26 (1) (j) of the Non-Proliferation of Weapons of Mass Destruction Act, 1993 (Act No. 87 of 1993) and section 56 (1) (h) of the Nuclear Energy Act, 1999 (Act No. 46 of 1999).

APPENDIX E
SECTION 50

50. Procedure after arrest.—

(1) (a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.

(b) A person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.

(c) Subject to paragraph (d), if such an arrested person is not released by reason that

(i) no charge is to be brought against him or her; or

(ii) bail is not granted to him or her in terms of section 59 or 59A,

he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.

(d) If the period of 48 hours expires—

(i) outside ordinary court hours or on a day which is not an ordinary court day, the accused shall be brought before a lower court not later than the end of the first court day;

(ii) or will expire at, or if the time at which such period is deemed to expire under subparagraph (i) or (iii) is or will be, a time when the arrested person cannot, because of his or her physical illness or other physical condition, be brought before a lower court, the court before which he or she would, but for the illness or other condition, have been brought, may on the application of the prosecutor, which, if not made before the expiration of the period of 48 hours, may be made at any time before, or on, the next succeeding court day, and in which the circumstances relating to the illness or other condition are set out, supported by a certificate of a medical practitioner, authorise that the arrested person be detained at a place specified by the court and for such period as the court may deem necessary so that he or she may recuperate and be brought before the court: Provided that the court may, on an application as aforesaid, authorise that the arrested person be further detained at a place specified by the court and for such period as the court may deem necessary; or

(iii) at a time when the arrested person is outside the area of jurisdiction of the lower court to which he or she is being brought for the purposes of further detention and he or she is at such time in transit from a police station or other place of detention to such court, the said period shall be deemed to expire at the end of the court day next succeeding the day on which such arrested person is brought within the area of jurisdiction of such court.

(2) For purposes of this section—

(a) 'a court day' means a day on which the court in question normally sits as a court and 'ordinary court day' has a corresponding meaning; and

(b) 'ordinary court hours' means the hours from 9:00 until 16:00 on a court day.

(3) Subject to the provisions of subsection (6), nothing in this section shall be construed as modifying the provisions of this Act or any other law whereby a person under detention may be released on bail or on warning or on a written notice to appear in court.

(4) The parent or guardian of a person under the age of eighteen years shall, if it is known that such parent or guardian can readily be reached or can be traced without undue delay, be notified forthwith of the arrest of such person by the police official charged with the investigation of the

(5) The probation officer in whose area of jurisdiction the arrest of a person under the age of eighteen years has taken place, shall as soon as possible thereafter be notified thereof by the police official charged with the investigation of the case or, if there is no such probation officer or if he is not available and there is a correctional official who is doing duty in the area concerned and who is available, the latter shall as soon as possible thereafter be notified thereof.

(6) (a) At his or her first appearance in court a person contemplated in subsection (1) (a) who—
- (i) was arrested for allegedly committing an offence shall, subject to this subsection and section 60—
  - (aa) be informed by the court of the reason for his or her further detention; or
  - (bb) be charged and be entitled to apply to be released on bail,

  and if the accused is not so charged or informed of the reason for his or her further detention, he or she shall be released; or
- (ii) was not arrested in respect of an offence, shall be entitled to adjudication upon the cause for his or her arrest.

(b) An arrested person contemplated in paragraph (a) (i) is not entitled to be brought to court outside ordinary court hours.

(c) The bail application of a person who is charged with an offence referred to in Schedule 6 must be considered by a magistrate's court: Provided that the Director of Public Prosecutions concerned, or a prosecutor authorised thereto in writing by him or her may, if he or she deems it expedient or necessary for the administration of justice in a particular case, direct in writing that the application must be considered by a regional court.

(d) The lower court before which a person is brought in terms of this subsection, may postpone any bail proceedings or bail application to any date or court, for a period not exceeding seven days at a time, on the terms which the court may deem proper and which are not inconsistent with any provision of this Act, if—
- (i) the court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application;
- (ii) the prosecutor informs the court that the matter has been or is going to be referred to an attorney-general for the issuing of a written confirmation referred to in section 60 (11A);
- (iii) (deleted)
- (iv) it appears to the court that it is necessary to provide the State with a reasonable opportunity to
  - (aa) procure material evidence that may be lost if bail is granted; or
  - (bb) perform the functions referred to in section 37; or
- (v) it appears to the court that it is necessary in the interests of justice to do so.

APPENDIX F
SECTION 60

60. Bail application of accused in court.—

(1) (a) An accused who is in custody in respect of an offence shall, subject to the provisions of section 50 (6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.

(b) Subject to the provisions of section 50 (6) (c), the court referring an accused to any other court for trial or sentencing retains jurisdiction relating to the powers, functions and duties in respect of bail in terms of this Act until the accused appears in such other court for the first time.

(c) If the question of the possible release of the accused on bail is not raised by the accused or the prosecutor, the court shall ascertain from the accused whether he or she wishes that question to be considered by the court.

(2) In bail proceedings the court—

(a) may postpone any such proceedings as contemplated in section 50 (6);

(b) may, in respect of matters that are not in dispute between the accused and the prosecutor, acquire in an informal manner the information that is needed for its decision or order regarding bail;

(c) may, in respect of matters that are in dispute between the accused and the prosecutor, require of the prosecutor or the accused, as the case may be, that evidence be adduced;

(d) shall, where the prosecutor does not oppose bail in respect of matters referred to in subsection (11) (a) and (b), require of the prosecutor to place on record the reasons for not opposing the bail application.

(2A) The court must, before reaching a decision on the bail application, take into consideration any pre-trial services report regarding the desirability of releasing an accused on bail, if such a report is available.

(3) If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court.

(4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence;

(b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or

(c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

(d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;

(e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security;

(5) In considering whether the ground in subsection (4) (a) has been established, the court may, where applicable, take into account the following factors, namely—

(a) the degree of violence towards others implicit in the charge against the accused;
(b) any threat of violence which the accused may have made to any person;
(c) any resentment the accused is alleged to harbour against any person;
(d) any disposition to violence on the part of the accused, as is evident from his or her past conduct;
(e) any disposition of the accused to commit offences referred to in Schedule l, as is evident from his or her past conduct;
(f) the prevalence of a particular type of offence;
(g) any evidence that the accused previously committed an offence referred to in Schedule l while released on bail; or
(h) any other factor which in the opinion of the court should be taken into account.

(6) In considering whether the ground in subsection (4) (b) has been established, the court may, where applicable, take into account the following factors, namely—
(a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;
(b) the assets held by the accused and where such assets are situated;
(c) the means, and travel documents held by the accused, which may enable him or her to leave the country;
(d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;
(e) the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;
(f) the nature and the gravity of the charge on which the accused is to be tried;
(g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;
(h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;
(i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or
(j) any other factor which in the opinion of the court should be taken into account.

(7) In considering whether the ground in subsection (4) (c) has been established, the court may, where applicable, take into account the following factors, namely—
(a) the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;
(b) whether the witnesses have already made statements and agreed to testify;
(c) whether the investigation against the accused has already been completed;
(d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;
(e) how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;
(f) whether the accused has access to evidentiary material which is to be presented at his or her trial;
(g) the ease with which evidentiary material could be concealed or destroyed; or
(h) any other factor which in the opinion of the court should be taken into account.

(8) In considering whether the ground in subsection (4) (d) has been established, the court may, where applicable, take into account the following factors, namely—
(a) the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings;
(b) whether the accused is in custody on another charge or whether the accused is on parole;
(c) any previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any bail conditions; or

(d) any other factor which in the opinion of the court should be taken into account.

(8A) In considering whether the ground in subsection (4) (e) has been established, the court may, where applicable, take into account the following factors, namely—
- (a) whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;
- (b) whether the shock or outrage of the community might lead to public disorder if the accused is released;
- (c) whether the safety of the accused might be jeopardized by his or her release;
- (d) whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused;
- (e) whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system; or
- (f) any other factor which in the opinion of the court should be taken into account.

(9) In considering the question in subsection (4) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely—
- (a) the period for which the accused has already been in custody since his or her arrest;
- (b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;
- (c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;
- (d) any financial loss which the accused may suffer owing to his or her detention;
- (e) any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
- (f) the state of health of the accused; or
- (g) any other factor which in the opinion of the court should be taken into account.

(10) Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty, contemplated in subsection (9), to weigh up the personal interests of the accused against the interests of justice.

(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to—
- (a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;
- (b) in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.

(11A)
- (a) If the attorney-general intends charging any person with an offence referred to in Schedule 5 or 6 the attorney-general may, irrespective of what charge is noted on the charge sheet, at any time before such person pleads to the charge, issue a written confirmation to the effect that he or she intends to charge the accused with an offence referred to in Schedule 5 or 6.
- (b) The written confirmation shall be handed in at the court in question by the prosecutor as soon as possible after the issuing thereof and forms part of the record of that court.
- (c) Whenever the question arises in a bail application or during bail proceedings whether any person is charged or is to be charged with an offence referred to in Schedule 5 or 6, a written confirmation issued by an attorney-general under paragraph (a) shall, upon its mere production at such application or proceedings, be prima facie proof of the charge to be brought against that person.

(11B)
- (a) In bail proceedings the accused, or his or her

legal adviser, is compelled to inform the court whether—
   (i) the accused has previously been convicted of any offence; and
   (ii) there are any charges pending against him or her and whether he or she has been released on bail in respect of those charges.
(b) Where the legal adviser of an accused on behalf of the accused submits the information contemplated in paragraph (a), whether in writing or orally, the accused shall be required by the court to declare whether he or she confirms such information or not.
(c) The record of the bail proceedings, excluding the information in paragraph (a), shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings.
(d) An accused who wilfully—
   (i) fails or refuses to comply with the provisions of paragraph (a); or
   (ii) furnishes the court with false information required in terms of paragraph (a),

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

(12) The court may make the release of an accused on bail subject to conditions which, in the court's opinion, are in the interests of justice.

(13) The court releasing an accused on bail in terms of this section, may order that the accused—
(a) deposit with the clerk of the court or the registrar of the court, as the case may be, or with a correctional official at the prison where the accused is in custody or with a police official at the place where the accused is in custody, the sum of money determined by the court in question; or
(b) shall furnish a guarantee, with or without sureties, that he or she will pay and forfeit to the State the amount that has been set as bail, or that has been increased or reduced in terms of section 63 (1), in circumstances in which the amount would, had it been deposited, have been forfeited to the State.

(14) Notwithstanding anything to the contrary contained in any law, no accused shall, for the purposes of bail proceedings, have access to any information, record or document relating to the offence in question, which is contained in, or forms part of, a police docket, including any information, record or document which is held by any police official charged with the investigation in question, unless the prosecutor otherwise directs: Provided that this subsection shall not be construed as denying an accused access to any information, record or document to which he or she may be entitled for purposes of his or her trial.