

# WITS **JUSTICE** PROJECT

**The Wits Justice Project**  
**Submission to the Parliamentary Portfolio Committee on Justice and**  
**Correctional Services**

**On the administration of parole and correctional supervision**



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**WITS**  
Journalism

## **Case Studies on Restorative Justice and Wrongful Convictions in Parole**

### **Background**

The WJP is grateful for the opportunity to make this submission to the Parliamentary Portfolio Committee on Justice and Correctional Services on the administration of parole and correctional supervision.

Wits Justice Project (WJP) is a project of the Journalism Department in the University of the Witwatersrand, Johannesburg (WITS). The WJP investigates miscarriages of justice and raises awareness of issues within the criminal justice system with the aim of advocating for change, strengthening procedures and building on reform efforts. This is achieved through investigative journalism, research, advocacy and education.

We support inmates on various matters - including procedure, case file reviews and referrals to lawyers.

The WJP was inspired by the Medill Justice Project in the USA which focused on the exoneration of wrongfully convicted persons. This resulted in wrongful convictions becoming a major theme in the work of the WJP.

### **Wrongful Convictions in SA**

As far as the WJP is aware, neither the Department of Justice and Correctional Services nor the National Prosecuting Authority maintain records of the number of people who have been wrongfully convicted.

The Wits Justice Project has an anecdotal idea of the scope of the problem informed by letters received from inmates, correctional officers, the family and friends of sentenced offenders. The actual number of people in South Africa who should not be behind bars, is unknown. A causal factor is that there is no effective remedy for people who have exhausted all their legal options, yet still maintain their innocence. There is also no existing independent case review mechanism or body in place to review cases of wrongful convictions.

In SA, if you have exhausted all available legal remedies, the only avenue for redress is Section 327 of the Criminal Procedure Act (CPA). It provides for a Presidential Pardon, which enables an applicant to petition the Minister of Justice, who can then refer the case to a court if he or she deems there are merits to the case. The decision of the court is then sent to the President who has the final power to award a pardon. The Department of Justice has confirmed to the WJP that they have no records of awarded or rejected Presidential Pardons, despite admitting to receiving pardon applications. The WJP knows of several cases of people who have petitioned the Minister of Justice, but were never updated on whether the petition was received, and/or forwarded to the Minister. In effect, this means section 327 CPA is a dead letter and people who uphold their innocence have no legal recourse under South African law, after exhausting all their legal remedies.

As long as no records of wrongful convictions exist, there is no urgency to address the matter. The absence of these records may adversely affect the parole process of people who claim they are wrongfully convicted, as we will outline below.

### **Restorative Justice in the case of wrongfully convicted individuals**

Six months before the completion of a minimum sentence, the prison's Case Management Committee is obliged to initiate an automatic process on the inmate's behalf. The committee should submit a profile to the Correctional Centre's Parole Board which contains detailed reports on inter alia the inmate's educational

and vocational achievements, psycho-social reports and sentencing remarks. Parole is not automatic and is dependent on a number of factors. There are programmes within correctional services which an incarcerated individual undertakes to generally improve their chances of being granted parole. One such programme is restorative justice. This programme is aimed at encouraging offenders to accept responsibility for their actions, to realise the harm their actions have caused their victims and their communities, and also provides them with an opportunity to apologise for their transgressions.

However, this restorative justice programme may be problematic in cases where an incarcerated individual maintains their innocence. In cases where an inmate refuses to admit guilt, it becomes complicated to partake in restorative justice initiatives as they encourage people to admit to, or to apologise for a crime they claim not to have committed.

It appears problematic that inmates, who continue to maintain their innocence when they are eligible for parole, are punished or penalised because they will not show remorse.

The parole system is highly problematic for an inmate who alleges his/her innocence. Although DCS maintains that showing remorse is not a mandatory part of the process, anecdotal evidence suggests that in practice this may not be the case. Additionally, a DCS parole document<sup>1</sup> outlines guidelines for the parole process, which reiterate the need show remorse or apologise to the victims. Inmates who refuse to show remorse, or take responsibility for their crime on the basis that they are innocent may be discriminated against in the parole process. .

## **Case Studies**

### **Case Study 1: Sabelo Ngani**

Sabelo Ngani spent nearly eleven years behind bars for the gang-rape of 24-year old Mpho Suping – a crime he still claims he did not commit. Suping testified in an open court that Ngani was the first of six men to rape her. His three co-accused were all arrested at the crime scene in various stages of undress - one of whom was forcibly removed from on top of Suping. They testified that Ngani was not present. What's more, DNA tests were inconclusive. No semen was found on three vaginal swabs taken from Suping, nor was any DNA evidence found matching Ngani's blood or pubic hair. Nonetheless, in 2007 Ngani was sentenced to eighteen years in prison.

Nine years after being sentenced and due for parole, Ngani still refused to accept responsibility for Suping's rape, or show remorse. The conundrum, however, is that in terms of the Department of Correctional Services' (DCS) Restorative Justice Programme which all long-term offenders are expected to complete, remorse is almost a quid pro quo for parole and release.

Though Ngani fulfilled all the Parole Board's requirements – including completing and repeating three anger management courses, sex-offender courses and life-skills - he was refused parole three times. Ngani claims that his refusal to show remorse or take responsibility for the crime meant he was forced to redo anger management programmes three times as well as sex offender programmes. He was accused of being

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<sup>1</sup> <http://www.dcs.gov.za/docs/landing/Parole%20public%20pamphlet%202012%20Eng.pdf>

aggressive and told that his denial meant that the rehabilitation programmes he completed had been ineffective.

Ngani was finally released after lodging a notice of motion in the South Gauteng High Court compelling the Board to comply with an earlier court order granting him parole.

Now, despite his new-found freedom Ngani can think about nothing except appealing his case, establishing his innocence and having his conviction and sentence set aside.

### **Case Study 2: Fusi Mofokeng and Tshokolo Mokoena**

Fusi Mofokeng and Tshokolo Mokoena were arrested towards the end of apartheid for killing a policeman on the basis of false statements. The actual killers went to the TRC in 1998 and were awarded amnesty and released while Fusi and Tshokolo spent 19 years in jail and only obtained parole in 2011. They still have criminal records and are subject to parole conditions.

### **Case Study 3: Thuba Sithole**

Thuba Sithole was walking home on Elise Road in Randburg, Johannesburg from his job at Pick 'n Pay on 31 August 2007, when a police van pulled up and three officers arrested him and another man he had never met. Around the corner, an attempted car hijack had just taken place. Two of the three women who had just been robbed were in the car with the police and they claimed Sithole was one of the three men who had robbed the women at gunpoint as they were leaving the house. He was sentenced to 15 years in prison based solely on two inconsistent witness statements.

Sithole maintains that he is innocent. The Wits Justice Project and Sithole's pro bono lawyers at Norton Rose have analysed the available evidence and concluded that there is no convincing evidence against him. Despite this, he has to undergo restorative justice procedures which require him to show remorse, in order to qualify for parole in six months' time. His refusal to admit guilt is a stumbling block in his rehabilitation programme. Sithole will have to spend nine more years in prison if he is not granted parole. His daughter will be 17 when he is released; she was a one-year-old when he was arrested. He is willing to sacrifice his imminent freedom for the principle of clearing his name and that principled stance is held against him. It seems unfair that his refusal to admit guilt has this punitive effect, as Sithole Thuba has an otherwise spotless disciplinary record in prison.

### **Conclusion**

Though neither SA's National Prosecuting Authority nor the Department of Justice and Correctional Services maintain records of wrongful convictions, anecdotal evidence in the form of letters from inmates received by the WJP and reports from Correctional officials suggest that cases like Ngani's are just the tip of the iceberg.

As long as there is no effective remedy for people who have served (a whole or part of their) sentence, yet still maintain their innocence, parole conditions are likely to be disproportionately punitive. Having to report regularly to the police station or being obliged to wear electronic monitoring devices is stigmatising and traumatising for these parolees. We realise this is not a problem that can be solved by a Parole Board, but it points to a broader problem that urgently needs resolution. There should be legal avenues available for people who claim to have been wrongfully convicted yet still uphold their innocence. They should have the opportunity to present new exonerating evidence to an independent court for review.

Respectfully Submitted,

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