

MARRIAGE OF CONVENIENCE (EXPERT PERSPECTIVES ON GENERAL DETECTIVE-PUBLIC PROSECUTOR RELATIONS IN SOUTH AFRICA)

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Abstract: This paper examines perceptions of the general detective and public prosecutor relations held by presiding officers, public prosecutors and investigating officers using the findings from focus group interviews and questionnaire data from a recent study conducted at Tshwane University of Technology (TUT). The plethora of literature on criminal justice system implicitly assumes that individuals, to a certain degree the public, the police, presiding officers as well as public prosecutors are well-informed about crime detection, arrest and conviction rates (as well as sentencing policies) and, therefore, respond immediately to any changes and challenges in the criminal justice system.

Although widely used, perception based studies in a qualitative research design have proved to be a difficult tool to use for directing policy and strategic interventions, more so regarding the performance of the police and the courts. Despite the obvious practical difficulties of 'direct measurement', this paper attempts to provide a strategic analysis in an attempt to supply knowledge to bridge the perceived gap between the investigating officers and public prosecutors relations, with the holistic view of improving public perceptions on the performance of the criminal justice system in South Africa. The paper concludes with some operational measures to improve general detective and prosecutor relations in South Africa.

Keywords: Case dockets, Criminal Justice System, Detective, Focus Group, Interviews

INTRODUCTION

This paper focus on the relationship between a general detective and prosecutor's office in South Africa. It deliberately excludes the category of specialized detectives. Since in the South African situation, the public have contact with this large group of police officers first, and cases may or may not be referred to specialized units once handled by general detectives. For simplicity, the term "investigating officer" or "detective" will be used interchangeably when referring to the general detectives working at local police stations in the nine Provinces of South Africa. It is argued that courts are institutions tasked to hear cases impartially, but that, as components of the criminal justice system, they are also expected to contribute to the (somewhat uncertain) aims of that system with regard to the combating of crime. It is argued that cases coming before the lower courts seemed petty, lack quality investigation and most of detectives are found wanting when coming to investigation skills and report writing (Altbeker, 2003:14).

Against this background, it is therefore essential that values such as efficiency, cooperation, effectiveness, and fairness amongst others should be the cornerstone for the administration of criminal justice in South Africa. DiIulio, Wilson, Moore, Petersilia, Alpert, Cole and Logan (1993:v) define efficiency as

a means to economically applying available resources to accomplish statutory goals as well as to improve public safety. DiIulio *et al.*, (1993:v) are of the view that effectiveness refers to carrying out justice system activities with proper regard for equity, proportionality, constitutional protections afforded defendants and convicted offenders, and public safety.

Although the criminal justice system has undergone substantive transformation and reorganisation in the post-apartheid South Africa, there is a general view that much work is still needed in the areas of crime prevention, reporting, detection and processing of cases (Shaw, 1996; Schönteich, 1999; Bruce, 2000; 2003; Stone, 2006; Montesh, 2007). Against this background, this paper takes seriously the challenge of creating knowledge on crafting healthy and efficient working relations between general detectives and public prosecutors in South Africa. After a brief review of the nature of weak links within the criminal justice system, especially on the general detective-public prosecutor relations, the paper then considers how some specific initiatives might be taken forward to improve.

INGREDIENTS FOR CONFLICT

The daily interactions and overall relationship between a prosecutor and local police is a complicated phenomenon comprised of elements both within and beyond the control of the prosecutor (Blair, 2002; Harris, 2011).

Independent of each other

Schönteich (1999:1) points out that in South Africa, the police and the prosecution service are two distinct and separate institutions. Yet, they must rely on each other if they are to succeed in their fight against crime. A perfectly investigated crime will not lead to a conviction if its prosecution is flawed. Equally, a flawless prosecution will lead to an acquittal of the accused if the police has not uncovered sufficient evidence to allow the prosecution to prove its case beyond reasonable doubt. In essence, one weak link in the criminal justice process is all that is required for it to fail.

Schönteich further points out that there are a number of weak links in South Africa's criminal justice system: (a) Too many cases are withdrawn before they go to trial because of crime victims' lack of understanding of and faith in the criminal justice process, and inordinate delays in the country's criminal courts. (b) Too many cases go undetected because of the public's general unwillingness to assist the police in its investigations, and to testify for the prosecution in criminal trials. Moreover, many cases go undetected because of the police's weak criminal investigation capabilities, especially in

respect of forensic investigations. (c) Too few cases are being taken on by the prosecution service because of a lack of experienced and adequately trained prosecutors.

In general, then, general detectives handle the investigative phase of a case with almost complete autonomy. When they finish the investigation, detectives then hand over the case to prosecutors, who bring charges against defendants in court. This separation and the resulting lack of any police accountability to prosecuting authorities, has long been the norm in the South Africa especially at lower or magistrate courts and is usually accepted as normal practice.

Mutual dependence

Harris (2011:1-12), however, points out that police and prosecutors may act independently, but they also depend on each other. Police officers conduct the investigation and make arrests, but they are not able to end the case on their own; prosecutors must accept the case and move it from its investigatory phase to a conclusion. Similarly, prosecutors may dominate the judicial processing of the case, but they have neither the resources nor the expertise to conduct the investigation (Kamisar, LeFave and Israel as cited by Harris, 2011:1-12).

Harris (2011:1-12) further points out that regardless of their formal autonomy, police and prosecutors find themselves mutually dependent members of the same team, working together to address crime. Prosecutors rely upon police to find and interview witnesses, and to get the strongest possible evidence in a form that can be used to prove a defendant's guilt in court. Police depend on prosecutors to bring cases through the legal thicket of the court system so that the suspects they arrest are brought to justice. Despite the fact that they play on the same team, a level of tension, mistrust, and mutual suspicion often characterizes the relationship between police and prosecutors.

Differing perceptions and expectations

Harris (2011:1-12) argues that the differences between the police and prosecutors in their respective roles and functions, as well as the disparities in social class, educational levels, and the like, can produce real divergences of opinions over particular cases, as well as personal and professional wariness. Detectives often feel as if they do the "real" work of law enforcement. Detectives complain that prosecutors do not understand the tough job of the police, and "sell them out" by accepting guilty pleas that do not punish criminals harshly enough. For their part, prosecutors often feel that police do not understand the need to follow the law while they enforce it and pay insufficient attention to the

legalities that can make or break a case. Overall, detectives and prosecutors with their mixture of independence and dependence, their roles as teammates, and their mutual suspicion share a complicated relationship.

Simply put, public prosecutors depend on general detectives to investigate and submit a case docket with sufficient evidence and witnesses that are crucial to the successful prosecution of their cases, and given the existing tensions that often characterises the relationships between them, both parties benefit from this mutualism, thus, public prosecutors need to work with the police on an on-going basis. In this complex and delicate relations, during the performance on their duties public prosecutors may reject any inclination to insist on better or more evidence for a particular case, or, for that matter, to insist on better general detective practices overall, in an effort to get along with general detectives in the short term, thus defeating the ends of justice.

Weaknesses and or gaps within the criminal justice system (CJS)

In his address at the criminal justice conference in February 2005, the then chief director of the court services branch of the Department of Justice and Constitutional Development, in South Africa, Pieter du Rand reminded the delegates that: *“The media and some persons at the time tend to be somewhat negative about what is happening in courts or the criminal justice system, but I am fortunate to be dealing with a topic today that has resulted in practice in some positive results. I wish to indicate up front that I am certain we are on the right track and whilst the challenges ahead remain substantial we have the right building blocks in place to deal with them in a constructive and realistic manner.”* This was a statement of hope towards building the criminal justice system to be seen as efficient and effective in terms of creating a sense of secure and safe environment for all who live in South Africa. Indeed, this recognises the need for the public, general detectives and public prosecutors across South Africa to work together for the greater good of creating a safe and secure environment for all the inhabitants within the country. Du Rand (2005) further indicated:

“To reduce crime effectively, to deliver justice and to enhance public confidence, the CJS has to work as a coherent, joined-up system, with all those involved, adopting a common set of values to meet a common set of goals. The CJS cannot meet its aims of delivering justice and reducing crime unless it operates effectively as a system and unless it works in fruitful partnership with other role players and local communities...”

The end-to-end process of criminal justice is a complex one. Cooperation is therefore important, but so too is maintaining necessary constitutional independencies. Efforts to join up the system must recognise the interdependence of the constituent instances, while continuing to respect the constitutional independence of operational policing, prosecution and judicial decisions” (du Rand, 2005).

While the positive relationship between general detectives and prosecutors need to be improved, the mechanisms that facilitate this relationship are well less established, thus creating weak links within the system. A comprehensive literature review, highlight the complicated and delicate process regarding how public prosecutors in South Africa and elsewhere exercise their discretion and reject a significant percentage of cases at screening, on the other hand creating a challenge on the side of police (Hara, 2007, Holleran, Beichner & Spohn, 2008).

The literature review also indicates that prosecutors attempt to “avoid uncertainty” (Albonetti as cited by Holleran et al., 20008:1-29) by filing charges in cases in which the odds of conviction are good and rejecting charges in cases in which convictions are unlikely. These studies suggest that prosecutors’ assessments of convictability are based primarily, although not exclusively, on legally relevant factors. Characteristics such as the seriousness of the offense (Holleran et al., 20008:1-29), the strength of evidence in the case (Nagel & Hagan, 1983; Spohn & Holleran, 2001 as cited by Holleran et al., 20008:1-29), and the culpability of the defendant (Schmidt & Steury, 1989; Spohn & Holleran, 2001; Swiggert & Farrell as cited by Holleran et al., 20008:1-29) consistently emerge as predictors in assessments of prosecutorial decision making (Holleran et al., 20008:1-29).

O’Donovan (2008:7) is of the view that in general court proceedings in South Africa are typified by frequent and lengthy delays and a very high rate of cases being withdrawn. The high rate of withdrawal has contributed to prisons enrolling ever fewer convicts. In the second quarter of 2007 the number of admissions to prison had fallen to less than half that of the corresponding period in 2003. This drop is far more dramatic than is warranted by the decline in the official crime rate. Given the still high crime rate many would view this drop as cataclysmic. At this stage it is unclear to what extent the drop can be attributed to the conclusion of fewer cases and to what extent it can be attributed to the passing of non-custodial sentences. The question then arises as to how the National Victimisation Survey (NVS) studies result in such a positive assessment of the court system – particularly by those who have been exposed to it.

An examination of the flow of cases reveals that a very high proportion of cases that appear in court are concluded with a guilty verdict. However the high conviction rate (typically in excess of 85 per cent) is achieved by prosecutors withdrawing questionable cases before a plea is entered. High conviction rates are thus achieved by effectively dropping most cases. Those victims who did get to court were thus almost certain to witness a conviction and, in the case of serious offences, a punitive jail sentence. The result is a high satisfaction levels with both the performance of the system and the way in which perpetrators are treated (as reflected by NVS respondents who have been to court as victims). However the vast majority of cases are never enrolled on the court system because perpetrators were not identified and arrested or the prosecution did not enrol the case because of 'insufficient evidence'. The criminal justice system is ultimately weakest where there are no interactions with the aggrieved i.e. when the prosecution declines to enrol a case because the poor quality of the investigation, congestion of the court roll or because the detectives are unable to identify or locate suspects (O'Donovan, 2008:7).

RESEARCH METHOD

Barnett as cited by Mofokeng (2010:18) asserts that in the social sciences, focus groups are a more recent development and are used to supplement methods of collecting data such as surveys, questionnaires, and one-on-one interviews. Information garnered from group interviews is used to construct surveys, or the focus groups would be considered as pilot interviews for a larger study utilising one-on-one interviews.

In support of the larger, more extensive study, three focus group discussions were conducted: one with SAPS personnel at Head Office Commercial Branch, members of the Detective Academy in Hamanskraal, and with two Detective commanders in Gauteng Province; with lecturing staff at the University of South Africa (Unisa) within the Police Practice Department; as well as with Judicial Service officials comprising Quality Assurance Officers, Senior Presiding Officers, Presiding Officers, Senior Prosecutors and members of the Special Investigating Unit (SIU).

In order to invite participants to the pilot focus discussion groups, open calls by means of e-mail and telephone communications were sent to the identified individuals at Unisa, the SAPS, the Judicial Service, the SIU and the Directorate of Special Operations (DSO). The intentions were to capture a diversity of responses from as many relevant role-players as possible. The DSO, however, opted not to participate and referred the research to the SAPS Training

Academy. The SAPS and SIU interview schedules that were used in the pilot study (focus group discussions) addressed participants' perceptions of the relevancy, or otherwise, of changes made in aspects of individual, team and organisational learning with reference to the Detective Learning Programme (DLP), as well as of the mentoring of detectives at station level.

The Academy interview schedule used in the focus group discussions addressed the perceptions held about the effectiveness, or otherwise, of changes made in general learning issues, curriculum development, course delivery and the evaluation of training. Thirdly, participants from the Judicial Service were asked general questions about their perception with regard to the performance of detectives, mentoring and detectives' capacity to investigate alleged crimes of fraud. For the purpose of this paper, only reflections addressing working relations between the public prosecutors and general detectives from the judicial officials as well as SAPS focus groups are discussed.

DISCUSSION AND FINDINGS

The findings emanating from the focus groups interviews amongst others showed that over the years there seems to be challenges in the relationship between prosecutors and detectives especially at lower courts. From the findings of a pilot study as well as from the bigger study (see Mofokeng, 2010) it seems as if there were challenges with regard to cooperation and the relationship between the prosecutors and the general detectives in South Africa. The general detectives and public prosecutors are supposed to be partners in the fight against crime regardless of their formal autonomy. Improved efforts are required in pursuit of justice that is, the preparation of case dockets, investigation of crime, gathering of evidence, presentation of evidence, adherence to criminal procedure and the improve relations between detectives and prosecutors. From the findings, there were concerns that some detectives and prosecutors are inadequately experienced and are not open enough to accept advice and assistance from each other. It would seem as if their egos are trumping the pursuit of justice. There is no mutual respect for each other's profession.

The focus group from SAPS indicated that even though not in all police stations in South Africa, there are pockets of excellence where the detectives and prosecutors do work together as a team thus using their time more efficiently processing cases. The SAPS focus group further indicated that in these stations, senior or experienced prosecutors work with the investigators on cases and advise the investigating officers on lines of inquiry and on the evidence that needs to be gathered and then decide on the correct

charge in all but minor cases. Pilot projects in some Provinces showed remarkable results. No mention of conviction rates was mentioned by the SAPS focus group to validate the statement.

The SAPS focus group also indicated that at some Provinces, there were opportunities for growth. In the Provinces where the between the detective and prosecutor relations have not yet been adequately cultivated, the SAPS focus group indicated that some prosecutors have frequently been critical of detectives' quality investigation, but their criticism was to some degree blown out of proportion. In other words, the judicial service scrutinizes the detectives too intensely even though both parties should take the blame equally when the miscarriage of justice happened due to strained relations between the detectives and prosecutors. This has sometimes led not only to bad feelings among detectives about the prosecutors, but poor relations as well.

However, the judicial service focus group were of the view that close on the heels of pursuing a team approach with the detectives, prosecutors are met up with the newly developing movement identified as "partnership justice," which placed pressure on the National Prosecuting Authority (NPA) to question their "professional" mode of operation and increase their responsiveness and accountability to citizens by working together with all role players within CJS in South Africa, including the detectives. The judicial service focus group were of the view that apart from teething challenges such as inadequate communication between the detectives and prosecutors, the judicial service embrace the ideology of working together with the detectives to make the South African CJS more effective and to raise public confidence. The judicial service focus group did however; confirm the arguments raised by the SAPS focus group regarding the poor quality investigations due to the influx of new and inexperienced detectives within SAPS Detective Service. These views of poor quality investigation due to lack of inexperienced detectives were shared by SIU and academics from Unisa. What Unisa and SIU focus groups agreed upon, was that in reality, the relationship between the detectives and prosecutors is a quite complex one. Despite the prosecutors' focus on detectives' poor performance, on many levels the relationship is symbiotic rather than antagonistic. Both focus groups further indicated that promoting change in crime detection and case prosecution requires an appreciation of the many demands on detectives as well as on the prosecutors by both teams. Attempting to influence detectives' practice prosecutors should acknowledge that they know little about what detectives' frustrations in the process of building a case is truly like and *visa versa*.

On the side of the SAPS, this, in turn, would attract new detectives who have different backgrounds and expectations than their predecessors to build long lasting relations with the prosecution team based on values such as respect and improved relations. In the end, the most effective way to change police attitudes may be through recruitment and selection. Senior prosecutors should work with SAPS senior managers emphasizing collaborations to mentor detective with the aim to ensure that SAPS Detective Service recruit detectives who bring or can develop a high-level awareness of the dynamics of effective CJS. Unisa focus group highlighted that once this approach of targeting new detectives to be mentored in collaboration with the prosecutors receives adequate attention by SAPS, will yield better results as new detectives come from diverse backgrounds and life experiences, and possess the curiosity to embrace new approaches and ideas more readily than their predecessors.

The findings of the pilot as well as final study by Mofokeng (2010) indicate that communications is also a major problem between these two entities. It seems as if changes and additional requirements are not communicated between general detectives and prosecutors which results in the unnecessary delay of matters on the court role. There has to be other platforms other than the justice meetings to address shortcomings and an additional platform similar to the Prosecutors pool where discussions and brainstorming can take place between detectives and prosecutors in order to achieve justice system's goals collectively. If there is no synergy in relations between detectives and prosecutors, then the criminal justice system will not become effective in the fight against crime. The fight against crime needs a team effort and the arrest of suspects is only one phase of the process which needs to take place to achieve the end goal of punishment, rehabilitation and retribution.

Most of the courts have station allocations which makes it easy for the prosecutors and detectives to forge relationships. These practices should be embraced and encouraged across the country thus, encouraging both parties to get together prior to a court day before the courts roll so as to discuss the dockets in hand and to iron out any problems prior to appearing before the bench. This will result in speedy trials in turn improving the backlogs and quality of prosecutions. To achieve this, will not be easy but will require commitment and time resulting in quality service. In the pursuit of justice it should be borne in mind that there is fundamental rights of the victims and the accused that get abused resulting in unnecessary pain and suffering and civil claims against the state due the attitude between the two parties towards each other. This can be avoided if

detectives and prosecutors can come together in order to achieve their goals.

The importance of cooperation between the judicial system, prosecutors and the police for successful criminal apprehension was discussed by Kec̃anovic̃ as cited by Gorenak and Gorenak (2009:46-458), the former stressing just how significant it is for forces to be joined in the training front. The findings by the study conducted by Kec̃anovic̃ indicate that almost 30 percent of detectives turn to prosecutors for professional help, and the latter warning that the police cannot only focus on criminal apprehension, but must also strive for criminal offenders to be charged and convicted.

Dvors̃ek as cited by Gorenak and Gorenak (2009:46-458) also talks about cooperation between the police and prosecutors, and stresses the need for on-going and effective cooperation based on a solid legal framework and independent of current individual political interests of representatives from the Prosecutor's Office or the police. In discussing the cooperation between the police and the Prosecutor's Office, Penko as cited by Gorenak and Gorenak (2009:46-458) established that when investigating serious white-collar crime, the work of these two organisations must surpass the limitations of formal regulations. In such cases, the Prosecutor's Office and the police must first evaluate together to what extent other institutions and external experts will be included in the pre-trial criminal procedure, and the Prosecutor's Office must make the final decision. Police procedures and procedures conducted by other bodies should be supervised by the Prosecutor's Office, not forgetting about international cooperation when deemed necessary (Penko as cited by Gorenak and Gorenak, 2009:46-458).

Despite the Prosecution Policy and directives relating to prosecution of criminal related matters as well as which governs the relationship between the police and prosecutors in South Africa, the SAPS focus group reported that they feel frustrated when the prosecutors' case-disposition conflicts with the expectations of the detectives. It is the view of respondents that it is totally disappointing for investigators if an arrested suspect is set free by prosecutors on the ground that the prerequisites have not been fulfilled for keeping the suspect in custody, or where investigatory activity despite the great deal of time and effort involved leads to the termination of the proceedings.

The general detective's relationship with the public prosecutor is also critical to the independence of both the judiciary and South African Police Service. If the elements of trust and teamwork are cultivated as well as being cherished by both parties, there will be no pressure to manipulate the evidence. The success of

creating a good working relationship between general detectives and prosecutors is an important factor in the criminal justice system to adequately respond to the issue. It can be argued that the voluntary nature of mentoring of detectives should be played down at the case development stage where it is thought that the inexperienced detective could benefit from the experience but might not attend if given free choice. This "end justifies the means" argument may find support in other domains. It is suggested by the author that compulsory attendance at justice meetings or on any available platform aimed at empowering the less experienced detectives or prosecutors, for example, should not necessarily be a barrier to benefiting both parties, provided certain conditions are met, such as being treated with respect and fairness.

STRATEGIC INTERVENTIONS

In South Africa, general detectives need to turn to prosecutors especially at lower courts for professional assistance. No adequate studies have been conducted that deal with the cooperation and bridging the gap between the general detectives and the prosecutors, but the situation is different for Specialised Commercial Crime Court (SCCC). Altbeker (2003) found that the police and SSC in South Africa cooperate when solving problems that are supposed to be handled by both bodies and for which they have a common goal – contributing to the well-being of victims and coercing offenders to assume responsibility for their criminal acts and their consequences.

Mentoring /Giving Guidance to Investigating Officers

The prosecutor should encourage as well as cooperate with detectives and where possible, assist with mentorship of detectives. Formal or informal assistance in the form of conducting periodic classes, discussions or seminars to equip detectives will go a long way to empower detectives with recent court decisions as well as procedural changes within criminal justice system.

CONCLUSION

The arguments and findings set out in this paper demonstrate that the working arrangement between general detectives and prosecutors' process as currently operated is too rigid and inflexible to cope with the demand for challenging environment. Based on the findings of the focus as well from the bigger study, it is apparent that general detectives and public prosecutors should be mutually dependent on each other due to the increasing complexity, multitude and other challenges of crime emerging in modern South African environment. Considering the heavy workload the general detectives and prosecutors are

facing, it is quite essential that, various ways of creating quality relations and teamwork should be encouraged from SAPS and judicial service structures and embraced from the highest levels downwards. These developments towards new forms of cooperation between the general detectives and prosecutors should not be viewed as just a marriage of convenience or an adjustment for the sake of convenience, on the contrary, these developments should be properly structured upon the deep consideration as to the independently entrusted roles of general detectives and prosecutors in the course of making South Africa a better place for all.

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