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Trials gone on too long

Long-term remand detention and legal representation

Sonia Rupcic[1]

sonia.rupcic@gmail.com

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Between 1995 and 2003, multiple legislative reforms made it more difficult for accused persons in South Africa to be released on bail. As a result, roughly one-third of South Africa's total prison population is held in remand detention. Drawing on 22 months of ethnographic research in regional courtrooms in the Thohoyandou area, this article contends that long-term remand detention predisposes defendants to dismiss state-sponsored legal counsel in favour of self-representation. In ways distinct from questions of legal competence, self-representation proved prejudicial to defendants. I argue that trial delays and remand detention have a synergistic relationship that thwarts the cause of justice beyond concerns with defendants' liberty interests.

Introduction

Between 1995 and 2003, several legislative reforms increased the number of people held in remand detention in South Africa's prisons.[2] Successive changes to the Criminal Procedure Act slowed the time it took for bail applications to be considered, making it more difficult for arrested people to obtain bail. This is especially the case for those accused of serious crimes like rape and murder who – while not technically disqualified from bail – must now demonstrate that the interests of justice are served by their *release*. This is an inversion of the earlier standard in which courts had to be satisfied that the interests of justice were served by *continued detention*.[3] Defendants charged with such crimes confront a difficult statutory test for release.[4] Courts have also justified categorically denying bail to undocumented migrants and poor and unhoused people on the grounds that the absence of a verified address constitutes a flight risk.[5] Such 'tough-on-crime'

policies, legitimised by widespread fears of an unmitigated crime wave, made it more difficult for those charged with a crime to be released on bail.

The predictable result of these reforms has been an increase in the remanded population. In 2020, the Department of Correctional Services estimated that more than 80% of remand detainees were 'detained without an option of bail.'[6] The population in remand detention peaked in 2000 at nearly 60 000 people.[7] While the absolute number of remand detainees has not reached that quantity again, remand detainees represent one-third of the total prison population in South Africa.

Legal scholars writing about South Africa have documented the manifold injustices associated with remand detention, the most basic being the right not to be arbitrarily deprived of liberty, in line with Section 12(1)(a) of the Constitution. Additionally, remand detention imposes heavy social and economic burdens on detainees, their families and their communities.[8] Those who are detained lose wages and employment and have their studies interrupted. Their families are deprived of the everyday caregiving and support of incarcerated loved ones. Detention also creates new expenses, like the costs of amenities that prisons should supply (e.g. toiletries, bedding) and expenses related to families' travel to the prison.[9]

Remand detainees contribute to overcrowding in South Africa's prisons, which are at roughly 130% capacity by recent estimates.[10] As Jean Redpath has shown, prison overcrowding is associated with an excess of 'natural deaths.'[11] Overcrowding facilitates the spread of infectious diseases like leptospirosis, tuberculosis, and HIV while producing tensions between imprisoned persons over limited space and resources. These tensions can result in interpersonal violence and death.[12]

Long-term remand detention compounds these injustices. Data on the duration of remand detention are not systematically reported. In 2013, the Department of Correctional Services noted they could not estimate the average remand detention duration due to 'system deficiencies' with the Information Management Systems. Since then, DCS has not made publicly available statistics on the length of remand detention. Nevertheless, a disturbing picture emerges from reported fragments.

In 2013, DCS admitted they had not achieved a target goal of reducing the average length of remand detention to 177 days.[13] Subsequent reports on Section 49G applications are a useful proxy for estimating the length of detention. Section 49G of the Correctional Services Act entitles remand detainees who have been imprisoned for more than two years to have the matter brought to the attention of a concerned court.[14] For the 2020/2021 reporting period, DCS submitted 8 431 applications for bail review pursuant to Section 49G, which suggests almost 18% of remand detainees had been in detention for a period exceeding two years.[15] Only 2.64% of these bail applications resulted in release or bail reduction.[16] A 2022 Judicial Inspectorate for Correctional Services report found that 27 remand detainees had been incarcerated for seven years or more.[17]

There is an important relationship between pre-trial incarceration and the conduct of a fair trial. Lines of influence run both ways. On the one hand, pre-trial detention might foreclose a successful defence by limiting an accused person's capacity to gather evidence, contact witnesses and consult with legal representatives.[18] People in custody may feel undue pressure to accept plea deals for release, resulting in wrongful convictions.[19] On the other hand, a fair trial is a speedy trial, and unreasonable delays have especially profound consequences for

remand detainees, whose arbitrary detention is prolonged by postponements.[20]

Drawing on ethnographic research, this article argues for expanding our understanding of injustices associated with long-term remand detention. I present a series of case studies to demonstrate that lengthy trials create conditions in which desperate remand detainees dismiss their state-sponsored legal counsel and instead represent themselves.[21] While electing to self-represent is often framed as a right available to accused people, I show that self-representation in these instances is less a freely made choice than a decision compelled by the urgency of protracted detention.[22]

The result is disastrous. Untrained in the law, unrepresented remand detainees are incapable of mounting a winning defence against seasoned prosecutors. Moreover, self-representation does not achieve the detainee's goal of expediting his trial. As I show, the decision to dismiss legal counsel instead results in a far longer trial. This qualitative and exploratory research points to the need for further investigation of the relationship between long-term remand detention and self-representation.

Methods

The research presented in this article was conducted as part of a more extensive qualitative study of how survivors of sexual violence seek justice inside and outside South Africa's criminal punishment system. Between 2015 and 2018, I conducted 22 months of ethnographic fieldwork in regional courtrooms and other sites in the Thohoyandou area of Limpopo Province. This article draws explicitly from observations of rape trials prosecuted in criminal courtrooms and interviews with court officials.[23] Sitting along the wall in front of the railing separating the gallery from the counsel tables and the magistrate's bench, I documented the activities and speech of the courtroom in handwritten notes, including that which occurred on and off the record.

I began research with the naïve intention of observing 15 complete trials. I could not accomplish this goal in the 135 days I appeared in court. While I viewed hundreds of hearings, I was able to track 73 trials involving 85 defendants across three or more hearings. Of these, I observed eight men who elected to represent themselves. I offer these figures to shed light on my data and fieldwork but caution against interpreting these as definitive statistics on the frequency of self-representation.[24] This was, in part, a methodological limitation of this ethnographic study, which was focused primarily on a narrative analysis of how survivors pursued remedy and redress after rape rather than a quantitative evaluation of case outcomes. As such, my research permissions did not extend to a comprehensive docket or court diary review.

In addition to denying justice to the parties of a case, frequent postponements posed serious methodological challenges to accurate accounting. There were days when the court was unexpectedly not in session. On other days, the court's roll might include eight cases, each remanded in quick succession, such that court was adjourned well before lunch. These were typically days when the court scheduled multiple defendants to make their first appearance and register their choice of legal counsel before being dismissed. Most days, the magistrate would spend the morning dismissing witnesses and remanding cases before hearing the evidence (and, if we were lucky, the cross-examination) of one witness for a single trial. Litigation was almost always concluded before the end of the workday. Many factors conspired to impede the progress of trials: the absence of witnesses, lawyers, or the magistrate; missing paperwork; audio-recording

equipment, broken, caught fire, or drowned out by the sound of heavy rains. The very phenomenon I document here, a long-term trial process with unpredictable postponements, made it challenging to observe every hearing of any given trial from start to finish.

Proceeding without counsel

Given the availability of free legal aid, legal scholars and practising jurists typically frame the decision to represent oneself against criminal charges as idiosyncratic. I often heard magistrates and prosecutors refer to self-representing defendants as 'arrogant' or 'trouble-makers,' characterisations that attributed the choice to proceed without counsel as one rooted in personality or temperament. Yet there was a striking pattern to the instances of self-representation I observed, pointing to the structural role of remand detention.

Each of the eight unrepresented men whose cases I observed spent the duration of their trials, which dragged on for more than a year each, in remand detention.[25] The sexual offences with which they were charged precluded the option of bail. Two had been in detention for three and four years. This was information they volunteered while representing themselves before the court and was confirmed by court officials. As we will see, defendants often remarked upon their experiences of detention during trial.

Critically, none of these men began their trials without counsel. All were initially represented through Legal Aid. As their trials wore on, they dismissed their public defenders. Three switched public defenders before eschewing Legal Aid altogether. The decision to switch Legal Aid personnel or self-represent was made reluctantly, after several postponements and at a juncture in the trial when a new delay was being discussed. The following account, documented on a bright summer afternoon in 2017, describes this dynamic. Late in the morning, a Legal Aid advocate approached the magistrate to tell her that he had started feeling sick and would need to leave early. She didn't reply, instead waiting for the prosecutor to introduce the case on the record officially. Gesturing to the public defender, the magistrate instructed, 'Proceed.' 'The defence is not feeling well, and I ask that the matter be postponed.' The magistrate turned to the prosecutor, 'State?' Shuffling his papers, the prosecutor replied, 'I have no objection.' This exchange was then translated into Tshivenda for the benefit of the litigants and witnesses. In the accused's dock, the defendant, who I will call Mashudu, stood up.[26] It was the first he had heard of this postponement. Mashudu raised his hand, 'I am asking that the remand date be a nearer one because I am very tired.'

At this stage, Mashudu, charged with rape, had been in remand detention for longer than a year. The trial had already lasted 11 months and had encountered a string of postponements. The magistrate announced that the next possible court date was 73 days away. Mashudu raised his hand again. The magistrate asked the public defender to attend to his client. Before he could, Mashudu objected, addressing the magistrate directly, 'If [my public defender] cannot proceed, then I will represent myself. I have five children who are supposed to have uniforms next year.' The magistrate warned him that dismissing his public defender would disadvantage him in the proceedings. Mashudu confirmed that it wasn't his desire to dismiss his advocate. He asked if it would be possible to defend himself only for the day, with the advocate watching from the bench. The magistrate told him that such an arrangement was not possible. They went back and forth like this for several minutes, with Mashudu proposing that his lawyer provisionally participate in some limited fashion so that the trial might continue. The magistrate rejected these requests. Disheartened, Mashudu finally

confirmed, 'I will proceed on my own.' 'Are you sure?' asked the magistrate. Shaking his head, he sighed, 'I am tired. Let's proceed.'

A postponement precipitated Mashudu's choice to self-represent. This was true for the other self-representing defendants I observed as well. These delays were sometimes caused by a public defender's absence or inadequate preparation, such as when a Legal Aid advocate requested more time to review the docket. Delays might result from the perception that a public defender was prolonging the trial by introducing or conceding to a time-consuming course of legal action. One accused person dismissed his public defender for assenting to the relocation of the prosecution to a new courtroom under the authority of a new magistrate. In these moments, defendants were vocal about their unhappiness with the speed of the trial and explicit in framing their refusal of counsel as a means of expediting the prosecution. To these remand detainees, dismissing legal representation was the only option to move the trial along.[27]

In these moments of crisis, defendants were simultaneously drawing attention to unreasonable trial delays and the injustice of arbitrary attention. However, their complaints about years-long detention did not trigger a bail review process. Unlike foreign jurisdictions, notably the European Court of Human Rights, South African jurisprudence is not governed by maximum custody limits and automatic bail review.[28] Magistrates might have interpreted these defendants' appeals in terms of Section 342A(1)-(6) of the Criminal Procedure Act, which empowers courts to investigate unreasonable trial delays. The statutory test for what constitutes an unreasonable delay includes the duration of the delay, the effect of the delay on the personal circumstances of the parties, and the potential the delay has to prejudice evidence or undermine the administration of justice.[29]

Once a determination has been made that a delay is unreasonable, the judge may strike the matter off the roll or close the case of the party responsible for the delays.

In these courtrooms, defendants were unambiguous in their frustration with the pace of prosecution. While remand detention is not enumerated in the Section 342A(2) unreasonableness test,[30] lengthy remand detention no doubt adversely affected the personal circumstances of the defendants, as was the case with Mashudu and his five children. Critically, remand detention made postponements so unbearable that they provoked defendants to proceed without counsel, a consequence that prejudiced evidence and undermined the administration of justice in ways I detail below. And yet, these critical moments did not precipitate a serious interrogation of whether the trial's duration was unreasonable. Magistrates instead took the application to self-represent at face value and granted it.

I am not trying to suggest that all remand detainees who endure exceptionally long trials will necessarily dismiss their legal representatives. I observed numerous rape trials in which detained defendants endured years of postponements without dismissing counsel. Nor am I trying to suggest that other factors do not play a role in the decision to dismiss counsel. Notably, sharing a courthouse cell with a defendant who had already decided to self-represent seemed to pave the way for the decision to dismiss counsel. This association was common knowledge amongst Thohoyandou legal practitioners. Nevertheless, postponements in the context of an already lengthy trial created conditions that made it far more likely for a defendant to be unrepresented.

Double bind of self-representation

Most defendants in the courtrooms I observed were represented by Legal Aid South Africa – only a small minority elected to pay for private

representation. Thohoyandou area litigants hailed from poor, rural communities with few opportunities for stable full-time employment. Jurists took for granted that defendants would require legal aid, and means-testing was an informal affair. A defendant's oral affirmation that they could not afford counsel was sufficient proof of need.[31]

Offering free legal representation to those otherwise unable to pay for it is widely viewed as essential to ensuring a fair trial. This was not always the case. Under apartheid, defendants of colour were very rarely represented in criminal prosecution. While apartheid-era courts observed the right to legal counsel, access was conditioned mainly on one's ability to find representation and pay for it.[32] In South Africa today, self-representation is no longer a choice prompted by financial necessity. While legal counsel is still not an absolute right, criminal defendants have a constitutional right to legal representation,[33] a right given substance by the 2014 Legal Aid South Africa Act, which created a national legal aid scheme staffed by professional public defenders who offer their services to indigent litigants. The country's legal aid budget is relatively large for a middle-income country and far exceeds investments in other African countries. Indeed, the country's legal aid spending per individual defendant is comparable to wealthier European countries and on par with public spending in the United States.[34]

Self-representation is a double-edged sword. On the one hand, self-representing defendants are untrained in navigating technical legal procedure and preparing compelling legal arguments. They are often forced to do this in a language with which they are also unfamiliar. In the majority Tshivenda-speaking area where I did research, this meant dockets were largely inscrutable to unrepresented defendants, if they were even made available in full. Beyond language issues, self-representing defendants often dwelt on immaterial issues. For example, one unrepresented remand detainee implied that the testimony of a police witness could not be trusted because he was responsible for confiscating his cell phone and cash on his arrest. Unrepresented detainees failed to call witnesses or adduce relevant evidence, sometimes because they didn't see its importance and sometimes because they could not do so from prison. While prosecutors often performed this legwork for self-representing defendants, they resented it and sometimes let such requests fall through the cracks.[35] During an adjournment, I inquired with a prosecutor whether he managed to contact a self-representing defendant's witness. He did not answer, only muttering angrily, 'I am tired of running errands for him.' In a different trial, a self-representing defendant repeatedly complained about the poor quality of audio-recording transcriptions taken from earlier portions of the case when a public defender was representing him. Lengthy portions of the complainant's testimony had been inaudible and didn't appear on the transcriptions.[36] No effort was made to assist him in filling in the blanks.

On the other hand, self-representing defendants did not necessarily assist themselves by demonstrating competence. Legal facility was often attributed to a deep familiarity with the legal system arising from prior encounters with the law. On one occasion, I expressed surprise and admiration to a magistrate after observing a self-representing defendant pursue a compelling line of questioning with a witness. The magistrate laughed, 'he has been here before.' This defendant's relatively strong performance led the magistrate to conclude that the defendant must be a serial offender. In this way, a successful defence could be prejudicial for the accused who mounted it himself.

For the most part, though, the defences lodged by unrepresented remand detainees were

very poor. Of the self-representing remand detainees whose cases I was tracking, I only observed verdicts for four, all of whom were found guilty and sentenced to the prescribed minimum. 'Time served' was not applied to reduce these sentences.[37] Given the direction of the remaining four cases and the sorts of offhand comments made about them in the hallways, I would guess the remaining four also ended in guilty verdicts (if the cases have been finalised at all). I am not trying to suggest that the outcome of these cases would have necessarily differed had they been professionally represented throughout their trials, although it is possible. Minimally, this link between long-term remand detention and self-representation raises questions of procedural justice.

Self-representation compounds postponements

Self-representing remand detainees saw dismissing their professional legal counsel as a means of moving the trial along more quickly. But in eliminating one source of delays, they unwittingly signed on to a host of new delays. Magistrates and prosecutors, in seeking to level the playing field for self-representing defendants, adopted unusual measures to ensure a fair trial. Some of these measures implied relatively insignificant delays, such as lengthy explanations of the charges, competent verdicts, relevant minimum sentences, and the purpose of examinations, cross-examinations, closing arguments, and sentencing hearings. Such explanations, mandated by the Criminal Procedure Act, were longer than those typically addressed to professionally represented defendants.

However, some attempts at creating a fair trial introduced delays of weeks and months. With an eye toward possible appeals, prosecutors and magistrates attempted to demystify the docket for the self-representing defendant by calling to court a series of police functionaries to testify about the quality of the investigation. It is not unusual for police officers to testify during trial, but the quantity of police witnesses called to aid the state's case against a self-representing defendant was significantly greater. Efforts were made to call all police officers who participated in evidence collection, custody and analysis, no matter how small their role.

A prosecutor explained the reason for the unusual number of witnesses called in cases against self-representing defendants. The integrity of the state's case relies on maintaining the chain of custody, which is documented in the docket. In a typical trial where a professional lawyer (often a Legal Aid advocate) represents a defendant, the prosecutor and the defence agree before the trial to take the docket at face value, representing an appropriately conducted investigation. In such trials, signed police forms constitute proof of proper evidence collection and, therefore, imply the reliability of the evidence. Testimony from the individual police bureaucrats responsible for compiling, storing, transporting, and analysing evidence is, thus, unnecessary.[38]

By contrast, in cases where the defendant had dismissed legal counsel, it was generally accepted that the court should call forth everyone who could attest to the minutiae surrounding the investigation. Trotting out every individual responsible for currying, compiling and interpreting evidence was meant to allow defendants to identify and highlight problems with the investigation. This practice of calling chain of custody witnesses was envisioned as a way to unpack the docket more transparently, including demonstrating the proper completion of bureaucratic forms. Unfortunately, defendants were not trained to evaluate whether this was the case, and they also often struggled with the fact that the documents were typically written in English – a language in which most defendants were not fluent.

Police chain of custody witnesses were as vulnerable to delay as any other. In scheduling police witnesses, prosecutors had to accommodate the work schedules of police stations unable to lose multiple officers for a morning and to reconcile these schedules with an already packed court roll. This meant staggering police testimony across weeks. Once scheduled, the testimony of police witnesses, like that of other witnesses, was subject to unexpected absences. These might include sickness, problems with over-booked police transport, or the demands of a pressing police matter.

Critically, the reasons that particular police witnesses were being called were often lost on defendants. In the trial against Ronewa, for example, the prosecutor called four police officers who assumed different roles in transporting a rape kit from a Thohoyandou trauma centre to a locked storage room in a Thohoyandou police station and then on to a forensic laboratory in Johannesburg. Each officer played some part in the journey of this rape kit. Taken together, their testimony might have afforded Ronewa an opportunity to ask about moments when the kit was left unattended in an insecure environment where tampering might have occurred. But he did not approach these witnesses with this line of legal argumentation. Ronewa instead levelled immaterial accusations, denouncing one officer as a liar because he could not recite the rape kit's serial number from memory. It made for an exhausting morning of futile challenges.

When the court returned after adjourning for lunch, the prosecutor called a crime scene photographer to the witness stand. He quickly asked about the photographer's role in the investigation before ceding to Ronewa's cross-examination. The magistrate instructed Ronewa on the purpose and method of questioning. As Ronewa began, the court officials braced themselves for what might follow. 'Are the photos in the album because I committed the crime?' Ronewa started. A bit befuddled, the witness responded, 'It is because I am a photographer. It is my duty.' 'So you cannot tell the court I committed the offence? Only that you were doing your job?' 'Yes,' the witness agreed. 'That is all,' Ronewa sat down. A wave of relief passed through the court. The magistrate congratulated Ronewa, 'I am glad to see you now see what is going on.'

This is critical. These additional police witnesses did not pave the way to self-representing defendants' acquittals. Nor did prosecutors or judges entertain the possibility that they might. When the magistrate told Ronewa, 'I am glad to see you now see what is going on,' she was not praising him for having identified some error in evidentiary procedure. On the contrary, she applauded him for recognising the irrelevance of the witness to the state's case and swiftly concluding his questions. In doing so, he had finally joined everyone else to recognise that these proceedings were purely perfunctory.

Conclusion

In this article, I have argued for expanding how we conceptualise the injustices associated with long-term remand detention. In Thohoyandou regional courtrooms, long-term remand detainees resort to dismissing their professional legal counsel to expedite court proceedings. Unrepresented, their defence flounders. Ironically, the decision to self-represent seems to extend the length of the state's case and the defendant's time in remand detention, as prosecutors and magistrates adopt time-consuming measures to ensure a fair trial. The implication is that trial postponements do not simply prolong arbitrary detention. Instead, the longer an accused person awaits trial, the more elusive fairness becomes. At no point during my observations were these delays scrutinised by jurists and found to be unreasonable. Quite

apart from liberty interests, trial delays and remand detention have a synergistic relationship that thwarts the cause of justice.

Bail reform is needed in addition to structural changes to address case backlogs.[39] Elsewhere, the manifold injustices of long-term remand detention have provoked many foreign jurisdictions to institutionalise maximum custody limits and automatic bail review. These are legislative reforms that are much needed. Whether there is political appetite to pass such reforms is a different question. While we wait on these reforms, justice-minded jurists might take a remand detainee's choice to self-represent as an act of desperation that indexes a trial that has gone on too long.

Notes

1 Sonia Rupcic is a legal and medical anthropologist with public health training. She is currently an Advanced Postdoctoral Fellow at the Center for Health Equity and Research Promotion at the Veterans Affairs Pittsburgh Healthcare System. Her research focuses on the intersection between gendered violence, clinical care and the law in South Africa and the United States. She is grateful for research support provided by the American Council of Learned Societies, the Mellon Foundation, the Wenner-Gren Foundation, the Social Science Research Council, the National Science Foundation, the Fulbright Program, and the University of Michigan.

2 This increase was both in terms of the absolute number of remand detainees and relative to the share of total incarcerated people not yet sentenced. See Jean Redpath, "Unsustainable and Unjust: Criminal Justice Policy and Remand Detention since 1994," *South African Crime Quarterly* 48 (2014): 25-37, https://doi.org/10.4314/sacq.v48i1.

3 Redpath, "Unsustainable and Unjust," 26.

4 For example, Section 60(11)(a) of the Criminal Procedure Act (51 of 1997) states of Schedule 6 offences (which include premeditated murder, rape of a minor and rape committed by a HIV seropositive person) that "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."

5 See Palesa Rose Madi and Lubabalo Mabhenxa, "Possibly Unconstitutional? The Insistence on Verification of Address in Bail Hearings, *South African Crime Quarterly* 66, no. 1 (2018): 19-30, http:// doi.org/10.17159/2413-3108/2018/i66a5710; and Sonia Rupcic, "Biocarceral Citizenship: Criminalizing through Care in Postapartheid South Africa," *American Anthropologist* 125, no 4 (2023), Note 14, https://doi.org/10.1111/aman.13904.

6 Department of Correctional Services, *Annual Report 2019/2020* (Pretoria: Department of Correctional Services, 2020), http://www.dcs.gov.za/wp-content/uploads/2020/11/DCS-Annual-Report-Tabling-Final.pdf, 56.

7 Department of Correctional Services, Annual Reports, http://www.dcs.gov.za/?page_id=663.

8 Jean Redpath, *Liberty Not the Only Loss: The Socio-Economic Impact of Remand Detention in the Western Cape*, (Bellville: University of the Western Cape, Africa Criminal Justice Reform, 2019), https://acjr.org.za/resource-centre/liberty-not-the-only-loss-report.pdf.

9 See Lukas Muntingh and Jean Redpath, "The Socio-Economic Impact of Pre-Trial Detention in Kenya, Mozambique and Zambia," *Hague Journal on the Rule of Law* 10 (2018): 139–164, https://doi.org/10.1007/s40803-017-0062-1.

10 Department of Correctional Services, *Annual Report 2021/2022* (Pretoria: Department of Correctional Services, 2022), http://www.dcs.gov.za/wp-content/uploads/2016/08/DCS-AR-2021_22-13_COMPRESSED-VERSION-2.pdf.

11 Redpath, "Unsustainable and Unjust," 28.

12 Peter Joseph Witbooi and Sibaliwe Maku Vyambwera, "South Africa's Prisons Are a Breeding Ground for the Spread of TB. Our Model Shows How," *The Conversation* (29 November 2022), http://theconversation.com/south-africas-prisons-are-a-breeding-ground-for-the-spread-of-tb-our-model-shows-how-191915.

13 Department of Correctional Services, *Annual Report 2012/2013* (Pretoria: Department of Correctional Services, 2013), http://www.dcs.gov.za/wp-content/uploads/2016/08/DCS-Annual-Report-2012-2013.pdf, 60. Redpath reports on earlier remand detention duration statistics, no longer publicly available on the DCS web site. Writing about March 2012, she found that more than half of all remand detainees had been incarcerated for more than three months, 18% of people in custody had been there for more than a year, and an unfortunate 5% had been detained for more than two years. See Redpath, "Unsustainable and Unjust," 31.

14 The provision applies to remand detainees who have not had their cases reviewed within the three months prior to the two years of remand admission. DCS makes referrals to courts in anticipation of any given detainee reaching two years in detention, but referrals can also be made annually thereafter for those detainees whose 49G applications are denied. As such, 49G applications should be filed for remand detainees who have been in detention for 1 year and 9 months or longer. See section 49G of the Correctional Services Act (111 of 1998).

15 DCS, *Annual Report 2021/2022*, 58.

16 Ibid.

17 Judicial Inspectorate for Correctional Services, *Annual Report 2021/2022* (Pretoria: Judicial Inspectorate for Correctional Services, 2022), http://jics.dcs.gov.za/jics/wp-content/uploads/2022/11/JICS-2021-22-Annual-Report.pdf, 9.

18 See Clare Ballard, *Research Report on Remand Detention in South Africa: An Overview of the Current Law and Proposals for Reform*, (Cape Town: Civil Society Prison Reform Initiative, 2011), 37, https://acjr.org.za/resource-centre/South%20Africa%20Ballard.pdf.

19 Catherine Heard and Helen Fair, *Pre-Trial Detention and its Over-Use: Evidence from Ten Countries*, (London: Institute for Criminal Policy Research, 2019), 7, https://prisonstudies.org/sites/default/files/resources/downloads/pre-trial_detention_final.pdf.

20 See Ballard, "Report on Remand Detention."

21 Often referred to with the Latin phrase *pro se* ('on behalf of themselves'), *pro se* litigants are also referred to as 'self-representing' or 'unrepresented' litigants or in South Africa as appearing 'in person.'

22 While I see long-term remand detention, lengthy trials, and self-representation as causally linked, I leave unaddressed the question of whether this connection implies a form of duress that might undermine a self-representing litigant's competency.

23 I was granted research access permission by the Department of Justice and Constitutional Development. In addition, I sought permission from individual magistrates to attend their courts. For sensitive cases involving minors, additional permissions were requested from the complainants and their legal guardians in order to conduct observations.

24 My time observing trials convinced me that it is impossible to categorise a defendant as represented or not until the trial's end. I did not see the conclusion of all 73 trials and so I suspect the percentage of unrepresented defendants is higher than 11%.

25 Redpath estimated that in the Western Cape the median remand detention for those charged with rape was 171 days. See Redpath, "Liberty Not the Only Loss", 38, 48. Her estimate was for all remand detainees charged with rape. The duration is likely longer for the subset whose cases come to be prosecuted in court.

26 Following ethnographic research conventions, I use pseudonyms throughout.

27 In the case law, there is evidence of similar patterns of remand detention, lengthy trials and changes to/dismissals of legal representation in other jurisdictions. See *Ncoto v State* (A253/2010) [2010] ZAWCHC 445 (20 August 2010).

28 Clare Ballard, "A Statute of Liberty? The Right to Bail and a Case for Legislative Reform," *South African Journal of Criminal Justice* 25, no. 1 (2012), 24–43, https://hdl.handle.net/10520/EJC122672.

29 Respectively, these are sections 342A(2)(a), (d), (f) and (g).

30 Remand detention does appear in section 342A(7), which requires the National Prosecuting Authority (NPA) to make biannual reports to cabinet about the number of long-term remand detainees whose trials have not yet started. The section dictates that the NPA must report the number of detainees held in custody for "(i) 18 months from date of arrest, where the trial is to be conducted in a High Court; (ii)12 months from date of arrest, where the trial is to be conducted in a regional court; and (iii) six months from date of arrest, where the trial is to be conducted in a magistrate's court." Section 342A(7) only applies to detainees whose trials have not yet started and offers limited oversight without implying judicial action. In practice, this remedy offers little in the way of protection to defendants awaiting trial in custody.

31 There is case law to suggest that such means-testing is not undertaken in other jurisdictions. See *State v Balatseng* (CA 157/2003) [2004] ZANWHC 23 (22 September 2004), para. 7.

32 For a history, see David McQuoid-Mason, "Access to Justice and the Need for a Holistic Approach to the Delivery of Legal Aid Services in Developing Countries: Lessons from South Africa," *Jindal Global Law Review* 11, no. 2 (2020): 309–337, https://doi.org/10.1007/s41020-020-00126-1.

33 Section 35(3)(g) of the Constitution reads: "to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly."

34 This says as much about the United States as it does about South Africa. United Nations Office of Drugs and Crime, *Access to Legal Aid in Criminal Justice Systems in Africa [Survey Report]* (Geneva: United Nations Office on Drugs and Crime, 2011), https://www.unodc.org/pdf/criminal_justice/Survey_Report_on_Access_to_Legal_Aid_in_Africa.pdf, 18–9.

35 This happens in other courtrooms as well. See *Sodede v State* (A4656/2013, 2013000247) [2014] ZAECGHC 59 (24 July 2014).

36 At the time, the audio recording equipment was sensitive to the use of cell phones. Though warrant officers instructed the gallery to turn off their cell phones to prevent disturbances, it was apparent that legal practitioners were themselves sending text messages throughout the trial. This created feedback interference on the recording machines, which resulted in moments when the court proceedings were inaudible. In the last months of my fieldwork, the court installed new equipment less sensitive to cell phone interference.

37 Writing in 2014, Redpath examined the question of whether remand detainees were more likely to go on to be convicted and sentenced to imprisonment. Comparing aggregate numbers, she found that the share of remand detainees who were ultimately convicted and sentenced to serve a custodial term declined between 2002/03 and 2010/11. Given that convictions remained relatively stable over the same period, she concluded that: "convictions are increasingly accompanied by non-custodial sentences – or alternatively that convicted people are being sentenced to time already served on remand…" See Redpath, "Unsustainable and Unjust," 33. In my observations of the court, I did not personally hear a magistrate deduct 'time served' from a sentence, though there were occasions when a long-term remand detainee received a wholly or partially suspended sentence. This practice was only observed for offences with shorter sentences of three to five years.

38 For a discussion of how documents come to instantiate the 'chain of custody' itself, see Michael Lynch, Simon Cole, Ruth McNally, and Kathleen Jordan, "Chains of Custody and Administrative Objectivity," in *Truth Machine: The Contentious History of DNA Fingerprinting*, (Chicago: University of Chicago Press, 2011), 113–41.

39 Ballard, "A Statute of Liberty."