The National Press Club and North-West University declared the Oscar Pistorius trial as the Newsmaker of the Year for 2014. The award was handed over to Deputy Chief Justice of the Constitutional Court, Justice Dikgang Moseneke on 15 May at the CSIR International Conference Centre in Pretoria.

In his opening statement, the National Press Club Chairperson, Jos Charle, said the award included the roles played in the trial by Oscar Pistorius himself, Judge Thokozile Masipa, prosecutor Advocate Gerrie Nel and defence lawyer, Advocate Barry Roux. Mr Charle said: ‘For the first time in the history of South Africa, most of any trial’s court proceedings were broadcast live on a dedicated TV channel.’

In his address to media delegates, Justice Moseneke said he was proud of the manner in which all of those who were a part of the trial allowed the nation and the world into the courts to see how justice was dispensed. ‘It has changed irrevocably the manner in which the media and the justice system of our country converge,’ he said.

Justice Moseneke said: ‘Everything about the trial – the judge’s rulings, the witnesses that gave evidence, and especially the verdict – clogged social media newsfeeds in our laptops and other devices for months on end.’ He added that the Constitutional Court became the first court in Africa to have an active presence on Twitter. ‘We are becoming a part of that elite team of apex courts adapting to the modern age. Our presence on Twitter is symptomatic of that change.’

The Constitution and open justice

Justice Moseneke referred to the decision of Mlambo JP in Multichoice (Proprietary) Limited and Others v National Prosecuting Authority and Another, In re: S v Pistorius, In re: Media 24 Limited and Others v Director of Public Prosecutions North Gauteng and Others [2014] 2 All SA 446 (GP) in which media houses made a ‘big ask’ from the courts. ‘They posed serious questions about how our courts could better ensure the hallowed principle of open justice. The questions were many and complex, but even more intriguing, they were new to the judicial system,’ he said.

Justice Moseneke said the public is entitled to have access to the courts and to obtain information pertaining to them. He said with the new age we live in and the advancement of technology, our society is no longer one in which citizens must, or should have to wander into courtrooms to find out what is happening. ‘People can now see and hear, all in the confines of their own homes, offices, villages or indeed in any other open spaces, so long as they have an active internet connection.’
He added: ‘The principle of open justice is an incident of the values of openness, accountability and the rule of law, as well as a core part of the notion of a participatory democracy. All these are foundational values entrenched in the Constitution. The preamble of the Constitution contemplates “a democratic and open society in which government is based on the will of the people”, and the text requires that our democracy shall ensure accountability, responsiveness and openness.’

According to Justice Mosekene, courts play an important role to solve conflicts in all areas of life and that is promised in the Constitution. He added: ‘For open justice alone, the Constitution guarantees the freedom of the press, the freedom of the media, and the right of the public to receive and discuss information and ideas [s 16(1) of the Constitution]. It provides for all criminal accused to have access to the courtroom to always fit everyone, and the distance limitation of court proceedings taking place in all four corners of our country, there is also the realistic point that not everyone wants to come to court to find out what is happening. Instead, they rely on the media to tell them. And we do not want a system in which the judicial system is “shrouded in mystique and protected at all times from the prying eye of the camera or the intrusive ear of the microphone” [South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others 2007 (1) SA 523 (CC) at para 33].’

Justice Mosekene said the Pistorius trial broke boundaries that were previously unbroken as international journalists flocked to the country. Media and social media were flooded with information and even a 24-hour television channel was created with the sole purpose of televising and discussing the proceedings. ‘All of this was made possible because, before the trial even began, Judge Mlambo did what no South African court had before dared to do: Media organisations were granted permission to broadcast, live and in full Technicolour, a criminal trial.’

Technology in the court room
Justice Mosekene said the question of technology in the court room is a two-pronged one, namely:

- What technology should the court allow others to use?
- What technology should the court allow witnesses to testify through intermediaries or with the help of a support person;
- closing the courtroom so that only certain people are present; or
- allowing a witness to testify from a remote location via closed-circuit television.

‘Other measures might include suppression orders such as that ordered in Multichoice when Judge Mlambo prohibited the media from photographing or broadcasting the testimony of Mr Pistorius or his witnesses …’ said Justice Mosekene.

The sub judice rule
In his address, Justice Mosekene referred to the potential pitfalls of media presence in the courtroom and where justice systems around the world have created exceptions to the rule of open justice, for example, where parties are prevented from using documents discovered in litigation for any purpose other than the purpose for which they were provided. ‘What may still operate in South Africa, though, is the principle of sub judice, which literally translates as “under judgment”. It refers to a prohibition on publically discussing what happens in a case until the case is finalised … the sub judice rule, and its relevance in South Africa, is, at the very least, on the verge of extinction. … Let it be enough to observe that the social and other media blasts and immediacy make the sub judice rule nearly impossible to hold and to keep, … [w]hat is more it will be near impossible for the courts to police the rule.’

Accuracy
Justice Mosekene added that one of the challenges for open justice is the role of the media as it is the media’s responsibility to report on events that happen in a courtroom and convey the events as accurately as possible. ‘Open justice is all for nought if the media does not accurately convey what happens in the courtroom. … The media must also be careful not to sensationalise cases and turn them into media circuses,’ he said.

In conclusion, Justice Mosekene said: ‘We, the media and the courts, share a common goal. We want the public to know. Indeed, it is our shared responsibility to ensure that they do. The trial against Oscar Pistorius may have attracted great media attention, but it is the decision in Multichoice that will set the trend for many years to come. It has paved the way for us to begin reassessing how to achieve open justice in a technological age.’

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