IMPLEMENTATION OF BAIL LEGISLATION IN SEXUAL ASSAULT CASES:

First Research Report 2000 – 2002

Based on research conducted by the Consortium on Violence against Women:

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University of the Western Cape
Private Bag X17
Bellville
7535
South Africa

ISBN 0 – 86808 – 543 - 0

To be cited as:
Barday, R., and Combrinck, H. 2002. *Implementation of Bail Legislation in Sexual Assault Cases: First Report*. Gender Project, Community Law Centre, University of the Western Cape: South Africa.

ACKNOWLEDGEMENTS

The Consortium on Violence Against Women would like to acknowledge the role of the following persons or organizations in completing this research project:

- Farahnaaz Safodien, Jane Larrington, Celia Devlin, Ntombekhaya James, Anneke Meerkotter, Zulpha Geyer, Zanele Ntambo, Zukiswa Skepu, Bernedette Muthien and Pam Parenzee, who assisted the ***Gender Project*** in various capacities from 2000 – 2002 in conducting and recording the research.

- ***Members of the Consortium on Violence Against Women***: Lillian Artz, Penny Parenzee, Joanne Fedler, Dee Smythe, Kelley Moult, Tanya Jacobs, Samantha Waterhouse, Nolitha Mazwayi and other representatives from Rape Crisis Cape Town for information, comments and ongoing support.

- ***Bronwyn Pithey***, senior advocate in the Sexual Offences and Community Affairs Unit of the National Directorate of Public Prosecutions, who was instrumental in the conceptualization of the research and has subsequently provided ongoing advice and assistance.

- ***Virginia Francis***, Bureau for Justice Assistance, for providing background information on the Mitchell's Plain bail project and the Thuthuzela Project; and

- ***Abdul Gaffar Barday***, Law Faculty (UWC), and ***Christopher Claasen***, Computer Science Department (UWC) for the development of the ***MS Access*** database.

We would also like to express our gratitude to the criminal justice personnel for their contribution to the research project:

- ***Adv Frank Kahn SC***, the Western Cape Director of Public Prosecutions.

- ***Police officials*** from Atlantis, Camps Bay, Cape Town Central, Conville, George, Kensington, Khayelitsha, Lamberts Bay, Milnerton, Mitchell's Plain, Pacaltsdorp; Tablebay Harbour and Tableview.

- ***Magistrates and prosecutors*** from Wynberg, Cape Town, Mitchell's Plain, George, Atlantis and Clanwilliam courts.

Finally, we are greatly indebted to the Open Society Foundation and the Ford Foundation for their generous financial support and consistent encouragement.

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CHAPTER 1

INTRODUCTION

1.1 INTRODUCTION TO THE CONSORTIUM ON VIOLENCE AGAINST WOMEN

The Consortium, established in 1998, grew out of informal collaborative working partnerships that existed between staff members of Rape Crisis Cape Town, the Institute of Criminology (UCT), the Gender Project at the Community Law Centre (UWC) and the Department of Public Health (UCT). These member organizations had a long history of working together on issues relating to violence against women and criminal justice reform. The central aims of the Consortium are *inter alia* to –

a) Identify areas within the criminal justice system that are ineffective for women who are victims of gender-based violence and to use these shortcomings as point of reference for developing -

- projects to assist the criminal justice system in alleviating secondary victimization; and

- criminal justice remedies in relation to gender-based violence;

b) Consider crime prevention initiatives that include relevant departments or organizations that are located outside of the criminal justice system, but will contribute to the reduction of violence against women.

1.2 BACKGROUND TO THIS RESEARCH REPORT

Since the introduction of the interim Constitution[1] in 1994, the release on bail[2] of alleged criminals has sparked considerable public debate. Increasing public concern about the spiraling crime rate has resulted in demands that criminals be dealt with effectively, and a perception that due process of law is 'soft' on criminals has been strengthened by incidents where hardened criminals who had been released on bail subsequently absconded or committed further crimes after their release.[3] This sense of alarm about the bail system

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[1]. Constitution of the Republic of South Africa Act 200 of 1993 [hereinafter referred to as 'the interim Constitution'].

[2]. The phrase 'release on bail' is used in this report as an abbreviation for the broader concept of 'pre-trial disposition' of the accused, which includes the additional options of detention and release of the accused on his or her own recognizance.

[3]. See MG Cowling 'Bail reform: an assessment of the Criminal procedure Second Amendment Act 75 of 1995' *SACJ* (1995) 50-51; L de la Hunt and H Combrinck '"In the interests of justice": bail and the criminal justice system' in G Maharaj (ed) *Between Unity and Diversity* (1998) 317-318.

has particularly revolved around persons accused of sexual assault,[4] an issue that was sharply drawn into focus in the series of judgments in the matter of *Carmichele v Minister of Safety and Security and Another*.[5]

The project outlined in this report had its origins in a number of research, education and advocacy initiatives around the pre-trial disposition of the accused in sexual assault cases. These initiatives were undertaken since 1997 by member organisations of the Consortium on Violence Against Women, and included –

- a Pre-trial Consultation Programme developed at Rape Crisis, Cape Town;
- an analysis of legislative amendments discussed and passed in Parliament in 1997;[6]
- research on the experiences of victims[7] of sexual assault;[8] and
- research on the re-alignment of the law on sexual assault to fit into a framework of constitutionally entrenched human rights.[9]

This work cumulatively highlighted a number of concerns relating to the criminal justice response to sexual assault. Although this was not the only area of interest, researchers eventually selected the issue of the pre-trial disposition of the accused as a specific focus of enquiry. The reason for this decision was, firstly, that currently there is very little 'empirical' information available on the implementation of the bail legislation. Secondly, we believed that an investigation into the pre-trial disposition of the accused could present us with a microscopic view of what happens in the broader criminal justice process.

1.3 A QUESTION OF VALUES: BALANCING ON THE CONSTITUTIONAL TIGHTROPE

From the outset, Consortium members agreed that the foundational values underlying the Constitution[10] would also guide the research. These values include 'human dignity, the achievement of equality and the advancement of human rights and freedoms'. [11]

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4. The term 'sexual assault 'is employed here as a collective term for the criminal offences recognized as 'rape', 'indecent assault', and '*crimen iniuria*' respectively. See J Burchell and J Milton *Principles of Criminal Law* 2nd ed (1997) at 487-500, 501-505, 510-517 for a definition and discussion of each of these offences.
5. *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC). This matter recently culminated in a ruling by the High Court (Cape Provincial Division) in favour of the plaintiff, Ms Carmichele. The judgments, most notably the judgment handed down by the Constitutional Court, are discussed in more detail below.
6. See Rape Crisis, Cape Town, and the Women and Human Rights Project, Community Law Centre, University of the Western Cape *Submission to the National Assembly Justice Portfolio Committee* (1997).
7. The term 'victim' is used in this report rather than 'survivor'.
8. See S Stanton et al *Improved Justice for Survivors of Sexual Violence?* (1997); V Francis *A Rape Investigation in the Western Cape* (2000).
9. See B Pithey et al *The Legal Aspects of Rape* (1999).
10. Constitution of the Republic of South Africa Act 108 of 1996 [hereinafter referred to as 'the Constitution'].

In the context of the criminal justice system, this implies a balancing of the rights of accused in criminal cases with the interests of society and the rights of persons who look to the State for protection from crime.[12] The South African courts have shown a marked willingness to consider the interests of society and the prevention of crime as a counterweight to the rights of accused persons, especially in cases of sexual assault.[13]

1.4 WHY ARE SEXUAL OFFENCES DIFFERENT?

This research project proceeded from the fundamental and non-negotiable premise that the consideration of bail in sexual assault cases warrants an approach from the criminal justice system that is specialized and distinct from that adopted with other types of cases. We will briefly explore this premise here.

The Ontario Court (General Division) in Canada has recognized that sexual assault is a crime that is not comparable to any other form of violent crime, and expressed this as follows:

> 'Rape is unlike any other sort of injury incurred by accident or neglect. Survivors of rape must bear social stigmatization which accident victims do not. Rape is not about sex; it is about anger, it is about power and it is about control. It is… "an overwhelming life event". It is a form of violence intended to create terror, to dominate, to control and to humiliate.' [14]

Herman recounts that follow-up studies find that rape survivors have high levels of persistent post-traumatic stress disorder, compared to victims of other crimes.[15] She notes that these effects of rape are not surprising, given the particular nature of the trauma: the essential element of rape is the physical, psychological and moral violation of the person.

> 'Violation is, in fact, a synonym for rape. The purpose of the rapist is to terrorize, dominate and humiliate his victim, to render her utterly helpless.'[16]

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11. See s 1(a) of the Constitution.
12. Pithey et al (*op cit*) 6.
13. See e.g. *Klink v Regional Court Magistrate NO and Others* 1996 3 BCLR 402 (E), where section 170A of the Criminal Procedure Act 51 of 1977 [hereinafter referred to as 'the CPA'] was challenged on the grounds that it deprived the accused of his right to a fair trial by limiting his right to cross-examine. Melunsky J, while recognizing the right to confront and cross-examine as part of a fair trial, held that it was still necessary to balance the right of the accused with the rights of witnesses not to be subject to further traumatizing events in their pursuit of justice.
14. *Doe v. Board of Metropolitan Toronto (Municipality) Commissioners of Police* 39 O.R. (3d) 487 [1998] O.J. No. 2681 (per MacFarland J). See also a similar dictum of the Canadian Supreme Court in *R v Seaboyer; R v Gayme* 1991 2 RCS. The South African Court of Appeal has similarly recognized the unique nature of sexual assault in *S v Chapman* 1997 (3) SA 341 (A): 'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.' [At 344J-345B.]
15. JL Herman *Trauma and Recovery* (1992) at 57.
16. *Idem* at 57-58.

Significantly, it is not unusual for victims of sexual assault to be threatened with retaliation and further violence if they were to report the assault.

> '[I] was afraid… because they (the rapists) told me that they would again do what they had done to me.. they told me that if I reported they would kill me or rape me again…'[17]

It is therefore easy to comprehend that victims of sexual assault generally have a specific interest in the question of whether or not the accused is firstly, arrested, and secondly, released before commencement of trial. This was confirmed in a 1997 study reporting on the experiences of rape victims at a specialized sexual offences court.[18] Significantly, all the women who were interviewed expressed a strong need to know what 'happened' to the accused after arrest. This concern was generally related to anxiety about their safety.[19] The participants also strongly felt that men accused of rape should not be given bail.[20] Where bail had been granted, the women described the fear and worry this caused them.[21]

1.5 THE CENTRAL RESEARCH QUESTIONS

The Consortium identified the following concerns relating to bail in sexual assault as arising from the research and advocacy projects outlined above:

- Victims of sexual assault explained to service providers and to researchers that police and prosecutors often fail to provide them with information on a range of issues that were of particular concern to them. This included the status of the accused after he has been arrested and appeared in court.

- The concerns of victims upon discovering that the accused had been released on bail.

- Questions arose regarding the appropriateness of the 1997 legislative amendments. Commentators maintained that the substance of the legislation then in force was sufficient to prevent the inappropriate pre-trial release of alleged perpetrators of sexual assault. It was, however, in the realm of *implementation* that the legislation failed.

- Legal analysts voiced concern about the introduction of the key notion of 'exceptional circumstances' without any statutory guidance to shape judicial interpretation of this term.

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17. Rape victim in Stanton et al (*op cit*) at 104.
18. Stanton (*loc cit*).
19. Stanton (*op cit*) at 104-105. See also V Francis *A Rape Investigation in the Western Cape* (2000) at 14-15.
20. Stanton (*op cit*) at 105.
21. *Ibid.*

- The jurisprudential development of the right to freedom from violence[22] has recently placed significant emphasis on the question of state responsibility to protect women against violence.[23]

- While the Domestic Violence Act[24] acknowledges the special needs of victims of domestic violence and imposes special duties on police officials and clerks of the court to protect their interests, [25] this is not the case with the current bail legislation.

The Consortium members ultimately agreed that the research should at this stage focus on two key questions:

- **How is the law on bail currently applied in cases of sexual assault?**
- **What are the needs and concerns of victims of sexual assault around the pre-trial disposition of the accused?**

Once these two questions have been answered, it will be possible to formulate recommendations on how the legislation ideally ***ought*** to function and to identify the nature of interventions that would be required to ensure this ideal operation.

The current report focuses on the first of these two key research questions.

1.6 THE PURPOSE OF THIS RESEARCH REPORT

At the inception of this project, we framed the broad over-arching aims of the bail research as follows:

a) To give effect to the intention of the legislature by ensuring that persons accused of sexual assault are detained where the interests of justice demand; and

b) To reduce secondary victimization and intimidation of sexual assault victims by ensuring that their interests are adequately represented during bail hearings.

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[22]. S 12(1)(c) of the Constitution provides that everyone has the right to be free from all forms of violence from either public or private sources.

[23]. See in this regard Pithey et al (op cit) at 15-25 ; *S v Baloyi* (Minister of Justice and Another Intervening) 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC); *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC).

[24]. Act 116 of 1998. This Act came into operation on 15 December 1999.

[25]. See ss 2 and 4(2) of the Domestic Violence Act.

In addition to this report, dealing with the criminal justice system, we are currently preparing a second report focusing on the experiences of sexual assault victims. This report, aimed at addressing the ***second*** key research question set out above, will *inter alia* be based on interviews conducted with clients of Rape Crisis, Cape Town.

The findings set out in these reports will be employed to inform a series of further initiatives, including –

- Recommendations regarding legislative reform to the National Assembly Portfolio Committee on Justice and Constitutional Development;

- Recommendations to the South African Law Commission to inform their investigation into sexual offences;[26] and

- An analysis of current training material for criminal justice personnel, with the compilation of additional material where necessary.

[26] . The South African Law Commission published its second Discussion Paper on Sexual Offences in 2001 – see *Discussion Paper 102 (Project 107) Sexual Offences: Process and Procedure*. At the time of writing, the Commission's final report on sexual offences is due for publication.

CHAPTER 2

THE RESEARCH MODEL

2.1 INTRODUCTION

This chapter sets out the model developed to conduct this research project. Firstly, we list the research methodologies and describe the initial steps, including the identification of critical research issues and development of interview guidelines and data collection forms. We also explain decisions regarding research sites and research periods.

In the second part of the chapter, we recount researchers' experience in gaining access to information at police stations and courts, and discuss the data-gathering process in more detail.

2.2 RESEARCH METHODOLOGIES

During the early stages of the project, researchers conducted an extensive literature review. The purpose of this review was to establish the norms and standards prevailing in comparable foreign jurisdictions (most notably the US and Canada) and also to determine whether any analogous studies have been completed elsewhere. The review consisted mainly of a *comparative analysis of legislation and case law*.

The literature review indicated firstly that there were few, if any, similar studies to draw on in terms of comparable research methodologies. Secondly, a number of themes emerged from this review that were of use in the development of a conceptual framework for the research.

Researchers decided that both qualitative and quantitative research methods should be used. Quantitative methods would primarily include the collection of data from police case dockets as well as from court documents such as charge sheets. The qualitative methods would consist of interviews with criminal justice personnel, viz police officials, prosecutors and magistrates.[27]

2.3 IDENTIFICATION OF CRITICAL RESEARCH ISSUES AND RESEARCH SITES

2.3.1 Key government agencies

As a point of departure, researchers identified the different government agencies involved in the implementation of the bail legislation. These included:

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[27] . During the second phase of the research, interviews would also be conducted with victims of sexual assault. As set out in Chapter 1, these interviews form the subject of our forthcoming second report.

- SAPS: station commissioners/ heads of investigative units;
- SAPS: members of the 'Uniform Branch' tasked with charge office duties;[28]
- SAPS: investigating officers ('Detective Branch');
- Senior Prosecutors/ Regional Court Control prosecutors;
- Court prosecutors; and
- Magistrates (District and Regional Court) presiding over bail applications.

Due to time constraints, we eventually decided against conducting individual interviews with members of the Uniform Branch. However, some information regarding the role of this Branch in assisting victims of sexual assault was gained indirectly from interviews with stations commissioners and investigating officers.

2.3.2 Critical Research Issues

Certain critical research issues (CRI's) were then identified for each 'sector'.[29] These research issues were aimed at discovering what happens at difficult stages of the criminal justice process, and also covered the perceptions and experiences of police officials, prosecutors and magistrates. At this stage, we were mindful of the fact that the identified CRI's constituted a 'wish list' of issues to be investigated, and that practical experience might reveal that not all of the CRI's were feasible as research questions.

2.3.3 Design of interview guidelines and data collection forms

Based on the above CRI's, researchers developed interview guidelines for each sector. Since the interviews were to be conducted in a 'face-to-face' format,[30] we decided that the formulated questions should serve as guidelines only, and that interviewers should have the freedom to deviate from the guidelines where they regarded this as necessary. An example of an interview guideline is attached as **Appendix 1**.

In addition, researchers also designed data collection forms for use at police stations and courts. These 'intake' forms were based on the CRI's, and were incorporated in a database that would be flexible enough to allow the data to be entered and for the database to be amended as the research developed and new information added.

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[28]. Members of the Uniform Branch are often tasked with taking initial statements from sexual assault victims when they report to the charge office or when Uniform Branch members are called to the scene of the incident.

[29]. These CRI's are analogous to the monitoring indicators employed in the Consortium study aimed at the monitoring of the Domestic Violence Act 133 of 1998. See P Parenzee et al *Monitoring the Implementation of the Domestic Violence Act* (2001) at 7.

[30]. During the later stages of the research, we requested court personnel to complete written questionnaires instead of conducting personal interviews, due to difficulties experienced in arranging meetings. These questionnaires were based on the interview guidelines.

2.3.4 Research sites

During the initial conceptualization of the research, the regional courts situated at Mitchell's Plain, Cape Town and George were identified as appropriate research sites. This decision was based on the fact that the jurisdiction of these courts encompassed urban, semi-urban and rural areas with great demographic and socio-economic diversity.

As the research progressed, it became apparent that certain adjustments to these sites were required. These shifts included the following:

- The jurisdiction of Cape Town ***Regional Court*** stretches well beyond the ten police stations falling under the jurisdiction of Cape Town ***District Court*** and includes a number of sessional courts in rural areas. Researchers decided to include two of these sessional courts, viz Atlantis and Lambertsbay, in the ambit of the research. The reason for this inclusion was our assumption that these sites may prove to be generally far less well resourced than the urban courts and police stations. The assumed disparity in resources, and the obstacles this might create for victims of sexual assault, could potentially provide instructive data for comparison.

- We also learnt that during the first research target period,[31] sexual assault cases originating from Khayelitsha police station were tried in Wynberg Regional Court rather than Mitchell's Plain court (which is where Khayelitsha cases other than sexual offences are usually heard). This arrangement entailed that sexual assault cases would be 'carried' on the district court roll in Mitchell's Plain for finalisation of the investigation and would then be transferred to the Wynberg Regional Court for trial. If the accused opted to bring a bail application during this initial 'investigation' phase, the bail hearing would therefore take place in the district court at Mitchell's Plain court. We therefore decided to include Wynberg Regional court in the ambit of the research to firstly follow up on the outcome of Khayelitsha cases that had been transferred for trial and to secondly interview prosecutors tasked with prosecuting these cases.

2.3.5 Research periods

Researchers identified the period of ***1 July to 31 December 1999*** as the initial research focus period. This meant that we would used cases reported to the SAPS during this period as the starting point for the investigation. The reason for this selection was primarily based on the fact that the current bail legislation had come into operation on 1 August 1998, and it was felt that during this period, one year after the commencement of the legislation, all government agencies would have had the opportunity to come to 'grips' with the new legislation.

The field research was conducted in two stages. The first stage was from October 2000 to February 2001, and the second from September 2001 – April 2002. During the second field research stage, we elected to shift the research focus period to ***1 July to 31 December 2001***. This shift was necessitated firstly by practical considerations such as the fact that

[31] . I.e. from 1 July to 31 December 1999.

certain bail records for the period July to December 1999 would have been destroyed by the beginning of 2001 and therefore be unavailable to researchers during the second phase.[32] Secondly, we believed that it was important to also examine whether there had been any development in implementation from 1999 to 2001.

2.4 GAINING ACCESS TO INFORMATION

2.4.1 Police stations

As a starting point, researchers contacted the commissioners of designated police stations, explained the research objectives and requested their cooperation in allowing us to interview investigating officers and to gain access to case dockets and other relevant records.

While the majority of station commissioners were helpful and readily agreed to assist researchers, others were less cooperative. Responses ranged from a repeated failure on the part of stations commissioners to respond to telephonic requests to arrange meetings (Woodstock and Sea Point) to a reluctance to allow researchers access to case dockets.[33] In some cases, this reluctance also extended to granting researchers permission to interview police officials at the station concerned. The reasons cited for the refusal of access to information included the national moratorium on the release of crime statistics then in place, as well as reliance on the provisions of the Promotion of Access to Information Act.[34]

The following police stations participated in the research:

- ★ Atlantis
- ★ Camps Bay
- ★ Cape Town Central
- ★ Conville
- ★ George[35]
- ★ Kensington
- ★ Khayelitsha
- ★ Lamberts Bay
- ★ Milnerton
- ★ Mitchell's Plain
- ★ Pacaltsdorp
- ★ Tablebay Harbour
- ★ Tableview

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[32]. See in this regard Section 2.5.2 below.

[33]. The station commissioners in question did not regard the written authorisation provided by the Office of the Director of Public Prosecutions as sufficient.

[34]. Act 2 of 2000.

[35]. Due to time constraints, researchers were unable to screen the dockets at George police station. However, interviews were conducted with the station commissioner, and he was prepared to make the relevant information available to researchers.

2.4.2 Courts

Our experience in gaining access to information at the magistrates' courts was markedly different from accessing information at police stations. The ease with which we obtained authorization to examine court documents was likely related to the fact that charge sheets are regarded as 'public documents', to which all members of the public have a right of access.[36] No objections were raised to conducting interviews with prosecutors or magistrates.

2.5 THE DATA-GATHERING PROCESS

2.5.1 Police stations

All participating stations made use of the Crime Administration System [CAS], a nationally standardized computer system from which we could extract details such as the CAS number, the name of the accused, the nature of the offence, the name of the investigating officer and the complainant's details for the cases reported during the research periods. The extent of the available details depended on whether or not the investigating officer (or other person entering the information) entered the data onto the computer comprehensively. Where stations had a relatively low turnover of cases, more detail could be extracted from the system.

Records obtained in this way were not always reliable or comprehensive, since they were not in all cases updated regularly. In some instances, the computer record would state the offence as 'rape' when it was in fact indecent assault. In other cases the name of the accused would not be entered (even though an arrest had taken place) – which the researchers needed in order to trace the case through the court process as we had initially planned.

From the lists of reported sexual assault cases provided by the police stations, we divided the cases into two categories, namely ***finalized*** cases and cases that were still ***pending or 'active'***. Gaining access to active dockets proved to be more difficult than originally envisaged. Depending on where the matter is in the criminal justice process, the docket may be either in the possession of individual investigating officers, with the prosecutor at court for purposes of a court appearance or 'traveling' between court and police station. In practice, therefore, screening all active dockets would have implied that each investigating officer concerned would have to be contacted and those dockets then traced, a task that was beyond the capacity of this research project. Instead, we included certain additional questions in the interview guidelines aimed at capturing some of the information that may have been gained from analysing active dockets, for example, the extent to which prosecutors provide guidance to investigating officers around gathering information for the bail hearing.

The database thus represents a sample of the research period originally conceptualized and by no means purports to be a comprehensive record of all the cases for the research periods.

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[36] . See s 233(2) of the CPA.

FIGURE 1: NUMBER OF SEXUAL ASSAULT CASES REPORTED

Police Station	Number of sexual assault cases reported during research periods	Number of finalized cases screened by researchers
Atlantis	48	0*
Camps Bay	7	6
Cape Town Central	Unknown[37]	0
Conville	53	52
Kensington	19	6
Khayelitsha	245	183
Lambert's Bay	5	0*
Milnerton	29	11
Mitchell's Plain	118	116
Pacaltsdorp	16	16
Tablebay Harbour	2	2
Tableview	13	5
TOTAL	**548**	**397**

*** All cases still current at time of research**

2.5.2 Courts

None of the courts visited had a computer system that could extract all the relevant sexual offence cases (finalized and pending), or match individual police CAS numbers with court case numbers. (It was only after the information was entered into the research database that some of the cases could be traced from the police dockets to the court charge sheets.) No statistics are kept according to the nature of charges and finding the sexual assault cases therefore largely depended on the ability of the researcher to 'spot' these charge sheets among other finalised and pending cases.[38]

Where the nature of the charges had not been indicated on the charge sheet (either on the so-called J7 cover sheet or on a ***pro forma*** annexure), it is quite possible that the case may have escaped the scrutiny of the researcher. Cases that were at the time being heard at court were in the possession of the individual prosecutors and could therefore not be perused.

Finalised cases are categorised in the court archives according to the manner in which the case had been finalised. In accordance with Department of Justice prescriptions, cases

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37. Appointments made by researchers with officials in order to scrutinize finalized dockets at this stations were not kept.

38. Apart from scrutinizing the charge sheets, another method of gathering information (such as postponement dates and the outcome of bail hearings) would be to consult the criminal record registers or 'court books' that are completed on a daily basis. Although researchers initially examined the possibility of using these registers to track cases, this soon proved to be beyond the capacity of the research project, given the fact that following each case through several registers would be a prohibitively labour-intensive endeavour.

falling within a certain 'disposition' category must be destroyed after a stipulated number of years. Due to the fact that the cases finalized during July to December 1999 were about to be destroyed (after the one-year period had lapsed) at the time of the first research period, the examination of these charge sheets had to be completed as a matter or urgency.[39]

The table below represents the number of charge sheets analysed at the various magistrates' courts that were included in the research. This number does not reflect all the sexual assault cases dealt with by these courts during the relevant research period, as certain of the charge sheets were either not filed or were in use by the courts at the time the courts were visited.

FIGURE 2: NUMBER OF CHARGE SHEETS ANALYSED

Court	Number
Cape Town	51
George	8
Lamberts Bay	4
Mitchell's Plain	154
Wynberg	51
TOTAL	**268**

[39] . At certain of the courts some of the relevant charge sheets had already been destroyed – at one court the archivist selected all the 1999 charge sheets that were due to be destroyed that day in order for the researcher to go through them first.

CHAPTER 3

LEGAL AND POLICY FRAMEWORK

3.1 INTRODUCTION

This chapter briefly sets out the constitutional, legislative and policy framework underpinning the consideration of bail in sexual assault cases. As a starting point, we briefly examine the legislative history of these provisions in order to place the current debates around bail legislation in proper context. Furthermore, we look at the relevant provisions of the Bill of Rights (including the rights of both accused persons and the victims of sexual assault) and the emerging jurisprudence on the interpretation of these rights. Finally, we list the current government policies that bear on the duties of state officials (most notably police officials and prosecutors)[40] in relation to bail.

3.2 DEVELOPMENT OF LEGISLATION ON BAIL

The development of the present legal rules on bail in sexual assault cases can be traced to the period immediately preceding the adoption of the interim Constitution in 1994.

3.2.1 Granting of bail prior to and after the adoption of the interim Constitution

Prior to the adoption of the interim Constitution in April 1994, an accused person was required to initiate the process of applying for bail, and bore the onus of showing that he or she was entitled to be released on payment of bail.[41] The primary issue to be considered by the presiding officer was whether or not the accused would stand trial, and in making this determination, the judge or magistrate was required to balance the rights of the accused against the interests of the community. However, the presiding officer was required to bear in mind that the accused person had not yet been found guilty, and therefore to avoid unduly infringing his or her liberty.

The interim Constitution set out a number of rights of arrested and accused persons. Section 25(2)(d) confirmed that an accused person had the right 'to be released on bail unless the interests of justice require otherwise'. The immediate effect of this provision was that instead of having to initiate bail proceedings and bear the onus of proof, the accused was now entitled to be released on bail.[42] This implied that where the prosecution was of the opinion that the interests of justice required the detention of the accused, the

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[40]. Due to the fact that the consideration of an accused's application for bail is a judicial function, the provision of 'policy guidelines' or similar directives (analogous to those issued to prosecutors or police officials) for ***magistrates*** is generally regarded as inappropriate.

[41]. See De la Hunt & Combrinck (*op cit*) at 318.

[42]. See De la Hunt & Combrinck (*op cit*) at 319 n 15 for views *contra*.

onus would be on the prosecution to initiate proceedings to ensure that bail would be refused.

The general perception, in the period immediately after the interim Constitution came into operation, was that presiding officers were too lenient in granting bail.[43] Due to this public dissatisfaction with what was seen as an undue emphasis on the rights of accused persons, the provisions regarding bail in the Criminal Procedure Act[44] were amended in 1995.

3.2.2 The Criminal Procedure Second Amendment Act 75 of 1995

The above Act, which came into operation in September 1995, *inter alia* replaced section 60 of the CPA with detailed measures regulating the determination of bail. (Section 60 had hitherto contained a rather mild confirmation of the fact that an accused person may be released on bail.) Section 60(1)(a), as amended, confirmed the position set out in the interim Constitution that an accused person had the right to be released on bail unless the court found that it was 'in the interests of justice that he or she be detained in custody'.[45]

Sec 60(11) also provided that an onus would be imposed on the accused person in certain instances: in more serious cases, (listed in Schedule 5 to the CPA) the accused had to show that the interests of justice did not require his or her further detention.

However, the 1995 Act did not have the desired impact. This was due to a number of causes, including shortcomings in the gathering of evidence for bail hearings by police officials, a lack of direction of police investigations by prosecutors, a lack of training and resources on the part of both police and prosecutors and uncertainty regarding the operation of a criminal justice system based on a culture of human rights.[46] In addition, the perceived failure of the 1995 Act was thrown into sharp focus by a number of tragic incidents that revived calls for drastic measures to protect the interests of victims of crime.[47] These cases had the effect of again focusing national attention on the perceived shortcomings of the 'bail' system,[48] and added impetus to government's resolve to tighten the existing provisions relating to the pre-trial disposition of accused persons.[49] The Criminal Procedure Second Amendment Act[50] was accordingly passed during December 1997. This Act, which had as a clearly stated aim to address public concerns regarding bail,[51] came into operation on 1 August 1998.

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43. *Idem* at 319.
44. Act 51 of 1977 [hereinafter referred to as 'the CPA'].
45. S 60(1)(a) of the CPA as amended by Act 75 of 1995.
46. See in this regard *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC); De la Hunt & Combrinck (*op cit*) at 321.
47. See H Combrinck '"He's out again": the role of the prosecutor in bail for persons accused of sexual offences" *Law, Democracy and Development* (2001) at 31-32 for a detailed discussion of these events.
48. S Hess and M Soggot 'Justice's betrayal of innocence', *Weekly Mail & Guardian*, 9 May 1997.
49. G Thiel 'Rape case is just the tip of the iceberg', *Weekly Mail and Guardian*, 1 August 1997.
50. Act 85 of 1997.
51. See Par 3 of the memorandum accompanying the Criminal Procedure Second Amendment Bill B 84B-97.

3.2.3 The Criminal Procedure Second Amendment Act 85 of 1997

The measures introduced by the 1997 Act (as amended) constitute the current legal position. [52] The relevant statutory provisions are included in this report as **Appendix 2**.

3.2.4 Subsequent amendments

a) Foundational principle

In its judgment in *S v Dlamini*,[53] the Constitution Court[54] pointed out that the wording of section 60(1)(a) (as it stood at the time) was slightly different from that employed in the corresponding section 35(1)(f) of the 1996 Constitution.[55]

The legislature subsequently set out to align the provisions of section 60(1)(a) with the Constitution.[56] The amended section came into operation on 23 March 2001.

b) Forum for bail proceedings

Another significant amendment was a shift in the forum for bail proceedings. The 1997 legislation originally provided that Schedule 6 matters were to be held in the regional court, unless such court was unavailable. This arrangement has subsequently been changed.

The revised section now provides that the bail application of a person who is charged with an offence referred to in Schedule 6 must be considered by a magistrate's (district) court.[57] However, a Director of Public Prosecutions (or duly authorized prosecutor) may, if he or she deems it expedient or necessary for the administration of justice, direct in writing that the application must be considered by a regional court.

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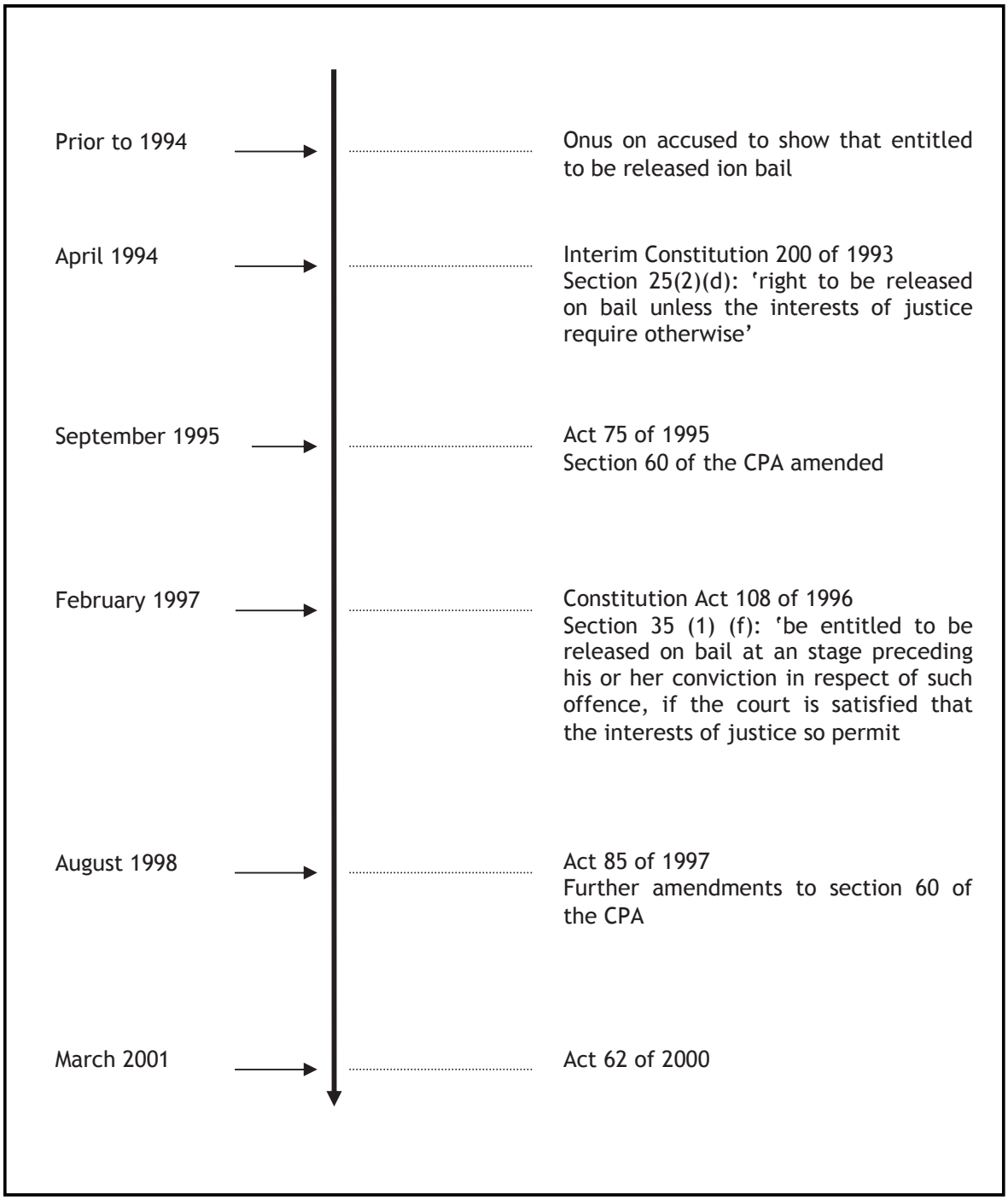
52. See generally J van der Berg *Bail: A Practitioner's Guide* 2nd ed (2001) for a useful exposition of the current legal position.
53. *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
54. Per Kriegler J.
55. This divergence came about as a result of the transplanting of the foundational principle as set out in section 25(2)(d) of the interim Constitution into section 60(1). After the Constitution came into operation and section 25(2)(d) was replaced by section 35(1)(f), section 60(1)(a) was not correspondingly amended. The effect was that section 60(1)(a) favoured liberty more than the minimum required by the Constitution.
56. S 60(1)(a) was amended by s 9(a) of Act 62 of 2000, and s 9(b) amended s 60(4) accordingly.
57. S 50(6)(c) as amended by s 8(1)(b) of Act 62 of 2000.

3.2.5 Summary of developments:

The main points in the development of the legislation can therefore be represented as follows:

FIGURE 3: DEVELOPMENT OF BAIL LEGISLATION



3.3 THE CONSTITUTION

3.3.1 The accused's right to be released from detention

The first significant provision of the Constitution is section 35(1)(f), which states that everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions. Section 35(1)(d) of the Constitution also affords an arrestee the right to be brought before a court as soon as reasonably possible, but within 48 hours of arrest, and at that first appearance to be charged, or told the reason for further detention, or released.

The Constitutional Court examined the import of section 35(1)(f) in considerable detail in its judgment in *S v Dlamini*.[58] While the judgment is noteworthy in a number of respects, we will briefly examine only aspect here, viz. the nature of bail as a judicial function.

The Court stated that an examination of the relevant provisions of the CPA shows that bail is unmistakably a judicial function.[59] The underlying policy is plain:

> 'Although societal interests may demand that persons suspected of having committed crimes forfeit their personal freedom pending the determination of their guilt, such deprivation is subject to judicial supervision and control.'[60]

The learned judge pointed out that in exercising such oversight in regard to bail the presiding officer is not to act as a passive umpire. If neither side raises the question of bail, the court must do so. If the parties do not of their own accord adduce evidence or otherwise produce data regarded by the court to be essential, it must itself take the initiative. Even where the prosecution concedes bail, the court must still make up its own mind.

Furthermore, a bail hearing is a *unique* judicial function. The peculiar requirements of bail as an 'interlocutory and inherently urgent step' imply that although the bail hearing is intended to be a formal court procedure, it is considerably less formal than a trial. (Thus the evidentiary material proffered need not comply with the strict rules of oral or written evidence.) Also, although bail, like the trial, is essentially adversarial, the inquisitorial powers of the presiding officer are greater. Finally, there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail.[61]

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58. *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
59. At Par 10.
60. *Ibid.*
61. At Par 11.

3.3.2 Rights of victims, witnesses and identifiable potential victims

Although a popular perception may have developed in recent years that the South African Constitution does not make any provision for the rights of victims of sexual assault (while guaranteeing the rights of arrested and accused persons),[62] we maintain that a closer examination of the Bill of Rights leads to a different conclusion.[63]

Section 12(1)(c) of the Constitution expressly entrenches the right to be free from all forms of violence from both public and private sources, as one of the aspects of the rights to personal security. The effect of section 12(1)(c) is amplified when this provision is read with section 7(2) of the Constitution, which requires the state to 'respect, protect, promote and fulfill the rights in the Bill of Rights'. The immediate consequence of these provisions is that victims of sexual assault may expect some form of protection from the state against further assault or injury. This expectation translates into certain duties resting on the *state*.

The nature of these duties will vary greatly, ranging from an obligation to enact appropriate legislation to address domestic violence[64] to the duties of individual state officials such as police officials.

This reading is borne out by the judgment of the Constitutional Court in *Carmichele v Minister of Safety and Security and Another*.[65] Due to the significance of this judgment to the question of bail, we will examine this case in detail here.[66]

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62. South Africa does not currently have a 'Victims' Charter' or similar document. A draft national Victims' Charter, based on internationally recognized basic victims' rights and aimed at addressing the needs of victims in a South African context, was developed in 1998. The following victims' rights are specifically acknowledged in the draft Charter: to be treated with fairness and with respect for dignity and privacy; to offer information; to receive information; to protection; to compensation; to restitution; and to assistance. At the time of writing, the draft Charter has not yet been formally introduced.

63. See Combrinck (*op cit*) at 39.

64. See *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC).

65. *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC).

66. Three recent judgments have analysed the relationship between the right to freedom from violence as entrenched in sec 12(1)(c) of the Constitution and concomitant duties on the state to take steps to protect this right: *Hamilton v Minister of Safety and Security* (Cape Provincial Division of High Court) Unreported Judgment, June 2002; *Minister of Safety and Security v Van Duivenboden* (Supreme Court of Appeal) Unreported Judgment dated 22 August 2002, Case Number 209/2001; *Van Eeden v Minister of Safety and Security* (Supreme Court of Appeal), Unreported Judgment dated 27 September 2002, Case No 176/2001. Although these judgments are of significance in the context of the emerging jurisprudence on the right to freedom from violence, they do not directly address the matter of bail and will accordingly not be discussed in any detail here.

3.3.3 *Carmichele v Minister of Safety and Security*: judgment in the Constitutional Court

a) Facts

On 6 August 1995 the applicant in this matter, Ms Alix Carmichele, was attacked by one Francois Coetzee in the home of a friend in Noetzie, a small seaside village situated near Knysna. Prior to this attack, Coetzee had been convicted of housebreaking and indecent assaulting a woman. Six months after this conviction, he attempted to rape and murder another woman. When this victim reported the incident, she informed the duty officer that the accused had a previous conviction on a sexual assault charge. He noted this information in the case docket.

Coetzee was arrested on the charge of attempted murder and rape and appeared in court the next day. At this appearance, the investigating officer indicated to the prosecutor that there was no reason to deny bail to the accused and recommended that he be released on warning. The prosecutor did not place before the magistrate any information around the previous conviction nor did he oppose the release of the accused. Coetzee was thus unconditionally released.

Following his release, the employer of Coetzee's mother (one Ms Gosling) was warned about the charges against Coetzee. Gosling, concerned about Coetzee posing a danger, approached the police to request that he be detained pending the trial. She was referred to the Senior Prosecutor, who informed her that there was nothing that could be done unless Coetzee committed another offence. The Senior Prosecutor did however subsequently conduct an interview with Coetzee and on the basis of this interview, the court referred him for psychiatric observation in terms of section 77(1) of the CPA.

Upon his return appearance, Coetzee was again released on his own recognizance. There is no reference in the record to the question of bail being raised. Subsequent to his appearance, he was once more found acting suspiciously around Gosling's house, where the applicant was staying at the time. The police and senior prosecutor were yet again approached and asked whether Coetzee could not be detained. The prosecutor reiterated that their hands were tied.

Four days later, Coetzee broke into Gosling's house while the applicant was there, and viciously attacked her with a pick-handle and a knife. She managed to escape, and Coetzee was charged and convicted on a number of counts including attempted murder.

b) The legal questions

The applicant's claim was founded in delict. (Although the direct cause of the damages she suffered was the assault by Coetzee, she aimed to hold the respondents liable because of the alleged wrongful acts or omissions of the police officials or the prosecutors at times when they were acting in the course and scope of their employment with the state.[67]) In order to succeed, the applicant would have to establish at the trial that:

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[67] . At Par 25.

(a) The police or the prosecutors respectively owed a legal duty to the applicant to protect her;

(b) The police or the prosecutors respectively acted in breach of such a duty and did so negligently;

(c) There was a causal connection between such negligent breach of the duty and the damage suffered by the applicant.

The Cape Provincial Division of the High Court initially granted the respondents an order for absolution from the instance. The applicant appealed to the Supreme Court of Appeal on this issue, and the appeal was dismissed with costs. The trial court and the SCA dealt with issue (a) only - having found against the applicant in respect of that issue, it became unnecessary for the court to consider whether there was sufficient evidence on the remaining two issues to place the respondents on their defence.

A major consideration before the Constitutional Court was the applicant's submission that both the High Court and the SCA had erred in not applying the relevant provisions of the Constitution in determining whether the police investigating officer or the prosecutors owed a legal duty to the applicant to protect her. In particular, the applicant relied on the obligation on all courts to develop the common law with due regard to the spirit, purport and objects of the Bill of Rights as required in section 39(2) of the Constitution. It was argued on her behalf that, had the common law been so developed, the High Court and the SCA would have found that there existed a legal duty to act.[68]

In its judgment, the Constitutional Court pointed out that there were various ways of applying section 39(2) in shaping the common law generally and in determining specifically the wrongfulness element of delictual liability for an omission.[69] Without the benefit of a fully considered judgment from either the SCA or the High Court as to whether one solution would be better than another, the Constitutional Court was at a grave disadvantage.[70] The Court therefore declined to engage in the exercise of developing the common law principles. Instead, based on its finding that the High Court had erred in granting an order for absolution of the instance, the Court referred the matter back to the High Court for the trial to proceed.

In reaching the conclusion that the High Curt should not have granted the order for absolution, the Court made a number of observations about the potential liability of police officials and prosecutors in the context of bail.

c) Police liability

The Court found positive obligations on members of the police force both in the interim Constitution and the Police Act and stated that in addressing these obligations in relation to

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[68]. At Par 29. The Constitutional Court deals in considerable detail with the High Court and SCA judgments and the obligation to develop the common law; unfortunately the nature and scope of this report do not allow for a comprehensive discussion of this aspect.

[69]. Par 58.

[70]. Par 58.

dignity and the freedom and security of the person, 'few things can be more important to women than freedom from the threat of sexual violence'.[71]

The Constitutional Court also emphasized that the police is one of the primary agencies of the state responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime.

d) Liability of prosecutors

The court pointed out that the interim Constitution did not contain any provisions dealing with prosecutors; however, prosecutors have always owed a duty to carry out their public functions independently and in the interests of the public.[72] In the context of bail, this has specific implications:

> 'While the consideration of bail is pre-eminently a matter for the presiding judicial officer, the information available to the judicial officer can but come from the prosecutor. *He or she has a duty to place before the court any information relevant to the exercise of the discretion with regard to the grant or refusal of bail and, if granted, any appropriate conditions attaching thereto.*'[73]

However, the learned judges cautioned that in considering the legal duty owed by a prosecutor either to the public generally or to a particular member thereof, a court should take into account the pressures under which prosecutors work, especially in the magistrates' courts. Care should be taken not to use hindsight as a basis for unfair criticism, since to err in this regard might well have a chilling effect on the exercise by prosecutors of their judgment in favour of the liberty of the individual.[74]

The court's conclusion regarding this aspect was therefore that there seemed to be no reason in principle why a prosecutor who has reliable information, for example, that an accused person is violent, has a grudge against the complainant and has threatened to do violence to her if released on bail should not be held liable for the consequences of a negligent failure to bring such information to the attention of the Court. [75]

3.3.4 Subsequent developments

The Cape Provincial Division of the High Court subsequently heard evidence form the defendants, and during May 2002 ruled in Ms Carmichele's favour.[76]

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71. Par 62.
72. Par 72.
73. Par 72. Our emphasis.
74. Par 73.
75. Par 74. The Court explains that if such negligence, for example, results in the release of the accused on bail and he then proceeds to implement the threat made, a strong case could be made out for holding the prosecutor liable for the damages suffered by the complainant.
76. *Carmichele v Minister of Safety and Security and Another* 2002 (10) BCLR 1100 (C).

In respect of Coetzee's initial release on warning, the court found that the contents of the police docket should, at the very least, have caused the investigating officer properly to consider whether Coetzee ought to be released. The fact that notwithstanding being aware of the contents, the investigating officer recommended Coetzee's release, leaves no other conclusion save that he 'failed to fulfil his constitutional duty to protect the plaintiff and others in her position'. [77]

Similarly, it must have been apparent to the prosecutor from the information in the docket that Coetzee posed a serious threat to the safety of women. Their failure to investigate the circumstances of Coetzee's previous rape case and placing such information before the court before which Coetzee would appear, coupled with the decision not to oppose bail, enabled the assault to be perpetrated on the plaintiff.[78]

The court reiterated that the plaintiff's action would have failed in terms of the common-law test for delictual liability. It therefore became necessary to determine whether the conventional test for the existence and scope of a private law duty of care needed to be developed in terms of section 39(2) of the Constitution.[79] There are two stages to such an enquiry: firstly, whether the existing common law requires development in accordance with the objectives of section 39(2), and if so, how such development should take place in order to meet these objectives.[80]

The court accepted that in the light of the constitutional duties imposed on the State (as set out by the Constitutional Court in its *Carmichele* judgment), it was necessary to revisit the conventional test for wrongfulness to determine whether the state owed the plaintiff a legal duty to protect her against attacks of the sort perpetrated by Coetzee.[81] The court then comes to the following conclusion:

> 'Consequently, in the enquiry whether the State owed the public in general, and women in particular, a duty at private law to exercise reasonable care in the prevention of violence crime, the proper application of the test requires one to attach primary significance to these constitutional imperatives. On the application of that test, [the police and prosecutor] owed the plaintiff a legal duty to protect her against the risk of sexual violence perpetrated by Coetzee. The negligent failure to do so, was, therefore unlawful.'[82]

Having made this finding, the court subsequently had to evaluate the further delictual elements of causation and proximity. Chetty J came to the conclusion that both of these elements had been satisfied, and that the defendants were therefore jointly and severally liable to the plaintiff.[83]

The defendants raised the concern that the recognition of a private claim for damages in delict under these circumstances would 'open the floodgates of litigation'. Chetty J

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77. Par 18.
78. Par 19.
79. Par 27.
80. Par 28.
81. Par 31.
82. Par 32.
83. See Par 33 - 38.

addressed this by emphasizing that it is not every *bona fide* error of judgment on the part of the police and prosecuting authorities that the plaintiff seeks to hold the State accountable for. Instead –

> 'The standard required is that policemen/ women and prosecutors act with the care and diligence that ordinary policemen/ women and prosecutors do, and only if they fail short of that standard, will liability ensure.' [84]

The Ministers of Safety and Security and of Justice have lodged an appeal to the Supreme Court of Appeal. At the time of writing, the matter has not yet been set down for hearing.

3.4 POLICY GUIDELINES

In the light of the remarks by Chetty J in the *Carmichele* matter, it will be useful to analyse two sets of policy documents in order to establish the standard of care and diligence required of 'ordinary policemen/ women and prosecutors'. These policy documents were issued to police and prosecutors on national level in 1998 and 1999 respectively.[85]

3.4.1 South African Police Service

The National Police Commissioner has issued an instruction document on the investigation of Sexual Offences.[86] The National Instruction No 22/ 1998 '*Sexual Offences: Support to Victims and Crucial Aspects of the Investigation*' was issued in 1998.

At the time of writing, researchers did not have access to the instruction document itself.[87] However, the South African Law Commission examines these Instructions in some details in its recent Discussion Paper on Sexual Offences, thus providing insight on the contents.[88]

The Law Commission recounts that the National Instruction accords priority to the giving of information to victims on the progress of the case. [89] It also points out that the safety of victims of sexual offences is listed under the heading of 'Victim After-care' without highlighting issues surrounding bail.

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84. Par 32.

85. This section merely recounts the contents of the policies without comment or analysis.

86. Section 25(1)(b) of the South African Police Service Act 68 of 1995 authorises the National Police Commissioner to issue national orders and instructions that are necessary for the establishment and maintenance of uniform standards of policing.

87. Researchers were informed that due to the confidential nature of the instructions, the document is not available to the general public. We were accordingly advised to make a formal application for access to the relevant sections of the document in terms of the Promotion of Access to Information Act 2 of 2000. At the time of writing, this application is underway.

88. See South African Law Commission *Discussion Paper 102* at Par 3.2.3 *et seq* for a general discussion of the National Instruction. Par 11.4.5 specifically deals with the National Instruction in the context of bail.

89. South African Law Commission *Discussion Paper 102* at Par 11.4.5.

3.4.2 National Prosecution Directives

The National Prosecution Directives[90] include a chapter setting out guidelines regarding bail.[91] The general principle is stated as follows:

> 'The consideration of bail is an important component of criminal proceedings, and the mismanagement of bail applications may have serious consequences for the administration of justice. Unconsidered releases, inadequate conditions or insufficient amounts of bail may contribute to mistrust in the criminal justice system. At the same time, prosecutors should not oppose bail if the interests of justice do not require the detention of the accused.'[92]

Prosecutors are instructed not to proceed with a bail application until they have all the necessary information.[93] The decision whether or not to oppose bail must be preceded by thorough consultation with at least the investigating officer.[94]

In addition, the chapter on sexual offences includes a specific section on bail,[95] which includes the following guidelines:

- 'Because of the close relationship that often exists between the accused and the victim in cases of sexual assault, the question of whether or not to release the accused on bail must be considered carefully. Where appropriate, section 60(11) of Act 51 of 1977 should be applied without hesitation.'[96]

- Efforts should be made to consult with the victim prior to the bail hearing to ensure that all relevant information is gathered and considered.[97]

- Prosecutors must also request the police to inform the victim of the result of any bail application. If bail is granted, special conditions relating to contact with the victim may be necessary. The complainant should also be informed of the procedure to be followed if the accused contravenes any of the bail conditions.[98]

- Prosecutors must take immediate action against accused who harass, threaten, injure or intimidate victims or other witnesses in sexual assault cases.[99]

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90. In November 1999, the National Director of Public Prosecutions issued national policy directives in accordance with the National Prosecuting Authority Act 32 of 1998 read with section 179(5) of the 1996 Constitution.
91. Part 9.
92. Par A.1.
93. Par A.3.
94. *Ibid.*
95. Part 27 Par C.
96. Par C.1.
97. Par C.2.
98. Par C.3.
99. Par C.4.

3.5 SUMMARY

3.5.1 Legislative history

Since 1994, the legal position regarding bail has undergone significant changes. The introduction of section 25(2)(d) of the interim Constitution changed the common law position in a number of respects. The interpretation of this section by presiding officers in the period immediately following the adoption of the interim Constitution eventually resulted in the amendment of the CPA in 1995.

It soon became apparent that the 1995 amendments did not have the desired impact. The reasons identified for this included (*inter alia*) shortcomings in the gathering of evidence for bail hearings, a lack of direction of police investigations by prosecutors and a lack of training and resources on the part of police and prosecutors. Act 85 of 1997 (amending the CPA) was accordingly passed with the express intention of 'tightening up' the law relating to bail. The 1997 amendments to a large extent constitute the current legal position.

3.5.2 Constitutional provisions

Section 35(1)(f) of the Constitution provides that everyone who is arrested for allegedly committing on offence has the right to be released from detention if the interests of justice permit. The Constitutional Court evaluated the relevant provisions of the CPA against section 35(1)(f) in *S v Dlamini*.[100] The Court's comments on the nature of bail as a judicial function are specifically instructive.

Section 12(1)(c) of the Constitution entrenches the right to be free from all forms of violence from both public and private sources. The effect of this right, read with section 7(2), is to impose positive duties on the state and its agents to provide protection against violence.

The nature of these duties in the context of bail was canvassed in the *Carmichele* judgments. The Constitutional Court drew inferences regarding positive duties resting on members of the SAPS from both the interim Constitution and the Police Act. The Court similarly stressed that prosecutors have certain duties, including the obligation to place before the court any information relevant to the exercise of the discretion with regard to the grant or refusal of bail. The High Court, on application of this paradigm to the facts in the *Carmichele* case, subsequently held the police and prosecutors liable for their negligent failure to protect her against the risk of sexual violence perpetrated by Coetzee.

3.5.3 Policy guidelines

Both the SAPS and National Prosecuting Authority have issued national policy guidelines regarding bail in sexual assault cases.

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[100] . *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).

CHAPTER 4

FROM REPORT TO ARREST

4.1 INTRODUCTION

This chapter examines the criminal justice process from the report of the sexual assault to the conclusion of the investigation (whether in the form of arrest of a suspect or by closure of the case without an arrest). Due to the specific focus of this research project, we emphasise aspects of this process that are pertinent to the question of bail. These include reporting procedures, contact between the investigating officer and the complainant, the focus of the bail investigation and information about the closure of cases.

4.2 SUMMARY OF THE PROCESS

The diagram below is a schematic representation of the processes followed once a victim reports a sexual offence. Should the victim report the offence, she will then follow the process as described briefly below. Once she reports to the police, she becomes known as the 'complainant'. After his arrest, the perpetrator or suspect will be become 'the accused'.

- When a complainant reports to a police station and states the reason why she is reporting, a female investigating officer or volunteer will be found to take the complainant's statement. In cases other than those of a sexual nature, the Uniform Branch officer stationed in the charge office will usually take the statement and open a docket.

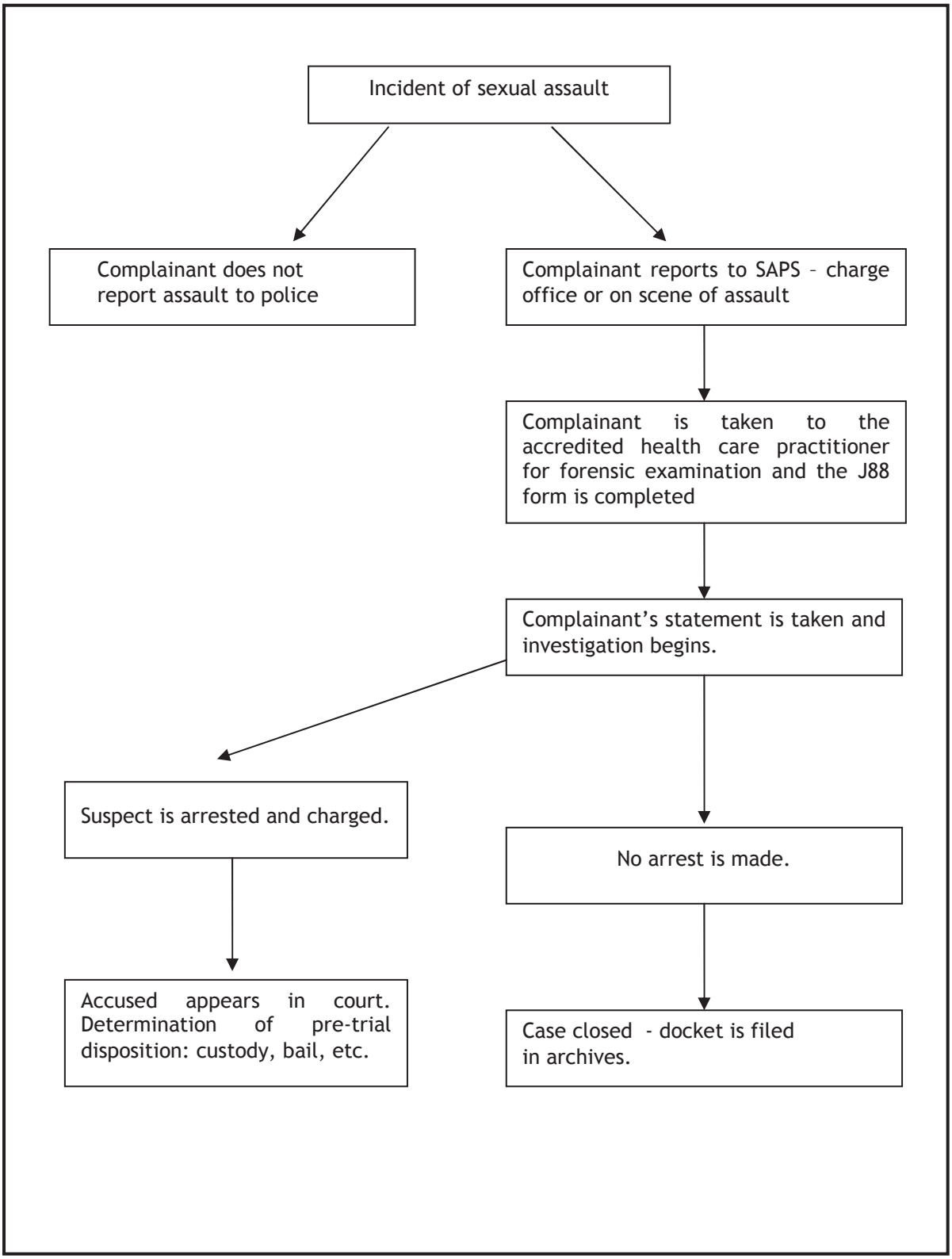
- The complainant will be taken to the accredited health care practitioner (formerly known as the district surgeon) surgeon for a medical examination in order that medical evidence may be gathered. The health care practitioner will complete a J88 form detailing the injuries suffered by the complainant that will be used as evidence in court.

- After the medical examination has been completed, the statement will be taken if not taken prior to the examination.

- If the complainant knows or can identify the suspect, he will be arrested and will appear in court on the next available court date. This will not always be on the day that he is arrested.[101]

[101] . The process around the accused's appearance in court and subsequent bail application is dealt with below in Chapter 5.

FIGURE 4: CRIMINAL PROCESS FROM REPORT TO ARREST



4.3 REPORTING PROCEDURES

The participating police stations follow a similar protocol where a crime of a sexual nature is reported. When a complainant arrives at the police station and alerts the charge office personnel that she is there to report a sexual assault charge, the duty detective will normally be contacted.

A very small number of participating stations have investigating officers assigned exclusively to sexual assault cases. The majority of investigating officers have to deal with sexual assault crimes along with all other crimes reported.

It was noteworthy that all participating stations made concerted efforts to ensure that the statements of sexual assault victims are taken by *women*. Where limited staff capacity implied that there may not always be a woman staff member available, a number of strategies are used. Attempts to overcome this difficulty included making use of a female detective who is called out to take such statements (if she is on 'standby'), or alternatively contacting one of the adjacent (larger) stations to make a woman official available for purposes of taking the statement. One of the smaller stations had a policy that for all three daily shifts one of the two officials attending to complaints (either in the charge office or on patrol) must be a woman.

Once the complainant's statement is taken, a district surgeon or accredited health care practitioner will examine her in order that forensic evidence is collected. Many of the participating investigating officers indicated that there are numerous difficulties involved in getting a complainant to a district surgeon. Investigating officers indicated that it is sometimes particularly difficult to contact a district surgeon to examine the complainant. Even though there are lists of district surgeons on duty, they are not always available. Some of the investigating officers noted that that they have been known to wait up to five hours for a district surgeon to become available.[102]

Another interesting observation was that virtually all police stations have a room dedicated for use by complainants in sexual assault cases. Here a complainant's statement can be taken in order to give her a measure of privacy, away from the hustle and bustle of the charge office where statements are ordinarily taken. One police station in particular reported that it did not have a comfort or 'trauma' room, as resources did not permit. This station also had the lowest number of reported cases (2) for the research period and only had one lockable office (that of the station commissioner). It was thus not economically feasible in this instance to establish a comfort room at this specific station.

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[102] . SC5.

OBSERVATIONS:

★ Where police have been alerted to the special needs of sexual assault victims (for example, the need for privacy when taking victims' statements), there appears to be a general willingness to accommodate these needs, as evidenced by the presence of 'comfort' rooms in the majority of police stations visited by researchers.

★ While the strategies employed to ensure that the statements of victims of sexual assault are admirable, the downside of these strategies may be that statements are taken by officials who are not immediately familiar with the specific evidential requirements of sexual assault cases (for example, reservist members or members of the Uniform Branch).

4.4 CONTACT BETWEEN THE COMPLAINANT AND INVESTIGATING OFFICER

Prior to the bail application, contact between the investigating officer and the complainant seems to be limited. In cases where the complainant's statement is taken by someone other than the specific investigating officer in charge of the complainant's case, communication between the investigating officer and complainant appears to be restricted to questions of whether the complainant can identify the perpetrator and the inspection of the scene where the offence occurred.

Opinion varied among investigating officers as to whether or not there would be any contact between the investigating officer and the complainant prior to the trial. One participating detective was adamant that there would be contact before the bail hearing.[103] The purpose of such contact would be for the investigating officer to follow up on statements, for example, to identify the so-called 'first report' witness.

Another participant indicated that there is no contact prior to the bail hearing.[104] The investigating officer would make contact with the complainant if the prosecutor informed him or her that the complainant is required for consultation. (This would however not take place ***prior*** to the bail hearing.)

In cases where an arrest had taken place, there is very little evidence in the dockets analysed by researchers indicating that investigating officers contact the complainant prior to the bail application specifically to gather information to be used at the hearing.

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[103] . IO3.

[104] . IO5.

In 27 of the finalised cases that we studied, the reason noted for closure was that 'the complainant could not be traced'.[105] In a number of these cases, it appeared that the investigating officer had tried on numerous occasions to contact the complainant, either by visiting her residential address personally or by leaving telephone messages. These efforts had not resulted in any response from the complainants, and the cases were subsequently closed.

In other instances, not much effort was made at contacting the complainant. Notes from either the prosecutor or supervising officer attest to this: "Rape is a serious matter and [you] should have made an effort". In one case, the notes in the dockets show that the investigating officer had kept the complainant waiting while he was busy with other work. The complainant subsequently walked away and could thereafter not be traced.

One peculiar reason for closing cases that we encountered was a statement that 'the complainant doesn't have time to attend court'. It should be noted that this particular reason appeared on six dockets and were all filed by the same investigating officer at a specific police station. No other investigating officer at any other station noted this as a reason for closing a case. In addition, this investigating officer handled a total of eight sexual assault cases during the research period. In addition to the six referred to above, another case was withdrawn by the prosecutor[106] and the eight one was withdrawn as the witnesses could not be traced.

A detective disclosed to researchers that at the particular police station where he was stationed, the practice was to 'warn' complainants that they should establish contact with the investigating officer within 7 days after reporting the case to indicate their interest in continuing with the case. [107] If they fail to do so, the case is subsequently closed provisionally without further attempts to investigate or follow up on the complainant. This detective also mentioned that the station allowed a three-months 'grace period' before the case was finally closed.

OBSERVATIONS:

- ★ Opinion varied among participating police officials regarding whether there will be contact between the investigating officer and the complainant during the early stages of the investigation (i.e. before the bail hearing or even before an arrest is made).
- ★ Where such contact does take place, the purpose of such contact often appears to be to obtain additional information for the investigation, for example, the 'first report' statement, rather than to obtain information in anticipation of a potential bail hearing.

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105. In several other cases, no reason for closing the case was evident from the dockets in question. The total number of cases closed due to the fact that the complainant could not be traced may therefore be higher than 27.

106. The docket did not contain any indication of the reasons for the withdrawal.

107. IO1.

OBSERVATIONS (CONTINUED):

- ★ The fact that cases are closed due to the fact that the complainant could not be contacted indicates that the apparently tenuous link of communication between investigating officer and complainant has a high potential to break down completely.
- ★ It is disconcerting to note that rape cases are closed due to the fact that investigating officers do not make sufficient effort to trace the complainant.
- ★ Information contained in finalised dockets makes it possible to track the progress (or lack thereof) in investigations conducted by individual officers. In the case study noted above, this history of investigations may suggest that reasons provided for closure of cases deserve closer scrutiny by supervising officers.
- ★ At one police station, a high onus is placed on complainants to maintain contact with investigating officers to ensure that their case remains open and the investigation continues.

4.5 FOCUS OF THE BAIL INVESTIGATION

Participating station commissioners were unanimous in their opinion that the main focus in the 'bail' investigation was whether or not there were other cases pending against the accused, and also whether he had a record of previous convictions.

Interestingly, one participant remarked that where the case is postponed for a period of 7 days prior to the bail hearing, the investigation should also focus on the merits of the case against the accused:

> 'One of the questions they ask you is how strong the case against the accused is. So obviously one needs not to use the 7 days only to prepare you for the bail application but to get most of your investigation done.' [IO5]

Interestingly, investigating officers at only one police station mentioned that they would investigate whether the accused has a history of belonging to any particular gang. This comment was made at a police station that does not have a high prevalence of gang activity within its area of jurisdiction. When asked what the purpose of such information was, the investigating officer answered that they would automatically oppose any bail application where the suspect was a gang member due to the threat of intimidation of the complainant by fellow gang-members. [108]

Very few of the investigating officers felt that involving the complainant in the investigation for purposes of the bail application was particularly helpful. It was noted by one investigating officer though, that he would involve the complainant, as often the perpetrator is someone who lives with the complainant. [109] This is an important factor to

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[108] . IO10.

[109] . IO7.

consider, as the perpetrator would have the opportunity to threaten or intimidate the complainant if he is released without bail conditions. According to this investigating officer, in these instances, he would make a recommendation that the perpetrator should find other accommodation for the duration of the trial, should he be released on bail. Alternatively, a bail condition would be set prohibiting the perpetrator from coming within a certain distance of the complainant.

OBSERVATIONS:

★ Although certain investigating officers do acknowledge that aspects such as threats made to the complainant are important to investigate for purposes of bail, the majority appeared to concentrate on information relevant to whether or not the accused will stand trial, such as whether he has a fixed address, permanent employment, etc.

★ While investigating officers generally do not believe that involving the complainant in the bail investigating is helpful, there is some degree of recognition of 'high risk' situations such as gang involvement or cases where the perpetrator and the complainant live together.

4.6 INFORMATION ABOUT DISPOSAL OF CASE

Another disconcerting finding from our analysis of finalised dockets was that in some cases arrests had not been made even where the investigating officer knew the identity of the perpetrator and his address. No reasons were noted on these dockets for the failure to arrest the perpetrator, and it was not evident why these cases were closed without further investigation. Many of these dockets only contained an initial (so-called "A1") statement by the complainant.

OBSERVATION:

★ Researchers were concerned about the lack of information about closure of cases without an arrest. In the event of a complainant enquiring about the reasons for closure, it would be difficult, if not impossible, to establish from the information contained in the docket what these reasons were.

4.7 NATURE OF CASES

The information gathered by researchers from the finalised dockets regarding the nature of the sexual assault cases reported at specific police stations allows for the analysis of these according to whether they would resort under Schedule 5 or Schedule 6 of the CPA. (This would be based on the researchers' assessment of the facts contained in the witness statements in the dockets, and may not reflect the charges as framed by the police or prosecution.) The specific focus of this report unfortunately does not allow for an extensive enquiry into the nature of cases typically reported at each participating station.

There is one specific 'circumstance' as listed in Schedule 6 of the CPA that deserves specific mention here, namely the HIV status of the perpetrator. The accused's HIV status may be relevant in the determination of bail, since the offence of rape 'by a person knowing he has AIDS or HIV' is included in Schedule 6 of the CPA. It was noteworthy that none the finalised dockets analysed by researchers contains either a reference to the possibility of the perpetrator having AIDS or HIV or any indication of attempts to establish the HIV status of the perpetrator.

At the time of writing, draft legislation aimed at the compulsory HIV testing of alleged sexual offenders has been tabled in Cabinet and awaits introduction in Parliament.[110] The introduction of these measures may result in closer attention being paid to the HIV status of the accused at the time of the bail investigation.

OBSERVATION:

★ An analysis of reported cases could potentially be useful in establishing a 'profile' of sexual assault and the prevalence of certain manifestations of sexual assault (i.e. where the victim is a girl under the age of 16 years or where the victim was raped more than once or by more than one person). This in turn may be useful in developing specialized investigation and prevention strategies at particular police stations.

★ The finalised dockets analysed by researchers did not contain any reference to the HIV status of the accused, which features in Schedule 6 of the CPA.

[110]. The Compulsory HIV Testing of Alleged Sexual Offenders Bill was tabled in Cabinet on 23 October 2002. The question of such compulsory HIV testing has been the subject of heated debate in South Africa: see South African Law Commission *Project 85: Fourth Interim Report Aspects of the Law relating to AIDS: Compulsory HIV Testing of Persons Arrested in Sexual Offence Cases* (2000).

CHAPTER 5

THE BAIL HEARING

5.1 INTRODUCTION

This chapter focuses on events around the bail hearing, and firstly examines the communication between investigating officers and prosecutors, the recommendations made to prosecutors regarding bail and the postponement of cases prior to the bail hearing. We then look at the factors considered by prosecutors in deciding whether to oppose bail as well as the presentation of evidence at the bail hearing. Furthermore, we analyse the determination of the bail amount, the imposition of bail conditions and the procedure to be followed where a breach of the bail conditions occur. Lastly, practices around record-keeping and the impact of bail hearings on court rolls are scrutinized.

5.2 SUMMARY OF THE LEGAL PROCESS

- Once a suspect has been arrested, he must be taken to court within 48 hours.
- At this court appearance, the accused may make an application for a bail hearing.
- The court may under certain circumstances postpone the bail hearing for a period not exceeding seven (7) days as a time.[111]
- Should the State oppose the release of the accused, a formal bail hearing will be held. If there is no objection to bail, the accused may be released.[112]
- A recent amendment to s 50(6)(*c*) states that the bail application in a Schedule 6 offence must be considered by a magistrate's court.[113]
- Where an accused has been charged with a Schedule 6 offence the accused bears the onus of adducing evidence proving that exceptional circumstances exist that in the interests of justice warrants his release.[114]
- In the event of the accused being charged with an offence listed in Schedule 5, the accused has to show that the interests of justice permit his release on bail.[115]

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111. S 50(5)(*d*).

112. Subject to the provisions of s 60(10), which states that even where the State does not oppose bail, the court must weigh up the personal interests of the accused against the interests of justice.

113. Prior to the amendment, Schedule 6 cases had to be heard in the Regional Court and only where there is no Regional Court available, the application could be heard in the magistrate's court.

114. S 60(11)(*a*).

115. S 60(11)(*b*).

a). The court will decide that it is not in the interests of justice to grant bail to the accused where one of the following grounds exist[116]:

b). 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; or

c). 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

d). Where there is a 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

e). Where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardize the objectives or the proper functioning of the criminal justice system; or

f). 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.

- Where a magistrate grants the release of the accused, she or he may attach bail conditions to his release. Bail conditions may include *inter alia*:

  ★ Prohibiting the accused from contacting the complainant or other state witnesses;

  ★ The court may stipulate that the accused report to a particular police station on particular days;

  ★ That the accused vacate his residence and reside elsewhere for the duration of the trial;

  ★ That the accused should instruct his attorney timeously;[117]

Once an accused has been released, he is bound by the bail conditions attached to his release. In the event that he breaches these conditions and the breach is brought to the attention of the investigating officer or prosecutor, a hearing will be held to determine whether the accused's bail should be cancelled.

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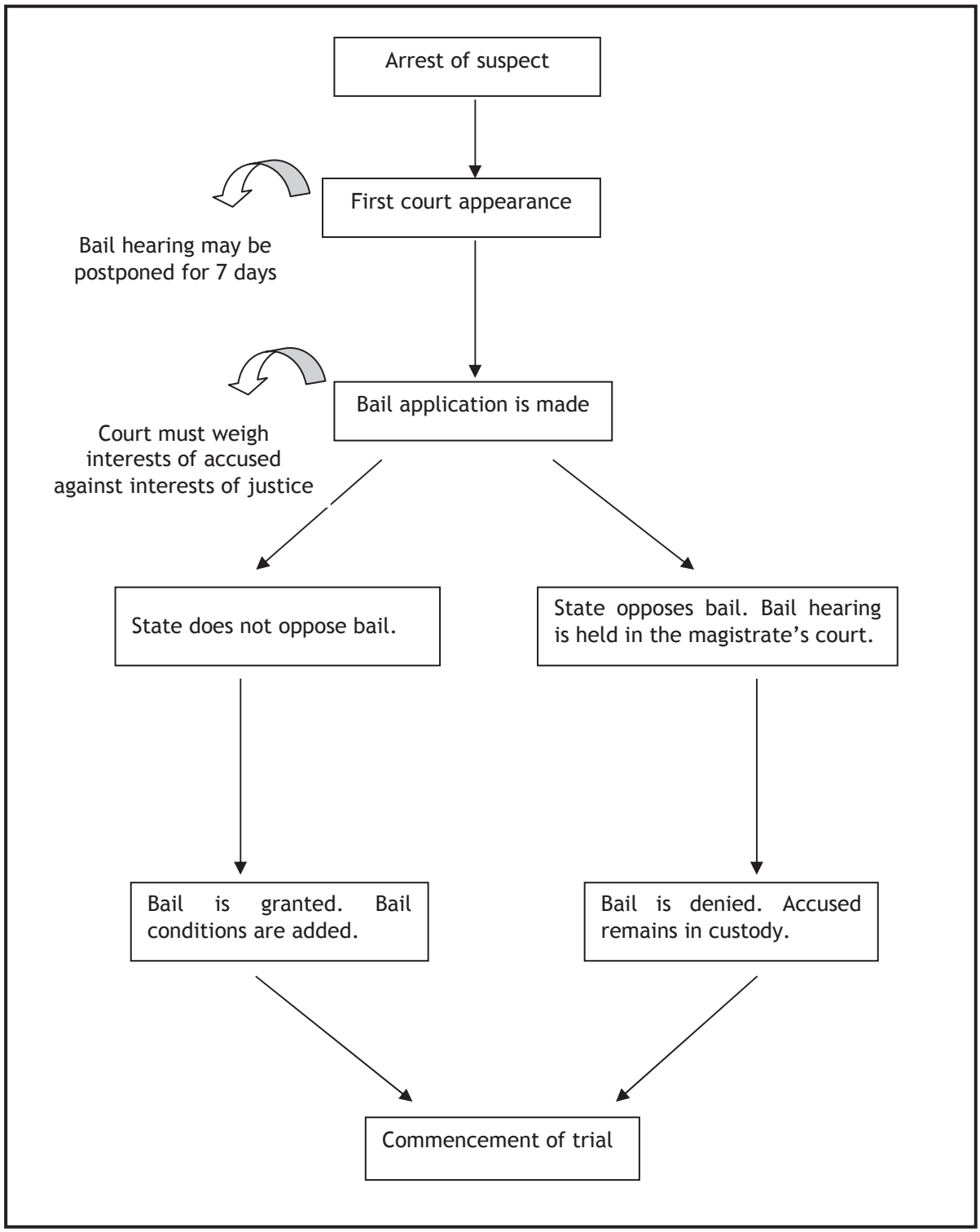
116. Ss 60(4)(*a*)-(*e*).

117. A participating magistrate, who makes use of this chis condition, explained that conditions such as these are particularly useful as cases are often postponed by reason that the accused has not appointed an attorney or that the attorney has insufficient instructions to proceed with the trial.

FIGURE 5: CRIMINAL PROCESS FROM ARREST TO TRIAL



5.3 COMMUNICATION BETWEEN INVESTIGATING OFFICERS AND PROSECUTORS AND GUIDANCE PROVIDED BY PROSECUTORS

Generally, the communication between investigating officers and prosecutors is reported to be good. Participating prosecutors explained that some form of consultation takes place with the investigating officer, since it is imperative for the investigator to provide the prosecution with certain information.[118] In the case of a bail hearing, the investigating officer is generally the main witness that the state relies on.

However, one of the participating prosecutors recommended that there should be closer liaison between prosecutors and investigating officers since there is 'a bit of a communication break'.[119] This was confirmed by another prosecutor who noted that cases are postponed about ten or twenty times to get one or two statements as there is no direct contact between the prosecutor and the investigating officer.[120]

An investigating officer noted that prosecutors do not consult with detectives about postponing cases and that when they are not at court, they are not told about the remand date for the bail application.[121] In cases where there were communication problems with the prosecutor, bail would be granted without the knowledge of the investigating officer. Another detective waits until the docket arrives back at the police station to find out what had transpired at court in relation to bail.[122] Often there would be a long delay between the court date and the time that the docket again reaches the hands of the investigating officer. Another detective mentioned that certain prosecutors are annoyed when the detectives do not contact them on a regular basis. [123]

In terms of guidance provided by prosecutors, the practice seemed to vary in this regard. One participant indicated that investigators 'sometimes' get guidance from prosecutors.

> '…They will just write small things what they want… One in every ten or fifteen cases you might have a nice entry there from the prosecutor saying I want this and I want this.' [IO1]

There are however, inexperienced prosecutors who are unable to give the detectives proper guidance when they are about to testify. One investigating officer reported as follows:

> 'Like the other day, I went to this one prosecutor, I won't mention his name and ask him: 'Listen here, I want to keep this guy inside, because due to the fact how he raped the girl and all that. But his lawyer is going to ask him, the guy's got a fixed address, he's married and all that stuff so at the end of the day he is going to get bail. Can't he say something

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118. PR2 & PR4.
119. PR5.
120. PR7.
121. IO4.
122. IO8.
123. IO3.

> to me that I can use in court, or can't he guide me or whatsoever.' He said to me no, he can't help me. Because I mean he's working with that kind of stuff all the time, you understand.' [IO3]

A participating magistrate also commented that prosecutors needed to guide the investigating officers more. [124]

OBSERVATIONS:

- ★ Although communication between investigators and prosecutors generally appears to be good, there are instances where this communication falls short.
- ★ A failure in communication between prosecutors and investigating officers may have serious implications for the decision regarding bail and the progress of the case in general.
- ★ Practice regarding provision of guidance to the investigating officer appears to vary.
- ★ A lack of experience on the part of prosecutors has an adverse impact on their ability to provide guidance to investigating officers.

5.4 RECOMMENDATIONS TO PROSECUTORS REGARDING BAIL

Investigating officers are expected to make recommendations to prosecutors regarding the release or detention of the accused. The majority of participating investigating officers feel that prosecutors do note their objections to granting of bail to the accused or the recommendations regarding strict bail conditions.

Researchers also investigated the use of the standardized bail recommendation form prescribed by the National Directorate of Public Prosecutions.[125] Opinion varied regarding the use of this form, with one participant stating that police 'definitely' make use of the forms, [126] while yet another noted that the forms are not really used. [127] A participant remarked that he had 'never seen one'.[128] He did however add that he consults with the investigating officer in person, and can then decide whether or not to oppose bail. This was

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124. MG2.

125. In November 1999, the National Director of Public Prosecutions issued national policy directives in accordance with the National Prosecuting Authority Act 32 of 1998 read with section 179(5) of the 1996 Constitution. These directives prescribed the use of a bail form to be completed by the investigating officer in all cases where an arrest had occurred prior to the accused appearing in court. This form aims to provide prosecutors with information relevant to the pre-trial disposition of the accused, including the possibility of intimidation or further harm of the complainant. The purpose of the form was to provide a standardized record of information conveyed to the prosecution by the investigating officer.

126. PR6.

127. PR7.

128. PR2.

echoed by another participant, who stated that although investigating officers do not use these forms as often as they should, prosecutors are in constant contact with investigating officers.[129]

OBSERVATIONS:

- ★ There appears to be a good exchange of information between prosecutors and investigating officers in the form of recommendations about the release or detention of the accused.
- ★ Investigating officers felt that prosecutors noted their objections and recommendations.
- ★ While the introduction of a standardized bail recommendation form is a sound principle, it appears that this initiative is currently not uniformly successful.

5.5 PROVISION ALLOWING FOR 7 DAYS' POSTPONEMENT PRIOR TO BAIL HEARING

In terms of section 50(6)(d) of the CPA, a lower court may postpone a bail application or bail proceeding to any date or court, for a period not exceeding seven days at a time.

A participating magistrate indicated that when dealing with sexual offence cases, 99% of cases are remanded for 7 days.[130] The reason for the postponement is to allow the accused to apply for legal aid or appoint an attorney of choice. Furthermore, time is needed to ensure that the investigating officer is present in court on the date of the bail hearing. As this magistrate points out:

> '… because some IO's don't even go to court, we need to physically summons them. So if they are not at court we can assign a warning to come to court because lots of times we can't deal with bail applications because of the IO's and schedule 6 offences…'

Participating police officials[131] generally welcomed the remand period, as it allows them to do a thorough job of investigating elements such as whether the accused has previous convictions, outstanding warrants for his arrest, fixed employment or to confirm the accused's address.

One detective however stated that the 7-day rule only served to delay the trial.[132] As there is a high mobility rate in this jurisdiction with regard to complainants living in informal housing settlements, the extension drags the case on further and increases the risk of the complainant not being contactable. Further, according to this detective, the major part of

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129. PR4.
130. MG1.
131. IO1, IO2, IO4 & IO7.
132. IO3.

the investigation should have been completed by the time that the suspect is arrested.[133] The detective indicated that in many of the rapes committed in the jurisdiction of the police station, the perpetrator is known to the complainant, and further added that in these cases, the main investigation is usually completed by the time that the bail hearing takes place.

OBSERVATIONS:

★ The general rule appears to be that sexual assault cases are postponed at the first court date in terms of section 50(6)(d) either to provide the accused with an opportunity to obtain legal representation or ensure that the investigating officer is present at court for the bail hearing.

★ It is not clear why it should be necessary to issue summons to ensure the presence of the investigating officer at the bail hearing. (One participant suggested that due to inexperience, investigating officers are reluctant to testify in court.)[134]

★ Police officials generally welcomed the 7-day extension, since this provides them with an opportunity to complete the bail investigation.

★ In areas where there is a great degree of mobility, the postponement of the case may increase the risk of a breakdown in communication between investigating officers and complainants.

5.6 FACTORS CONSIDERED BY PROSECUTORS IN DECIDING WHETHER OR NOT TO OPPOSE BAIL

Significantly, participants listed the attitude of the complainant and the fact that she knows the accused (or that he knows her) or knows where she stays as one of the primary factors in their decision regarding the opposition of bail.[135] Additional factors enumerated by prosecutors include the following:[136]

- The gravity of violence;
- Whether the accused has previous convictions;
- The nature of the offence;
- Community outrage;
- Whether the accused has a fixed address;
- Whether he has fixed employment;
- Whether he has previous convictions similar to the instant case; and
- Whether he has any warrants (for his arrest) pending.

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[133] . It should be noted that the police station where this detective is based currently forms part of a project aimed at fast-tracking sexual assault cases through the criminal justice system

[134] . This investigating officer was not formally interviewed, but informally contributed information while researchers were busy interviewing another detective.

[135] . PR3 & PR4.

[136] . PR3, PR4 & PR6.

One prosecutor mentioned that he would consider the following as exceptional circumstances where he would not oppose bail: '… [w]here for instance it's a husband and wife, or people who drank together…' [PR6].

OBSERVATION:

★ The factors regarded as significant by prosecutors extend beyond those listed by investigating officers as the focus of their bail investigation.

5.7 PRESENTING EVIDENCE AT THE BAIL HEARING

5.7.1 Evidence of the investigating officer

Investigating officers play a vital role in sexual offence bail applications. However based on the interviews held, the participant magistrates[137] shared the view that investigations in these cases are generally poorly conducted, which also has an adverse impact on the quality of evidence presented during the bail hearing.

Investigating officers are required to provide important information to both the prosecutor and magistrate. This information includes background knowledge of the accused, for example, where the accused resides, if he is employed, and indication as to whether the accused has any previous convictions or whether the accused is a person who has 'firm roots in society'.[138] Furthermore, investigating officers are expected to provide a detailed account of the offence in question, how it was committed, the surrounding circumstances of the case, together with a statement upon which the investigating officer's information is based.[139]

5.7.2 Presenting the evidence of the complainant

Participating magistrates and prosecutors are not in favour of calling the complainants in sexual offence cases to testify as early as the bail stage of the proceedings. The reason for this was generally twofold: firstly, to allow the complainant to testify so early in the proceedings may ultimately harm the state's case in the event of discrepancies between evidence given by the complainant in the bail hearing and her evidence during the trial. Secondly, the defense would be entitled to cross-examine the complainant, thus likely leading to secondary victimization of the already traumatized complainant.[140]

Instead, the participating magistrates shared the view that at the bail stage, it's the role of the investigating officers to communicate with and thereby testify 'on the complainant's behalf'. Thus, one participant stated:

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137 MG3

138 . MG2.

139 . MG4, MG5, MG6

140 . PR4, PR7, MG1, MG2 & MG3.

> 'I never had any difficulties to make a finding when the complainant was not there, and I think it will be in her best interest not to be there.' [MG2]

A prosecutor also confirmed that the decision not to call the complainant increased the reliance on the investigating officer.[141] One prosecutor did however indicate that if the investigating officer were to inform her that the complainant wished to testify at the bail hearing, she would call the complainant to testify.[142]

OBSERVATIONS:

- ★ As a general rule, the evidence of the investigating officer is crucial to the bail hearing.
- ★ The well-founded reluctance to call the complainant to testify during the bail hearing increases the reliance on the testimony of the investigating officer.

5.8 USE OF BAIL EVIDENCE IN TRIAL

Some participants noted that they 'often' use evidence presented during the bail hearing in the eventual trial.[143] However, one of these participants noted that one needs to be aware of what happened during the bail application, and prosecutors handling the trial are often not even aware that there had been a bail application.[144] (Bail proceedings are not transcribed as a matter of course, and a prosecutor wishing to rely on the transcribed record has to specifically request transcription.) Another participant pointed out that the trial prosecutor normally has notes from the prosecutor who handled the bail application.[145] She pointed out that transcription of the record is very expensive, and therefore one can't ask for every record to be transcribed.

A third participant was however of the opinion that the bail hearing seldom yields a useful basis for cross-examination on the merits:

> 'The only thing you can cross-examine him about is his previous convictions, pending cases or warrants for him or his address and employment.' [PR6]

OBSERVATIONS:

- ★ Evidence presented during the bail hearing may be used in the eventual trial. However, it appears that prosecutors do no always recognize the potential value of such evidence.

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141. PR4.
142. PR10.
143. PR4, PR7 & PR10.
144. PR4.
145. PR7.

OBSERVATIONS (CONTINUED):

★ Information regarding the evidence led during the bail hearing will not be accessible to the trial prosecutor unless the prosecutor conducting the bail hearing makes adequate notes or the bail hearing is transcribed.

5.9 FACTORS CONSIDERED BY THE COURT IN DECIDING ON BAIL

A participating prosecutor felt that the interests of the accused weigh quite heavily with presiding officers:

> 'So, although the legislation makes provision for the safety of her [sic] and various things, you're still reliant on the discretion of the magistrate. And I think the magistrates will often go back to the basics, you know, the interest of the accused to have his freedom, of course. Does he have a fixed address, is he going to escape, is he going to interfere with the judicial process? So these factors will still play quite largely despite the legislation.' [PR4]

Researchers also noted in a number of police dockets a note by the investigating officer stating that the accused, for example, 'will not be a happy man if released', indicating that the community would in all probability cause harm to the accused should he be released on bail.[146]

Interestingly, a number of magistrates indicated that of the five 'indicators' of the interests of justice listed in section 60(4),[147] they regard the question of whether there is a likelihood (in exceptional circumstances) that the release of the accused will disturb the public order or undermine the public peace or security as particularly significant in sexual offence cases.[148] However, another magistrate prioritized the likelihood that the accused will attempt to influence or intimidate witnesses:[149]

> 'Therefore that's the most important thing, that the court must be sure that no intimidation will take place because for most victims it's even very difficult for them to make a case, so in that same breath she will also be easily intimidated to withdraw the case, so that is very important to look at that aspect.' [MG1]

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146. See s 60(8A)(c).

147. According to this subsection, the interests of justice do not permit the release of detention of an accused where on or more of the five listed grounds are established. (See Annexure 2 for statutory provisions.)

148. MG4, MG5, MG6.

149. See s 60(4)(c).

OBSERVATIONS:

★ The perception of participating prosecutors is that the interest of the accused plays a major role in deciding on bail.

★ A number of presiding officers listed the question of whether the release of the accused will disturb the public order or undermine the public peace as particularly important in sexual offence cases.

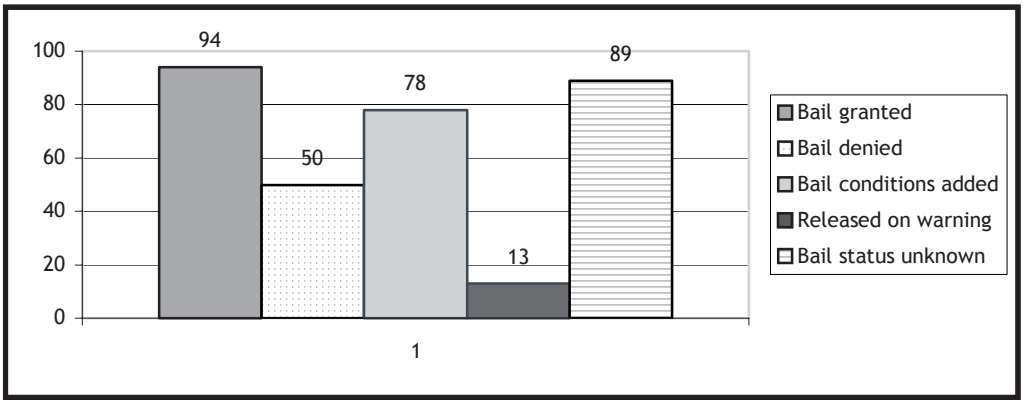
5.10 OUTCOME OF BAIL HEARINGS

The table below indicates the outcome of bail hearings at the different courts. This information was extracted out of a total of 268 cases screened at court. As many of the cases screened did not have a complete written record of what had transpired at the bail hearing, it is possible that these figures do not correspond with actual outcomes of the bail hearings. For example, more cases might have had bail conditions added, but because there is no record of the outcome of the bail hearing (either because the mechanical recording has not been transcribed or that there was no bail form attached), it was impossible for researchers to access the information. These cases are depicted as the column 'Bail status unknown' in Figure Six.

The column indicating 'bail conditions added' in Figure 6 refers to conditions other than the accused's returning to court on the next court date. These conditions included (*inter alia*) measures prohibiting the accused from contacting the complainant, instructing the accused to change his address to avoid living in close proximity to or with the complainant and instructing the accused to report to the police at specific times. In one instance, the magistrate added a condition to the effect that the accused should take steps to consult with his attorney at least one month prior to the next appearance. The magistrate set a specific date for this consultation (which was on a Saturday).

Although the charge sheets did not disclose sufficient information regarding the 13 cases where accused were released on warning, in at least three instances this release on warning appeared to be due to the fact that the accused were under the age of 18 years and accordingly released in the care of their parents.

FIGURE 6: BAIL STATUS AND OUTCOME



OBSERVATIONS:

★ Researchers found a high percentage of cases where it was not possible to establish the bail status of the accused from the information noted on the charge sheet. This implies that it would also be difficult for a complainant making enquiries from the clerk of the court about the outcome of the bail hearing to establish whether the accused has been released.

★ Bail was granted in the majority of the cases [94] where researchers could establish the outcome of the bail hearing. In contrast, bail was denied in 50 cases.

★ Where bail had been granted, we found a high incidence of cases where additional conditions (including 'no contact' provisions) had been added.

5.11 DETERMINATION OF THE BAIL AMOUNT

The exact amount set by magistrates when granting bail is not based on any written formula. There are a number of considerations taken into account by the presiding officer when he or she determines what amount to set as bail. These factors can be as nebulous as determining whether the accused is able to forfeit the amount considered.

According to the data collected from 268 at the magistrates courts, the bail amount fixed by magistrates in sexual assault cases can range from as little as R200 to as much as 50 000.[150] It was much more common to find that an extremely low amount of bail had been set.

On average the bail amounts fixed at four participating courts appeared as follows:[151]

FIGURE 7: RANGE OF BAIL AMOUNTS

	Cape Town	Mitchell's Plain	Wynberg[152]	Lamberts Bay
Lowest	R200	R200	R300	R1 000
Highest	R50 000	R2 000	R1 500	R1 000

[150] . The accused in the matter where R50 000 bail had been set subsequently brought an appeal against the bail decision. Researchers were unable to establish the outcome of the appeal.

[151] . Although charge sheets at the George magistrate's court were also screened, none of these had any clear indication of the amounts set for bail. Bail amounts for Atlantis magistrate' court are also not included, as sexual assault cases from this court are referred to Cape Town Regional Court.

[152] . This data is not representative of all the cases referred to the court. Data was only taken from those cases that were referred to Wynberg Court from Mitchell's Plain Court. In the normal course of events, the bail application would be heard at Mitchell's Plain Court, whereafter the case would be transferred to Wynberg Regional Court. It is only when the accused chooses not to apply for bail in the District Court in Mitchell's Plain and then later decides to apply for bail when the case has been transferred to the Regional Court, that the bail application will be heard at Wynberg Court.

Magistrates emphasized that there are a number of factors that should be taken into account. The purpose of granting the accused bail is so that he may be released. Should the magistrate set a bail amount that the accused cannot afford to pay, the purpose of granting bail is defeated. A participating magistrate explained this as follows:

> '… [I]t would serve no purpose to grant bail and to fix bail on an amount that the accused would not be able to pay – this however do [sic] happen quite often.' [MG6]

On the other hand, the bail amount that is set should also not be so negligible that the accused can afford to have the bail amount forfeited to the State. Factors that the court takes into consideration when determining the bail amount include –

- whether the accused is employed;
- what the chances are that he will abscond; and
- whether he can afford to lose the bail money.

One magistrate stated that generally, once the bail amount has been set, the accused would pay the amount.[153] If however, after the third appearance of the accused in court the magistrate notes that the accused is still in custody, the bail amount would be lowered at the request of the accused. This implies that the factors taken into consideration when deciding on the amount of bail become 'watered down' when the bail amount is reduced at subsequent appearances.

Forfeiture of bail monies to the State was recorded in a small number of cases. The reason noted for forfeiture in all these cases was the fact that the accused had failed to appear at court and a warrant had been issued for the arrest. None of the court records indicated that the accused's bail had been forfeited to the State due to his breaching bail conditions other than appearing in court.

OBSERVATIONS:

★ There is no set formula to determine the bail amount, and presiding officers take a range of factors into consideration.

★ The amounts set at the courts varied greatly.

★ If the accused is unable to pay the amount set by the court, this amount may be reduced at subsequent appearances.

★ Charge sheets contained insufficient information to establish whether bail had been granted or denied, and whether any additional conditions had been added.

[153] . MG2.

5.12 BAIL CONDITIONS

Participating prosecutors indicated that bail conditions prohibiting the accused from having contact, directly or indirectly, with the complainant are imposed as a general rule.[154] These conditions are imposed in an attempt to protect the complainant from further harm and intimidation prior to the finalisation of the case.

According to one participant, the investigating officer will notify the complainant that the accused has been released on bail and that his release is subject to his compliance with certain bail conditions. She should also be informed that should the accused try and contact her, she should inform the investigating officer and then make a statement.[155]

There was consensus among participants that often, when bail is granted, it would be accompanied by bail conditions. Prohibition of contact (either directly or indirectly where the friends or accomplices of the accused initiates contact) with the complainant, her family or any of the witnesses for the State appeared to be the condition most commonly set. Thus, as one participant noted, it is important to establish where the complainant resides, where the complainant is employed and if there's a history of violence between the accused and the complainant.[156] However, bail and bail conditions should only be set once the magistrate is satisfied that the complainant, the complainant's family and the witnesses are not in any danger.[157]

The importance of prohibiting contact with the complainant lies in the fact that the accused would be prevented from intimidating the complainant or from trying to dissuade her from continuing with the case against the accused. As the prohibition also extends to anyone who contacts the complainant on the accused's instructions, any such contact would constitute a breach of the accused bail conditions and could lead to cancellation of the accused's bail. A participating magistrate stressed the importance of prohibiting contact:

> '… But first I would want to satisfy myself that he's not going back there. One cannot compromise on that… It would be difficult to grant bail'. [MG2]

OBSERVATIONS:

- ★ Prosecutors related that conditions aimed at preventing the accused from contacting the complainant are imposed as a general rule.
- ★ Prosecutors appear to rely on the investigating officer to convey the outcome of the bail investigation to the complainant, including the nature of bail conditions as well as the procedure to follow in the event of breach of these conditions.
- ★ Magistrates also stressed the importance of bail conditions aimed at prohibiting the accused from contacting the complainant.

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154. PR4, PR6 & PR7.
155. PR4.
156. MG3.
157. MG2.

5.13 BREACH OF BAIL CONDITIONS

Where the prosecution wishes to initiate proceedings to cancel the accused's bail due to an alleged breach of the bail conditions, the prosecutor must apply to the court to lead evidence to prove the breach.[158] If the accused is not present, the court may issue a warrant for his arrest to secure his presence. Once the accused is before the court, the court will establish whether he admits or denies the alleged breach. If the accused denies the allegation, the court must hear such evidence led by the prosecution and accused. The prosecutor bears the onus of proving a breach of conditions on the accused's part. Once the prosecutor has proved the breach, the onus passes to the accused who then has to show why cancellation of his bail (and forfeiture of the bail money) should not follow.[159]

Section 68 provides the State with an additional remedy where the accused is complying with his general and specific bail conditions, but there is information available showing that the accused is (*inter alia*) about to evade justice, to interfere with witnesses or poses a threat to the safety of the public or of a particular person.

The majority of the magistrates interviewed indicated that there are very few applications to have bail revoked in circumstances other than failure to appear in court. One of the magistrates stated that in the event that such an application is made, in 90% of these cases, the accused person's bail is revoked.[160]

Another participant added the following cautionary note:

> 'I think that [complainants] don't understand the whole concept of bail conditions. Maybe that is also an aspect that should be given more attention to. Maybe they think that it is only breach where the accused himself contacts them and not friends or phone calls etc. I think maybe we should explain to them in detail.' [PR7]

OBSERVATIONS:

- ★ Where there is a breach of 'no contact' provisions, it is up to the complainant to report such a breach. The prosecution must then initiate proceedings to have the accused's bail cancelled.
- ★ Few applications are made to revoke bail based on violation of 'no contact' provisions.
- ★ It has been suggested that complainants do not always have a clear understanding of the actions that would constitute a violation of 'no contact' provisions.

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158. See s 66 of the CPA.
159. See Van der Berg (*op cit*) at Par 133 and authorities cited there.
160. MG3.

5.14 RECORDING OF BAIL APPLICATIONS

One of the main difficulties experienced by researchers was that in spite of the provisions of section 64 of the CPA, information regarding bail was not recorded consistently. In addition, recordkeeping practices at certain courts made the information even more difficult to trace.

At one court, for example, the records of bail applications and the charge sheets are filed separately. This resulted in the data collection process being far more time-consuming as information was duplicated (there would potentially be two records, filed separately, for each one case). To get a realistic figure of the number of cases heard at the court, researchers had to identify and eliminate the duplicates and assemble the relevant information.

This separation of bail applications from the rest of the charge sheet also made it difficult to establish the outcome of the bail application, since in some cases the record of the bail application would consist only of a copy of the cover sheet (J7) and the envelope containing the cassette recording of the bail hearing. In the absence of a note by the magistrate on the charge sheet as to the outcome of the bail hearing or the bail record having been transcribed, it was virtually impossible to determine such outcome.

In a number of cases were a request had been made for the bail application to be transcribed, a note was subsequently attached by the transcription service to the effect that the recording devices in the particular court were out of order and thus the cassettes could not be transcribed. Where the magistrate had not kept written notes of the bail application, there was thus no record of what had transpired in the bail application other than a few random notes by the prosecutor attached to the charge sheets.

Due to the fact that in a large number of instances there was no proper record of the bail application, it was not always possible to note whether there were any other conditions added to the release of the accused on bail. Some of the charge sheets also did not indicate what the outcome of the bail application was, whether bail had been granted or denied and whether any other conditions were added to the accused's release.

However, in contrast to these empirical findings, each of the participant magistrates indicated that they record all bail information. As one participant stated:

> 'If it's going to be a tricky or 'hot' case that gets a lot of attention from the media and the chances are very big that the defence is going to appeal if bail is denied, then its better to record the application on tape. But I personally like, in other matters, to rather write down all the evidence.'[MG1 & MG3].

It is noteworthy that at one of the participating courts, magistrates make use of a *pro forma* bail hearing form that sets out the bail conditions where bail is granted (the form is amended as desired in each individual case). The condition that the accused should not communicate with witnesses for the prosecution was a standard provision that was attached in most cases.

OBSERVATION:

★ There is a discrepancy between information provided by participating magistrates (i.e. that all information conveyed during bail applications is noted) and the findings of researchers (namely incomplete court records).

5.15 IMPACT OF BAIL APPLICATIONS ON COURT ROLLS

Until the amendments brought about by Act 62 of 2000, bail applications in Schedule 6 cases were heard in the regional court unless such court was unavailable. This was the legal position at the time of the initial field research stage. Although the information gathered by researchers regarding the impact of bail applications on regional court rolls is now strictly speaking obsolete, we briefly reflect on these results here in order to have a complete picture of the implementation of the legislation.

The responses of prosecutors confirmed that the hearing of bail applications in Schedule 6 cases had an adverse impact on the rolls of the regional courts. One participant noted that in addition to clogging the court rolls, the handling of bail applications implied that prosecutors did not have time to prepare for trials. It also implied that preferential trials were 'pushed out' in order to accommodate bail applications.[161]

Given the heavily booked schedules in the regional courts, regional court prosecutors often tried to have bail applications heard in the district court.[162] One participant noted that the district court might handle three or four applications per day.[163]

A participating magistrate indicated that where the state does not oppose bail, the bail hearing remains time consuming because of the magistrate requiring the accused to adduce evidence under oath and to convince the court as regards his release.[164] Despite this not being regular practice, this particular magistrate prefers this method:

> '…because on a few cases I found where the state doesn't oppose and I listen to his (the accused) evidence, then I refuse bail'.[MG3]

[161]. PR1.
[162]. PR4.
[163]. PR6.
[164]. See s 60(10) of the CPA.

OBSERVATIONS:

- ★ Formal bail hearings are time-consuming, and impact on court management not only in terms of the time taken up by the hearing, but also in terms of preparation time.
- ★ Even where the prosecution does not oppose bail, the court has to weigh up the personal interests of the accused against the interests of justice. This may also result in a time-consuming process.
- ★ The shift of bail hearings in Schedule 6 cases from regional court to district court implies that these hearings are now conducted by district court prosecutors, who generally have much less experience then their regional court counterparts.

CHAPTER 6

EXPERIENCES AND PERCEPTIONS OF CRIMINAL JUSTICE PERSONNEL

6.1 INTRODUCTION

In this chapter, we report on the perceptions of police officials, prosecutors and magistrates regarding the current bail legislation as conveyed to researchers, and also recount their experiences in implementing this legislation.

The interviews with criminal justice personnel yielded a vast amount of information, and it is not possible to discuss all aspects in detail. We have therefore selected specific areas that we considered to be of particular relevance to the implementation of the bail legislation.

Researchers interviewed the following numbers of criminal justice personnel:

FIGURE 8: NUMBER OF PERSONS INTERVIEWED

Capacity	Number
Police officials (including station commissioners, investigating officers and reservists	14
Prosecutors	10
Magistrates	9
TOTAL	**33**

Prior to conducting the formal interviews, researchers also held informal preliminary meetings with station commissioners, senior or control prosecutors and chief magistrates in order to establish background information about the station or court and to make arrangements for access to records and to interview personnel. These informal, unrecorded meetings have not been included as interviews in the table above.

6.2 PERCEPTIONS OF THE DIFFERENCES BETWEEN THE 1995 BAIL LEGISLATION AND SUBSEQUENT AMENDMENTS

Opinion varied among the station commissioners and detectives as to whether the 1997 amendments constituted an improvement on the 1995 Act. In one instance, a participant remarked that the opportunity now provided to the investigating officer to gather evidence prior to determination of bail was positive. (Prior to the 1997 changes, the investigating officer's task was more difficult because bail applications could be brought immediately on arrest, even outside of ordinary court hours.)

However, this participant also added:

> '… So, if we don't oppose bail, then they'll get bail. You know, so it's very difficult for us, we haven't really got the time to oppose bail every time. And so, I think with the old one they were kept inside more, you know.' [IO1]

This sentiment was echoed by another participant, who remarked that the old legislation was more useful, since accused persons had been kept in custody more readily.[165] In terms of the present provisions, the accused 'will get bail' if investigating officers are not at court, even if they are, for example, busy with other cases.

Detectives did not express a clear understanding of how the 'new' legislation impacted differently on their investigative duties. One investigating officer indicated that there was a need for further training as detectives were unfamiliar with the court environment and did not know what would be expected of them at a bail application.[166] Guidance from prosecutors in this regard could not be relied upon as the majority of bail applications in sexual assault cases were dealt with in the district court where the prosecutors themselves were inexperienced.

As far as prosecutors are concerned, one participant stated that the new legislation is much more strict, especially in Schedule 6 cases, 'so in that instance it seems to have worked'.[167] Another remarked that since the new bail provisions make it more difficult for the accused to get bail, 'they are useful from the state's point of view'.[168] Yet another participant noted that the new provisions are 'very effective'.[169]

A participating prosecutor, interviewed prior to the amendment of section 50(6) in March 2001,[170] saw the fact that all Schedule 6 matters were referred to the Regional court for bail applications as a positive development, since this implied that within 2 weeks of the arrest of the accused, the regional court prosecutors got to see the docket (in order to handle the bail application, where necessary). This means that they could identify loopholes and get the investigating officer to address these. The investigation is therefore

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165. IO7.
166. IO2.
167. PR5.
168. PR3.
169. PR6.
170. See Chapter 2 for a discussion of this amendment.

prosecutor-directed, and problems can be identified early in the process. (In other cases, the regional court prosecutor normally only gets to see the docket about 2 months after the arrest of the accused.)[171]

OBSERVATIONS:

- ★ Opinion was divided regarding whether the 1997 amendments are preferable to the previous legal dispensation. It is interesting to note that the majority of participating prosecutors felt that the current legislation is stricter, i.e. that it is now more difficult for an accused person to get bail. However, investigating officers were more ambivalent about this aspect.
- ★ Police officials specifically emphasized the additional workload that the need for their physical presence at court to testify in the bail hearing has brought.
- ★ There appears to be a need for training around what is required of investigating officers during their testimony in bail hearings.
- ★ The fact that bail hearings in Schedule 6 cases were previously heard in the regional court had the advantage of ensuring that the investigation would be led by an experienced prosecutor.

6.3 KNOWLEDGE OF THE LEGISLATIVE PROVISIONS

Researchers identified certain instances of confusion among prosecutors regarding the contents of the legislative provisions. One participant remarked that prosecutors are compelled to oppose bail in Schedule 6 offences, since 'the legislation prescribes that bail be opposed'.[172] This is not the case: the legislature clearly envisaged a situation in Schedule 5 and 6 matters where the state does not oppose bail by including subsection 60(2)(d).[173]

The following is a further example of a misreading of the Criminal Procedure Act:

> '… [t]he provision which even her statement could be handed up to the magistrate. You'd have noticed, there's a proviso in the legislation where, even on the basis of an affidavit, the court can have insight into the complainant's statement at the bail stage.' [PR4]

In analysing this statement, researchers have concluded that the prosecutor was referring to the rule that generally applies in bail applications that evidence may be presented on affidavit (this is of course a departure from the rules of evidence, applicable to the trial itself, that demand *viva voce* evidence).[174]

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171. PR2.

172. PR4.

173. This subsection provides that where the prosecutor does not oppose bail in respect of Schedule 5 and 6 cases, the court must require of the prosecutor to place on record the reasons for not opposing the bail application.

174. This rule is subject to certain well-demarcated exceptions set out in, for example, section 212 of the CPA.

OBSERVATION:

★ Researchers noted certain instances where participating prosecutors misread or misunderstood the legal provisions relating to bail.

6.4 INTERPRETATION OF 'EXCEPTIONAL CIRCUMSTANCES'

Section 60(11) of the CPA provides that where an accused is charged with certain offences (committed under prescribed circumstances as set out in **Schedule 6**), he or she shall be detained in custody unless he or she satisfies the court that '*exceptional circumstances*' exist that permit his or her release. These offences include, amongst others, premeditated murder, murder of a law enforcement officer, and rape committed under certain circumstances.[175]

An accused charged with an offence listed in **Schedule 5**[176] will remain in custody unless he or she adduces evidence that satisfies the court that the interests of justice permit his or her release.[177]

In ***all other cases***, the onus is on the state to show that the interests of justice demand the continued detention in custody of the accused.

The legislature did not elaborate on the concept of 'exceptional circumstances', and the meaning of this concept must therefore be determined by the presiding officer in each individual case. It has emerged from our interviews with magistrates that the interpretation of 'exceptional circumstances' may differ substantially from one magistrate to the next or even from case to case handled by the same magistrate.[178]

The lack of clarity regarding the interpretation of the term 'exceptional circumstances' was unanimously underscored as a shortcoming of the current bail legislation.[179] As one

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175. These circumstances include rape where the victim was raped more than once or by more than one person, where the victim was raped by a person charged with having committed two or more offences of rape, or by a person knowing that he has AIDS or HIV. Schedule 6 also lists rape where the victim is a girl under the age of 16 years, is a physically disabled woman who is particularly vulnerable due to her physical disability or is a mentally disabled woman. Indecent assault where the victim is under the age of 16 years, involving the infliction of grievous bodily harm, is also listed in this Schedule.

176. Schedule 5 lists (*inter alia*) rape, other than under the circumstances set out in Schedule 6, and indecent assault where the victim is under the age of 16 years.

177. Ss 60(11)(b) of the CPA.

178. The interpretation of this concept has been the subject of considerable judicial consideration: see e.g. *S v Jonas* 1998 (2) SACR 677 (SE); *S v C* 1998 (2) SACR 721 (C); *S v H* 1999 (1) SACR 72 (W); *S v Mokgoje* 1999 (1) SACR 233 (NC); *S v Mauk* 1999 (2) SACR 479 (W); *S v Mohammed* 1999 (2) SACR 507 (C); *S v Yanta* 2000 (1) SACR 237 (Tk) and the Constitutional Court judgment in *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC). See also Van der Berg (*op cit*) at 70-74.

179. The Constitutional Court, in its judgment in *S v Dlamini*, expressed the opinion that the concept of 'exceptional circumstances' is not realistically open to exact definition. 'In any event, one can hardly expect the lawgiver to circumscribe that which is inherently incapable

magistrate stated: 'I still don't know what exceptional circumstances are'.[180] Certain sets of circumstances lend themselves to easy interpretation. Thus, where the accused has a serious or life-threatening illness or needs special treatment that cannot be provided for while he is imprisoned, the accused would have proven the existence of 'exceptional circumstances' that would warrant his release on bail. However, it was noted that in certain cases, ordinary factors could be interpreted as 'exceptional'. To some magistrates, the fact that the prosecutor does not object to releasing the accused on bail or that the State does not have a very strong case, would be considered an 'exceptional circumstance'.

Participating magistrates have indicated that, absent clear definitions in the legislation, this concept (as well as the notion of 'the interests of justice' as employed in section 60 of the CPA), are problematic. The participants unanimously highlighted the problems that they are faced with on a daily basis when interpreting the term 'exceptional circumstances'. As one participant stated: 'Every day I do about five or six exceptional circumstances bail applications. I still don't know what exceptional circumstances are.'[181]

Thus the impact of the failure to define or to provide guidelines for the interpretation of 'exceptional circumstances' can be accurately summarized in the words of one of the participating magistrates:

> 'I'm the one doing schedule sixes everyday. It's no use saying something and then we cannot implement it at all. Everybody says it's a schedule 6 case – it's a big case – but at the end of the day, we're just regarding it as a normal bail application. So there's nothing exceptional about it!' [MG3].

OBSERVATION:

★ Magistrates tasked with the interpretation of the legislative provisions experience difficulties in giving meaning to the concepts of 'exceptional circumstances' and 'interests of justice'.

6.5 PERSONAL PERCEPTIONS REGARDNG SEXUAL ASSAULT

Researchers discovered that personal perceptions about why women report rape filter through to the cases that detectives are called upon to investigate. In two of the dockets screened, a note appears that the investigating officer 'suspects complainant only opened the docket so as to secure lawful abortion at Groote Schuur Hospital'. Another investigating officer remarks: 'Preliminary investigation suggests that complainant and her friend are prostitutes.'

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of delineation. If something can be imagined and outlined in advance, it is probably because it is not exceptional.' (At Par 75-76.)

180. MG3.

181. MG3.

There are also suggestions, both in the interviews and in the dockets that 'boyfriend - girlfriend' cases (i.e. where the complainant has an existing relationship with the accused) are not prioritized. A case note states: "They don't take boyfriend - girlfriend cases". Two participating investigating officers indicated that 'boyfriend - girlfriend' cases are time-consuming in that these cases are more often than not withdrawn.[182]There was also very little evidence to indicate that the complainant is kept informed of the progress of the case.

An interesting aspect of the responses of senior police officials (including station commissioners) was the extent to which they appeared to conflate sexual assault with domestic violence and other forms of gender-based violence.

In one instance, the interviewer had enquired about the number of sexual offence cases dealt with at the particular station, and the participant responded as follows: 'Sexual offences, you mean from rapes straight through to assault, man beating wife, that sort of thing?'[183]

In another instance, the interviewer had asked whether the participant dealt with sexual offence matters. The participant's response indicated a similar equation of sexual assault and domestic violence:

> 'If a problem arises, especially… where there is something, really I do regard it as something very sensitive. And not all the members is [sic] trained to, and will take sensitive statements. Sometimes the complainant come here… sometimes the complainant come here, okay, it's domestic violence, what is the address? We go out to the areas, but what is really happening?' [IO3]

OBSERVATIONS:

- ★ Stereotypical assumptions regarding sexual assault and the reasons for reporting such cases appear to have an impact on the manner in which investigations are conducted.
- ★ Researchers have identified instances where supervising police officials appear to have an incomplete understanding of the differences between sexual assault and other forms of gender-based violence.

[182] . IO3 & IO7.

[183] . IO1.

6.6 TRAINING

Training of police investigating officers ranged from intensive training (the so-called 'Seksuele Misdrywe Ondersoek Kursus') to 'learning on the job'. In general, few of the investigating officers dealing with sexual offence cases had received additional training on dealing with these types of cases. In some instances, training was received a long time ago without the detective having undergone any additional courses incorporating the new amendments to the bail legislation. A senior detective at one police station stated that he is often approached by less experienced detectives to oppose bail applications at court (in spite of their being the investigating officer for the particular case).[184] He believes that the reason for this is that these officials have not been adequately trained to testify within a courtroom environment.

Most participating prosecutors indicated that they have not received any specific training in dealing with sexual offences. Three prosecutors however added that they had attended informal seminars or workshops.[185] While one of the participants believed that the issue of a lack of 'formal' training had to be taken up for further action, she did not include specific information on bail as one of the aspects that she felt required further attention.[186]

A prosecutor who had been appointed during the course of 2001 explained that he had attended a prosecutors training course in Pretoria, which *inter alia,* dealt with sexual offences:

> 'I think we talked about what to do, how to consult with the complainant, how to deal with the whole incident.' [PR6].

Of the magistrates interviewed the large majority stated that they had prosecutorial backgrounds prior to becoming magistrates. In general, magistrates are required to undergo a one and a half month training course in Pretoria before becoming a magistrate. According to one magistrate, sexual offences are touched on very briefly:

> '… [S]exual offences is [sic] also part of it. Everything is just touched because it's only one and a half months. There's not much that you can do in one and a half months compared to all the work that you have to do here on the bench.' [MG2]

Despite participating magistrates' awareness of the resource problems facing investigating officers, one magistrate was of the view that in order to counter resource problems, the lack of training and various other problems experienced by investigating officers, 'sexual offences should be treated separately. Sexual offences should have a separate charge office – they should have separate everything in all areas'.[187]

Whilst accepting the fact that investigating officers are not adequately trained in the area of sexual offences, another magistrate stated that:

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184. See footnote 136 above.
185. PR4, PR7 &PR10.
186. [PR7]. Her 'wish list' mostly referred to aspects such as DNA evidence and medical evidence.
187. MG3.

> 'Training would help to a certain extent, but in the end they could have all the training, but they must be guided by both the prosecutors and the court.' [MG2].

On the other hand, a few of the detectives were of the opinion that some of the prosecutors are themselves inexperienced in handling sexual assault cases and are ill-equipped to guide detectives adequately.[188]

OBSERVATIONS:

- ★ Specialised training for investigating officers, prosecutors and presiding officers appears to be a priority.
- ★ In addition to training, ongoing guidance by prosecutors and courts is required.
- ★ Where prosecutors are inexperienced, they are ill-equipped to provide adequate guidance to investigating officers.

6.7 RESOURCES

Participating investigating officers indicated that resource constraints impact on various aspects of their tasks. One of the detectives pointed out that investigating officers receive no payment for working overtime. Since the investigating officers are only on duty until 16:00, rape cases reported at this particular police station after 16:00 (for example, late at night) will be left until the following morning.[189] The investigating officer will only then see the complainant and take her to the district surgeon for the medical examination. Another station overcame this dilemma by dividing the detective unit into shifts, thereby ensuring that complainants will be assisted more speedily regardless of the time at which they report the offence.

Another participant also pointed out that an opposed bail application may take a considerable period of time.[190] The investigating officer has to prepare for court and then wait at court for the application to be heard, which means that it takes a couple of hours in each case 'just to keep him [the accused] in custody'. This was borne out by a prosecutor who estimated that a formal bail hearing may take up approximately 3 hours.[191]

It was also pointed out that the high workload of investigating officers may influence the prospect of communication with the complainant. One station commissioner mentioned that the station had only two patrol vans. Furthermore, there were just two drivers for these vans (they were the only officials with a driver's licence available for this

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188. IO2, IO6 & IO7.
189. IO1.
190. IO7.
191. PR10.

function).[192] This makes it extremely difficult to contact complainants, especially in instances where the complainants live in informal housing settlements.

OBSERVATION:

★ Resource constraints affect various aspects of the smooth functioning of the bail system, and may have an adverse impact on, for example, the investigating officer's ability to sustain contact with the complainant.

[192] . This information was conveyed informally to researchers. The conversation took place during the initial research period, and we acknowledge that the position at this station may subsequently have changed.

CHAPTER 7

COMMENTS AND RECOMMENDATIONS

7.1 INTRODUCTION

This chapter draws together certain of the main themes that we have explored during this phase of the research, and makes recommendations based on the observations noted by researchers.

7.2 REFLECTIONS ON THE RESEARCH EXPERIENCE

7.2.1 The 'hypothetical complainant'

Throughout the process of gathering information at police stations and courts, the researchers were always keenly aware that they were going through the same steps that a complainant would have to tread to obtain information about her case. This gave distressing insight into the problems that complainants may have to face to ensure that their case is treated with the priority that it deserves.

One of the difficulties experienced by researchers was in securing opportunities to meet with criminal justice personnel. Cancellation of scheduled appointments was a recurring problem. A striking example occurred when researchers, having made and confirmed an appointment to meet with a specific police station commissioner, were told on their arrival that the commissioner was at a sporting event. At another police station researchers had to wait for two hours before the station commissioner arrived (despite their having previously scheduled an appointment with him). Similar problems were experienced in arranging meetings with prosecutors and magistrates.

Apart from the practical implications in terms of 'wasted' resources, researchers experienced the cancellation of appointments as demoralising: we were left with a feeling that the research process was perceived as unimportant and the subject matter of the research as insignificant. Again, if we had to extrapolate our experiences to a hypothetical complainant with limited resources who travels to a police station or court to meet with criminal justice personnel, we gained a sense of the disappointment that could be experienced by the complainant under those circumstances.

7.2.2 *Audi alteram partem*

However, we were also acutely aware of the other side of the coin, namely the structural obstacles encountered by criminal justice personnel on a daily basis. The sentiments expressed by one participating magistrate describes this aptly:

> 'Most of the investigating officers, when I start asking them questions they all tell me: "What do you want us to do, the workload is bad. This is not the only rape or the only charge that's been laid over the weekend. There were fifteen murders. What do you want us to do?" Then I can't also say anything. Then I just keep quiet because I can't even think to, I can't even imagine to think how the environment is over there.' [MG3][193]

Researchers monitoring the implementation of the Domestic Violence Act have noted that overworked criminal justice personnel perceive it as futile to share their perceptions if it reaps no short-term concrete changes to make their work more manageable.[194] This is borne out by the comments of a prosecutor regarding the bail research project:

> 'This [project] sort of makes a lot more sense because hopefully something will come from this, than people that we get told we must assist doing their masters degrees for example. It's just, you know, from our point of view, there's no benefit for us in that. You know, we do not have the time and energy to just go and do charity work you know towards other people's masters degrees.' [PR1]

7.2.3 Beyond bail

It was significant to note how often formal interviews progressed into more informal 'conversations' going far beyond the scope of bail, with participants sharing with researchers their general frustrations and disillusionment. We consistently gained the impression that the interviews provided criminal justice personnel with an opportunity to 'debrief' that may otherwise not have been available.

While these discussions gave researchers a broader understanding of how the imperfections of the criminal justice system affect those working within it, they also left us with a sense of disempowerment. On one level, we recognised numerous instances of criminal justice personnel (especially those interacting 'directly' with victims, namely police officials and prosecutors) experiencing vicarious traumatisation, yet we had to concede that there were hardly any mechanisms within the criminal justice system to address such traumatisation. On another level, the wide-ranging ambit of these discussions reminded us of the fact that the determination of bail does not operate in a vacuum, and that numerous other variables in the bigger systemic environment influence the question of bail in sexual assault cases. This served to create an impression of the criminal justice system as a monolithic entity with imperfections that are 'too large' to take on.

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193 . While this comment was made in the context of evidence given by investigating officers in the course of bail hearings, it is also apposite to the experience of researchers.

194 . Parenzee et al (*op cit*) at 101.

7.3 ANSWERING THE MAIN RESEARCH QUESTION

The main question that researchers set out to answer was 'how is the law on bail currently applied in cases of sexual assault'.[195] This question was to be examined within the framework of the broad aims of the research, namely –

- To give effect to the intention of the legislature by ensuring that persons accused of sexual assault are detained where the interests of justice demand; and
- To reduce secondary victimisation and intimidation of sexual assault victims by ensuring that their interests are adequately represented during bail hearings.

Attempting to answer this key question was not as easy as it may appear at first glance. A major frustration to researchers was the discovery that due to current shortcomings in record-keeping systems, it was impossible to track reported cases from the beginning of the investigation through to arrest and the outcome of the bail hearing at court. Similarly, the fact that we were unable to establish clearly what the outcome of all bail hearings had been came as a disappointment.

However, in spite of these setbacks we were still able to gather a great deal of information from finalised police dockets, charge sheets and of course the interviews with criminal justice personnel. Our observations, as set out in Chapters 4 to six above, indicate that to a large extent, the introduction of the 1997 amendments went mostly unremarked in the criminal justice system, apart from the immediate day-to-day implications such as the impact that the new dispensation had on court rolls (especially in the regional courts).

It is tempting to draw a comparison between the response of criminal justice personnel to the 1997 bail amendments and their response to the introduction of the Domestic Violence Act in 1999. While the latter Act was not uniformly welcomed by the criminal justice sector, its provisions setting out the legal duties of police officials and clerks of the court do give specific guidance on what is expected in the implementation of the Act.[196]

When measuring current practices of specifically police and prosecutors as established in this research project against the existing constitutional and policy framework, we note that in numerous instances such practices fall short of the standards set by this framework. (The question of whether this framework is adequate in itself will be addressed at a later stage of the research project.)

Our observations of the experiences and perceptions of criminal justice personnel indicate that a great deal remains to be done in terms of specialized training on sexual assault and the contents of the legislation, addressing stereotypical views regarding these offences, providing guidance to presiding officers on the interpretation of the legislation and, very specifically, the appropriate allocation of resources.

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[195] . See Chapter 1.

[196] . See generally Parenzee et al (*op cit*) for an incisive analysis of the implementation of the Domestic Violence Act.

An interesting phenomenon was noted in rural sites and smaller communities (such as Lamberts Bay, George, Conville and Pacaltsdorp) where police officials themselves lived within the area that they were serving. Despite fewer resources available at these stations, there seemed to be a higher level of successful cases in terms of arresting suspects and involving the complainant in the investigation. This seems to be directly linked to the fact that officers in these areas have a vested interest in keeping their community safe. Also, it appeared that, as the police knew the community well, it was easier to identify potential suspects. This did not appear to be the case at police stations that served larger communities. In these instances, it was apparent that resource constraints impacted more heavily on the outcome of cases. It would, for example, prove to be more difficult to trace a suspect in a larger community where the investigating officers have limited time available to use police vehicles.

7.4 RECOMMENDATIONS

As set out in Chapter 1, we originally resolved to limit this report to a description of the current implementation of the bail legislation in sexual assault cases, and to also complete the second part of the research (focusing on the needs and concerns of victims of sexual assault) before formulating recommendations on how the legislation ideally ought to function. However, we believe that the observations made during the first part of the research already invite the tentative articulation of certain recommendations.

Researchers were aware of the fact that the research sample is not representative of current practices or conditions at all police stations and courts nationally (or even in the Western Cape). However, based on our observations and the information available to us, we have formulated the following recommendations:

1. All police officials (including reservists) who may be tasked with taking the reporting statements of sexual assault victims should be properly briefed on the inclusion of information that may be pertinent in the event of a bail hearing. This would include questions such as whether there had been specific threats of retaliation against the complainant, whether the accused knows where the complainant stays, whether he is a member of a gang, or has attempted to contact her after the attack.

2. The questions relevant to bail should be included in the checklist of questions provided in the National Instruction No 22/1998.

3. Investigating officers should be made aware that in sexual assault cases the possibility of threats or intimidation of the victim exists beyond the so-called 'high risk' situations such as gang rape or where the complainant and perpetrator live together.

4. Investigating officers should be alerted to the fact that initial ('A1') statements may not contain all the information relevant to the bail hearing.

5. The complainant should be given the opportunity of imparting any information that she feels might be relevant to the bail investigation prior to the bail application being held.

6. The importance of establishing and maintaining contact with the complainant prior to the bail hearing should be emphasized in the training of investigating officers.

7. Strategies should be implemented to ensure that a breakdown of communication between investigating officer and complainant is avoided at all costs. These strategies could include the following:

   - The introduction of 'victim liaison' services analogous to the victim advocate system employed in the USA;

   - Existing NGO's that provide counseling and other services to victims of sexual assault could include such liaison functions in their services;

   - Accessible written information could be provided to complainants setting out their rights in terms of access to information as well as the importance of maintaining contact with the investigating officer;

   - The computer databases (CAS) could be upgraded to facilitate access to information in the event of queries by complainants (this strategy would rely on the database being updated regularly); and

   - Obtaining an additional contact address for complainants when sexual assault is first reported.

8. Supervising officers who are requested to close sexual assault cases should scrutinize these dockets carefully and should periodically review the investigation history of detectives tasked with sexual assault cases.

9. Where cases are closed by police officials or withdrawn by prosecutors, clear reasons should be noted on the docket as to why the case was withdrawn or was not investigated further.

10. Where the complainant identifies the perpetrator in her statement, the investigating officer should note why he or she refuses or is unable to make an arrest.

11. Complainants should be notified prior to the case being closed and be given full reasons why the case has been withdrawn.

12. Where investigating officers are guilty of dereliction of duty (for example, in the form of a failure to make sufficient effort to trace a complainant), disciplinary proceedings should be instituted.

13. Strategies should be developed to ensure that proper communication between investigating officers and prosecutors is sustained. These strategies could include making use of existing resources, such as the police liaison officer stationed at the larger courts as well as the services of the clerk of the court, and should specifically include measures to ensure that investigating officers are present for bail hearings.

14. Prosecutors should pay attention to the provision of guidance to investigating officers regarding the investigation as well as the nature of their evidence in bail hearings.

15. Specific steps should be taken to ensure that prosecutors who screen dockets and conduct bail hearings in sexual assault cases have adequate experience and training to do so.

16. The use of the standardized bail recommendation form should be included in the SAPS National Instructions 22/1998, and police investigating officers and prosecutors should be directed to make use of the form in all cases to construct a written record of their communication regarding bail.

17. In areas where there is a high degree of mobility, specific measures should be developed to ensure that complainants are not 'lost' due to postponements of the case. At the same time, postponements in these cases should be kept to a minimum.

18. Training for prosecutors should include information on making maximum use of evidence presented during the bail hearing in the trial. (This should incorporate aspects such as cross-examination of the accused during the bail hearing.)

19. Prosecutors conducting bail hearings where evidence is led that may potentially be used in the trial should be directed to –

    - make a request for transcription of the bail record where the hearing is mechanically recorded; or

    - make proper written notes of this evidence for use by his or her successor handling the prosecution of the trial.

20. Given the actual and potential difficulties in communication between investigating officers and complainants, strategies should be developed to ensure that all relevant information about bail conditions and potential breach is conveyed to the complainant. This information should include a detailed explanation of the actions that would constitute a violation of 'no contact' conditions.

21. Complainants should also be provided with adequate information to enable them to report violations of 'no contact' provisions.

22. Strategies should be developed to address current shortcomings in the record-keeping system for bail applications. These strategies could include the use of standard bail application forms to be completed by the presiding officer as well as computerized record-keeping systems.

23. Our experience in negotiating access to information at police stations has shown that there is no uniform policy in place in the Western Cape regarding access to information for research purposes. It will be useful, for purposes of future research beyond this project, to engage on a formal level with senior police management in an attempt to establish a 'research protocol' that will on the one hand capture valid police concerns regarding, for example, the confidentiality of victims and the safeguarding of operational methods while on the other hand allowing for researchers to access essential information from police dockets and records. The agreement negotiated with the Director of Public Prosecutions for purposes of this research project may serve as a useful starting point in the development of such a research protocol.

7.4 THE WAY FORWARD

The above recommendations imply interventions that would take place on a number of levels. In certain instances, legislative amendment may be required. In other cases, policy directives may have to be amplified. Yet other recommendations entail the planning of innovative strategies to address specific systemic shortcomings.

The next step will therefore be to consolidate our recommendations and translate these into proposals for legislative reform (where appropriate) and for the development of implementation policies and training material.

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APPENDIX A

SAMPLE INTERVIEW SCHEDULE: MAGISTRATES (DISTRICT AND REGIONAL COURT)

Experience with sexual offence cases and bail

1.	Experience as magistrate (regional and district court) [length of time]
2.	Experience prior to bench [length of time]
3.	Have you received any training in dealing with sexual offences as a magistrate? If so, details?

First appearance

4	In sexual offence cases, how often is section 50(6)(d) applied?
5.	*Which subsection is relied on most frequently?* (a) Court is of the opinion that it has insufficient information or evidence to reach a decision on a bail application; (b) Prosecutor informs court that case has been or is going to be referred to DPP for issuing of written confirmation referred to in s 60(11A); (c) Prosecutor informs court that person is going to be charged with Schedule 6 offence and the bail application is to be heard by a regional court; (d) It appears to the court that it is necessary to provide the State to procure material evidence or perform functions referred to in s 37; (e) It appears to the court that it is necessary in the interests of justice to do so.
6.	What is generally the length of postponement [in days] for a bail application?

Bail hearings

7.	How often do you deal with Schedule 6 cases?

8.	Do you regard any one of the five grounds to be considered by the court in deciding whether the release of the accused would be in the interests of justice as particularly significant in relation to sexual offence cases? (a) Likelihood that accused will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; (b) Likelihood that accused will attempt to evade his trial; (c) Likelihood that accused will attempt to influence or intimidate witnesses or to conceal or destroy evidence; (d) Likelihood that accused will undermine or jeopardize the objectives of the proper functioning of the criminal justice system; (e) Likelihood (in exceptional circumstances) that release of accused will disturb the public order or undermine the public peace or security.
9.	Are there any specific factors (as listed in s 60) that you would concentrate on?
10.	Describe how you interpret 'exceptional circumstances' as used in sec 60(11)(a).
11.	How often do you apply sec 60(3) – order information or evidence to be placed before court?
12.	What is generally the amount set for bail in sexual offences – both Schedule 5 and 6 cases?
13.	How is the amount of bail determined?
14.	What is the general practice regarding bail conditions prohibiting contact with the complainant?

Evidence presented in bail hearings

15.	What information would you expect the investigating officer to put to the court in order for the court to consider bail in sexual offence cases?
16.	What is your opinion on the complainant's testifying at the bail application?
17.	Do you think that investigating officers need training regarding testifying at bail applications and if so, what would you recommend?
18.	What is your opinion on the value of the submission of an affidavit by the victim?

Bail conditions

19.	Which bail conditions are most often stipulated?
20.	What is your opinion on using a 'standard bail condition form' recording all information regarding the decision to grant bail, i.e. bail amount, conditions, etc.
21.	What information should be included in this standard form?
22.	When would the bail proceedings be mechanically recorded?
23.	Do you make any notes during a bail application?
24.	Where would those notes be recorded?

25.	Where would you record whether or not bail conditions have been ordered?
26.	How does one find out how much bail was granted?
27.	If the complainant/ investigating officer came to enquire at the clerk of the court whether or not bail conditions have been added, how would they (they clerk of the court) determine this?

Variation of bail conditions

28.	How often is application made for variation?
29.	What criteria do you use to determine whether or not to vary the bail conditions?

Breach of bail conditions

30.	How often does the prosecution apply to have bail withdrawn?
31.	Are these applications to have bail withdrawn generally successful?
32.	Which bail conditions (besides not appearing at court) are breached most often?
33.	What criteria do you use to determine whether or not bail should be withdrawn?

Prosecutors

34.	Do you think that prosecutors are adequately trained to deal with bail in sexual offences? If not, what specifically would they need training on?
35.	Do you have any recommendations to prosecutors to successfully oppose a bail application?

Perceptions and recommendations

36.	Perceptions on the differences between the old legislation and the new legislation
37.	How has it changed the factors that magistrates take into consideration when granting bail?
38.	Any recommendations for the improvement of the legislation?

APPENDIX B

KEY PROVISIONS OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

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, authorize that the arrested person be detained at a place specified by the court and for such a 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, authorize 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 her 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.

[Subsections (2) to (5) not reproduced here.]

50(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 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 authorized 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) …

(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;

(v) it appears to the court that it is necessary in the interests of justice to do so.

58. Effect of bail.

The effect of bail granted in terms of the succeeding provisions is that an accused who is in custody shall be released from custody upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his bail, and that he shall appear at the place and on the date and at the time appointed for his trial or to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned, and that the release shall, unless sooner terminated under the said provisions, endure until a verdict is given by a court in respect of the charge to which the offence in question relates, or, where sentence is not imposed forthwith after verdict and the court in question extends bail, until sentence is imposed: Provided that where a court convicts an accused of an offence contemplated in Schedule 5 or 6, the court shall, in considering the question whether the accused's bail should be extended, apply the provisions of section 60(11)(a) or (b), as the case may be, and the court shall take into account –

(a) the fact that the accuse has been convicted of that offence; and
(b) the likely sentence which the court may impose.

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 subject 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.

(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 of detention of an accused where on 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 jeopardize 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 1, 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 1 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 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 gravity of the charge on which the accused is to be tried;
(g) the strength of the case against he 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 her or her arrest or during the bail proceedings;
(b) whether the accused is in custody on another charge or whether the accused is on
(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 willfully –

(i) fails or refuses to comply with the provisions of paragraph (a);
(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 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.

64. Proceedings with regard to bail and conditions to be recorded in full –

The court dealing with bail proceedings as contemplated in section 50(6) or which considers bail under section 60 or which imposes any further condition under section 62 or which, under section 63 or 63A, amends the amount of bail or amends or supplements any condition or refuses to do so, shall record the relevant proceedings in full, including the conditions imposed and any amendment or supplementation thereof, or shall cause such proceedings to be recorded in full, and where such court is a magistrate's court or a regional court, any document purporting to be an extract from the record of proceedings from that court and purporting to be certified as correct by the clerk of the court, and which sets out the conditions of bail and any amendment or supplementation thereof, shall, on its mere production in any court in which the relevant charge is pending, be *prima facie* proof of such conditions or any amendment or supplementation thereof.