"He's out again": The role of the prosecutor in bail for persons accused of sexual offences[1]

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"I was worried about seeing him . . . there were rumours going around that this man was out and around in the township and that meant that at night we had to watch out because he may arrive at anytime kill us and leave" (Stanton *et al* 1997:104).

1 INTRODUCTION

During July and August 1997, the South African public was shocked by media reports on the discovery of the body of Mamokgethi Malebana, a seven year old girl from Katlehong on the East Rand.[2] An alarming train of events preceded this gruesome find. In November 1996, Mamokgethi's mother had laid charges against a neighbour of the family, one Daniel Mabote, for allegedly raping the seven-year old girl.

Mabote was accordingly arrested, and on his appearance in the Germiston regional court, he repeatedly applied to be released on bail.[3] On two occasions, he was refused bail because of his threats of retaliation against the daughter and her mother for reporting him. His third bid for bail, however, was successful: he was granted bail to the amount of R2 000 after the prosecutor had indicated that he had no objection against the granting of bail.[4] The accused paid his bail and was subsequently released.

Soon after Mabote's release, Mamokgethi disappeared. Mabote eventually led police investigators to the shallow grave where the young girl's body was found with her hands tied behind her back (Thiel 1997). Mabote was charged with and convicted of murdering Mamokgethi.[5]

1 This paper is based on research currently in progress at the Gender Project, Community Law Centre, University of the Western Cape. The financial assistance of the Open Society Foundation and the Ford Foundation towards the completion of this research is acknowledged with gratitude.

2 See for example Thiel 1997.

3 *Sunday Times* 21 July 1997.

4 *Sunday Times* 21 July 1997.

5 Mabote was sentenced to life imprisonment for the murder – see Amupadhi 1998.

It subsequently transpired that the prosecutor handling Mabote's bail application had failed to establish the facts of the case before agreeing to the accused's release on bail. According to media reports, he was not even in possession of the case file at the time.[6] (This file also contained details of two other complaints against the accused of raping young children.) The prosecutor had also failed to obtain information from the investigating officer or any of the preceding prosecutors.[7] No application had been made by the prosecution to postpone the case to obtain the file or call witnesses.

This case (understandingly) sparked a great sense of public outrage, and focused national attention on the perceived shortcomings of the 'bail' system (Hess & Soggot 1997). It also added impetus to government's resolve to tighten the existing provisions relating to the pre-trial disposition of accused persons (Thiel 1997). The Criminal Procedure Second Amendment Act[8] was accordingly passed during December 1997.[9] This Act, which had as a clearly stated aim to address public concerns regarding bail,[10] came into operation on 1 August 1998.

In this paper, we examine the role of the prosecutor in the determination of the pre-trial disposition of persons accused of sexual assault against the background of these recent legislative amendments.[11] Firstly, we provide a brief overview of the current legal position (as established by the introduction of Act 85 of 1997). We then argue that the specific nature of sexual assault warrants a differentiated prosecutorial approach to the question of bail, and we attempt to establish how such an approach would fit into the framework of the criminal justice system generally and the nature and purpose of bail specifically. Subsequently, we examine the provisions of the South African Constitution[12] as well as international human rights law in order to determine the rights of sexual assault victims relevant to the pre-trial release of accused persons, and we consider instances in comparable jurisdictions where guidelines for prosecutorial conduct have been formalised. Finally, we analyse current South African prosecutorial directives for dealing with bail in sexual assault cases and make certain recommendations in this regard.

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6 *Sunday Times* 21 July 1997.

7 This was Daniel Mabote's fifth appearance before five different magistrates and prosecutors in 23 days.

8 Act 85 of 1997.

9 The provisions of this Act primarily replaced s 60 of the Criminal Procedure Act 51 of 1977. The Criminal Procedure Second Amendment Act 75 of 1995 had already amended this section significantly. For an analysis of this legislative development, see De la Hunt & Combrinck 1999:318–325.

10 See Par 3 of the memorandum accompanying the Criminal Procedure Second Amendment Bill B 84B –97.

11 The term 'sexual assault' is employed in this paper as a collective term for the criminal offences recognised as 'rape', 'indecent assault' and '*crimen iniuria*' respectively. See Burchell & Milton 1997:487–500, 501–505, 510–517 for a definition and discussion of each of these offences.

12 Constitution of the Republic of South Africa Act 108 of 1996.

It should be noted that at present, there is very little data available on the pre-trial release of accused in sexual offence cases. Is it now more difficult for alleged rapists to obtain bail than before the commencement of Act 85 of 1997? Where bail is granted, are adequate conditions imposed to ensure that there is no intimidation of or contact with victims? While anecdotal evidence seems to suggest that bail may be granted less readily than before, no "hard" statistics exist.[13] The recommendations put forward at the end of this paper should be read in this context.

2 PRE-TRIAL RELEASE OF PERSONS ACCUSED OF SEXUAL OFFENCES

The pre-trial release of accused persons is primarily dealt with in sections 58 *et seq* of the Criminal Procedure Act.[14] The dominant principle underlying the judicial[15] determination of bail is to be found in section 60(1)(a), which states that an accused person is entitled to be released from detention unless the court finds that it is in the interests of justice that he or she be detained in custody pending finalisation of the criminal trial.[16]

Subsection 60(4) sets the parameters for this decision by providing that a refusal to grant bail (and thus the detention of the accused in custody) shall be in the interests of justice:

(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 the public interest, or will commit a Schedule 1 offence;[17]

(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;[18]

(c) where there is the likelihood that the accused, if he or she where released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence;[19]

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13 The Gender Project, in association with the Institute of Criminology (University of Cape Town) and Rape Crisis (Cape Town) is currently engaged in research to establish trends in the granting or refusal of bail in sexual assault cases since the commencement of Act 85 of 1997. This study, however, is still in its preliminary stages and it is too early to draw any conclusions.

14 There are additional provisions of the Criminal Procedure Act that may be relevant to the question of pre-trial release: see, for example, ss 50(6), which sets out the arrangements for bringing an arrested person before court for purposes of institution of bail proceedings. The scope of this paper does not allow for a comprehensive discussion of all such sections.

15 As opposed to pre-trial release by a police official (as provided for in s 59 of the Criminal Procedure Act) or by a member of the prosecuting authority (as envisaged in s 59A of the Criminal Procedure Act).

16 This section echoes s 35(1)(f) of the Constitution, which guarantees an arrested person the right to be released from detention if the interests of justice permit, subject to reasonable conditions.

17 Ss 60(4)(a). Schedule 1 lists (*inter alia*) the offences of rape and indecent assault.

18 Ss 60(4)(b).

(d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;[20] or

(e) where in exceptional circumstances there is a likelihood that the release of the accused will disturb the public order or undermine the public peace and security.[21]

Subsections 60(5) to (8A) detail the *factors* to be taken into consideration in determining whether any of the five grounds set out above have been established. These factors correspond to some extent with the rules that prevailed under common law and precedent prior to the enactment of legislative amendments in 1995.[22] A number of the stated factors may relate to the concerns of victims of sexual assault, including:

- the degree of violence towards another implicit in the charge against the accused;[23]
- any threat of violence which the accused may have made to any person, any resentment the accused is alleged to harbour against any person or any disposition to violence on the part of the accused (as is evident from his past conduct);[24]
- the fact that the accused is familiar with the identity of the witnesses and with the evidence that they might bring against him or her;[25]
- whether the investigation against the accused has already been completed;[26]
- the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;[27]
- how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;[28]
- 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;[29] and
- whether the sense of peace and security among members of the public will be undermined or jeopardised by the release of the accused.[30]

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19 Ss 60(4)(c).
20 Ss 60(4)(d).
21 Ss 60(4)(e).
22 See *S v Acheson* 1991 2 SA 805 (Nm).
23 Ss 60(5)(a).
24 Ss 60(5)(b)–(d).
25 Ss 60(7)(a).
26 Ss 60(7)(c).
27 Ss 60(7)(d).
28 Ss 60(7)(e).
29 Ss 60(8A)(a).
30 Ss 60(8A)(d).

Section 60 also provides for mechanisms to ensure greater judicial circumspection where accused persons are charged with a serious offence. It effectively creates the following 'three-tier' system:

(a) Where an accused person is charged with an offence listed in *Schedule 6* of the Criminal Procedure Act, this person must remain in custody unless he or she satisfies the court that exceptional circumstances exist which permit his or her release.[31] The offences in Schedule 6 include, amongst others, premeditated murder, murder of a law enforcement officer, and rape and indecent assault committed under certain circumstances.[32]

(b) An accused charged with an offence listed in *Schedule 5*[33] will remain in custody unless he or she adduces evidence that satisfies the court that the interests of justice permit his or her release.[34]

(c) 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.

Section 60 in its amended form requires the presiding officer to play a more active role in the proceedings than that usually expected from the judge or magistrate in a (predominantly) adversarial criminal justice system. Subsection 60(1)(c), for example, requires the court to ascertain from an accused person whether the question of bail should be considered if this is not raised by the prosecution or defence. Subsections 60(2) and (3) confer certain powers on the court, for example, to require that certain evidence be adduced or information be placed before the court. In addition, the court is required to weigh up the accused's personal interests against the interests of justice, even where the prosecution does not oppose bail.[35]

Other significant measures include provisions to the effect:

(a) that an accused person is not entitled to be brought to court (for purposes of bringing a bail application) outside ordinary court hours;[36]

(b) that bail applications of persons charged with Schedule 6 offences will only be heard in regional court unless the regional court is unavailable;[37]

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31 Ss 60(11)(a).

32 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.

33 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.

34 Ss 60(11)(b).

35 Ss 60(10).

36 Ss 50(6)(b). Prior to the introduction of this provision in the 1997 Act, an accused person was entitled to be brought before court for purposes of a bail application as soon as possible after arrest – even if this was outside ordinary court hours (see *Twayie v Minister van Justisie* 1986 2 SA 101 (O); *Minister van Wet en Orde & Andere v Dipper* 1993 2 SACR 221 (A)).

37 Ss 50(6)(c).

(c) that where an accused is charged with a Schedule 5 or 6 offence and the prosecutor does not oppose an application for bail, the presiding officer must note the reasons for this on record;[38] and

(d) that an accused person does not have a right of access to the police docket for the purposes of the bail application.[39]

3 SHOULD SEXUAL OFFENCES BE TREATED DIFFERENTLY?

This paper proceeds from the premise that the consideration of bail in sexual assault cases warrants a specialised and differentiated approach from the criminal justice system. It is important to briefly examine the reasons for this assumption.

The Canadian Supreme Court has recognised that sexual assault is a crime that is not comparable to any other form of violent crime, and expressed this as follows:[40]

> "Perhaps more than any other crime, the fear and constant reality of sexual assault affects how women conduct their lives and how they define their relationship with the larger society. Sexual assault is not like any other crime."[41]

Unlike other violent crimes against the person, sexual assault not only violates the physical safety of women, but their sexual and psychological integrity. 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 . . ." (Stanton *et al* 1997:104).

It is therefore easy to comprehend that these victims generally have a specific interest in the question of whether or not the accused is firstly, arrested, and secondly, released before commencement of the trial. This was confirmed in a recent study reporting on the experiences of rape victims at a specialised sexual offences court (Stanton *et al* 1997). 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 (Stanton *et al* 1997:104–105).[42] The participants also strongly felt that men accused of rape should not be given bail (Stanton *et al* 1997:105). Where bail had been granted, the women described the fear and worry this caused them.

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38 Ss 60(2)(d).
39 Ss 60(14).
40 *R v Seaboyer; R v Gayme* 1991 2 RCS (*per* L'Heureaux-Dubé J).
41 At 648–649.
42 See also Francis 2000:14–15.

4 THE RIGHTS OF VICTIMS OF SEXUAL ASSAULT

4.1 The nature of a criminal trial and the purpose of bail

The South African criminal justice system is predominantly adversarial in nature. Criminal trials are viewed as two-sided battles between the state (represented by the public prosecutor) and the accused, who has a right to legal representation.[43] The presiding officer in the criminal trial acts as an impartial 'umpire' who decides the guilt or innocence of the accused once all the evidence has been adduced by both sides.

The prosecutor's primary function is to assist the court in arriving at a just verdict and, in the event of a conviction, a fair sentence based upon the evidence presented.[44] The position of the prosecutor differs from that of the defence lawyer in the sense that the latter is representing a particular client, whose interests are predominant in determining the nature and scope of the defence lawyer's duties.[45]

Sexual assault is punished by the criminal justice system first and foremost as a crime against the *state*. The effect of this is that despite the particular nature of the crime, the victim is regarded as no more than a state witness (she is not a "party" to the criminal trial). This stands in stark contrast to the experience of victims of sexual assault, who regard the assault and the resultant criminal trial as intensely personal, as is evident from the fact that victims often refer to the incident as "*my rape*", to the perpetrator as "*my rapist*" and to the criminal trial as "*my case*".[46]

A further dichotomy is presented by the inherent purpose of the institution of bail, both in its traditional formulation[47] and the interpretation followed by the Constitutional Court in *S v Dladla and Others, S v Joubert; S v Schietekat*.[48] The Court emphasised that the main objective of bail is to minimise the prejudice suffered by awaiting trial prisoners, (or, put slightly differently, to maximise personal liberty).[49] Kriegler J remarked that there was widespread misunderstanding regarding the institution of bail:

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43 Ss 35(3)(f) of the Constitution.

44 This is the formulation contained in the National Prosecution Policy recently tabled in Parliament by the National Director of Public Prosecutions (in terms of sections 21 and 22(2) of the National Prosecuting Authority Act 32 of 1998, read with s 179(5) of the 1996 Constitution) at 3. This statement differs slightly from the formulation found in case law: it has generally been accepted by the courts that the paramount duty of the prosecutor is to assist the court 'in determining the truth' – see eg *S v Jija* 1991 2 SA 52 (E) at 67J–68A.

45 There is, for instance, no reciprocal duty on the defence to disclose evidence that could potentially be favourable to the prosecution. See Combrinck 1996.

46 See, for example Smith 1999.

47 According to commentators, the purpose of bail is to strike a balance between the *liberty of the accused* (who, pending the outcome of the trial, is presumed to be innocent) and *the interests of society* (the accused should stand trial and there should be no interference with the administration of justice) – see Du Toit *et al* 1999:9/2.

48 1999 2 SACR 51 (CC).

49 At 63 fn 17; see also 58F.

> "Manifestly, much must still be done to instil in the community a proper understanding of the presumption of innocence and the qualified right to freedom pending trial under s 35(1)(f)."[50]

The criminal justice system is therefore presented with a dilemma: on the one hand there is a need to accommodate the realistic and legitimate fears and concerns of the victims of sexual assault, while on the other hand it is also essential to protect the right to liberty of accused persons who have not yet been convicted of any offence. This implies that the parameters of "preventive" detention (that is, where an accused is refused bail in order to prevent the commission of further offences or acts of intimidation against victims) could be relatively narrow.[51] The dilemma above will not necessarily be resolved by broadening these parameters in the case of sexual assault; instead, it may be necessary to look at other measures to address the concerns of victims, such as the more explicit enumeration of prosecutorial duties.

During the public debate that preceded the introduction of the legislative amendments in 1997, strong voices of concern were raised about the proposed measures.[52] Women's organisations maintained that the proposed legislation did not sufficiently safeguard the interests of victims of violence against women.[53] Their main argument was that the legislation as it stood at that time should have been sufficient to avoid the inappropriate release of accused persons; it was in the *implementation* of this legislation that the system failed dismally. These organisations raised the argument that none of the suggested amendments, if they had been in force at the time of the tragic Mabote incident, would necessarily have prevented the professional negligence displayed by the prosecutor. It was argued that instead of focusing on legislative amendments, energy should rather be directed at providing guidance to prosecutors as to the nature of their duties in bail applications.[54]

It was recommended that such guidelines should include, for example, the obligation to:

- consult with all victims of sexual assault prior to the bail application
- keep victims informed of progress at all stages of the proceedings
- make use of expert witnesses, where appropriate
- request the imposition of bail conditions excluding contact with witnesses.

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50 At 80E–F.

51 The question of preventive pre-trial detention has also been controversial in other jurisdictions. See in this regard Salzburg 1988:706 and Delisle & Stuart Learning 1991:264.

52 See, for example, the submission presented by the Human Rights Committee to the National Assembly Portfolio Committee on Justice at the public hearings on the proposed legislation held during October 1997.

53 See the joint submission presented by Rape Crisis (Cape Town) and the Women and Human Rights Project, Community Law Centre (UWC) as well as the submission of the Tshwaranang Legal Advocacy Centre.

54 Submission by Rape Crisis and the Women and Human Rights Project.

4.2 Determining the rights of sexual assault 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 accused persons), we argue that a closer examination of the Bill of Rights results in a different conclusion.

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 right 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 fulfil* the rights in the Bill of Rights".[55] 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.[56] In addition, they are also entitled to *information* that may be essential for the protection of their interests, such as whether or not an accused has been released on bail.

This reading is also borne out by the provisions of international human rights documents, such as the Declaration of Basic Principles of Justice for Victims of Crime, which states that the responsiveness of judicial and administrative processes to the needs of victims[57] should be facilitated by the following:[58]

(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;

(c) Providing proper assistance to victims throughout the legal process;

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation; and

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55 Our emphasis.

56 The scope of this paper does not allow for a comprehensive discussion of the state duties arising from the constitutional entrenchment of the right to freedom from violence. See in this regard the judgment of the Constitutional Court (*per* Sachs J) in *S v Baloyi* 2000 1 SACR 81 (CC) as well as Combrinck 1998:663 *et seq*.

57 According to article A(1) of this Declaration, "victims" means "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, emotional loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member states".

58 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly Res 40/34 of 29 November 1985.

(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.[59]

It is clear that compliance with these standards will have specific practical implications for the prosecuting authority. In this regard, it is instructive to note that in a number of comparable jurisdictions, prosecutorial duties have been concretised in the form of either statutory provisions or policy guidelines.

Section 12 of the Combating of Rape Act recently passed in Namibia affords rape complainants the right to attend bail hearings and to request the prosecutor to present relevant information to the court. In addition, this section also imposes a duty on the police to inform complainants of the place, date and time of first appearance of the accused. If the complainant is not present at the subsequent hearing, the prosecutor has a duty to inform the complainant of the outcome of the hearing and the conditions of bail, if any.

Significantly, section 13 of the Act imposes an obligation on the presiding officer, where the accused in a rape case is released on bail, to add conditions to ensure that the accused will not make contact with the complainant.

The *US Attorney General Guidelines for Victim and Witness Assistance*, a compilation of guidelines for Department of Justice personnel on how to treat crime victims, states that victims (*inter alia*) have the following rights:[60]

(a) The right to be reasonably protected from the accused offender;

(b) The right to be notified of court proceedings;

(c) The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial; and

(d) The right to information about the conviction, sentencing, imprisonment, and release of the offender.[61]

The guidelines further state that during the course of the investigation, an official from the investigating agency must provide the victim at the earliest possible opportunity with information concerning the status of investigation of the crime and the arrest of a suspected offender.[62]

During the prosecution of a crime, an official from the prosecutorial authority must notify the victim as soon as possible of the release or detention status of an offender or suspected offender.[63] Where if the victim has provided a current address or telephone number, an official is expected to provide the victim with general information, preferably in writing, about the criminal justice process, in particular:

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59 Article A(6).
60 This document is based on federal victims' rights laws and Department of Justice policy.
61 Article III.B.
62 Article IV.A.3.a.3(a) and (b).
63 Article IV.B.2.a.1(a).

(a) The role of the victim in the criminal justice process, including what the victim can expect from the system as well as what the system expects from the victim; and

(b) The stages in the criminal justice process of significance to a crime victim and the manner in which information about such stages can be obtained.[64]

In cases of *interstate domestic violence*, *violation of a protection order* or *stalking*, a member of the investigative agency must inform the victim that he or she has the right to make a statement regarding the danger posed by the defendant for the purposes of determining pre-trial release of the defendant or conditions of such release.[65]

4.3 The South African position

The South African National Prosecuting Authority has made some strides towards the compilation of guidelines for prosecutors dealing with bail in cases of sexual assault. The National Prosecution Directives[66] enjoin prosecutors to carefully consider the question of whether or not the accused should be released on bail.[67] Efforts should be made to consult with the victim before the bail hearing to ensure that all relevant information is gathered and considered.[68] Prosecutors must request the police to inform the victim of the result of bail application and the procedure to be followed if the accused contravenes any of the bail conditions.[69] Prosecutors are expected to take immediate action against accused who harass, threaten, injure or intimidate victims or other witnesses in sexual assault cases.[70]

While these directives provide a starting point, their usefulness is limited by the fact that they are in fact merely *policy guidelines*. This may imply a lack of clarity regarding whether or not these guidelines are in fact binding, and if so, what the consequences of non-compliance would be. There may also be a lack of certainty as to whether, for example, victims or advocacy organisations have a right of access to these guidelines.[71]

Furthermore, we believe that the substantive ambit of these guidelines should also be expanded. We therefore argue for the concretisation of prosecutorial duties in legislative format, analogous to the Namibian provisions referred to above.[72] We recommend the inclusion of the following provisions in national legislation:

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64 Article IV.B.2.a.3(a) and (b).

65 Article IV.A.3.a.1(f).

66 Compiled in compliance with the provisions of the National Prosecuting Authority Act 32 of 1998 read with s 179(5) of the 1996 Constitution.

67 Part 27, Par C(1).

68 Par C(2).

69 Par C(3).

70 Par C(4).

71 The scope of this paper unfortunately does not allow for a comprehensive analysis of these directives.

72 A precedent for the legislative enactment of the duties of specific state officials is to be found in ss 2 and 4(2) of the Domestic Violence Act 116 of 1998.

Section 1: Rights of complainants

The complainant in a sexual offence case has the right to:

(a) be reasonably protected from the accused;

(b) be notified of all court proceedings, including bail hearings;

(c) attend all public court proceedings relating to the offence, unless the court determines that the evidence of the complainant would be materially affected if he or she heard the evidence of other witnesses either during the bail hearing or the trial;

(d) make a statement regarding the potential danger posed by the accused for the purposes of determining the pre-trial release of the accused or the conditions of such release;

(e) request the prosecutor to present information relevant to pre-trial release of the accused, conviction or sentencing to the court; and

(f) be kept informed about the pre-trial release, conviction, sentencing, imprisonment and release of the accused.

Section 2: Duties of police officials

During the course of the investigation, the investigating officer must provide the complainant at the earliest possible opportunity with information regarding:

(a) the status of the investigation;

(b) the arrest of the suspect;

(c) the place, date and time of the first appearance of the accused; and

(d) the rights set out in section 1 above.

Section 3: Duties of prosecutors

During the course of the prosecution, the prosecutor must:

(a) take steps, including the presentation at the bail hearing of evidence in the form of affidavits or *viva voce* evidence, to ensure the reasonable protection of the complainant;

(b) where an accused is released on bail or warning, request the imposition of appropriate conditions to ensure the reasonable protection of the complainant;

(c) make efforts to consult with the complainants prior to the bail hearing;

(d) notify the complainant about the outcome of the bail hearing if he or she is not present at such hearing;

(e) where the accused is conditionally released on bail or warning, take steps to ensure that the complainant is informed of the procedure to follow if the accused were to contravene any of these conditions; and

(f) inform the complainant, preferably in writing, of

(i) his or her role in the criminal justice process, including what the complainant can expect from the system and what is expected from the complainant; and

(ii) the stages of the criminal justice process of significance to the complainant and the manner in which information about such stages can be obtained.

Section 4: Contravention of bail conditions

Prosecutors must take immediate action against accused who allegedly contravene the conditions of bail or who harass, threaten, injure or intimidate the complainant or other witnesses in sexual offence matters.

5 CONCLUSION

As described above, prosecutors are uniquely placed to mediate in the quandary presented by the uneasy confluence of the rights of accused persons and the interests and expectations of victims of sexual assault in relation to the question of bail.

The need for greater prosecutorial activism is specifically pertinent in the determination of the pre-trial status of the accused. At the point where bail is considered, the victim is often at her most vulnerable: the arrest and concomitant bail hearing may happen relatively soon after the incident of sexual assault, before the victim has had the benefit of counselling or legal advice. Events around the arrest and pre-trial disposition of the accused may well determine whether or not the victim is prepared to go ahead with testifying at the eventual trial. If, at this initial stage, she gets the message that the criminal justice system has a limited capacity to accommodate her interests, she may well lose confidence in the ability of this system to represent these interests during the trial.

Appropriate pre-trial disposition is further essential to ensure that the victim is in a position to provide the court with evidence in its optimal form – not only in terms of the integrity of evidence, but in the light of South African realities, simply in terms of making it to the courtroom alive.

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