

**THE CHILD RAPE VICTIM THROUGH THE CRIMINAL JUSTICE SYSTEM:  
PITFALLS AND PROPOSED SOLUTIONS**

**BY**

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Date: December 2001**

ANNEXURE F

DECLARATION

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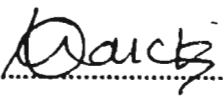
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# **INTRODUCTION**

## **ORIGIN OF THE STUDY**

In 1998, I joined the Department of Justice as a Public Prosecutor. When I first went to court, I was absolutely afraid – of both the courtroom and the people who worked there. As I sat in court, I recall being totally afraid to utter a single word. The courtroom set-up scared me into silence. Although I was now a part of this set-up, nothing could erase those feelings of fear and apprehension. The other prosecutors were just as intimidating, with their long black, authoritarian gowns. My first reaction was to open the door and run out. I was 23 years old on that day. I was an adult with 5 years education at a tertiary institution. I was considered to be an extrovert by friends and family. The freedom of University life had moulded me into a person of absolute strength, or so I had thought. For me serving as a prosecutor was to become one of the most daunting experiences of my adult life.

As the days passed in the Department of Justice, I began prosecuting cases where children were victims. I soon realised that this was a sensitive and problematic issue. Firstly, the child victim undergoes severe trauma during the incident. Secondly, having to re-live that experience in court places severe strain on the physical and emotional well-being of the child. Being part of the Criminal Justice System allowed me to see this injustice at first-hand. I witness secondary abuse on a daily basis – I see the pain in the face of the child in the court when she is faced with strangers and her fear when she is speaking to prosecutors and magistrates about her experience. I see her difficulty in recalling the incident in such an environment and her apprehension when she is chided by insensitive magistrates and cross-examined at length by attorneys. I see her feeling stupid when she makes a mistake and her disappointment when people indicate that she is not telling the truth. I see her feeling hopeless and useless when she leaves the court and no one gives her a second thought. Finally, I see myself feeling just as helpless, feeling the

anger of being a member of the criminal justice system, and one who has probably added to this traumatic experience.

For this reason, I decided to concentrate on the plight of the abused child (with specific reference to the child rape victim) through the Criminal Justice System and investigate the pitfalls within the system.

## **MOTIVATION**

The following factors have motivated this Study:

- Much attention is given to the prevention of child abuse and the treatment of abused victims. The issue of secondary victimisation tends to be ignored.
- The success of the intermediary system remains untested.

The term “undue mental stress” (S 170 (A) CRIMINAL PROCEDURE ACT 51 OF 1977) remains undefined and no standard criteria in this context have been developed.

- Post-trial counselling is not often practised. It is a new concept in South Africa. This option is not being sufficiently explored by the Criminal Justice System, even though studies indicate that it is necessary.
- Lack of specific training amongst court officials remains a huge obstacle. The importance of such training is understated. It is taken for granted that a legal degree is sufficient to deal with child abuse cases. A lack of training leads to a lack of sensitivity and compounds the problem of poor child witnesses.
- Statistics have shown an increase in child rape cases in South Africa. The need for reform is becoming increasingly urgent. The rate of change is out of step with the increase in such offences – research is called for to obtain some kind of balance.
- Many of our legal instruments offer more protection to the accused person than to the victim. Much improvement is needed in this aspect. The victim needs to know that the law also protects her.

- The Criminal Justice System needs to work in conjunction with the other role players. A multi-disciplinary approach is needed. The Criminal Justice System cannot and should not work in isolation to effect change.

For the above-listed reasons, I felt that the roles of the relevant personnel in court (namely prosecutors, magistrates and attorneys) need to be evaluated. Further, the child's needs have to be considered and investigated to bring about change.

## **AIMS OF THE STUDY**

1. To pinpoint the problematic areas regarding the child rape victim in court. To pinpoint the physical problems as well as the emotional factors.
2. To identify each role player's shortcomings in dealing with the child witness and to address these problems.
3. To compare selected aspects of our Criminal Justice System, concentrating on the evidence of the child witness and related issues thereto (its shortcomings) with foreign jurisdictions and to offer proposed solutions to the problems. The various perspectives regarding the issues of competence and credibility are discussed in Chapter Four.

## **PRESENTATION OF CONCEPTS**

Chapter One deals with the child rape victim as she or he passes through the criminal justice system. A brief overview of the criminal justice system is provided, beginning with pre-trial, the trial and the post-trial procedure. The process differs with regards to the accused person and the victim. Both processes are discussed. This Chapter includes a look at the intermediary system in South Africa. The aspect of the child witness is also discussed, concentrating on issues such as competence and credibility.

The child rape victim comes into contact with many professionals in the criminal justice system. The roles of each of the professionals are identified and discussed in Chapter

Two. The problems that are experienced by the role players impact directly on the child rape victim. These problems are also highlighted in Chapter Two.

Chapter Three focuses on the main interest of this Study. It discusses the problems experienced by the child rape victim in the context of the criminal justice system. It also illustrates the need for improvement in the system.

Chapter Four includes a comparison of legal viewpoints predominant in the United States of America and Britain regarding the child witness in court. The aspects of competence and credibility are discussed with a view to comparing the legal approach to the child witness in these aspects in the United States of America and Britain to that of South Africa.

The conclusions of the Study are presented in Chapter Five. The main problems are identified and discussed, and possible solutions to the shortcomings are also discussed.

# CHAPTER 1

## THE CHILD RAPE VICTIM THROUGH THE CRIMINAL JUSTICE SYSTEM

### 1.1 A CLOSER LOOK AT THE CRIMINAL JUSTICE SYSTEM

Burchell and Milton define the crime of rape as an act that ‘consists in intentional unlawful sexual intercourse with a woman without her consent.’<sup>1</sup> It follows from the definition that only a woman can be a victim of rape, and that rape can only occur if there is sexual intercourse. Penetration is an essential element of the crime and the slightest penetration is sufficient.<sup>2</sup> A further requirement is that the intercourse must take place without the woman’s consent.<sup>3</sup>

A critical analysis of this definition shows that the definition of rape pivots on the concept of sexual intercourse with an adult female. It is submitted that the definition should actually make reference to a ‘person’ rather than a ‘woman’. The reason for this is that by using the term ‘woman’, one can draw the inference that the definition limits the victim to that of an adult female.<sup>4</sup> This clearly does not reflect the reality that young children are often victims of this heinous crime. In fact, statistics regarding child rape victims are indeed shocking. South Africa has the world’s highest rape rate, 120 per 100 000 which is more than ten times that of the United States of America.<sup>5</sup>

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<sup>1</sup> Johnathan Burchell and John Milton, Principles of Criminal Law, 2<sup>nd</sup> ed. (Kenwyn :Juta and Co.Ltd, 1997) 487.

<sup>2</sup> C.R Snyman, Criminal law, 3<sup>rd</sup> ed. (Durban: Butterworths, 1995) 425.

<sup>3</sup> *Ibid* at 426.

<sup>4</sup> Proposals are presently being forwarded to include the male person as a victim in the definition of rape.

<sup>5</sup> Sheila Camerer “What about the victims?” De Rebus: The SA Attorneys’ Journal January 1999:23.

Consent is a crucial issue in rape matters.<sup>6</sup> South African law, following English law to a great extent, has placed the emphasis on the absence of valid consent to intercourse on the part of the female, rather than on the aspect of violence.<sup>7</sup> Since the absence of consent is an essential element of the crime, a common defence is that of consent being given to the act.

However, a person under a certain age cannot give valid consent to sexual intercourse.<sup>8</sup> This was decided in the case of *R v Socout Ally* where it was stated that a person under the age of twelve is at law incapable of giving valid consent to sexual intercourse.<sup>9</sup> Even if she 'consents', intercourse with her amounts to rape.<sup>10</sup> The defence of consent cannot be raised where a child is below the age of 12.

The treatment of children as a separate entity in law not only affords them protection, but also renders them as a category of persons requiring special attention. This is also illustrated by the fact that the evidence of children is approached with caution, and more so in sexual offence cases. A discussion of the cautionary rule follows below. A general overview of the procedures that relate to the child rape victim when she comes to court will also be discussed in this chapter.

## 1.2 THE CAUTIONARY RULE

'The danger of believing a child where evidence stands alone must not be underrated.'<sup>11</sup>

A magistrate or judge makes his final decision on a matter based on the evidence that is placed before him. However there are certain rules and regulations that guide the presiding officer in his approach to examining the evidence. One such rule is the

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<sup>6</sup> See definition above.

<sup>7</sup> Snyman *op cit.* At 425

<sup>8</sup> *Ibid* at 120.

<sup>9</sup> *R v Socout Ally* 1907 TS 336 at 338.

<sup>10</sup> *Ibid.*

cautionary rule, which is applied when the magistrate or judge is presented with evidence in matters requiring a degree of caution. The rationale behind the application of the cautionary rule is to emphasise the importance of careful examination of certain witnesses. The categories of persons referred to here are witnesses in sexual offences, single witnesses, accomplice witnesses, claims against the estates of deceased persons, police traps, spies and informers, inquiry agents, prostitutes and young children.<sup>12</sup> The evidence given in these cases require that there be some kind of 'satisfactory indication of trustworthiness'.<sup>13</sup> Hoffmann and Zeffertt maintain that the corroboration of evidence is a sufficient indication of trustworthiness.<sup>14</sup> However, other grounds may also indicate trustworthiness. In such case, an absence of corroborating evidence will not automatically result in the disregard of the evidence.<sup>15</sup> Furthermore it does not imply that because there may be corroboration of some sorts, that the evidence is sufficient for a conviction beyond a reasonable doubt.<sup>16</sup> The courts usually require substantial confirmation when very young children are concerned.<sup>17</sup> This is especially true in cases where children are the victims of sexual offences. The reason for this is that both children and sexual offences are categories that require that the cautionary rule be applied.<sup>18</sup>

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<sup>11</sup> Diemont JA in *Woji v Santam Insurance Co. Ltd* 1981(1) SA 1020 at 1027.

<sup>12</sup> LH Hoffmann and D Zeffertt, The South African Law of Evidence, 4<sup>th</sup> ed. (Durban : Butterworths, 1988) 584.

<sup>13</sup> Hoffman and Zeffertt *op cit.* at 572.

<sup>14</sup> *Ibid.*

<sup>15</sup> *S v Artman* 1968 (3)SA 339 at 341

Judge Holmes stated that 'while there is always need for caution in such cases, the ultimate requirement is proof beyond a reasonable doubt; and the courts must guard against their reasoning tending to become stifled by formalism, In other words, the exercise of caution must not be allowed to displace the exercise of common sense.'

<sup>16</sup> *S v Hlapezulu* 1965 (4) SA 439(A) at 440 G

Judge Holmes stated that 'satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of the safeguard [provided by some factor reducing the risk of a wrong conviction.'

<sup>17</sup> *R v Bell* 1929 CPD 478.

<sup>18</sup> Hoffman and Zeffertt *op cit.* at 572.

### 1.3 UNDERSTANDING THE OATH

Perry and Wrightsman maintain that children must possess a sense of the obligation to tell the truth in order to be found competent as witnesses.<sup>19</sup> Judges often question whether or not a child is capable of understanding the oath. In terms of legislation in English law a person of tender age is allowed to give unsworn evidence in criminal proceedings provided that they have ‘sufficient intelligence to justify the reception of the evidence’ and understand the duty of speaking the truth.<sup>20</sup> However, the recent decisions by high court judges in South Africa indicate that the proper procedures regarding the administering of the oath be followed in order to confirm the conviction of the accused.<sup>21</sup> In *S v Sithole*, Judge Webster questioned whether a 14- year old knew the meaning of taking the oath.<sup>22</sup> *In casu*, the judge questioned whether the magistrate had made sure that the girl knew what it meant to speak the truth under oath and whether she was sworn in correctly.<sup>23</sup> In another case that was referred to the high court for sentencing (the outcome of which is still pending), the same judge again questioned whether or not a 13- year old had been sworn in and properly warned to tell the truth.<sup>24</sup>

Whether or not a child understands the taking of the oath and its significance, depends on various factors. Perry and Wrightsman suggest that the age of the child and his/her ‘moral frame of reference’ are two of the deciding factors. According to them, the notion of what the truth is differs with age.<sup>25</sup> For example to a child of 4 years and younger, the truth may be what is ‘most advantageous for the child’.<sup>26</sup> A child who is older, for example, kindergarten age, may equate telling the truth to ‘obedience to authority’.<sup>27</sup> Children who are aged between 6 and 9 years old are categorised as perceiving the truth based on the

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<sup>19</sup> Nancy Walker Perry and Lawrence S. Wrightsman. *The Child Witness : Legal Issues and Dilemmas*. (Newbury Park: Sage Publications, 1991) 104.

<sup>20</sup> H.K. Bevan, *Child Law*. (London: Butterworths, 1989) 452.

<sup>21</sup> Zelda Venter, “Child rape victim cases under the spotlight: Judge asks if minors understand oath.” *The Mercury* 1 May 2001.

<sup>22</sup> *S v Sithole*, matter still pending in the High Court at the time of research being compiled.

<sup>23</sup> *Ibid*.

<sup>24</sup> Venter *op cit.* at 2.

<sup>25</sup> *Ibid* at 105.

<sup>26</sup> *Ibid* at 105.

<sup>27</sup> *Ibid* at 105.



‘philosophy of reciprocal benefit’<sup>28</sup>. In other words, they understand the benefits of telling the truth. Children between the ages of 9 and 12 years of age generally confuse the idea of telling the truth and telling people what they want to hear.<sup>29</sup> This is because children of this age group are ‘eager to please others and to be seen as nice’.<sup>30</sup> Adolescents, on the other hand, understand the need to speak the truth because of their needs to meet personal obligations.<sup>31</sup> The above-mentioned categories are merely guidelines and opinions of the writers mentioned. It is submitted that various other factors must be considered when determining the issue of truthfulness as far as the child witness is concerned. The level of intelligence of the child as well as his/her ability to understand the concept of telling the truth must also be taken into consideration. The social background of the child is also a factor that may influence the child’s ability in formulating the concept of the ‘truth’. It is therefore submitted that each case be determined on its own circumstances and taking into account the individual child witness.

#### **1.4 AN OVERVIEW OF THE CRIMINAL JUSTICE SYSTEM**

The Constitution of the Republic of South Africa Act 108 of 1996 has made special provision for the children of our country. Section 28 (2) maintains that ‘a child’s best interests are of paramount importance in every matter concerning the child.’ State parties are required to ensure that structures are put in place to prioritise the best interests of the child. One major facet of the state that deals with children on a daily basis is the criminal justice system. Children are linked to crime, either as offenders or as victims. It is imperative that in keeping with international legal instruments regulating children’s rights, that they are treated in a manner that is in their ‘best interests’.<sup>32</sup>

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<sup>28</sup> *Ibid* at 105.

<sup>29</sup> *Ibid* at 106.

<sup>30</sup> *Ibid* at 106.

<sup>31</sup> *Ibid* at 106.

<sup>32</sup> United Nations Convention on the Rights of the Child (United Nations, 1989).

Burchell and Milton define the criminal justice system as ‘an administrative system that involves the following functions:

- Law enforcement: this function involves the monitoring of the observance of the law by the public and where necessary or appropriate, the enforcement of laws through the use of force, the investigation of crime, and the arrest and interrogation of suspected offenders.
- Prosecution of offenders: a process involving various procedures for determining whether a person said by the police to have committed a crime indeed did so and the determination of the punishment to be inflicted for having done so.
- Penal stage: a function involving the carrying out of the judicially determined punishment upon the convicted person. This may, for instance, involve imprisonment, the receipt of monies paid by way of a fine or an order of corrective supervision.’<sup>33</sup>

The South African criminal justice system thus comprises the various disciplines, namely the South African Police Services, the Department of Justice, the Department of Correctional Services and more recently, the Department of Social Welfare.

The next section sets out a discussion of the procedures leading up to the trial stage, an explanation of trial procedure as well as post trial events.

#### **1.4.1 PRE-TRIAL PROCEDURE**

When an offence is committed, the matter does not come to trial immediately. There is a period of usually 2 to 3 weeks (depending on the amount of investigations still outstanding) before the trial, which is referred to as the pre-trial period. During this period, the police complete their investigations and the state prepares its witnesses for trial. This is done through the interviewing of the witnesses. It must be noted, however, that the pre-trial procedure in criminal matters differs for accused persons and for victims

of the offence.

#### **1.4.1.1 Pre -Trial Procedure with regards to the Accused Person**

An arrested person is entitled to be brought to court within 48 hours of his arrest. During this time he may apply for bail. Bail may be granted to the accused person by the police.<sup>34</sup> If the offence is one that is contained in schedule 7 of the Criminal Procedure Second Amendment Act 85 of 1997, then the prosecutor on duty can set bail in the matter.<sup>35</sup> The accused then appears in court on the next court day.<sup>36</sup> If the accused has not applied for bail, then he can do so at his first court appearance. Thereafter, the matter is adjourned until investigations are completed. The matter is then set down for trial.

#### **1.4.1.2 Pre –Trial Procedure with regards to the Victim**

When an offence is committed, the injured party referred to as the complainant, reports the matter to the police. An affidavit is then taken by the police official. This statement forms the basis of the arrest. The offender is then arrested. When the matter is set down for trial, the complainant is subpoenaed to court to give her evidence on a certain day. However the prosecutor usually calls the witness (complainant) on an earlier date to hold a pre-trial interview.<sup>37</sup> Unfortunately, while this may be an ideal situation, the pre-trial interview is not conducted in all cases. The purpose of the pre-trial report is clear up any doubts that the prosecutor may have regarding the testimony that is to be given in court. All other discrepancies are also cleared up at this interview. The witness is then called to court to give her evidence at the trial.

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<sup>33</sup> Burchell and Milton *op cit.* 2.

<sup>34</sup> This is referred to as police bail and can be granted by a member of the South African Police Services if the offence does not fall into any of the schedules contained in the Criminal Procedure Second Amendment Act of 1997 and the value involved (in matters such as theft) does not exceed R2000.

<sup>35</sup> Prosecutors are rotated on a roster system in a given jurisdiction. If an accused person has committed an offence that falls into schedule 7 of the Bail Act, and he makes an application for bail, then the prosecutor on duty, must go out to the police station to attend to that application.

<sup>36</sup> This is any day other than a weekend or public holiday between 8am and 4:15pm.

## **1.4.2 TRIAL PROCEDURE**

The criminal trial is initiated by the accused tendering a plea. If the accused pleads guilty, the magistrate questions him accordingly and the matter is finalised. However, if the accused pleads not guilty, then the matter proceeds by way of trial. This is done by the state calling witnesses to prove its case beyond a reasonable doubt. These witnesses are then subject to cross-examination by the accused and /or his legal representative. The state closes its case once all the witnesses have been led. The accused, at this stage may either elect to give evidence or remain silent. If he does give evidence, he is subjected to cross-examination by the prosecutor. He may also be questioned by the court. At the close of the defence case, arguments on the merits of the case are presented by both parties. The magistrate then considers the evidence presented to him/her and decides on the facts of the case whether or not the state has proved its case against the accused. If he/she finds that this is so, then the accused is found guilty. He is then sentenced. If the state has failed to do so, then the accused is found not guilty and discharged. The prosecution process is initiated by putting the charge to the accused.

### **1.4.2.1 Putting the Charge to the Accused**

The charge is put to the accused person informing him or her of the offence with which he or she is charged. The charge sheet and annexure outline the elements of the charge, which must be proved by the state.<sup>38</sup>

### **1.4.2.2 The Plea**

The accused person pleads to the charge. He pleads either guilty or not guilty.<sup>39</sup> If he pleads guilty, and the magistrate accepts the plea then the matter is finalised without leading any evidence. However, if the accused pleads not guilty, then the prosecutor is required to prove her case beyond a reasonable doubt. This is done by leading evidence for the state.

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<sup>38</sup> See Annexure A and B.

<sup>39</sup> These are not the only options of the accused. For example, he may plead that he has already been tried for the offence. However, these are the most frequent pleas in the criminal court.

### **1.4.2.3 Leading Evidence**

This is done in two ways:

The prosecutor may choose to lead evidence by calling witnesses. She can also lead evidence into the record by handing in affidavits. Once this is done, the defence has the opportunity to rebut this evidence by questioning the witnesses. This is referred to as the process of cross – examination.

### **1.4.2.4 Closing the State's Case**

Once all the evidence is led, the prosecutor then closes the state's case. At this stage, the defence is given the opportunity to lead evidence. (The procedure is the same as discussed above for the state.)

### **1.4.2.5 Address on Judgement and Judgement by the Magistrate**

The prosecutor is given the opportunity to argue the state's case and convince the magistrate to convict the accused based on the evidence before the court. The defence is thereafter given the same opportunity. After reviewing the evidence, the magistrate arrives at a decision to either convict or acquit the accused.

### **1.4.2.6 Sentencing the Accused**

If the person is convicted, then the prosecutor addresses the court on sentencing. The defence also does this. The magistrate then considers all the factors presented to the court by the prosecutor and the defence, and hands down an appropriate sentence.

This concludes the matter.

## **1.4.3 POST - TRIAL PROCEDURE**

This usually involves the removal of an accused that has been found guilty and sentenced. It also involves counselling for the victim.

## **1.5 THE RAPE VICTIM THROUGH THE SYSTEM**

### **1.5.1 PRE -TRIAL PROCEDURE**

When a rape victim makes a report regarding the incident to another person, this person becomes known as the first report. This person is usually a family member or someone whom she trusts. The matter is then reported to the police. At present, a specialised unit within the South African Police Services deals with cases involving the sexual abuse of children. The Child Protection Unit (hereinafter referred to as the CPU) investigates all matters involving child victims.

#### **1.5.1.1 Taking Down the Statement of the Accused**

A statement is taken from the child by a member of the CPU relating to the events of the incident. The statement contains all the relevant details pertaining to the rape and should therefore be taken down by an experienced and trained officer. The language that is contained in the statement should reflect that of a child as this can and often is queried by the defence attorney. If this requirement is not met, the defence may argue that the statement is not totally that of the child's recollection, but rather a suggestive account of the officer responsible for the writing of the statement. An example of this would be the use of complicated terms and sentence order in the statement. Furthermore the statement is there to assist the child to recall the incident at a later stage.<sup>40</sup> Therefore all the pertinent details will have to be included in the statement to assist the child. It is also important to ensure that the proper order of events is maintained. The officer should also ensure that the statements of the victim are unambiguous. All discrepancies should be cleared up by the officer. It is suggested that the statement be taken down immediately by the officer while the sequence of events is still fresh in the memory of the victim. This is

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<sup>40</sup>Interview with Mr D. Govender of the Scottburgh Magistrates Court on the 14<sup>th</sup> February 2000. Mr Govender, of the Scottburgh Magistrates Court maintains that the matter usually comes to trial a year later. Sometimes the child's evidence is taken over a year after the incident due to heavy court rolls in the Regional Courts.

obviously quite a daunting task as the child would still be severely traumatised from the incident. It therefore requires a person with skill and sensitivity to perform this task.<sup>41</sup>

The victim is then taken to the district surgeon.

### **1.5.1.2 Medical Examination of the Victim**

The district surgeon is a medical doctor who is employed by the state to perform certain duties, one of these being the medical examination of rape victims. The child is taken to the district surgeon by the police officer and is usually accompanied by her mother or the person who accompanied her to the police station. The medical findings of the examination are recorded on a J88.<sup>42</sup> This form is evidence and can be handed in at court to form part of the proceedings.<sup>43</sup> The process is naturally a terrifying experience for any child and therefore it is of the utmost importance that the examination does not cause any further trauma to the child. The doctor therefore needs to be patient and sensitive to the needs of the child.

The child is then referred to a social worker for counselling and therapy. The referral may be to a social worker that is employed by the state or to a private psychologist. The matter proceeds in court in the meantime. When the trial date is set, the prosecutor arranges with the police officer investigating the matter (investigating officer) to take the child to court for a pre-trial interview.

### **1.5.1.3 The Pre -Trial Interview**

It is common practice that the witness in any case must be interviewed before the matter goes to trial. One of the reasons for this is that the statement originally made to the police is taken down immediately after the offence. At this time the facts are still fresh in the mind of the witness and all pertinent details are listed in the statement. A pre-trial interview in such instances will assist the child in recalling the pertinent details and important facts of the matter before going into court.

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<sup>41</sup> Interview with Mr Govender *op cit*.

<sup>42</sup> The J88 is a medical form which is completed by the doctor regarding his findings emanating from the examination of the victim. See annexure C.

The evidence of a child is often a matter for debate.<sup>44</sup> There are two schools of thought on this issue; namely those who believe that they can be good, credible and honest witnesses and those who doubt their credibility due to various factors. One of the reasons as to why a child's evidence is approached with caution is because of the age factor. It is often believed that a child's lack of maturity reflects on his/her ability to recall facts with clarity. However, the findings compiled from the data extracted from various role players, namely the prosecutors, magistrates and attorneys, indicate that despite the tender age of the child, he or she can be a good, credible witness.<sup>45</sup> However, the matter may only come to the trial stage weeks or even months after the commission of the offence. This obviously poses a problem since the witness who is now called to court may not remember the details contained in the statement. As it is often the intention of the defence to bring out contradictions in the state's case in order to show that the state has not proved its case beyond a reasonable doubt, this problem is overcome through the use of pre-trial interviews.<sup>46</sup> The use of pre-trial interviews in cases involving children should be considered as being absolutely essential. It is often remarked that a child's powers of observation and memory are less reliable than an adult's.<sup>47</sup>

Another advantage of conducting a pre-trial interview is to allow the child to become acquainted with the courtroom setting. Children have a tendency to shy away from new experiences. Being a witness in court may not only be a new experience for a young witness but also a terrifying and intimidating one. The prosecutor can overcome this obstacle by taking the child to the courtroom before the trial and informing her of the court setting and procedure. This will ensure that the witness is comfortable in the courtroom environment and will be able to give her evidence without any fear or discomfort. The pre-trial interview also allows for the prosecutor who is dealing with the

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<sup>43</sup> This is in terms of S212 (4) of the Criminal Procedure Act 55 of 1977.

<sup>44</sup> See the section on The Child Witness discussed below.

<sup>45</sup> Refer to research data compiled by researcher at the Magistrates Courts on the lower south coast of Kwa-Zulu Natal.

<sup>46</sup> Hoffmann and Zeffertt op cit. at 512. The burden of proof in criminal matters is to prove the accused person's guilt beyond a reasonable doubt

<sup>47</sup> J.R. Spencer, The Child Witness : Ingenious or Ingenuous? A Review of the Psychological Evidence (1993) at 285.



matter and the child witness to form a rapport with each other. It is important that the child trusts the prosecutor and forms some kind of relationship with her.

#### **1.5.1.4 Procedure in a Pre -Trial Interview**

The pre-trial interview is usually scheduled for a date preceding the trial. However it is not uncommon to conduct the interview on the day of the trial. The child is usually brought to court by the investigating officer on the day arranged between himself and the prosecutor. The mother of the child (or the guardian) accompanies the child to court. An interview is conducted in the office of the prosecutor. The interview begins by the prosecutor assisting the child to recall the series of events of the incident. This is done through the use of the initial affidavit that was taken by the police immediately after the incident. All discrepancies are clarified by the prosecutor. Thereafter, the child is briefed as to what will happen in court on the day of the trial. The importance of telling the truth is also stressed by the prosecutor. Finally, the child is given an opportunity to ask the prosecutor any questions regarding the matter and to clear up any doubts or fears. At this stage, the prosecutor is able to gauge the strength of the case. Any inconsistencies arising out of the interview are brought to the attention of the investigating officer, who follows up on them before the day of the trial. It may be necessary to conduct another interview with the child if the circumstances call for it. The similar procedure is followed during the second interview.

## **1.6 THE TRIAL PROCESS WITH SPECIFIC REFERENCE TO THE CHILD RAPE VICTIM**

The rape trial process involving children differs from the procedure of a normal trial. Firstly, the use of an intermediary renders the courtroom set-up slightly different from other trials. Secondly, the matter is held '*in camera*'. This means that the general public who are allowed access to the courts in most other matters, are not allowed into the

court.<sup>48</sup> As is the case with juveniles in general, the parent or guardian of the child is allowed to be present in court during any matters involving the child.

### 1.6.1 LEADING THE EVIDENCE OF A YOUNG WITNESS

The evidence of children is often questioned with regard to its reliability and quality. Some of the reasons for this are listed below.

- A child's powers of observation and memory are less reliable than an adult's.
- Children often make up stories and have a tendency to exaggerate incidents.
- They are extremely immature and are very suggestible. They are thus easily influenced.
- They may not be able to realise the full impact of telling a lie and they may not fully understand the concept of truthfulness.
- Children are prone to inventing stories and making false accusations for the reason that 'they enjoy investigating this mystery'.<sup>49</sup>

The criticism of evidence of children has come under close scrutiny by legal experts. It has been discovered that in many cases children prove themselves to be excellent witnesses. An important aspect of the evidence is the manner in which it is led. For this reason it is imperative that the prosecutor possesses the skills to lead the evidence of the young witness without compromising the credibility of that evidence. He/she must be trained to ask questions that would bring the pertinent facts to the attention of the court without actually asking leading questions that would jeopardise the admissibility of the evidence. Leading the evidence of a young witness is a sensitive matter and it is essential that a balance be maintained between earning the trust of the witness and making her feel comfortable without introducing any form of suggestibility. For example, the simple act of repeating a question may induce the court into believing that the prosecutor is suggesting an answer to the child. The prosecutor must gain the trust of the young witness. This is vitally important in order to ensure that the witness is not intimidated by

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<sup>48</sup> Matters such as domestic violence are also held *in camera*.

<sup>49</sup> J.R. Spencer *op cit.* at 285.

a strange person wearing a long black gown (the prosecutor). It is also important that the witness does not view such a person as someone of a superior status as this will lead to the witness answering the questions in a manner that would be favourable to the prosecutor. Therefore it is clear that the actions and the demeanour of the prosecutor affect the evidence of the child.<sup>50</sup>

The child also has to be reassured that he or she is in safe environment. The onus is on the prosecutor to ensure this. In cases involving young children, an application should be made to the court to allow for the use of an intermediary.<sup>51</sup> The court must be satisfied that the use of an intermediary is warranted in any particular case. It follows that for the court to make such an order, evidence will have to be led by the prosecutor to convince the court that the child will be 'exposed to undue mental stress or suffering'. Therefore it is submitted that it would be preferable that the prosecutor possess more than a legal degree. He or she must have some insight into child psychology to satisfy the requirements of s170 A of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as the CPA). Unfortunately, few prosecutors possess these qualities.

### 1.6.2 THE INTERMEDIARY SYSTEM

This is a process whereby the evidence of the child is led through another person, usually a social worker, during the trial. The child is kept in a different room and does not have direct contact with any persons in the courtroom. The advantage is that the child is not exposed to the accused person and therefore cannot be intimidated by her assailant. This allows the child to give her evidence in a less intimidating environment.<sup>52</sup> The court may order that in certain cases the witness shall give his or her evidence directly or through the use of electronic devices such as a closed circuit television. This enables the court and any other person, whose presence is necessary at court, to see and hear the intermediary

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<sup>50</sup> s170 A of the Criminal Procedure Act 51 of 1977.

<sup>51</sup> *Ibid.* See section on The Intermediary.

<sup>52</sup> *Ibid* s170A(3).

as well as that witness during his or her testimony.<sup>53</sup> In cases where the court has ordered the use of an intermediary, no examination, cross-examination or re-examination of the witness in respect of whom an intermediary has been appointed, shall take place in any manner other than through that intermediary.<sup>54</sup>

The following persons/categories of persons /classes of persons are competent to be appointed as intermediaries:<sup>55</sup>

- a) Medical practitioners registered under the Medical, Dental and Supplementary Health Service Professions Act 56 of 1974, specialising in paediatrics and/or psychiatry.
- b) Family counsellors who are appointed as such under s3 of the Mediation in Certain Divorce matters Act 24 of 1987 and who are or were registered as social workers under s17 of the Social Work Act 110 of 1978, or who are or were classified as teachers in qualification category C to G, as determined by the Department of National Education, or who are or were registered as clinical educational or counselling psychologists under the Medical, Dental and Supplementary Health Service Professions Act 56 of 1974.
- c) Child care workers who have completed a two year course in child and youth care (approved by the National Association of Child Care workers) and who have four years experience in child care.
- d) Social workers who are registered as such under s17 of the Social Work Act 110 of 1978 and who have at least two years' experience in social work.
- e) Teachers (as classified above) who have four years experience in teaching and who have not at any stage for whatever reason, been suspended or dismissed from service in teaching.
- f) Psychologists who are registered as clinical, educational or counselling psychologists under the Medical, Dental and Supplementary Health Service Professions Act of 1974.

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<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid* s170A(2).

### 1.6.3 THE CHILD WITNESS

When considering the child witness, the basic issues that need to be considered are:

- The competence of children as witnesses.
- The credibility of children and their testimony.
- The matter of protecting the child in his/her capacity as a witness and as a person with full rights.<sup>56</sup>

#### 1.6.3.1 Competence

Evidence is adduced in criminal proceedings by leading the evidence of competent witnesses.<sup>57</sup> A witness is regarded as being competent if he/she may lawfully give evidence.<sup>58</sup> Section 192 of the CPA states that:

Every person not expressly excluded by this Act from giving evidence shall, subject to the provisions of section 206, be competent and compellable to give evidence in criminal proceedings.

It therefore follows that all persons are presumed to be competent witnesses. Children are therefore also considered to be competent witnesses. However, certain issues must be considered when considering the capabilities and competence of children as witnesses. Perry lists these as follows:<sup>59</sup>

- a) The capabilities of children with respect to attending, perceiving, encoding, storing and retrieving memories.

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<sup>55</sup> *Ibid* s170A(4)(a).

<sup>56</sup> Nancy Walker Perry and Lawrence S. Wrightsman, The Child Witness : Legal issues and Dilemmas, (Newbury Park : Sage Publications, 1991 ) 10.

<sup>57</sup> Evidence can be adduced *viva voce* or through the handing in of affidavits.

<sup>58</sup> Hoffman And Zeffertt *op cit.* at 369.

<sup>59</sup> Perry and Wrightsman *op cit.* at 14.

The reliability of the memory of the child is an issue that must be considered. A child's ability to recall events clearly is often doubted. This is linked to the age factor where children are concerned. However, from my personal experience with children in court over the last 2 years or so, it has become clear that a child as young as three or four years in age has the ability to recall events clearly and in coherent order. It would not be an exaggeration at all to actually state that in many instances, children prove to be better witnesses than adults.

b) The receptive and expressive communication skills of children.

When a child is examined as a witness in court, it is important that the prosecutor is able to put forth questions in a straightforward manner. Furthermore the questions should be phrased in such a way so as not to create any confusion for the child. Simple questions are encouraged. In this way, the child is able to understand the questions and answer them accordingly without much difficulty. Understandably, the child's understanding and response to questions may not be on the same level as that of an adult and to expect this would be extremely unreasonable and unfair to the child. However, it is an issue that is pertinent to the concept of competence where children are concerned.

c) Children's perceptions of what is expected of them by parents, peers, authority figures affect what they remember and report.

The notion exists that children are easily influenced by external factors. This is highly overrated. It must be remembered that all people are influenced to a certain extent. To say that a child moulds his recollection of events around what is expected of him/her, is generalising to a large extent. It is true that in sexual cases especially, a person who is caught doing the 'wrong thing' is likely to make up a story that will render him/ her the victim in order to avoid blame. But this can be said of any person in that position and not only a child. It is therefore submitted that although a degree of caution is called for when dealing with such witnesses, the evidence must still be considered.<sup>60</sup>

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<sup>60</sup> See discussion on The Cautionary Rule, above.

d) The extent to which children perceive the procedures and players in the legal system, and how these perceptions influence their ability to recall and report important information.

The courtroom setting and environment is undoubtedly a key consideration when dealing with children. The presence of the prosecutor, attorney and magistrate may easily scare the child. The child often has to give his/her evidence in this intimidating setting. It is therefore possible that the evidence of the child will be tailored to satisfy these figures of authority. On the one hand, he/she may be afraid to recall and report the information. On the other hand, he/she may recall a different set of facts because of the fear. This needs to be considered when dealing with the competence of a child witness.

e) The strategies that maximise the accuracy of children's report of events.

Taking down the statement of the child immediately after the incident is one way of ensuring that the details are accurate. Preparing for the trial by conducting a pre-trial interview with the child will ensure that the child is able to recollect the series of events as they occurred on the day. Discrepancies in the recollection can also be sorted out at the interview.<sup>61</sup>

f) The suggestibility of children.

Unfortunately some children may be quite suggestible by nature. A lack of maturity and inexperience of life in general, contributes to the fact that they may be easily influenced. This must therefore be considered when viewing the evidence of a child.

g) Children's capabilities compared to those of adults'

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<sup>61</sup> See discussion on Pre-trial Interview, above.

Interviews conducted at the magistrates courts on the lower south coast region of Kwa-Zulu Natal indicates that a child can be just as good a witness as an adult.<sup>62</sup>

h) The abilities of a particular child in a certain set of circumstances associated with a given legal case.

A child may or may not be a good, credible witness. There are no set rules to decide this. Each case must be decided on its own circumstances.

It is therefore essential to view the capabilities of the individual child witness in a particular case and draw the conclusions relating to that case and the facts thereof. Factors such as the age of the child, his/her level of understanding and comprehension, his/her ability to answer questions correctly and confidently and his/her background are some of the factors that differ from case to case and must be taken into account.

Young children may be competent witnesses, if it deduced by the magistrate that he/she understands the purpose and contents of the oath. In other words, if the court is satisfied that the child knows and understands what it is to tell the truth, then the child may be considered to be a competent witness. The court decides whether or not the evidence will be sworn or unsworn, depending on the understanding of the oath.<sup>63</sup>

Each case must be decided on its facts and circumstances as there is no blanket rule regarding the exclusion of the evidence of children under a certain age. The type of evidence and the potential prejudice that it may cause to the accused should it be admitted, are some of the factors that are considered by the magistrate. In order to determine whether or not the child understands the concept and implications of giving evidence under oath, the magistrate usually questions the child regarding his/her ability to realise the implications of telling a lie.

S164 of the CPA reads as follows:

Any person who, from ignorance arising from youth, defective education, or other cause, is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation.

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<sup>62</sup> Interviews were conducted with magistrates at the courts on the lower south coast of Kwazulu Natal.



It is to be noted that a child's unsworn evidence is not necessarily less trustworthy than if it had been given under oath.<sup>64</sup> A witness is incompetent if he/she 'does not have the intelligence to distinguish between what is true and false, and to recognise the danger and wickedness of lying, he cannot be admonished to tell the truth...'<sup>65</sup> The evidence of young children should be approached with caution.<sup>66</sup> There are no laws binding the courts to believe the evidence of children in all cases. Neither are there any statutory requirements in our law that require that the child's evidence be corroborated in order for it to be accepted. Ultimately the decision to allow the child to give evidence (sworn or unsworn) depends on the court. The evidential value is also decided by the court when the evidence is considered in totality. Each case should therefore be decided on its circumstances and facts.

### 1.6.3.2 Credibility

Hoffman and Zeffertt maintain that the evidence of young children should be 'scrutinised with great care'.<sup>67</sup> Perry suggests that the following issues be considered when determining the credibility of child witnesses:

- What are the factors influencing the child's credibility?
- Are the influential factors substantive or tangential?
- To what degree is the evidence of a child more or less credible than that of an adult witness?
- Do the preconceived notion of children's abilities affect the credibility of that witness?
- Is the child more credible under some circumstances than others?<sup>68</sup>

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<sup>63</sup> A child may be expected to give his/her evidence under oath. This is regarded as sworn testimony. However, if he/she does not understand what it means to take the oath, he/she may give his/her evidence without taking the oath. The evidential value of this evidence is questionable.

<sup>64</sup> *R v Manda* 1951 (3) SA 158 (A) at 163

'A child may not understand the nature or recognise the obligation of an oath or affirmation and yet may appear to the court to be more than ordinarily intelligent, observant and honest.'

<sup>65</sup> Hoffmann and Zeffertt *op cit.* at 376.

<sup>66</sup> See discussion on The Cautionary Rule, above.

<sup>67</sup> Hoffmann and Zeffertt *op cit.* at 581.

<sup>68</sup> Perry and Wrightsman *op cit.* at 15.

Interviews indicate that most magistrates find child witnesses to be good, credible witnesses.<sup>69</sup> However, their evidence is almost always approached with caution.<sup>70</sup> The testimony of an eyewitness (adult) to corroborate the evidence of the child assists the credibility of the child's evidence.<sup>71</sup> The credibility of a witness pivots on the trustworthiness of his/her evidence. Whether or not the court will consider the evidence to be trustworthy depends on the circumstances of the case as well as factors such as the age and level of understanding of the child.<sup>72</sup> Corroborating evidence will have the court leaning towards accepting the evidence of the child as being trustworthy but there are other factors that play a role in deciding trustworthiness. Hoffmann and Zeffertt refer to these factors as which were summed up by the learned Judge Diemont JA in *Woji V Santam Insurance Co. Ltd*, where it was said that:

The question that the trial court must ask itself is whether the young witness' evidence is trustworthy. Trustworthiness...depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears 'intelligent enough to observe'. Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion 'to remember what occurs' while the capacity of narration or communication raises the question whether the child has 'the capacity to understand the questions put, and to frame and express intelligent answers'... There are other factors ... Does he appear to be honest-is there a consciousness of the duty to speak the truth?<sup>73</sup>

The credibility of the child witness does not only depend on the accuracy of the account of the events, but also on the child's ability to answer questions put forth to him/her.<sup>74</sup> In other words the degree of confidence displayed by the child in answering the questions,

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<sup>69</sup> Interview with Mr M Daya, Magistrate at the Scottburgh Magistrates Court, on the 2<sup>nd</sup> February 2001.

<sup>70</sup> See discussion on The Cautionary Rule, above.

<sup>71</sup> Hoffmann and Zeffertt *op cit* at 581.

<sup>72</sup> Hoffmann and Zeffertt *op cit.* at 581.

<sup>73</sup> 1981 (1) SA 1020 at 1028.

<sup>74</sup> Perry and Wrightsman *op cit.* at 17.

his/her interpretation of the questions and the understanding thereof are all factors that play a role in determining the credibility of witnesses.

#### **1.6.4 PROTECTING THE CHILD IN HIS/HER CAPACITY AS A WITNESS AND AS A PERSON WITH FULL RIGHTS**

It became evident from the interviews that were conducted with child rape victims, that their experience in court was a daunting and frightening one.<sup>75</sup> Unfortunately, our justice system is such that it is virtually impossible to obtain a conviction on a rape charge without the evidence of the complainant.<sup>76</sup> Because she is usually the only person present during the incident (other than the accused), it becomes necessary for the court to hear her evidence. This raises the issue as to whether or not the law protects the child witness sufficiently. Is it in 'the best interests of the child' to have her testify about a gruelling, painful incident and to be cross-examined on that incident?

Melton describes the traumatisation of the child witness as follows:

The victim often must describe, and in a sense relive, the traumatic event repeatedly, and defence counsel may suggest that the victim stimulated or participated in the offence....This emotional fallout of the legal process may be heightened by the requirement of testimony in open court; the victim may feel on display as he or she is forced to recall painful memories, defend against suggestions of having stimulated the offence, and confront the defendant. This feeling of public humiliation may be exacerbated by the presence of the press in the courtroom and the specter of future publicity.<sup>77</sup>

A sad but true fact is that the secondary trauma that the child goes through by giving evidence in court, is directly as a result of the criminal justice system and its processes. It is therefore the submitted that changes must be effected in the system to overcome this

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<sup>75</sup> Interviews conducted at the Scottburgh Magistrates Court during the period March-April 2001 with child rape victims.(names withheld)

<sup>76</sup> Interview with M.Daya *op cit*.

<sup>77</sup> Melton, G.B *Child witnesses and the first amendment: A psychological dilemma*. Journal of Social Issues, 40, 109-123.

serious shortcoming.<sup>78</sup> The United States of America, a First World country, is also grappling with similar problems in their justice system.<sup>79</sup> However, there have been reported cases where the rules have been bent to ensure that children are given full protection in rape cases. The judicial system in England has also not managed to ensure the absolute protection of the young rape victim as a witness.<sup>80</sup> In South Africa, the introduction of the intermediary system has greatly contributed towards promoting the 'best interests of the child' as far as young witnesses in rape matters, are concerned.<sup>81</sup>

The mere fact that children come face to face with the accused person in the same room, has tremendous psychological repercussions. The intermediary system therefore alleviates this major downfall. However, even this system has its problems.<sup>82</sup> Another major problem facing the child witness is the fact that professionals dealing with them lack the proper training and facilities to offer them any real protection in court.<sup>83</sup> From the ranks of the presiding officer to that of the prosecutor and the social worker, training and qualifications with specific regard to child witnesses are lacking.<sup>84</sup> The factors that need to be considered by the relevant role players when a child gives evidence are:

- the degree of harm caused to the child to obtain a conviction against the accused;
- the child's psychological background;
- the child's ability to give evidence on the witness stand without getting upset; and
- the effect of a conviction or acquittal of the accused on the child.<sup>85</sup>

The decision to prosecute must be made against the backdrop of these factors. However, this is not always the case. From the research conducted, it is apparent that the child's needs are not always considered in relation to the needs of the criminal justice system.

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<sup>78</sup> See Chapter 4 – Conclusions and Recommendations.

<sup>79</sup> Perry *op cit.* at 4.

<sup>80</sup> See Chapter 3 – A Comparison of Foreign Jurisdictions.

<sup>81</sup> Interview with A. Fundi, social worker at Scottburgh Magistrates Court, on the 18<sup>th</sup> February 2001.

<sup>82</sup> See the section on the Roles of Professionals and the Problems Encountered, with specific reference to the role of the social worker.

<sup>83</sup> See Chapter 2 – The Roles of the Professionals and the Problems Encountered.

<sup>84</sup> Interviews conducted at the Scottburgh Magistrates Court during March 2001.

<sup>85</sup> Perry, *op cit.* at 18

## 1.7 POST TRIAL PROCEDURE

Child care specialists argue that a trial may give the child the satisfaction of having her story heard. A conviction in such a case may enhance the child's confidence in the criminal justice system as well as prove to be therapeutic.<sup>86</sup> At this stage, the only post-trial procedure in our criminal justice system appears to be counselling.<sup>87</sup> This is provided by a social worker who is employed by the state. Counselling is only provided to the child on the recommendation of the prosecutor. This is not done in all cases involving young children.

## 1.8 CONCLUSION

It is evident that the process through the criminal justice system for the child rape victim is both confusing and frightening. The child rape victim has to possibly endure the pain of reliving the entire event in court to strangers. It is submitted that our judicial system be re-shaped to avoid the secondary victimisation of the child. In order to facilitate this, problems must first be identified. The following chapter highlights the problems experienced by the role players.

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<sup>86</sup> A conviction is not guaranteed in every case. In cases where the accused is acquitted, the victim suffers further trauma.

<sup>87</sup> Interview with P.Lazarus, Control Prosecutor at Scottburgh Magistrates Court on 14th March 2001.

## **CHAPTER 2**

# **THE ROLES OF PROFESSIONALS AND THE PROBLEMS ENCOUNTERED**

### **2.1 A BRIEF LOOK AT THE ROLE PLAYERS INVOLVED**

The rape victim comes into contact with various persons, from the time of the reporting of the offence to that of the post-trial stage. The first person with whom the victim comes into contact is the policeman. This is usually, but not always, a member of a specialised unit, namely the Child Protection Unit ( hereinafter referred to as the CPU ). The officer obtains a statement from the child and all relevant parties.<sup>88</sup> He is also the person who investigates the matter. The child is then taken to the district surgeon who examines the child. When the matter is ready for trial, the child is brought through to court where she is introduced to the prosecutor. At the trial stage, the child meets the social worker if an intermediary is used. In court, she meets the attorney and magistrate.<sup>89</sup> Therefore it is clear that the child rape victim comes into contact with the members of various disciplines. Each of these people play an important role in the child's life soon after the commission of the offence. I therefore chose to investigate these roles more closely and the problems that are experienced by the role players when dealing with the child. Interviews were conducted with subjects, mainly children, regarding their experiences in court. The various professional role players were also interviewed. This chapter deals with the analysis of the data collected from the professionals working within the system. The problems encountered by the child are discussed in the next chapter.

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<sup>88</sup> For example, the statement of the first report of the rape.

## **2.2 RESEARCH DESIGN AND METHODOLOGY**

### **2.2.1 SELECTION OF SAMPLE**

The sample was chosen from the South Coast Cluster, more specifically the lower South Coast of Kwa-Zulu Natal. This included the magistrates courts at Scottburgh, Port Shepstone, Umzinto and Ixopo. The sample included prosecutors, attorneys, magistrates, members of the CPU and social workers from the various stations. The selection was random, although the prosecutors were chosen from the regional courts in the area. The rape victims were also selected at random but were limited to those in the district of Umzinto.

### **2.2.2 METHODOLOGY**

The study was conducted by means of questionnaires.<sup>90</sup> Qualitative research methods were mainly employed in the research of the Study. However, the questionnaires included questions that allowed data of a quantitative nature to be obtained as well. This was done by asking the respondents questions that required straightforward yes or no answers. These were hand delivered and the contents therein explained to the participants. Confidentiality was guaranteed and honesty was emphasised. The questionnaires were then recollected and the data was analysed accordingly. The interviews were held at the various courts and stations and the questions asked were mainly opinion related.

### **2.2.3 LIMITATIONS OF THE STUDY**

The problems encountered were few due to the fact that the Study was conducted in a familiar environment. Working as a prosecutor at the Scottburgh Magistrates Court

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<sup>89</sup> Not all accused are defended by attorneys. An accused may choose to defend himself/herself.

<sup>90</sup> See Annexures 1-5.

allowed me easy access to the various subjects of the Study. I was granted permission from the Chief Prosecutor, Mr Ray Sansom to conduct the Study. The regional courts in Scottburgh provided the sample for the child rape victims, from which a random sample was interviewed. I also work with the CPU, based at Port Shepstone and Umzinto, on a daily basis and was therefore able to obtain the data from them easily. The prosecutors, attorneys and magistrates were available at all times to assist me as subjects for the study. The problems that were encountered are discussed below.

### **2.2.3.1 Subject: children**

Firstly, it was difficult to gain the trust of the children who were being interviewed, in such a short time span. The maximum time spent on each interview that was conducted by the child was twenty minutes. The interviews had to be conducted during my free time, which amounted to my tea and lunch breaks which could not exceed forty-five minutes. The interview could also only be conducted once the child had given her evidence in court and the subjects were not too eager to wait for me. This was understandable since they were not getting any reward for their time and effort. Also, most of them live in outlying areas and needed to travel long distances to their homes. The use of public transport by the children and their parents to and from court did not allow for the interviewing to take place after court hours.<sup>91</sup>

Furthermore, the interviews could not be followed up on since the children were only present at court on the days of the trial. Once the child had given her evidence there was no reason for her to come back to court. It was difficult to visit the children at their homes without overcoming the issue of the invasion of their privacy. Most children simply wanted to put the incident behind them and move on with their lives and I could not deny them this privilege. Being in court to give evidence is a painful experience for any child. To interview them directly after this was an emotionally painful task for us both.

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<sup>91</sup> Court hours are between 8am and 4.15pm, weekdays only.



Some of the children were from rural areas, with very little understanding of the aims of the research. The skills of an interpreter had to be employed in many cases due to the language barrier. Even then, the purpose of this Study made very little sense to them. The interviews were conducted at court and this environment was not conducive to the interviewing. The reason for this was that the children still saw the researcher as someone superior to them and in a position of authority. This added to the problem of not being able to gain the trust of the child. Although the child being interviewed was made aware of the nature of the study and the aims of the interview, it remained a daunting task to get the child to feel comfortable during the interview. As a result of this the child was afraid to answer questions openly and without carefully planning their answers, for fear of giving a 'wrong answer'.<sup>92</sup> I had to maintain a balance between being sensitive to the needs of the interviewee and maintaining the role of the interviewer.

I did this by ensuring that the child was comfortable at all times. The interviews were conducted with the parent of the child being present at all times. A female interpreter was used so that the child did not feel embarrassed to talk to me. I conducted most interviews in my office instead of in the courtroom. I kept my questions short and to the point so that the subjects understood me clearly. I was not able to overcome these problems with every child and therefore the sample chosen consisted of those children who were willing to participate. The selection was done at random and I did not limit the sample to any specific age group or race.

### **2.2.3.2 Subject: Members of the CPU**

Once again the language barrier proved to be a problem as many of the officers were not English speaking. Many of the responses from the participants showed that they were giving answers to questions that they felt were correct answers instead of giving their honest views. For example, when asked about certain procedures that were followed, many said that they did so according to textbook procedure. However, some replied that very few procedures are actually carried out properly in practice.

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<sup>92</sup> All questions were phrased so as to allow the respondents to give their views and opinions.

The problems were overcome when I explained the value of the research to them. It was made clear to the subjects that the information would be treated with the utmost confidentiality. I also explained to them that there were no correct answers to the questions and that the research would not reflect on the quality of their work. The sample was chosen at random but restricted to the South Coast region of KwaZulu Natal.

### **2.2.3.3 Subject: Attorneys**

The response from the attorneys was very limited. Many of them explained that they chose not to take on child rape matters because of the sensitive nature of such cases.

This is reflected in the tables on pages 36 and 37.

## **2.2.4 ANALYSIS OF DATA**

The aim of the research conducted is to highlight the problems that are experienced by the professionals as well as the children in the criminal justice system in child rape matters.

The main issues of concern were:

- training received in specific regard to children;
- amount of experience dealing with children;
- degree of specialisation; and
- working environment.

Ten members of each of the various sectors were interviewed regarding their experience with child rape victims. The aim was to illustrate the extent to which these professionals come into contact with the child rape victim. The results are tabulated below.

**A) DEGREE OF EXPERIENCE WITH CHILD RAPE VICTIMS**

SUBJECT	NO. IN SAMPLE	RARELY DEAL WITH CHILD RAPE VICTIMS	DEAL WITH CHILD RAPE VICTIMS AT LEAST ONCE A WEEK	DEAL WITH CHILD RAPE VICTIMS ON ALMOST DAILY BASIS
MAGISTRATE	10	0	0	10
PROSECUTOR	10	1	0	9
CHILD PROTECTION UNIT	10	0	0	10
SOCIAL WORKERS	10	0	0	10
ATTORNEYS	10	5	2	3

It is startling to discover that many of the professionals within the criminal justice system have not received any specific training to deal with the child rape victim. The sample of the ten members of the various disciplines were questioned regarding this aspect. The results are tabulated on the following page.

## **B) SPECIFIC TRAINING REGARDING CHILD RAPE VICTIMS**

SUBJECT	TOTAL NUMBER IN SAMPLE	RECEIVED SPECIFIC TRAINING	DID NOT RECEIVE SPECIFIC TRAINING
MAGISTRATES	10	3	7
PROSECUTORS	10	1	9
CHILD PROTECTION UNIT	10	2	8
SOCIAL WORKERS	10	10	0
ATTORNEYS	10	0	10

### **2.2.5 SUMMARY**

With the exception of attorneys, all four of the categories of subjects deal with child rape victims on an almost daily basis. However, with the exception of the social worker, over 70 % of the professionals who deal with child rape victims do not receive any type of specific training to deal with children who are victims of rape. In fact 80% of the CPU, which is a specialised unit dealing with such cases, have not received any training in this aspect. It is a glaring fact that one of the major problems facing those who come into contact with the child rape victim is that they lack proper training.

## **2.3 THE MAGISTRATE**

### **2.3.1 THE ROLE OF THE MAGISTRATE**

The magistrate is the presiding officer in the district and regional courts.<sup>93</sup> He/she is responsible for making a decision on whether or not the accused person should be convicted or acquitted. This is done by listening to the evidence presented by the state and the defence. Evidence is usually given through oral testimony of witnesses. In child rape cases, the main witness for the state is the complainant. Magistrates therefore have to base their decisions in such matters on the evidence that is given by the child. The evidence of a child is an issue of concern in cases involving child witnesses.<sup>94</sup> The other problems identified are discussed below.

### **2.3.2 PROBLEMS ENCOUNTERED**

#### **2.3.2.1 Lack of Training**

All ten subjects listed this as one of their main problems when dealing with the evidence of the rape victim. Although most of the interviewees had received some training regarding child witnesses at Justice College, they maintained that this was very basic training that did not concentrate on the child rape victim in particular.

#### **2.3.2.2. Lack of Qualified Personnel in Court**

The intermediary system was widely praised. However one of the major shortcomings of the system identified by the magistrate was a shortage of qualified persons to perform the duties of the intermediary. Magistrates maintained that this contributed a great deal to the problems experienced in court as this interfered with the quality of the evidence that was given during the trial.

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<sup>93</sup> District and regional courts differ in that the jurisdiction of the offences vary. For example, offences such as rape and murder are not tried in the district courts but only in the regional and high courts. The presiding officer in the High Court is called a judge.

Inexperienced prosecutors also proved to be a problem. The evidence of the child must be led with great skill and care.<sup>95</sup> It may be detrimental to the state's case if the witness is not led correctly.<sup>96</sup> This ultimately leads to the credibility of the witness being questioned by the magistrate and increases the chances of a possible acquittal of the accused.

Another major problem cited by magistrates is the use of inexperienced interpreters.<sup>97</sup> An interpreter is an essential component of the court process. Any errors made by the interpreter can also affect the outcome of the case. The problem with interpreters is magnified when an intermediary is used. It becomes confusing to the court if the intermediary used does not understand the language of the child and has to engage the services of an interpreter. The interpreter must be sensitive to the needs of the child when performing his/her duties. He/she must also be able to translate the words used into simple language that can be understood by the child. The interpreter must also be familiar with the terms used by children in their description of objects. For example a child refers to the penis as 'ipipi'. An experienced interpreter is therefore needed in cases where children are involved.

## **2.4 THE PROSECUTOR**

### **2.4.1 THE ROLE OF THE PROSECUTOR**

The prosecutor is often referred to as the "people's attorney". He/she possesses the appropriate legal qualifications and is employed by the state.<sup>98</sup> His/her job is to 'assist the court to arrive at a just verdict and not simply to secure a conviction at all costs.'<sup>99</sup>

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<sup>94</sup> It became clear that many problems are experienced during this process from the interviews that were conducted with the regional court magistrates at Scottburgh and Port Shepstone.

<sup>95</sup> See discussion on The Child Witness, above.

<sup>96</sup> See discussion on Prosecutors, below.

<sup>97</sup> Interpreters assist the court officials in overcoming the language barrier. They are trained officers and possess a qualification in the languages.

<sup>98</sup> The prosecutor may possess the following qualifications :B. Proc / B. LLB / B. Iuris

While the role of the prosecutor is a complex one, ‘the notion of a fair trial and the basic principles of the presumption of innocence and the onus resting on the state to prove its case beyond a reasonable doubt remain paramount.’<sup>100</sup>

According to the prosecutor’s policy manual, ‘a prosecutor must give attention not merely to the content of the evidence, but also in the spirit of the right to a fair trial, to the manner in which it was acquired.’<sup>101</sup> It also states that ‘all parties to criminal proceedings (the victim, witnesses, the police, the accused and legal representatives) have rights which the prosecutor must recognise and respect’ and that the ‘dignity and authority of the courts must also be respected and upheld at all times’. Prosecutors must conduct matters in a ‘fearless and unbiased manner.’<sup>102</sup> The role of the prosecutor differs to a certain extent where children are concerned. Fortunately, there are courts around the country that specialise in juvenile offences.<sup>103</sup> However facilities as far as children who are victims of crime are concerned is most definitely an area that is need of desperate attention. In an article published in the January 1999 issue of the *De Rebus*, Sheila Camerer suggests that our justice system should accord a greater role to the victims of the crime and move away from an ‘offender-orientated criminal justice system.’<sup>104</sup>

## 2.4.2 PROBLEMS ENCOUNTERED

### 2.4.2.1 Unqualified and Inexperienced Prosecutors

All prosecutors have legal qualifications. This, however, does not mean that they are suitably qualified for their jobs. There are areas of the law that require specialisation and one such aspect is the law relating to children.<sup>105</sup> Although universities include courses

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<sup>99</sup> Office of the National Director of Public Prosecutions, National Prosecuting Authority, *Policy Manual* (Pretoria, 1999).

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

<sup>103</sup> Interview with Omashnee Naidoo, prosecutor at the juvenile court at the Durban Magistrates Court, Durban on the 14<sup>th</sup> February 2001.

<sup>104</sup> Sheila Camerer ‘What about the victims’ *op cit.* at 23.

<sup>105</sup> Interview with Mahendra Daya, *op cit.*

such as Family Law in their curriculum, many prosecutors still maintain that further training is needed to allow them to deal specifically with children in court.<sup>106</sup> Unfortunately budget restraints in the Department of Justice does not allow for the specific training of prosecutors.<sup>107</sup> Therefore the problem of having untrained professionals in the legal field dealing with young children remains an obstacle.

However, the situation in South Africa is not totally hopeless. The courts in the bigger centres in the urban areas, do have specialised prosecutors who have undergone specific training to deal with young children, both as victims and offenders.<sup>108</sup> Courts such as the Durban Magistrates Court, also have prosecutors who deal specifically with child abuse cases and sexual offences.<sup>109</sup> These prosecutors maintain that the extra training received makes a tremendous difference to the quality of their work.<sup>110</sup> It was suggested by Sheila Camerer that prosecutors should make victims aware of their right to institute civil proceedings against the perpetrator.<sup>111</sup> However, it was discovered that many prosecutors themselves do not know of such procedures and therefore could not advise the victims. Many of the prosecutors interviewed were also not aware of s300 of the Criminal Procedure Act 51 of 1977 in terms of which the prosecutor may ask for compensation orders. Prosecutors must be made aware of the social issues involved in their jobs, especially where children are involved. Ultimately, it is a field that requires that prosecutors be properly trained.

Judge Arthur Chaskalson maintains that ‘prosecutors were (thus) on the frontline in defending the constitution.’<sup>112</sup> He also stated that in order to carry out this task they ‘need to act consistently within its provisions, and they had to be given the resources they needed to do the job properly.’<sup>113</sup> In the light of this statement, it is clear that prosecutors

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<sup>106</sup> Interview with Devendran Govender *op cit.*

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> Lecture by Ms Val Mellis, prosecutor at the Durban Magistrates Court, at the University of Durban-Westville, August 2000.

<sup>110</sup> *Ibid.*

<sup>111</sup> Sheila Camerer ‘What about the victims?’ *op cit.* at 23

<sup>112</sup> Arthur Chakelson, “Don’t blame the Constitution for crime” Sunday Times :10 September 2000

<sup>113</sup> *Ibid.*



need to become well equipped to specialise in issues concerning children as the intention of the legislature is clear in this regard.<sup>114</sup>

#### **2.4.2.2 Lack of Facilities**

A child needs to feel comfortable to give evidence.<sup>115</sup> This can be achieved by making courts child friendly. Colourfully painted murals on the courtroom walls is one way to do this. The intimidating atmosphere of the courtroom may be counteracted by ensuring that the child feels safe and secure at court. However, once again this is not the position for many courts, especially in the smaller centres, because there are no facilities or resources to allow for separate courts for children. Therefore, the evidence of children is taken in an ordinary court setting and prosecutors with experience in the field agree that this can be detrimental to the child as well as the strength of the case itself.<sup>116</sup>

The smaller courts also lack in facilities in that prosecutors do not have consultation rooms. Offices are shared by prosecutors and therefore consulting with witnesses in private is difficult. This can lead to the child feeling uncomfortable in the presence of too many strangers. Pre-trial interviews are subsequently conducted in the courtroom itself for lack of privacy. However, this is not always possible and interviews are hampered in this way.

The lack of intermediary facilities at the courts is also a cause for concern. In smaller courts such as Scottburgh, prosecutors are faced with the problem of not having the intermediary facilities available to them at all times.<sup>117</sup> This is because only one of their regional courts is fitted with the equipment that is needed to facilitate the proceedings. This leads to a backlog in cases. Cases involving the use of intermediaries are thus remanded for months at a time and this in all probabilities affects the evidence that is eventually given by the witness.<sup>118</sup>

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<sup>114</sup> S28 of the Constitution *op cit.*

<sup>115</sup> Perry and Wrightsman *op cit.* at 17.

<sup>116</sup> Lecture by Ms Val Mellis *op cit.*

<sup>117</sup> Interview with Ms Pravina Lazarus *op cit.*

Prosecutors also complained that the intermediaries themselves are not readily available on the day of the trial despite having been notified to attend court proceedings months in advance. This stifles court proceedings and results in undue delays. Another problem identified within the intermediary system is that most of the intermediaries are ill equipped to perform the task properly.

### **2.4.2.3 No Pre-Trial and Post-Trial Counselling for Victims**

During the interviews conducted with prosecutors, it emerged that the only post trial practice for most prosecutors involved informing the victim of the outcome of the case. Referrals of the victims to social workers were seldom followed through. This was because social workers were not readily available to offer their services to the victim soon after the trial. Furthermore, the victims did not understand the process or the concept of counselling. Prosecutors were not in the position to explain this to them since many of them lacked a similar understanding themselves.

It is therefore quite clear that the criminal justice system does little to provide for the needs of the child rape victim. This needs to change to alleviate any secondary trauma that the child may experience during the court process.

## **2.5 THE CHILD PROTECTION UNIT (CPU)**

### **2.5.1 THE ROLE OF THE CPU MEMBER**

Members of the CPU are the first persons (other than the first report) that the victim comes into contact with when she reports the crime. The investigations that follow from this stage are solely in the hands of the investigating officer. The child is taken to the district surgeon by this officer where a medical examination is conducted. This is a frightening experience for the child. There have been reported cases where the child

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<sup>118</sup> See discussion on The Child Witness, above.

became hysterical and would not allow the doctor to examine her. If this happens, it is the responsibility of the officer to comfort and calm the child.<sup>119</sup> This officer is also responsible for taking the child to court for the pre-trial interview as well as ensuring that the child attends the court proceedings on the day of the trial. He may also be requested by the prosecutor to take the child to the social worker for counselling. Therefore it is clear that the child is 'in the hands of the investigating officer' immediately after the commission of the offence, right through the trial proceedings and at times, at post trial proceedings.

Some critics argue that it is at the trial stage that the victim 'loses possession of the crime and, instead of being the centre of the event, becomes a mere accessory.'<sup>120</sup> This can be detrimental to the victim who may feel that her pain is not as important as a conviction in the matter. Victims are not always informed of the proceedings of the case and therefore feel left out of the process of ensuring that the perpetrator is caught and punished.

## **2.5.2 PROBLEMS ENCOUNTERED**

### **2.5.2.1 Lack of Manpower**

One major problem facing the South African Police Services is a shortage of manpower.<sup>121</sup> It is therefore a common occurrence that the officer that initially deals with the matter is not able to see the matter to finalisation, and is replaced by another officer during investigation. This may be due to the internal arrangements made at the respective units to delegate matters to investigating officers according to jurisdictional criteria. In these cases, the child is given the impression that her case is not important enough to be dealt with by a certain officer. The child may have already developed a rapport with a specific officer. The trust that she may have built with him/her may be lost with the changing of officers and this may be detrimental to the child.

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<sup>119</sup> Interview with Captain P. Giani, Branch Commander of the Child protection Unit, Umzimkulu, on 8<sup>th</sup> March 2001, at the Umzinto Magistrates Court.

<sup>120</sup> Sheila Camerer 'What about the victims?' *op cit.* at 23.

<sup>121</sup> Interview with Captain P Giani *op cit.*

Another major problem with the CPU is that most of its members are male.<sup>122</sup> Naturally, a female child feels more comfortable talking to a woman about the incident. However, there are too few female police officers to attend to every rape matter, as would be the ideal situation. As a result, male officers are given the task of investigating the matter. Because of a shortage of manpower, the investigating officer seldom has the chance to dedicate all of his time and attention on one particular docket.<sup>123</sup> These officers investigate as many as ten to twelve cases at the same time.<sup>124</sup> The quality of work thus deteriorates because of this heavy workload.

#### **2.5.2.2 Lack of Proper Training**

Even though officers in the specialised units such as the CPU, deal specifically with crimes against children, the training received is still insufficient to deal with the needs of the victim.<sup>125</sup> While officers have at some stage received some training in their field of specialisation, they are not taught the intricacies of dealing with child rape victims in particular.<sup>126</sup>

The taking down of statements is also an important part of the procedure regarding the criminal justice process. However, because of a lack of proper training the officer performing the task does so in his own language and not that of the child. This is often queried by the defence and goes toward raising doubt in the state's case.

#### **2.5.2.3 Lack of Facilities**

A child- friendly atmosphere is the ideal environment for the interviewing of children. The surroundings should be comfortable and private. However, in reality the interviewing of children takes place in a busy and noisy charge office. This is because there are no facilities at most police stations to facilitate the proper conducting of interviews.

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<sup>122</sup> The researcher's subjects were all male persons – CPU ( Umzinto Branch) .

<sup>123</sup> Interview with Captain Giani *op cit*.

<sup>124</sup> *Ibid*.

<sup>125</sup> *Ibid*.

## **2.6 THE SOCIAL WORKER**

### **2.6.1 THE ROLE OF THE SOCIAL WORKER**

The social worker is involved in the counselling of the victim. The child is usually referred to the social worker by the prosecutor and/or magistrate. This referral may be at the beginning of the trial or at post-trial stage. The social worker may also be used as an intermediary.<sup>127</sup> Her role as an intermediary is important in the criminal justice system. The problems discussed are therefore directly related to the social worker's role as an intermediary.

### **2.6.2 PROBLEMS ENCOUNTERED**

#### **2.6.2.1 Lack of Facilities at Court**

Some courts are fortunate in that a social worker is resident at the magistrates court. However, courts lack the facilities to enable the social worker to perform her duties properly.<sup>128</sup> The offices are small and are often shared by other officers of the court. Privacy is a problem and most counselling sessions are conducted in the presence of others.<sup>129</sup> Furthermore, the equipment that is used during the intermediary proceedings is often of an inferior quality.<sup>130</sup> It is not uncommon to find that the television is not in working condition on the day of the proceedings. For this reason the matter will have to be remanded to another day. This is a source of inconvenience to the victim who has travelled especially to court for the trial. It is also a waste of time for the social worker as well as for the rest of the court personnel involved in the trial. It may be months before the matter can be set down for trial again as court rolls are quite full and the date will have to be convenient to the defence as well as the state, including the social worker.

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<sup>126</sup> *Ibid.*

<sup>127</sup> See discussion on The Intermediary, above.

<sup>128</sup> Interview with Asewa Fundi *op cit.*

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

### 2.6.2.2 Lack of qualified intermediaries

Certain requirements are required to qualify as an intermediary.<sup>131</sup> While the categories of competent persons may appear to include a vast number who qualify as intermediaries, in actual fact the number is quite small.<sup>132</sup> Furthermore, most of the people who do qualify as intermediaries are often not willing to come to court to perform such tasks for various reasons. Firstly, it is not worth their while to come and spend an entire day in court for a matter that may eventually be adjourned for whatever reason.<sup>133</sup> Secondly, if the case does go on trial, the time at which the case will be heard is not specified.<sup>134</sup> Thirdly, remuneration for their time and effort is a minimal amount.<sup>135</sup> These persons are therefore reluctant to come to court and act as intermediaries. It is for these reasons that most intermediaries are state-employed social workers.<sup>136</sup> However, this compounds the problems faced by the state regarding the availability of intermediaries, as the social workers who are employed by the state perform an array of other tasks. These include preparing pre-trial and post trial reports, dealing with the diversion programmes, offering counselling to the victims, dealing with children's court matters and so on.<sup>137</sup> As a result of this, the social worker is not available to act as an intermediary as often as the courts would like. This causes undue delay in the trial proceedings and is prejudicial to both the accused person as well as the victim.

## 2.7 CONCLUSION

The child rape victim is in the hands of the criminal justice system from the time that she reports the matter. From her first contact with the police when the matter is reported, right up until the matter is tried and finalised in court, she is faced with various professionals handling the matter. It is clear from the research gathered that there are numerous obstacles that stunt the performance of the role players in the system. These problems

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<sup>131</sup> See discussion on The Intermediary, in Chapter One.

<sup>132</sup> See list of persons competent to qualify as intermediaries on p22 above.

<sup>133</sup> Interview with Ms V Govender, probation officer and social worker at the Umzinto Correctional Services, Umzinto, on the 18<sup>th</sup> March 2001.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

will have to be addressed and overcome to allow the criminal justice system to work at its optimum. Only then can the position regarding the child rape victim be improved.

However, it is not only the role players who experience problems within the system. The child also experiences difficulties. The next chapter highlights the problems experienced by the child rape victims who go through the system.

## **CHAPTER 3**

# **PROBLEMS EXPERIENCED BY THE CHILD RAPE VICTIM THROUGH THE CRIMINAL JUSTICE SYSTEM**

## **3.1 RESEARCH METHODOLOGY**

### **3.1.1 RESEARCH METHODS**

The research regarding the child rape victim through the criminal justice system was conducted by means of interviews and the completion of questionnaires. The greater part of the research took the form of qualitative research. However, I also included questions in the questionnaire that produced qualitative research results.

#### **3.1.1.1 Interviews**

Interviews were conducted at the Scottburgh Magistrates Court with the permission of the Senior Public Prosecutor and the Chief Prosecutor. The children were interviewed in the office of the prosecutor to allow for total privacy. The subjects were accompanied by their parents/guardians who were allowed access during the interviewing. The children were asked simple questions so as not to confuse them. The questions took the form of opinion related responses regarding their actual experiences and their feelings regarding the system. They were also asked for their suggestions relating to the improvement of the situation. An interpreter was used to assist in overcoming the language barriers.

#### **3.1.1.2 Questionnaires**

The questionnaires were completed by the victims with the guidance of the respective regional court prosecutors and myself.



### **3.1.2 SELECTION OF THE SAMPLE**

The sample consisted of ten children who were victims of rape.<sup>138</sup> The research was conducted over a period of ten days by randomly selecting the subjects. The sample for the interviews was also selected at random, over a period of two weeks. However, the subjects were chosen from a specific age category for the interviews, that is, children over the age of eight but younger than fourteen years. The subjects chosen to fill in the questionnaires were from various age groups.

### **3.1.3 LIMITATIONS OF THE STUDY**

The major problems experienced were due to the fact that many of the subjects were ignorant and illiterate. The subjects had difficulty in understanding the nature and purpose of the study, even though it was explained to them in detail. It was extremely difficult to gain the trust of the subjects, especially after their experience in court. However, it was essential to obtain this information from them at this stage and this message was conveyed to them. The interviewees were sensitive and still very emotional about their experience. They were therefore very reluctant at first in assisting me with my questions. They also were very fearful of me and it was difficult to make them feel comfortable.

The lack of proper facilities at the court also posed a problem. There were no rooms with toys and dolls, or colourfully painted walls to make the child feel more comfortable. Instead the interviews were conducted in cold offices and the researcher found it difficult to move past the formal environment. The environment was reminiscent of being in court again and giving evidence. This stirred up painful memories for the child.

The questions had to be translated through an interpreter. This was time consuming and at times I had to wait for an interpreter to make himself available. The use of an interpreter

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<sup>138</sup> Ten children were selected for the interviews and ten others for the completion of the questionnaires.

also meant that there was an extra person in the room and this made the child uncomfortable and wary. I also had to introduce the interpreter's role in the process and ensure that the child felt comfortable having him around. Another problem relating to the use of the interpreter emerged because the interpreter that was available for use for the interview was a male. The children thus felt extremely uncomfortable.

It was an emotional process to interview these subjects. Unfortunately, I could not follow up on the progress of the subjects after the interview because most of them lived in outlying rural areas without proper addresses making it a difficult and expensive exercise to pursue.

### **3.2 DATA ANALYSIS**

The results of the questionnaires are tabulated on the following page.

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<b><u>QUESTIONS</u></b> <b><u>ASKED</u></b>	<b><u>NO. IN SAMPLE</u></b>	<b><u>NO. ANSWERED</u></b> <b><u>'YES'</u></b>	<b><u>NO. ANSWERED</u></b> <b><u>'NO'</u></b>
I feel comfortable in court.	10	2	8
I know what it means to tell the truth.	10	1	9
The magistrate is there to help me.	10	4	6
The prosecutor is my friend.	10	4	6
The attorney is there to help me.	10	2	8
I trust the social worker.	10	6	4
The police officer is there to help me.	10	2	8
I enjoy coming to court.	10	1	9
I need to speak to someone before I go into court.	10	10	0
I need to speak to someone when I come out of court.	10	10	0
There are people I can relate to in court.	10	4	6
The courtroom is frightening.	10	10	0

### 3.3 CONCLUSION

The following conclusions were derived from the Study conducted. The results indicated that children did not generally feel at ease in court. They are afraid of the courtroom environment as well as the court personnel. Each of the subjects interviewed felt that they needed someone to talk to before going into court to give evidence and also once they had completed giving evidence. Only 40 % of the subjects felt that they could relate to people at the court. 90 % of the children did not rate their experience at court as being an enjoyable one. Only two out of the 10 subjects felt that the policeman was there to help them.

The problems experienced by children at court centre around the fact that they are intimidated by the whole experience. They feel that there isn't anyone who they can trust in the criminal justice system. Firstly, the idea of the policeman being someone that should be feared has been carried through from the past regime. The child thus appears to have difficulty in trusting the police. A similar problem is experienced by the child when she comes to court. She is fearful of everyone, from the prosecutor to the magistrate. The physical environment of the courtroom is also intimidating to her. The child also lacks understanding of the system and there are no structures in place to facilitate a better understanding of procedures. Her lack of understanding of court procedures adds to her pain of having to relive the entire experience.

One major problem that emerged from the interviews with the children was that the cultural upbringing of the child placed enormous pressure on her when it came to court procedure. Children are taught to respect their elders and to a certain extent that meant not implicating them in matters where they (the elders) faced chastisement. It was difficult for the child to go against these principles and to give evidence against older people. Ultimately, the experience in court was an emotionally painful one, and every subject agreed that it was one they never wanted to relive. This was in spite of the fact that the perpetrators in some cases were convicted and sentenced to many years imprisonment on the evidence that was given by the respective child.

The South African legal system is often criticised for its treatment of the rape victim. It is submitted that there is tremendous room for improvement regarding the criminal justice system and the child rape victim. Other countries have sought to overcome their shortfalls in the recent years and it is submitted that our country should certainly follow suit.

The following chapter takes a look at the criminal justice systems of two first world countries namely the United States of America and Britain and their views regarding the child rape victim.

## **CHAPTER 4**

# **THE CHILD RAPE VICTIM: AN INTERNATIONAL PERSPECTIVE ON THE ISSUE OF THE CHILD WITNESS**

### **4.1 INTRODUCTION**

The aim of this chapter is to highlight the advanced legal approach to the law concerning young children in the USA and Britain. South Africa experiences unique shortcomings when it comes to child witnesses, and a major contributing factor is the stagnating mindset of the role players. However, the role players in turn are guided and influenced by the legislation and the mindset of the legislature. Therefore it is submitted that a change in the perspectives regarding the child witness will positively influence the various role players, and in so doing, improve the status of the child rape victim in the system.

The legal systems of countries differ to a great extent. Their approach to the law and to the evidence of young children also differs. The evidence of a child continually comes under criticism. In Britain, it has been reported that ‘children and adults are equally reliable as witnesses despite the presumption embodied in English law that children’s evidence is often impaired.’<sup>139</sup> Studies in England and abroad have shown that children as young as three can give coherent and truthful accounts of events, and while older children can give more information because they remember more, they are no more accurate than younger children.<sup>140</sup> Another study at a German university, revealed that ‘under the

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<sup>139</sup> Creney, Stephen, G. Douglas and N. Lowe eds. “Current Topics : Child Evidence” Family Law vol 17 1987 : 111.

<sup>140</sup> *Ibid.*

German system of having children's evidence examined by an impartial psychologist, 90% of statements are judged to be truthful.<sup>141</sup>

It is ultimately the quality of the evidence given by the child that decides the conviction or acquittal of an accused person. The views regarding the evidential value of a child's evidence differs greatly amongst professionals in different judicial systems. I therefore chose to briefly highlight different international perspectives regarding the child witness. Aspects such as the credibility of the witness, the admissibility of the evidence and the stress experienced by the child are some of the aspects that are compared. I chose to compare two first world countries, namely United States of America and England in the hope of broadening the South African view of the child witness.

## 4.2 THE ENGLISH VIEW

### 4.2.1 COMPETENCE

There is no minimum age prescribed for the admission of evidence by young children under the new criminal provision.<sup>142</sup> However, unlike in civil proceedings where children under fourteen years of age may give sworn or unsworn evidence, the law prescribes that in criminal proceedings, the evidence can only be unsworn.<sup>143</sup> The ideal situation was summed up by Bainham as follows:

A child of tender years shall be competent as a witness provided he is able to give coherent replies to questions that are put to him; and his level of understanding, including misunderstanding (if any) of the duty to speak the truth, shall affect the weight of his evidence but not its admissibility.<sup>144</sup>

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<sup>141</sup> *Ibid.*

<sup>142</sup> s 33A of the Criminal Justice Act of 1988.

<sup>143</sup> *Ibid.*

<sup>144</sup> Andrew Bainham, 'Children – The Modern Law' (Cambridge, 1993) at 468.

## 4.2.2 CREDIBILITY

The question of credibility is a common issue that arises when the evidence of children is analysed. At common law the judge was required to warn the jury about convicting on the strength of a child's uncorroborated evidence.<sup>145</sup> Similar warnings are still given in sexual cases whether the alleged victim is a child or an adult.<sup>146</sup> The fact that it was an 'underlying assumption that women or children were more likely to be untruthful' was highly criticised.<sup>147</sup> The corroboration rule being justified on the basis that 'children have a propensity for imagining things, lack moral responsibility, have weaker powers of observation and recollection and are more likely to be open to suggestion,' was unacceptable.<sup>148</sup> The claims were not substantiated by psychological evidence.<sup>149</sup> Furthermore it was argued that moral understanding is not equated to honesty in adults and therefore this should also apply to children.<sup>150</sup> It was further held that 'comparisons between children and adults have often been founded on an exaggerated view of adult competence.'<sup>151</sup>

The Criminal Justice Act of 1988 abolished the corroboration rule. It now provides that:

Any requirement whereby at a trial or indictment, it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of the child is abrogated in relation to cases where such a warning is required by reason only that the evidence is the evidence of the child.

In effect, this translates to mean that a jury should not be warned about the uncorroborated evidence of a child by the mere fact that the evidence presented is that of a child. Therefore it is possible to secure a conviction in a case based on the evidence of a single child witness.

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<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid.*



## 4.3 THE UNITED STATES OF AMERICA

According to Perry, a potential witness must possess the capacity to observe, sufficient intelligence and adequate memory to store information, the ability to communicate, an awareness of the difference between truth and falsehood, and an obligation to speak truthfully, to testify in court.<sup>152</sup> In the past the courts adopted the attitude that children were deemed deficient in these abilities and were thus excluded from giving evidence.<sup>153</sup> However, the courts have recently leaned towards favouring the view that a child of any age who possesses the requisite characteristics may testify.<sup>154</sup> Child sexual abuse victims are deemed competent by statute in many states.<sup>155</sup>

### 4.3.1 COMPETENCE

Case law and statutory requirements concerning the competence of child witnesses are found in each of the fifty states.<sup>156</sup> Variations occur from one jurisdiction to another but they generally fall into one of four categories; namely

- states presuming incapacity below a specified age,
- states requiring an understanding of the oath,
- states following the Federal Rules of evidence, and
- states providing that all children are competent in sex cases.<sup>157</sup>

These categories are not exclusive and some states have enacted statutes from more than one category.<sup>158</sup> Basically the trial judge determines the competence of all witnesses, including children and the court has broad discretion in reaching its competency decisions.<sup>159</sup>

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<sup>152</sup> Perry and Wrightsman *op cit.* American jurisprudence as quoted at 37.

<sup>153</sup> *Ibid.*

<sup>154</sup> Myers, 1987 as quoted in Perry *op cit.* at 37.

<sup>155</sup> Landwirth, 1987 as quoted by Perry and Wrightsman *op cit.* at 37.

<sup>156</sup> Perry and Wrightsman *op cit.* at 37.

<sup>157</sup> Myers, 1987 as quoted in Perry and Wrightsman *op cit.* at 37.

<sup>158</sup> Perry and Wrightsman *op cit.* at 37.

<sup>159</sup> *Ibid.* at 15.

### 4.3.2 CREDIBILITY

While some people believe that children are poor at remembering important, relevant details of an event, others believe that they are honest and are likely to tell the truth as they understand it.<sup>160</sup> The stereotype of children as poor rememberers can be dispelled if the child appears to be confident, alert, articulate and not confused.<sup>161</sup> Once the child is considered to be a competent witness, it is left to the jurors to determine the weight to be given to the child's testimony.<sup>162</sup> Therefore, although a child may be considered competent, she may or may not be considered as a credible witness.<sup>163</sup>

### 4.4 CONCLUSION

South African courts tend to view the evidence of child witnesses with somewhat more caution and scepticism than the United States of America and England. Whereas in South Africa appeals have been upheld on the basis that the child was not properly sworn in, English law provides that a child may give unsworn evidence in criminal proceedings.<sup>164</sup> Very few convictions have been obtained in cases where the child was a single witness as a result of the cautionary rule being strictly adhered to by our courts. However, in England, juries are warned not to disregard a child's evidence, or to consider it with less importance merely because it is the evidence of a child.<sup>165</sup> The USA has stricter criteria when dealing with the evidence of children. Some states require that the child must understand the oath, while other states presume incapacity below a specified age. The attitude of South African courts show a leaning towards the USA's stricter policy regarding the evidence of the child witness. The scepticism of our courts may be overcome with proper training and understanding on the part of the presiding officers. The recent focus on child abuse and child rape victims implies that there is hope yet towards positively altering the mindset of the relevant role players in the system.

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<sup>160</sup> *Ibid.* at 16.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> S33A of the Criminal Justice Act of 1988.

<sup>165</sup> The abolition of the Corroboration Rule – the Criminal Justice Act of 1988 supports this.

## CHAPTER 5

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 INTRODUCTION

A criminal justice system which does not accommodate a whole class of victims, specially those who are the most vulnerable, helpless, and deserving of protection does not serve society well. It is intolerable that the opportunity for justice so unevenly depends on the state where the child is victimised. The basic procedural changes should be immediately extended to all jurisdictions.<sup>166</sup>

As has been shown in this Study, the child rape victim experiences many problems within the criminal justice system. As has emerged from the research undertaken, a fair share of these problems lies with the various professional role players. However this is a two - fold problem. On the one hand, the child is exposed to the shortcomings of the role players themselves and this in turn is a source of some of the problems experienced in court. On the other hand, the role players also experience problems with the child rape victim due to shortfalls in the system of which they are a part.

It was pointed out by Sheila Camerer in her article that '(V)ictims who are dissatisfied with the way that they are treated in the criminal justice system will lose faith in it and may in future take matters into their own hands.'<sup>167</sup> She further maintains that it has been proven by 'scientific evaluation, in the Netherlands for example, that focusing on victims and addressing and accommodating their needs is one of the most effective public relations policies the criminal justice system can pursue.'<sup>168</sup> Therefore, the problems within the system need to be addressed and the status of the victim needs to be improved. It is imperative that the faith of the victims be restored in our justice system.

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<sup>166</sup> L. Berliner, social worker, Sexual Assault Centre, University of Washington, 1985, p179 quoted in Perry and Wrightsman *op cit* at 224

<sup>167</sup> Sheila Camerer 'What about the victims?' *op cit.* at 23

<sup>168</sup> *Ibid.*

From the Study conducted regarding the child rape victim and the criminal justice system, the following conclusions can be drawn.

- The child can often be a good, credible witness in court as long as she understands the court procedure and is informed as to what is expected of her.
- The child is usually terrified of coming to court to give evidence. She is equally afraid of the court personnel and police officers dealing with the matter.
- The child experiences various problems within the present system. Most of these problems emerge because of a lack of training and understanding on the part of the role players.
- The lack of suitable facilities at the court also contributes to the unpleasantness that the child experiences at court.
- Most South African professionals lack sensitivity when dealing with child rape victims.
- The major role players, such as the prosecutors and the magistrates, frequently display a certain degree of ignorance when dealing with the child witness. This is due to a lack of training on these issues.
- The problems experienced within the system may be considered major, but it is submitted that they can be overcome.
- The system can also be criticised in that the legislation regarding the child rape victim requires redrafting. The approach to the child witness' evidence, for instance, should be more along the lines of the international approach discussed in Chapter Four. However, there has been a marked improvement in the procedural aspect of the criminal justice system as far as the child rape victim is concerned. The introduction of the intermediary system in court has improved the status of the child victim tremendously. It is my submission that the nature of the procedure is commendable. The main problems clearly lie with the various role players and I have therefore chosen to concentrate on the latter in my discussion on improving the system.

This Chapter deals with the solutions that are recommended to improve the status of the child rape victim within the criminal justice system.

## **5.2 PROPOSED SOLUTIONS REGARDING THE ROLE PLAYERS**

### **5.2.1 THE POLICE OFFICER**

During the apartheid regime policemen were feared. This image was carried through, and still exists to date. Children who were interviewed regarding their views on the police officer still regarded him as the person who ‘put people in jail’.<sup>169</sup> It is therefore submitted that this image be altered to conform to the notion that the police are there to assist people and not only to incarcerate them. The idea of community policing should be practised on a wider scale. Victims should be able to feel comfortable in the presence of the police officer. The officer must be able to gain the trust of the victim or attempt to do so, anyway. In order to do this the officer should undergo special training so as to cope with child rape victims. He/she should be sent regularly on special courses that teach them to deal with rape victims. A more sensitive approach is called for when dealing with such victims and police officers are required to treat victims with sympathy and compassion. The officer should also be in a position to take down the statement of the child correctly and in proper detail. For this he/she would have to be well versed in the language and mannerisms of children. Some insight into child psychology is an added advantage when dealing with child rape victims and this ranks highly on the list of recommendations. The officer should also be in a position to counsel the child or refer her to the correct channels to receive counselling. In other words, he/she should, take the child for proper counselling or advise her of the options available to her at the end of the interview.

Once the matter is reported to the police, it is the ‘state’ and not the victim who becomes the plaintiff in the case. In order to ensure that the victim does not become sidelined throughout the investigations, it is submitted that the police get the victim more involved in the case. It is a common perception on the part of the police that victims who want to

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<sup>169</sup> Interview with child rape victims at the Scottburgh Magistrates Court, during February 2001.

be kept informed are a nuisance to the officer and merely hinder the investigations.<sup>170</sup> This attitude of the police will have to change and the victim should be kept informed of the developments in the case.

Victims also need to be treated differently from accused. Rape victims, especially children, deserve more attention and dedication than victims of other crimes. It must be noted by police officers that rape is an emotionally crippling crime and that victims need all the help that they can get. Ignoring the victim after the report is made maybe detrimental to the wellbeing of the victim as well as the investigation of the case.

If a victim is not treated in the proper manner by the police officer, then he (the officer) should be reported to a higher body. At present, the CPU has its own branch commander who is responsible for his/her own officers. He is accountable to the station commissioner and the area commissioner of that jurisdiction. The Independent Complaints Directorate has also been established to deal with the complaints of the public in general regarding the conduct of police officers.<sup>171</sup> However, it is submitted that a separate body be established to deal with the complaints of rape victims. This body should employ a higher standard of care towards these victims. The officers who are found guilty of mistreating the victims should be severely dealt with.

## **5.2.2 THE PROSECUTOR**

### **5.2.2.1 Specialised Training**

An ideal situation regarding the prosecutor dealing with child rape victims, would be a prosecutor with some experience in social work. This would allow him/her to understand the child better and therefore impact on the treatment of the victim when she comes to court. It is suggested that prosecutors attend courses dealing with sexual offences in order to familiarise him/ herself with the law and its developments regarding sexual offences.

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<sup>170</sup> Sheila Camerer, *op cit* at 23.

<sup>171</sup> Hereinafter referred to as the ICD.

Furthermore, it is submitted that these courses also concentrate on such aspects as the psychological impact of the trial on the victim. He/ she should be informed on ways to make the victim feel comfortable in court and of maximising the credibility of the witness in court. The interviewing skills of the prosecutor should also be improved so as to conduct proper pre-trial interviews. The prosecutor should keep up to date on issues such as the evidence of children and their credibility as witnesses, to allow him/her to address the court at judgement stage.

### **5.2.2.2 Provision of Proper Facilities**

In order for the prosecutor to function properly as a specialist, certain facilities need to be provided. For instance, many of the subjects of the study complained about the lack of facilities. It has been established that children needed an environment that was conducive to giving evidence in court. This was greatly lacking in the rural courts. In fact, the rooms that were used by the intermediaries did not have any child-related posters or toys for the children. These rooms are as coldly lacking in the proper décor as are the courtrooms in which these children give their evidence. It is thus difficult for the prosecutor to make the child feel comfortable.

### **5.2.2.3 Reduction of Overloaded Court Rolls**

Prosecutors are burdened with court rolls that do not allow for the proper interviewing of witnesses. There is insufficient time for pre-trial interviews. Complainants complained that their cases were not finalised quickly and that they were called to court and sent back several times without having their matter heard.

The current Saturday court programme implemented in certain courts around KwaZulu-Natal definitely goes toward lessening the workload. It is submitted that a similar project be implemented to deal with the backlog in child abuse cases. However, when this suggestion was made to the Regional Court prosecutor at Scottburgh Magistrates Court, she maintained that this was a problem since intermediaries were not available on Saturdays.<sup>172</sup> However, it is submitted that if it social workers in private practice were

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<sup>172</sup> Interview with Ms Lazarus *op cit*.

paid well enough to work on Saturdays, then this would be an easy solution to the problem.

#### **5.2.2.4 General Improvements regarding Prosecutors and Child Rape Victims**

Prosecutors should make victims aware of their right to institute civil proceedings against the perpetrator.<sup>173</sup> Victims should be made aware of their options regarding the law.<sup>174</sup> The stages of the court procedure should be explained to the victim and they should be kept informed at the various stages as well as to the outcome of the trial. The victims should be advised on post trial counselling.<sup>175</sup> Prosecutors should make more use of s300 of the CPA 51 of 1977 in terms of which they may ask for compensation orders.<sup>176</sup>

#### **5.2.3 THE MAGISTRATE**

Magistrates are often guilty of viewing the evidence of children with absolute scrutiny on every occasion.<sup>177</sup> While the cautionary rule may call for a cautious approach with regard to the child witness, it is submitted that the child can be a good, credible witness.<sup>178</sup> However, the researcher found that the magistrates who endorsed this view, were those who were very recently appointed to the bench. This approach needs to be infiltrated amongst the older presiding officers who still doubt the credibility and ability of children as witnesses. Magistrates need to be educated on aspects pertaining to the child witness. For instance, they must be aware of how the child perceives, remembers and reports events.<sup>179</sup> They need to understand that at times he/she as the presiding officer will have to allow certain questions even though they may be leading, in order to obtain the truth from the child.<sup>180</sup> They must be trained to properly assess the credibility of statements made by children.<sup>181</sup> This will assist the magistrate in arriving at an informed decision.

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<sup>173</sup> Sheila Camerer *op cit.* at 23.

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.*

<sup>177</sup> Interview with Ms Lazarus *op cit.*

<sup>178</sup> Interview with Mr M Daya *op cit.*

<sup>179</sup> Perry and Wrightsman *op cit.* at 255

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.*



#### **5.2.4 THE SOCIAL WORKER**

Social workers should make themselves available before, during and after the court proceedings. Victims who choose to go for counselling should be given proper appointments to see the social worker and this should be done as soon as possible. Social workers also need to be trained specifically for the task of being intermediaries. They should be sent on courses that concentrate on the psychological impact on the child. They must be specifically trained to deal with the child rape victim. They should also be prepared to counsel victims who may have become HIV positive as a result of the rape.

#### **5.2.5 THE ATTORNEY**

Attorneys also need to be educated to deal with child witnesses. They need to become familiar with the different techniques and procedures involved in dealing with the child witness. For example, they need to familiarise themselves with the intermediary system. They should be educated on the psychological impact of their questioning. Furthermore, they should be sensitive to the position of the child and take into consideration the emotional trauma of the child rape victim. They should be specifically trained to deal with a child rape victim.

### **5.3 CONCLUSION**

The child rape victim must be treated with sensitivity. The role players who come into contact with her need to be able to treat her accordingly. Proper detailed statements should be obtained at the early stages so as to refresh the memory of the witness. Magistrates and prosecutors must be educated on the needs of the child. They should also approach cases with an open mind concerning the credibility of the child as a competent witness. Social workers need to adopt a policy that will place the needs of the victim above everything else. They should receive proper training to allow them to function as intermediaries as well. Courtrooms need to be upgraded to facilitate the child rape victim. For example, proper equipment must be supplied in cases involving the use of an

intermediary. Courts need to adopt measures in becoming child-friendly. One way of doing this is to have brightly coloured rooms in which to interview the children. Ultimately, there exists much room for improvement in the criminal justice system, regarding the child rape victim. A multi-disciplinary approach is needed to improve the status quo. Working together can and will improve the position of the child rape victim in the criminal justice system.

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ANNEXURE ONE

**UNIVERSITY OF DURBAN WESTVILLE  
FACULTY OF LAW AND SOCIAL WORK  
MASTERS IN CHILD CARE AND PROTECTION**

DISSERTATION: THE PLIGHT OF THE CHILD RAPE VICTIM THROUGH THE  
CRIMINAL JUSTICE SYSTEM: CRITICISMS, DOWNFALLS AND PROPOSED  
SOLUTIONS

QUESTIONNAIRE 1: A LOOK AT THE ROLE OF THE PROFESSIONALS WITH  
SPECIFIC REGARD TO THE CHILD RAPE VICTIM

**A) THE STATE PROSECUTOR**

NAME:

AGE :

QUALIFICATIONS:

NO. OF YEARS EXPERIENCE:

(PLEASE NOTE THAT ALL INFORMATION WILL BE TREATED AS  
CONFIDENTIAL AND USED SOLELY FOR THE PURPOSES OF THIS  
DISSERTATION)

1.DO YOU DEAL WITH CHILD RAPE VICTIMS?

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2.HOW OFTEN DO YOU DEAL WITH SUCH WITNESSES (RAPE VICTIMS)?

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3.DO YOU CONDUCT PRE – TRIAL INTERVIEWS?

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4. IS YOUR OFFICE CHILD - FRIENDLY? IF YES, HOW SO?

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5. IS THE COURT THAT YOU WORK IN, CHILD - FRIENDLY?  
IF YES, HOW SO?

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6. DID YOU RECEIVE ANY SPECIFIC TRAINING WITH REGARDS TO CHILD  
ABUSE VICTIMS? SPECIFY.

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7. ARE YOU IN FAVOUR OF THE INTERMEDIARY SYSTEM? WHY?

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8. DO YOU EXPERIENCE ANY DIFFICULTIES WITH THE SYSTEM? IF SO,  
WHAT ARE THEY?

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9. WHAT IS YOUR VIEW REGARDING THE ATTITUDE OF THE MAGISTRATE  
TOWARDS THE INTERMEDIARY SYSTEM?

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10. HOW DO YOU THINK THAT THE INTERMEDIARY SYTEM CAN BE  
IMPROVED?

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11. WHAT ARE YOUR VIEWS REGARDING THE CHILD WITNESS, ESPECIALLY IN RAPE CASES?

A) REGARDING THEIR CREDIBILITY?

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B) REGARDING THEIR Demeanour DURING PROCEEDINGS?

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12. WHAT FACILITIES DO YOU HAVE AT YOUR OFFICES / COURT TO HELP THE CHILD AFTER THE TRIAL? (POST- TRIAL COUNSELLING)

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**ANNEXURE TWO**

**UNIVERSITY OF DURBAN WESTVILLE  
FACULTY OF LAW AND SOCIAL WORK  
MASTERS IN CHILD CARE AND PROTECTION**

**DISSERTATION: THE PLIGHT OF THE CHILD RAPE VICTIM THROUGH THE  
CRIMINAL JUSTICE SYSTEM: CRITICISMS, DOWNFALLS AND PROPOSED  
SOLUTIONS**

**QUESTIONNAIRE 2: A LOOK AT THE ROLE OF THE PROFESSIONALS WITH  
SPECIFIC REGARD TO THE CHILD RAPE VICTIM**

**A) THE SOCIAL WORKER**

**NAME:**

**AGE :**

**QUALIFICATIONS:**

**NO. OF YEARS EXPERIENCE:**

**(PLEASE NOTE THAT ALL INFORMATION WILL BE TREATED AS  
CONFIDENTIAL AND USED SOLELY FOR THE PURPOSES OF THIS  
DISSERTATION)**

**1.DO YOU EXPERIENCE ANY PROBLEMS WITH THE INTERMEDIARY  
SYSTEM? IF YES, WHAT ARE THEY?**

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**2. HAVE YOU RECEIVED ANY SPECIFIC TRAINING WITH REGARD TO  
DEALING WITH CHILD RAPE VICTIMS? IF SO, WHAT KIND OF TRAINING DID  
YOU UNDERGO?**

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3. ARE YOU SENT ON COURSES TO UPDATE YOUR KNOWLEDGE AND TRAINING? IF SO, HOW OFTEN?

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4. WHAT INVOLVEMENT, IF ANY, DO YOU HAVE WITH THE CHILD, AT:-

a) PRE – TRIAL STAGE

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b) DURING THE TRIAL PROCESS

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c) POST – TRIAL STAGE

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5. WHAT ARE YOUR VIEWS REGARDING THE CRIMINAL JUSTICE SYSTEM IN RELATION TO THE TREATMENT OF THE CHILD RAPE VICTIM?

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6. DO YOU THINK THAT THE SYSTEM CAN BE IMPROVED TO BENEFIT THE CHILD? HOW SO?

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**ANNEXURE THREE**

**UNIVERSITY OF DURBAN WESTVILLE  
FACULTY OF LAW AND SOCIAL WORK  
MASTERS IN CHILD CARE AND PROTECTION**

**DISSERTATION: THE PLIGHT OF THE CHILD RAPE VICTIM THROUGH THE  
CRIMINAL JUSTICE SYSTEM: CRITICISMS, DOWNFALLS AND PROPOSED  
SOLUTIONS**

**QUESTIONNAIRE 3: A LOOK AT THE ROLE OF THE PROFESSIONALS WITH  
SPECIFIC REGARD TO THE CHILD RAPE VICTIM**

**A) THE CHILD PROTECTION UNIT**

**NAME:**

**AGE :**

**QUALIFICATIONS:**

**NO. OF YEARS EXPERIENCE:**

**(PLEASE NOTE THAT ALL INFORMATION WILL BE TREATED AS  
CONFIDENTIAL AND USED SOLELY FOR THE PURPOSES OF THIS  
DISSERTATION)**

**1. DO YOU UNDERGO ANY SPECIFIC TRAINING TO DEAL WITH CHILD ABUSE  
VICTIMS? IF SO, PLEASE STIPULATE WHAT TYPE OF TRAINING?**

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**2. DO YOU THINK THAT YOU ARE APTLY TRAINED FOR YOUR POSITION?  
PLEASE COMMENT.**

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**3. WHAT ARE THE MAIN PROBLEMS EXPERIENCED WHEN DEALING WITH  
CHILDREN WHO ARE VICTIMS OF SEXUAL OFFENCES?**

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4. WHO IS USUALLY PRESENT WHEN YOU TAKE DOWN THE CHILD'S STATEMENTS?

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5. DO YOU CONSULT WITH THE VICTIM AGAIN ONCE HER STATEMENT IS TAKEN? IF SO, WHEN?

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6. ARE YOU EQUIPPED TO DEAL WITH TRAUMATIC VICTIMS AND THEIR FAMILIES? IF YES, HOW SO?

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7. DO YOU TAKE THE VICTIM TO THE DISTRICT SURGEON?

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8. ARE YOU PRESENT DURING THE EXAMINATION?

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9. WHAT ARE YOUR VIEWS REGARDING THE MANNER IN WHICH THE MEDICAL EXAMINATION IS CONDUCTED?

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10. DO YOU ADVISE THE VICTIM OF COUNSELLING OPTIONS?

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**ANNEXURE FOUR**

**UNIVERSITY OF DURBAN WESTVILLE  
FACULTY OF LAW AND SOCIAL WORK  
MASTERS IN CHILD CARE AND PROTECTION**

**DISSERTATION: THE PLIGHT OF THE CHILD RAPE VICTIM THROUGH THE  
CRIMINAL JUSTICE SYSTEM: CRITICISMS, DOWNFALLS AND PROPOSED  
SOLUTIONS**

**QUESTIONNAIRE 4: A LOOK AT THE ROLE OF THE PROFESSIONALS WITH  
SPECIFIC REGARD TO THE CHILD RAPE VICTIM**

**A) THE ATTORNEY**

NAME:

AGE :

QUALIFICATIONS:

NO. OF YEARS EXPERIENCE:

(PLEASE NOTE THAT ALL INFORMATION WILL BE TREATED AS  
CONFIDENTIAL AND USED SOLELY FOR THE PURPOSES OF THIS  
DISSERTATION)

1. DO YOU BELIEVE THAT THE CHILD WITNESS CAN BE A GOOD, CREDIBLE  
WITNESS? WHEN AND WHY?

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2. IS IT NECESSARY TO APPROACH THESE WITNESSES DIFFERENTLY (AS  
OPPOSED TO ADULT WITNESSES)? IF YES, HOW SO?

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3. DO YOU THINK THAT IT IS IN THE "BEST INTERESTS OF THE CHILD TO  
HAVE THE ATTORNEY PRESENT IN CHILD RAPE CASES?"

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4. WHAT ARE YOUR VIEWS ON THE INTERMEDIARY SYSTEM?

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**UNIVERSITY OF DURBAN WESTVILLE  
FACULTY OF LAW AND SOCIAL WORK  
MASTERS IN CHILD CARE AND PROTECTION**

DISSERTATION: THE PLIGHT OF THE CHILD RAPE VICTIM THROUGH THE  
CRIMINAL JUSTICE SYSTEM: CRITICISMS, DOWNFALLS AND PROPOSED  
SOLUTIONS

QUESTIONNAIRE 5: A LOOK AT THE ROLE OF THE PROFESSIONALS WITH  
SPECIFIC REGARD TO THE CHILD RAPE VICTIM

**A) THE CHILD RAPE VICTIM**

NAME:

AGE :

(PLEASE NOTE THAT ALL INFORMATION WILL BE TREATED AS  
CONFIDENTIAL AND USED SOLELY FOR THE PURPOSES OF THIS  
DISSERTATION)

ANSWER YES OR NO TO THE FOLLOWING QUESTIONS:

1. I FEEL COMFORTABLE GIVING EVIDENCE IN COURT.

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2. I KNOW WHAT IT MEANS TO TAKE THE OATH.

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3. THE MAGISTRATE IS THERE TO HELP ME.

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4. THE PROSECUTOR IS MY FRIEND.

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5. THE ATTORNEY IS ALSO THERE TO HELP ME.

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6. I TRUST THE SOCIAL WORKER.

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7. THE POLICE OFFICER IS THERE TO HELP ME.

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8. I ENJOY COMING TO COURT.

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9. I NEED TO SPEAK TO SOMEONE BEFORE I GO TO COURT.

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10. I NEED TO SPEAK TO SOMEONE WHEN I RETURN FROM COURT.

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11. I TRUST THE MAGISTRATE.

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12. I TRUST THE PROSECUTOR.

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13. I TRUST THE ATTORNEY.

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14. I FIND IT DIFFICULT TO SPEAK IN COURT.

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15. THERE ARE PEOPLE I CAN RELATE TO AT COURT.

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16. THE COURTROOM IS FRIGHTENING.

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17. I FEEL BETTER WHEN I LEAVE THE COURT.

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**CONSIDER THE FOLLOWING QUESTIONS AND ANSWER THEM IN YOUR OWN WORDS.**

1. HOW DO YOU FEEL WHEN YOU COME TO COURT? WHY?

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2. WHAT WILL MAKE YOU FEEL MORE COMFORTABLE AT COURT?

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3. WHAT WOULD YOU CHANGE ABOUT THE COURTROOM SETTING?

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4. WHAT DID YOU ENJOY ABOUT BEING AT COURT?

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5. WHAT DID YPU NOT LIKE ABOUT BEING IN COURT?

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**UNIVERSITY OF DURBAN WESTVILLE  
FACULTY OF LAW AND SOCIAL WORK  
MASTERS IN CHILD CARE AND PROTECTION**

DISSERTATION: THE PLIGHT OF THE CHILD RAPE VICTIM THROUGH THE  
CRIMINAL JUSTICE SYSTEM: CRITICISMS, DOWNFALLS AND PROPOSED  
SOLUTIONS

QUESTIONNAIRE 6: A LOOK AT THE ROLE OF THE PROFESSIONALS WITH  
SPECIFIC REGARD TO THE CHILD RAPE VICTIM

**A) THE MAGISTRATE**

NAME:

AGE :

QUALIFICATIONS:

NO. OF YEARS EXPERIENCE:

(PLEASE NOTE THAT ALL INFORMATION WILL BE TREATED AS  
CONFIDENTIAL AND USED SOLELY FOR THE PURPOSES OF THIS  
DISSERTATION)

1. DID YOU RECEIVE ANY TRAINING IN RESPECT OF DEALING WITH CHILD  
WITNESSES? IF SO, WHAT TRAINING DID YOU RECEIVE?

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2. DO YOU ENSURE THAT YOUR COURT IS "CHILD FRIENDLY"? HOW SO?

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3. ARE YOU IN FAVOUR OF THE INTERMEDIARY SYSTEM? WHY?

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4. WHAT, IF ANY, DO YOU CONSIDER TO BE THE SHORTCOMINGS OF THE  
INTERMEDIARY SYSTEM?

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5. WHAT, IF ANY, DO YOU CONSIDER TO BE THE POSITIVE ATTRIBUTES OF THE SYSTEM?

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6. DO YOU THINK THAT THE CHILD WITNESS CAN BE A GOOD, CREDIBLE WITNESS? WHY?

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7. WHAT IS YOUR INPUT REGARDING THE IMPROVEMENT OF THE PRESENT SYSTEM IN RELATION TO THE CHILD VICTIM IN SEXUAL ABUSE CASES AND THEIR APPEARANCE IN COURT?

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# CHARGE SHEET • KLAGSTAAT

*\*Make an X in the appropriate block.  
Maak 'n X in die toepaslike blokkie.*

Case Saak No. ....	Date Datum .....
Review Case Hersieningsaak No. ....	Date Datum .....

Police station/Polisiekantoor	CAS/CR/MAS/MR No.	Investigation officer/Ondersoekbeampte
District/Division-Distrik/Afdeling	Place of trial/Plek van verhoor	Date of first appearance/Datum van eerste verskyning

Particulars of court officials must be furnished on the minutes of proceedings.  
Besonderhede van hofbeamptes moet op die notule van verrigtinge verstrek word.

### THE STATE versus /DIE STAAT teen

Particulars of accused/Besonderhede van beskuldigde(s):

Name Naam			
Address Adres			
Male Manlik <input type="checkbox"/>	Female Vroulik <input type="checkbox"/>	Nationality Nasionaliteit	Age Ouderdom
*In custody In hegtenis <input type="checkbox"/>	On bail Op borgtog <input type="checkbox"/>	Warned Gewaarsku <input type="checkbox"/>	Date of arrest Datum van arres <table border="1" style="width: 100px; height: 20px;"></table>

Name Naam			
Address Adres			
Male Manlik <input type="checkbox"/>	Female Vroulik <input type="checkbox"/>	Nationality Nasionaliteit	Age Ouderdom
*In custody In hegtenis <input type="checkbox"/>	On bail Op borgtog <input type="checkbox"/>	Warned Gewaarsku <input type="checkbox"/>	Date of arrest Datum van arres <table border="1" style="width: 100px; height: 20px;"></table>

(hereinafter called the accused) charged with the offence(s) as set out in Annexure(s) I to as attached.  
(hierna die beskuldigde genoem) beskuldig van die misdryf(we) soos in Aanhangsel(s) I tot hierby aangeheg, uiteengesit.

Plea  
Pleit .....

(Date / Datum)

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Judgement  
Uitspraak .....

(Date / Datum)

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Sentence on  
Vonnis op .....

.....

.....

Date  
Datum

Magistrate  
Landdros

Date appointment to the rank of Magistrate  
Datum van aanstelling in die rang van Landdros

Direction with regard to revision of sentence  
Aanwysing met betrekking tot hersiening van vonnis .....

.....

Direction with regard to filing of case record  
Aanwysing met betrekking tot lassing van saakrekord .....

.....

Verslag van Distrikageneesheer, Mediese Beampte of Mediese Praktisyn oor die uitvoer van 'n Medieseregteike Onderzoek  
Report by District Surgeon, Medical Officer or Medical Practitioner on the completion of a Medico-legal Examination

Die vorm moet in LEESBARE handskrif voltooi word  
The report must be completed in LEGIBLE handwriting

← NB →

Die geneesheer moet ELKE bladsy ONDERTEKEN  
The med. practitioner must SIGN at the bottom of EVERY PAGE

Polisiestase • Police station	MAS No./CAS No.	2 Persoon wat ondersoek aanvra: Van en voorletters Person requesting exam.: Surname and Initials	No. (Indien polisiëbeampte) No. (If police officer)	3 Datum van ondersoek • Date of examination Dag-Maand-Jaar • Day-Month-Year
Geneesheer wat die ondersoek voltooi Medical practitioner completing the examination		Posadres en Tel No. • Postal address and Tel No.		5 Plek van ondersoek • Place of examination
Geneesheer: Van en Voorletters Med. Practitioner: Surname and Initials				

**PERSOON ONDERSOEK • PERSON EXAMINED**

Naam • Name	(b) Geslag • Sex	(c) Ouderdom of vermoedeike ouderdom • Age or apparent age
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Vorige relevante mediese geskiedenis (bv. diabetes, hoë bloeddruk ens.) • Past relevant medical history (eg. diabetes, hypertension etc.)

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Toestand van klere • Condition of clothing

.....

Toestand van persoon wat liggaamskragte, algemene gesondheidstoestand en geestestoestand betref • State of the person as regards physical powers, general state of health and mental state

.....

0 Kliniese bevindings (Uitgesluit [11] hieronder) • Clinical findings (Excluding [11] below)

In elke geval moet die aard, plek en grootte van die skaafplek, wond of ander letsel sowel as die vermoedeike datum en wyse waarop dit veroorsaak is, omskryf en aangeteken word.  
In every case the nature, position and extent of the abrasion, wound or other injury must be described and noted together with its probable date and manner of causation.

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**Kliniese bevindings in geval van beweerde verkragting of ander seksuele oortreding • Clinical findings in a case of alleged rape or other sexual offence**

Vorige swangerskappe Previous pregnancies	NEE NO	Aantal swangerskappe Number of pregnancies	Aantal bevallings Number of deliveries	(b) Swangerskaptoets Pregnancy test	NEE NO	JA YES	Positief Positive	Negatief Negative
Antikonsepsie Contraception	NEE NO	JA YES	(d) Datum van laaste menstruasie Date of last menses	(e) Datum van laaste vrywillige geslagsgemeenskap Date of last intercourse with consent				

Of die persoon sedert die beweerde plaasvind van die misdryf gebad, urineer, gespoel of idere verwissel  
Has the person bathed, urinated, douched or changed clothing since the alleged offence took place

NEE NO	JA YES
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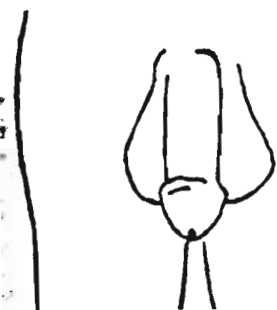
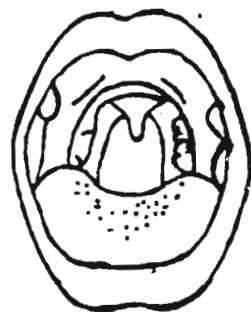
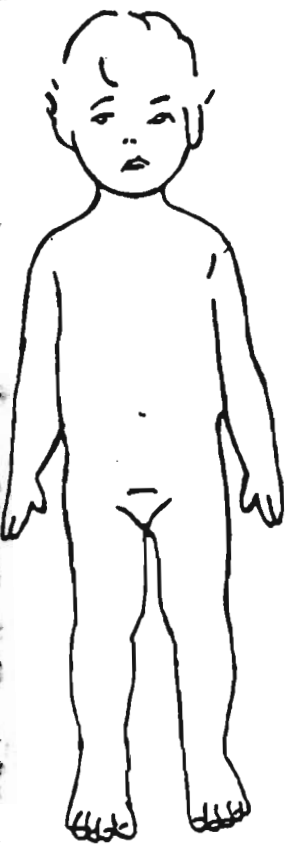
Indien JA, spesifiseer • If YES, specify

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**GINEKOLOGIESE ONDERSOEK • GYNAECOLOGICAL EXAMINATION**

Smert of pynlik Painful or painful	Groot skaamlippe Labia majora
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Handtekening van geneesheer  
Signature of Med. practitioner



Oordrom  
Ear-drum



Reghs  
Right



Links  
Left