

The Road to Justice

The Rape Trial



Rape Crisis
Cape Town Trust

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Introduction

Background

At Rape Crisis, the experience of the rape survivor within the criminal justice system has always been central to our work. The rape survivor comes into the trial process extremely traumatised by the rape and, in most cases, without much knowledge of how the criminal justice system functions. The result is that the trial can often be a bewildering and traumatic experience for her, which can detract from her ability to fulfil her very important role in this process.

We have a vision of a South Africa where the criminal justice system supports and empowers rape survivors in all its interventions. Until this becomes a reality our mission is to provide a bridge between survivors and the system, so that more survivors report rape, rape incidents decrease, survivors experience reduced secondary trauma within the system and the conviction rate of rapists improves.

For this reason, the Rape Crisis Cape Town Trust began a pre-trial consultation programme aimed at providing survivors with a better understanding of how the criminal trial works, and what they can expect, maybe even more importantly, what is expected of them when they give evidence.

The rape survivor is the most important witness in the trial; she is often the first person called to give evidence, and she is a powerful resource for the State in its effort to bring the accused to justice. The process of pre-trial consultation empowers the survivor to play this

vital role. It can also help to make the criminal justice process a less traumatic experience for her.

Special care must be taken to make sure that pre-trial consultation does not interfere with the integrity of the survivor's evidence in court. The pre-trial consultation sessions are designed to add to the consultation between the prosecutor and the survivor, and are not in any way a replacement for these consultations. The meeting with the prosecutor is for the purpose of getting information that will help him or her convict the accused, so that he can be properly punished. Conversations with the advisor, or court supporter, are for the purpose of supporting the survivor and giving her as much information about the trial as possible, so that she is not surprised or shocked during the process, and so that she understands how powerful and valuable her contribution is.

The pre-trial consultation programme has been in operation at Rape Crisis since 1994, and there is a need to share the expertise developed in the programme in the form of this booklet. We hope that it will be useful to other organisations that support survivors.

Introduction

Who is this booklet for?

The Rape Crisis model described in this booklet relies on the involvement of two persons in each pre-trial session, together with the survivor: the person providing the pre-trial consultation services (the advisor) and a counsellor.

The advisor (also known as a court supporter) gives the survivor information about what she can expect during the process of the trial, and how she should prepare herself in practical terms.

The counsellor (sometimes the same person who has been giving the survivor emotional support since she was raped) helps the survivor to prepare for the trial emotionally by helping her to cope with the feelings she is likely to have.

It is extremely important to understand the emotional demands that a trial places on a survivor, and the impact it will have on her. These issues must be explored during the counselling process, so that the survivor is emotionally prepared for the trial. Information about the court procedures alone is not enough – it's important to build up the emotional strength of the survivor and explore strategies for coping with the process, so that she doesn't feel even more disempowered. This is why the pre-trial consultation model described here involves a counsellor as well.

This booklet is aimed at the advisor and the counsellor, who will work as a team to help the survivor through this challenging process.

How to use this booklet

The booklet provides two types of information:

- Information for the advisor
- Information for the counsellor

Some information is relevant to both advisors and counsellors.

The booklet is divided into five sections:

1. Planning and preparing for pre-trial consultation

2. Key information for advisors and counsellors:

Essential background information about the criminal justice system that advisors and counsellors need to be familiar with before starting pre-trial consultation work.

3. Key information for survivors:

Information the survivor needs to know about the criminal justice system, including who the different role-players in the rape trial are, and how the trial process works.

4. Additional information:

Information about the trial and the criminal justice system, based on concerns that survivors often raise during pre-trial consultation.

5. Resources:

Examples of a court checklist and pre-trial consultation record form, as well as a list of useful contact numbers.

Introduction

The language used in this booklet

We recognise that rapists and sexual offenders attack both women and men, and we believe it is important for society and the law to recognise sexual offences against boys and men. However, women and girls are far more often the targets of sexual offences than men, and through our court support programme we serve a constituency consisting mainly of women. Therefore, this booklet will refer to survivors of rape as 'women' or 'she'. Similarly, we recognise that women can also, and do, commit sexual offences. However, as the majority of sexual offences are committed by men, in this booklet we will refer to perpetrators as 'men' or as 'he'.

There are different terms used for the rape survivor, depending on who is using these terms.

Some of these include:

Survivor – often used by organisations providing counselling and other services to the survivor. This term recognises her strength, acknowledges what she did to survive the rape, and recognises that many rapes end in death or involve the threat of death.

Victim – the most commonly used term in society. The police and many other service providers refer to a rape 'victim'.

Complainant – a legal term referring to the person against whom a crime has been committed. Prosecutors often use the term 'complainant' when they are

talking about the survivor/victim. **Chief witness** – the complainant is usually the chief or most important witness in a case.

In this booklet, we use the term 'survivor' throughout.

There are also different terms used to describe the rapist.

These include:

Suspect – used before the person is formally charged with the crime, when he is still only under suspicion.

Accused – the suspect becomes the accused when he is formally charged with committing the crime.

Perpetrator – while we realise that in our legal system a person is innocent until proven guilty, we also respect that fact that many rape perpetrators are not found guilty by a court of law but that from the survivor's point of view he is still and always will be the perpetrator.

In this booklet, we use all three terms.

In this booklet, we use the following abbreviations:

CJS: criminal justice system
SOA: Sexual Offences Act

Introduction

Some practical recommendations

We recommend that advisors equip themselves to do pre-trial consultation in the following ways:

1. Read this booklet carefully.
2. Attend and observe rape trials.
3. Establish good working relationships with the public prosecutors and police at local courts and police stations.
4. Network with legal experts in the field of violence against women.
5. Get regular support, debriefing and supervision.

To keep up to date, we recommend that where possible, advisors read the most recent directives and guidelines issued by national and local government, and the Commentary on the Sexual Offences Act of 2007.

We also recommend that the booklet *You and Rape* (published by Rape Crisis) be given to survivors. This booklet is aimed at survivors and provides information about the entire criminal justice process, from the time of reporting the rape or assault through to the trial. Copies can be obtained from Rape Crisis Cape Town Trust.



Planning and preparing
for pre-trial consultation

Planning and preparing for pre-trial consultation

What is the purpose of pre-trial consultation?

The purpose of pre-trial consultation is to give the rape survivor as much information as possible about the trial process. This is so that she has a clear understanding of what to expect when she goes to court, the role that she is expected to play and how she can prepare herself for the trial.

The consultation should:

- inform the survivor of her rights and responsibilities regarding the trial
- give the survivor a chance to raise any questions or concerns that she has about the upcoming court case.

The pre-trial consultation process is there to support the survivor and to provide information that will help her to make informed decisions. All those involved should understand this and be committed to it. It is not about persuading or convincing the survivor to choose certain options, or making decisions for her.



NB: The term pre-trial consultation is sometimes misunderstood to mean 'coaching' the survivor – helping her to come up with a version of her story that will 'sound good' in court. This is absolutely not the case. The advisor and survivor must not discuss the merits of the case. In other words, the survivor must not tell the advisor what happened in relation to the sexual offence committed against her. The advisor must never tell or 'coach' the survivor what to say in court, not even if the survivor asks for this.

It is very important that the survivor understands that she must tell the truth at all times, according to her own knowledge and understanding of what happened. Everything that she tells the court must be in her own words. If the court finds out or believes that the survivor was told what to say by her counsellor or pre-trial advisor, the court might reject her evidence, and this could lead to the accused being found not guilty. This will not only mean a negative outcome for the case, but it might even lead to prosecutors refusing to work with the advisor's organisation again.

Planning and preparing for pre-trial consultation

Who should do the pre-trial consultation?

The person who does the pre-trial consultation should not be the survivor's counsellor, although in smaller towns and rural districts this might be unavoidable. It is preferable for the counsellor to remain separate and to focus purely on the survivor's feelings and needs, as many of the issues raised can be difficult and painful. This leaves the person doing the pre-trial consultation, the advisor, free to focus on giving the survivor the information that she needs.

Although the person doing pre-trial consultation does not need formal legal qualifications, the information she needs to convey is quite technical, and survivors sometimes struggle to understand it all. So it's vital that the advisor is familiar with this information and has a good grasp of it.

We make suggestions on how the advisor can equip herself for pre-trial consultation on p. 6.

What is the role of the counsellor in pre-trial consultation?

The counsellor should:

- offer emotional and counselling support to the survivor throughout the process
- help the survivor's family to get emotional support throughout the process
- help the survivor to get information and documents about the case from the police and the court
- try to attend the trial with the survivor to offer support.

Some survivors feel strong enough to deal with the police and court personnel themselves, but many others feel very intimidated by the system. In these cases, it is better for an informed counsellor to act as liaison.

Planning and preparing for pre-trial consultation

When should pre-trial consultation take place?

Any survivor who chooses to report being raped to the police experiences two processes at the same time: the criminal justice process and her own therapeutic process. To show how these two separate processes influence one another, we have set out a broad outline of what happens in the criminal justice process, and how this relates to the therapeutic process, in the diagram on p. 11.

The therapeutic process can be divided into three broad phases: the initial crisis phase, followed by the outward adjustment phase, and finally the phase of integration and resolution. The stress of the trial can disrupt the survivor's progress through these phases.

This is partly because there is usually a long waiting period between the arrest of the accused and the court case itself. The police usually contact the survivor quite close to the trial date to let her know that she must appear in court to testify. Every witness has to receive a subpoena to appear in court. By law, this must happen a minimum of 14 days before the trial, and the witness must sign a form to say that she received the subpoena. This is called a return of service, and is taken back to the court. (The only other way you can be notified to appear in court is if you appear in court and there is a postpone-

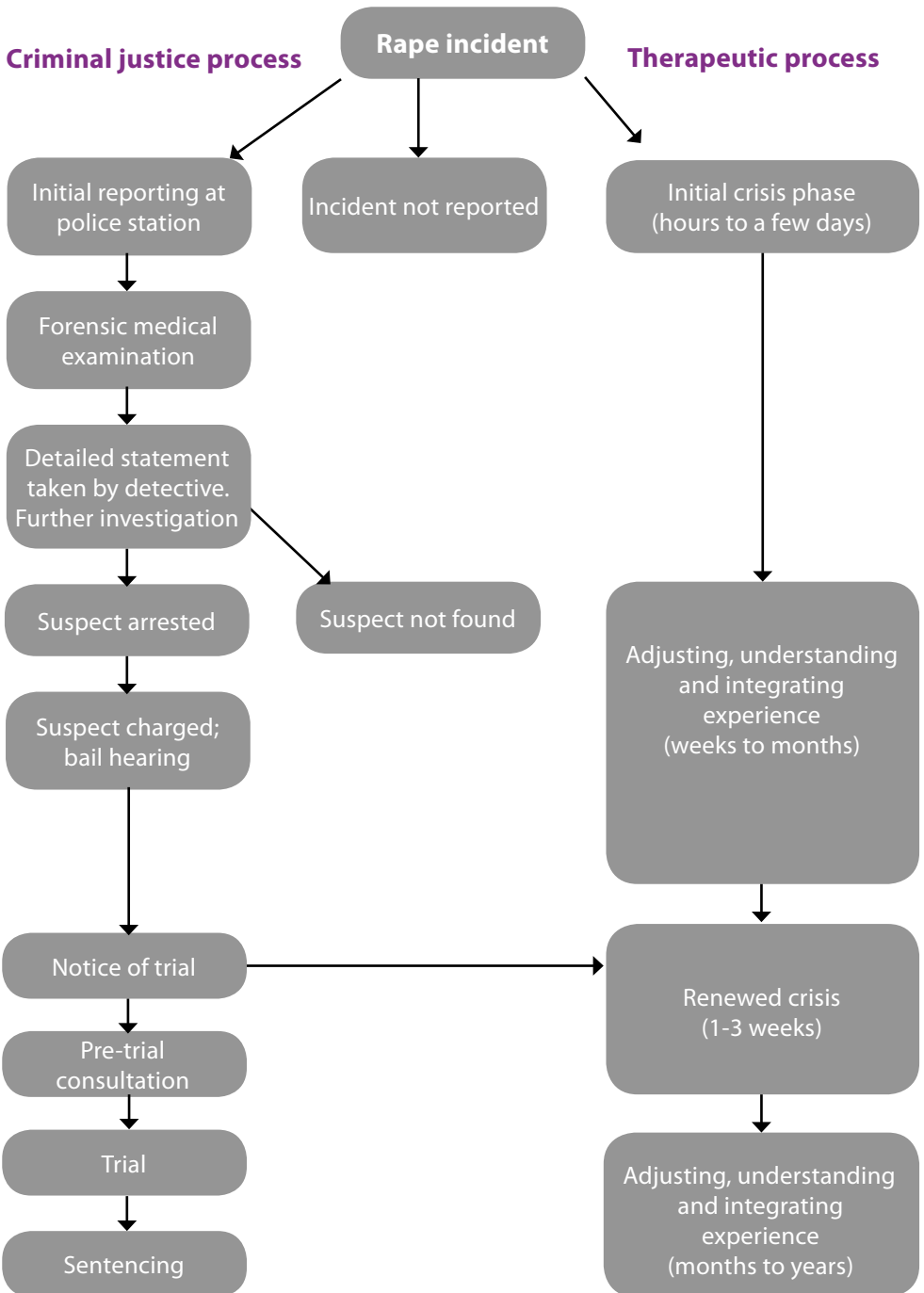
ment, and you are instructed to return on a certain date. Then the need for a subpoena falls away.) You will see on the diagram that the pre-trial consultation should happen soon before the trial.

If possible, the pre-trial consultation should start two weeks before the trial, and should consist of at least two sessions. This will give the advisor and the counsellor time to sort out any problems that may crop up.

Although we describe two sessions of pre-trial consultation (the ideal) in the following pages, we also give guidelines for cases where there is only time for one session (see p. 16.)



NB: The pre-trial consultation usually comes at a time when the survivor has dealt with many aspects of her experience and is trying to move on with her life (she has reached the integration and resolution phase). The trial and the pre-trial consultation can cause the survivor to go back to a state of crisis. The pre-trial consultation will remind her of the details of her traumatic experience, and she may even relive aspects of the rape, including re-experiencing her early feelings of loss, fear and helplessness. This is another reason why it is essential that the counsellor be present during the pre-trial consultation sessions.



Planning and preparing for pre-trial consultation

What needs to be done before the pre-trial consultation sessions?

1. The survivor should ask for a copy of her statement from the police. We strongly recommend that the advisor does not read the statement. If she does, she might suggest what the survivor could say in court even if she doesn't mean to, or it might create the impression that the advisor is coaching the survivor on what evidence she should present in court.

Hint: The police are not legally required to give the survivor a copy of her statement. Look at p. 26 to see what to do if they refuse.

Hint: When the police tell the survivor to come to court, they should give her this information in the form of a written document called a subpoena.



2. Find out the date of the trial and which court it will be at.

3. Once the survivor knows the date and location of the trial, she can ring the court to find out the name of her prosecutor.

4. We recommend that organisations develop a standard document where all the information about the court case can be recorded. Look at the example on p. 67-70.

Note to the counsellor

The counsellor must have a session to explore the survivor's expectations of the court case. Find out what she hopes to achieve from the trial, and if she has fears and anxieties about it. Discuss what she stands to gain and what she stands to lose from the process. The survivor needs to think about how she will cope with the potential challenges and difficulties that can accompany the trial.

Getting information from the police:

If you do not have the police CAS (case) number:

- Find out at which police station the incident was reported.
- It might help if you have the full name of the accused, or if you have the date when the matter was reported to the police. This will help the police to track down the case in the computer system.

Once you have the CAS number, you can find out who the investigating officer (IO) is. The IO will have information about the court dates, the statement and any other information about the case that you need.

Planning and preparing for pre-trial consultation

Getting information from the court:

Most rape cases are heard at the regional magistrate's court. When phoning the court, first make sure that you are phoning the right court. You will also need the name and surname of the accused and the date of the trial.


Ask to speak to the regional court control prosecutor. This person deals with administration and should be able to tell you who will actually be prosecuting the case. Once you know who the prosecutor of the case will be, you can make contact with her or him to discuss specific issues about the case.

Some courts don't know until a few days before the trial who the court prosecutor will be. If this is the case, ask to speak to the senior state prosecutor, who is responsible for all of the prosecutors; she or he will be able to help you.

What happens during the survivor's consultation with the prosecutor?

It is important to arrange a consultation between the survivor and the prosecutor before the trial, so that the survivor can discuss her statement in detail with the prosecutor. If there are any mistakes in her statement, she must point these out to the prosecutor before going into

court. Prosecutors usually make arrangements to consult with the survivor a few days before the trial. Unfortunately, this is not always possible for the prosecutor. It is therefore helpful if the counsellor (or the survivor) telephones the court in the week before the trial to make an appointment for this consultation. The consultation sometimes only takes place early in the morning on the day of the trial. This is not ideal, but it might be the only option available.

Hint: During the consultation, the survivor should ask the prosecutor to show her the courtroom, and to explain where she and everyone else will be sitting. This is so that she can get an idea of what the room looks like and a sense of the atmosphere. 

What to do if the prosecutor refuses to consult with the survivor

The National Directives (professional rules) for prosecutors instruct them to consult with sexual offence survivors in all cases. This means that if a prosecutor refuses to meet with the survivor for consultation, the advisor or counsellor should report this immediately to the senior prosecutor at the court.

We give more information about lodging complaints against prosecutors on p. 72.

Planning and preparing for pre-trial consultation

What happens during the two pre-trial consultation sessions?

The first session takes about two hours, and the second about one hour. The exact length varies according to the specific needs of the survivor. Both sessions are divided into three sections: introduction, main content and closure of the session.

SESSION 1

The first session deals with the process of the trial, the layout of a courtroom, and the roles and responsibilities of all who will be present at the trial. During the first session, the advisor also explains how important it is that the survivor points out and explains any inaccuracies in the statement to the prosecutor. They also discuss how to make sure that the prosecutor is aware of all possible witnesses and evidence in the case.

Introduction

1. Explain what the pre-trial consultation process is about, and describe a broad outline of the sessions.
2. Explain the different roles of the advisor and of the counsellor during pre-trial consultation, and make sure the survivor understands these.
3. Ensure that you have all the necessary information about the case, and check this information

with the survivor.

4. Briefly explore the survivor's expectations of the court case, as already discussed with her counsellor.
5. Find out if the survivor has any questions or concerns about her case.

The main content of the session

1. Find out if she has ever been to court before, so that you do not explain things to her that she already knows.
2. Using a diagram of the court, discuss the roles of the different people who will be present in the court (see p. 28 to 32).
3. Go through what the survivor can expect when she arrives at court before the trial starts (see p. 33 to 34).
4. Go through the process of the trial (see p. 35 to 51).
5. Explain the potential outcomes of the trial (see p. 47 to 38).
6. Explain the process of the sentencing hearing (see p. 50 to 51).
7. Discuss the likelihood of the court date being postponed (see p. 53 to 55).

Planning and preparing for pre-trial consultation

Closing the session off

1. Make sure that the survivor leaves with clear guidelines about what she must do. It's a good idea to do this in writing – look at the example on p. 65 to 66.

These guidelines could include:

- the need to read through her statement before meeting with the prosecutor – if she has been able to get a copy – and the importance of telling the prosecutor if there are mistakes in the statement, or if it is incomplete
- writing a victim impact statement
- the need to arrange a consultation with the prosecutor.

2. Ensure that the survivor and counsellor are clear about who will be responsible for these different tasks.

3. Confirm the date of the next pre-trial consultation session.

SESSION 2

The second session aims to build the survivor's confidence in her ability to testify in court. It's best if the second session takes place after the consultation with the prosecutor, if possible.

Introduction to the session

1. Discuss whether the follow-up tasks have been done.

2. Ask the survivor if she has any specific questions or concerns she wants to talk about.

The main content of the session

1. Recap the process of giving evidence, including cross-examination, and explain the reasons for the different questions the survivor will be asked (see p. 39).

2. Explain different defence tactics that might be used to create reasonable doubt (see p. 41 to 43).

3. This session should help the survivor to understand how commonly believed myths and misconceptions about rape generally influence the questions the defence will ask. It should also explore ways of coping with the emotional stress of cross-examination.

4. Talk about the survivor's rights and responsibilities while testifying.



NB: Don't prepare the survivor's evidence or tell her what information to give to the court during this session. Take care not to discuss the actual evidence she will present. Rather give general examples, not ones that specifically apply to her case.

Planning and preparing

for pre-trial consultation

Closing the session off

1. Ask if the survivor has any further questions about the process.
2. Make sure that the counsellor and survivor know what to do next, and that this is noted on the court checklist (look at the example on p. 65 to 66).
3. Ask the survivor or the counsellor to let you know what takes place in court.

Hint: We recommend that the survivor and her counsellor have a further counselling session at this stage to talk about the emotional impact of the pre-trial consultation sessions.



What to do if you only have time for one session

If there is not enough time for both pre-trial consultation sessions, extend the length of the first session to discuss some of the issues contained in the second session. It is important to cover all the information listed here for the first session. Make sure the survivor has a clear idea of what to expect in court.



Key information
for advisors and counsellors

Key information

for advisors and counsellors

Background to the South African criminal justice system

This section contains background information with which both the pre-trial advisor and the counsellor need to be familiar.

The criminal justice system is set up to punish criminals and deter crime. The CJS includes the South African Police Service (uniformed police and detectives), the health professionals who perform the forensic medical examination (doctors), the National Prosecuting Authority (prosecutors), the Department of Justice and Constitutional Development (courts, magistrates and administration of the courts) and the Department of Correctional Services (correctional facilities).

The Bill of Rights in the South African Constitution says that everybody has the right to be free from violence, as well as the right to have their dignity respected and protected. These rights are obviously important to survivors. However, the Bill of Rights also makes provision for the rights of people accused of crimes, to make sure that innocent people do not get punished for crimes they have not committed. This is especially important if we think of South Africa's history under apartheid of detaining people without trial and punishing them without having given them a proper chance to prove their innocence. These different sections of the Bill of Rights sometimes work against each other, and this contributes to the feeling some people have that criminals are

'protected' by the constitution. Although huge advances have been made in recent years, the CJS, like any other system, is influenced by the myths about sexual violence found in our society, including the tendency to blame the survivor for the actions of the rapist. Many people who have written about rape admit that the police and the courts prefer to try 'perfect cases', in which there are lots of credible witnesses, the rapist is clearly identifiable (and is preferably a hardened criminal with a record), a weapon or extreme force was used during the rape, and there is 'good' medical evidence (injuries, semen, skin under the survivor's nails). There is also a picture of the 'ideal' survivor. According to Helen Moffett, '[It is unfortunate that] in order to be seen and treated as a credible witness by the criminal justice system, any woman who lays a charge of rape must be articulate; preferably educated; if not virginal, then clearly morally beyond reproach; and possessed of impeccable mental health.' (**Hannah Britton, Jennifer Fish, Sheila Meintjes (eds): *Women's Activism in South Africa*, University of KwaZulu-Natal Press, 2008.**)

If you think of this as a kind of 'ideal' survivor or case, one that is easy to try in the CJS, you will find that most of the cases you see in

court are far from 'ideal'. However, a prosecutor will be more than satisfied if a survivor can give strong evidence, no matter how far from the ideal her case might be. Strong evidence means that in her testimony, a rape survivor:

- tells a clear story that is easy to understand
- stays consistent
- is detailed and accurate
- stands up to close questioning
- shows the impact of the rape on her life.

Like many other countries around the world, in South Africa the courts work on the assumption that someone accused of a crime is innocent until proven guilty. This means that, like any other accused in a trial, the rapist is assumed by the court to be innocent ('presumption of innocence'). It is the job of the State (represented by the prosecutor) to prove that he is guilty (the 'burden of proof' lies with the State, in other words).

Because of the serious consequences of a criminal trial, this proof needs to meet a very high standard before someone can be found guilty – there can be no room for doubt or question marks. This is what we mean when we say the State has to prove its case 'beyond reasonable doubt'. This is because the law wants

to protect innocent people from being wrongly punished for crimes they did not commit. The rule of reasonable doubt means that there is no guarantee that the accused will be found guilty, even if the survivor knows he is guilty.

In rape and other sexual offence cases, it is often frightening for the survivor to testify in the court environment and in front of the accused, as well as to be cross-examined by the defence lawyer. Testifying always means remembering and reliving the rape experience. These factors are among the many that make the process traumatic for survivors.

Members of the CJS tend to carry heavy workloads, and are often unaware of the needs of the complainants in their cases. One result is that they often can't give the case as much attention as it should get, or show the survivor how important she is and how much they value her participation. Rape survivors generally get little information about the processes and procedures of the CJS, and not enough feedback regarding the status of their case.

Key information

for advisors and counsellors

Batho Pele principles of service delivery

Although some of the above may sound discouraging, the good news is that a few years ago, the government committed itself to certain service delivery principles under the banner of Batho Pele (which means 'people first'). These principles acknowledge that the organs of the State and their employees work for the people, and should treat them with dignity and respect. This means that the survivor can insist on being treated humanely and decently by members of the CJS.

Survivors' rights

According to the Service Charter for Victims of Crime, the survivor – like all victims of crime – has the following rights when in contact with the Criminal Justice System:

- **The right to be treated with fairness and with respect for dignity and privacy:** This includes being attended to promptly and kindly, and applies to the police, prosecutors and court officials.
- **The right to offer information:** This means that the survivor has the right to be heard in connection with the investigation, prosecution and parole hearing. The survivor may also add to her statement and, where appropriate, may give

evidence during sentencing of the impact the crime has had on her.

- **The right to receive information:**

This includes information on the survivor's rights, relevant services, the survivor's role in the case, the status of the case and the reasons why a case may not be prosecuted. The survivor has the right to receive explanations in her mother tongue. The survivor may also request documents that she is entitled to, ask to be notified of proceedings that she may attend, and request that the prosecutor notify the survivor's employer if she has to be absent from work to attend proceedings.

- **The right to protection:** The survivor has the right to be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse. If the survivor is a witness, she must report any such threats to the police or senior state prosecutor. The survivor may also request that she be informed if the accused has escaped or been transferred from prison.

- **The right to assistance:** The survivor has the right, where relevant, to access to social, health, counselling and legal services. The police must help the survivor with these procedures.

Key information

for advisors and counsellors

• **The right to compensation:**

The survivor has the right to monetary compensation for loss of or damage to property suffered as a result of a crime. The survivor can ask to be present at court on the date of sentencing of the accused and ask the prosecutor to apply to the court for a compensation order.

If these rights have not been upheld, the survivor may lay a complaint with the particular government department or service provider, or the following bodies:

- The Office of the Public Protector
- The South African Human Rights Commission
- The Commission on Gender Equality
- The Independent Complaints Directorate
- Metropolitan Police Offices
- The Health Professions Council of South Africa
- A lawyer of her choice

Note that if the survivor chooses to approach a lawyer, she will have to pay the lawyer, whereas she may approach any of the other bodies listed above free of charge.

Expectations of the criminal justice system

People who report sexual offences to the police do so for many different reasons, and have different expectations of the system.

These include:

• **Justice:** The expectation that the seriousness of the crime committed by the rapist and the pain and damage that he caused will be formally recognised by the CJS.

• **Punishment of the rapist:** Achieving justice also involves punishing the rapist. Many survivors expect that this punishment will include imprisonment for a long period of time, related to the serious impact of sexual offences. Some survivors feel they need the rapist to 'pay' for what he has done; others just want him to realise and feel some of the pain that he caused.

• **Protection:** There is a crucial need for protection from the perpetrator, and the CJS offers the only official means of getting this in South Africa.

• **Being believed:** Because the survivor knows exactly what the rapist did to her, she will often assume that the court will understand this. It is sometimes a shock to the survivor when this reality is questioned and challenged during

Key information

for advisors and counsellors

the trial. Many survivors expect the prosecutor and the magistrate to take them seriously and to protect them from the accused and his attorney during the trial process.

• **Staying informed:** Survivors often expect officials to keep them informed about the progress of their cases and to tell them what to expect at every step in the process. In many cases this does not happen, which is one of the main reasons Rape Crisis has put pre-trial consultation services in place.

• **Closure:** Some survivors expect a sense of closure at the end of the court case, and believe that all of the negative and painful emotions that they have been experiencing will disappear once the trial is over.

• **Efficiency and coordination:** Survivors often expect a speedy process and a quick resolution – an impression created by courtroom dramas on television. These trials are very different to the ones that take place in South African courts. They also expect that the different officials involved in the case will communicate with one another and know what the others are doing about the case. In reality, there can sometimes be a lack of coordination between different role-players.

• **Complaints:** When things do go wrong, survivors may believe they will be able to complain to someone about it, that their complaint will be dealt with by a higher authority and that officials will be held accountable for poor performance. This does not always happen smoothly.

The reality is often very different to the expectations of the survivor. This is why we recommend that the survivor and her counsellor explore her expectations of the court case and also talk about how to deal with unmet expectations. Some survivors have low expectations, or don't know what to expect. The value of the kindness and respect the counsellor or advisor offers them is enormous, because it gives survivors the courage and strength they need for the important role they have to play in bringing rapists to justice.

Key information

for advisors and counsellors

The role of the rape survivor in the case

The law says that when a crime is committed, it is a very serious matter; it harms not only the victim of that crime, but also our whole society (the State). For this reason, the State will open a case against the person accused of the crime. This means that a criminal case is between the State and the accused, and not between the survivor and the accused. The State (police and prosecutors) can and often do make decisions about the case without considering the needs and wishes of the complainant.

The rape survivor is most often viewed as the chief witness in the State's case; she is not a party in the trial. This has an effect on how much say she has in what happens with the case, and how much information about the case she can get. This also means that, unlike the accused, she will not have a lawyer of her own to represent her.

It is very important to recognise, and to help the survivor recognise, that in the process of proving the guilt of the perpetrator, she is often the most powerful resource the prosecutor has. She drives the process through her courage in coming forward and pursuing a case. Even though she may be made to feel insignificant during the court proceedings, or as if her feelings don't matter, it is her evidence that can give the State the opportunity to find the accused guilty and to punish him.

Key information

for advisors and counsellors

The pros and cons of the State prosecution system

Positive

The State prosecution system recognises the seriousness of the offence.

Negative

Some prosecutors are overworked and are unable to give each case the attention it deserves. Others do not understand the seriousness of rape.

Note to the counsellor

The complainant does not get to choose who will prosecute her case. This means that the prosecutor may not understand the issues that surround sexual violence, and may even believe some of the misconceptions and myths about the causes and effects of rape. This can add to the burden on the survivor. She should be prepared emotionally for this possibility so that the stress and potential trauma can be minimised.

Positive

The complainant is not expected to pay the costs of hiring a legal representative.

Negative

The complainant is not an official party to the case. Instead, she is a State witness. This means that the accused and his attorney and the State prosecutor have access to more information about the case and more decision-making power than she does.

Note to the counsellor

The fact that the survivor is considered only a witness might give her a sense of helplessness and being unable to control events. It's important that she be prepared for these feelings, and that the importance of her role is recognised and explained to her. Remind her that it is her participation and evidence that give the State the opportunity to prove the accused guilty. The survivor's sense that she is unable to control decisions about something that is deeply personal to her might feel similar to the lack of control she experienced during the rape. In addition, the attitudes and behaviour of the CJS personnel she meets might reveal that they believe common myths about rape (that the survivor is in some ways to blame, and so on). These are major causes of what is called 'secondary victimisation' of rape survivors by the CJS .

Key information

for advisors and counsellors

Positive

Prosecutors at specialised sexual offence courts should have specific training and experience in the area of sexual offences. See p. 58 to 59 for more information.

Notes to the counsellor for the counselling session before the pre-trial consultation

- The pre-trial consultation process, as well as providing the survivor with information, is helpful in pointing out the need to take control by telling her story in court, even if it is only for part of the process.
- It is always important to affirm the survivor's strengths, to stress the value of her role and to remind her how much she has already achieved and endured.
- Help her to set achievable goals separate from the goals of the trial. Help her to prepare for and anticipate what she will realistically face as she goes through the CJS.
- Prepare the survivor for the possibility that she might encounter insensitive or uninformed attitudes during the court process.
- Strongly and clearly state that the rapist is to blame, not the survivor. Even if she questions her actions, remind her that the rapist chose to rape her, against her will.
- Make her aware of the fact that she will have to endure the presence of the rapist in the courtroom. This may be the most frightening thing of all for her, and you can play a vital role in helping her think of ways in which she can cope with her fear.

Key information

for advisors and counsellors

The survivor's statement to the police

The statement is usually taken down at a time when the survivor is in a state of shock and confusion. It is written down in English or Afrikaans, which may not be the survivor's first language. In some cases, the police official who takes the statement may write her or his own interpretation of what she or he hears the survivor saying. The importance of the statement is seldom explained to the survivor, and emotional exhaustion, distress and embarrassment may result in information being left out of the statement. Sometimes the police official does not ask the right questions, and if the survivor does not know that certain information is important, she may fail to mention it.

These factors influence the accuracy of the statement. If the statement is not accurate or if it is incomplete, this must be brought to the attention of and discussed with the prosecutor before the trial. It is important that the statement be a true and accurate reflection of what the survivor experienced. If there are gaps in the initial statement, it is possible for the survivor to make a second supplementary statement. She must arrange to do this with the prosecutor or the detective investigating her case.

Because of possible difficulties in communicating with the prosecutor, it is a good idea for the survivor to write down any mistakes or omissions in the statement and give this to the prosecutor at their consultation. If there is any other information, such as witnesses to some of what happened, or letters or threats from the accused that the police do not know about, this information must also be given to the prosecutor so that he or she can decide whether to use it or not.

A lot of time passes between the date when the survivor first reports the rape and gives her statement to the police, and the start of the trial. It is common for her to forget aspects of the experience during this period. This is why it is important that the survivor asks the police for a copy of her initial statement. If they do not want to give it to her, she should use the Batho Pele principles of service delivery (see p. 20) to try to get a copy of her statement. Reading through it before the trial will help to remind the survivor of these details, which she will need to be clear about for the trial.

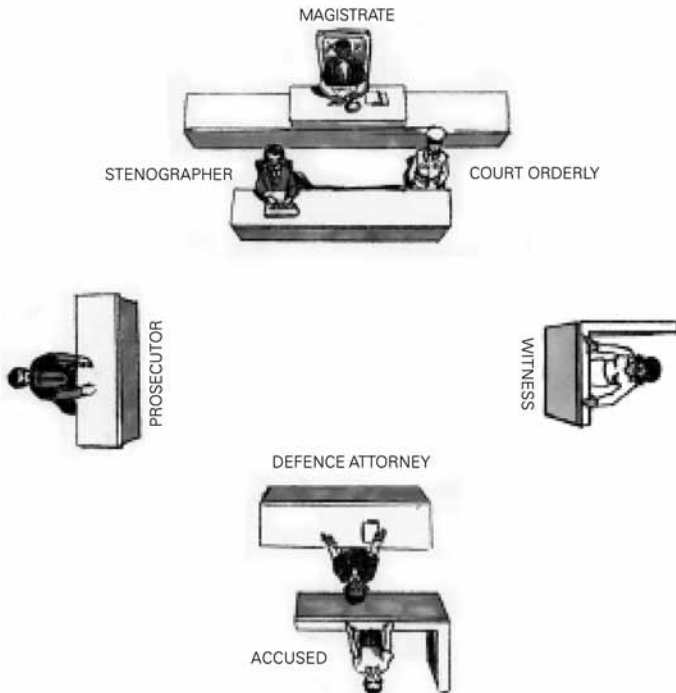


Key information
for survivors

Key information for survivors

The role-players in court

This diagram illustrates what a courtroom looks like. It also shows the role-players in a criminal trial.



Key information

for survivors

The magistrate

The magistrate is the presiding officer in the case. She or he will listen to all of the evidence from both sides, and will then decide if there is enough proof to find the accused guilty. The magistrate will also decide on the punishment of the offender if he is found guilty.

If the case goes to the High Court, instead of a regional court, the person who makes these decisions is called a judge.

The magistrate knows nothing about the case before the trial starts, other than the charge and the name/s of the accused. She or he has been trained to stay impartial throughout the case, which means that they should not choose sides until all of the evidence has been presented to the court. Because of their need to be impartial, most magistrates will try to keep their faces expressionless while listening to evidence (even if this is distressing or shocking). They only ask questions when something needs to be made clearer. When faced with a magistrate who keeps a blank face while the survivor gives her evidence or is cross-examined, the survivor may fear that the magistrate does not believe what she is saying. This is not necessarily true.

Note to the counsellor

Magistrates have an enormous amount of responsibility and power over people's lives. Yet some of them share the common misconceptions about rape, and some have never really had a chance to challenge these stereotypes. There are currently training programmes for magistrates to help them understand issues of diversity, including gender bias. Help the survivor to understand that as much power as the magistrate has, she or he may not understand all the issues involved.

The prosecutor

The survivor will not be able to get her own lawyer in court, because the State appoints its own legal representative, who is called the public prosecutor or state prosecutor. It is the task of the prosecutor to prove that the accused committed the offence. The prosecutor will be on the survivor's side in court.

Look at p. 72, where we explain how to lay a complaint against a prosecutor if you believe she or he did not handle the case properly.

Key information

for survivors

The defence lawyer

In most cases, the accused will hire a lawyer to represent him. If the accused cannot afford to pay the legal costs, a legal aid lawyer will be appointed. An accused can also decide not to be represented by a lawyer.

The job of the defence lawyer is to ensure that their client is not found guilty. If the accused is found guilty, the defence lawyer will try to ensure that he gets the lowest possible sentence. To do this job, the lawyer will support and promote the accused's version of events, and the story that he tells.


The accused

The accused will be in the courtroom throughout the trial. This is often one of the most frightening aspects of the trial for the survivor. It's helpful if she remembers that, because of her courage in reporting the crime, the accused is facing the consequences of his actions; and if the court finds him guilty, he might go to jail.

But this means that the accused will do whatever is necessary to ensure that he is not found guilty. He might look confident and in control, and this might make the survivor feel that she will not succeed even before the trial

starts. If the accused shows no fear or does not seem worried, the survivor might get so anxious that this affects the quality of her testimony to the court.

It is very important to understand that even if the accused seems confident or relaxed, he is almost certainly nervous and afraid of what might happen during the trial.

Hint: When the survivor is giving evidence, she may find it useful to turn away from the accused and face towards the magistrate. If the accused tries in any way to distract her while she is giving her evidence, she should make the court aware of this and ask that he be made to stop. 

Note to the counsellor

Because sexual offences involve both physical and psychological attack, seeing the accused in court can be a very upsetting and emotionally unsafe experience for the survivor.

It is often useful to point out to her what the perpetrator stands to lose – his freedom, his employment, his community of family and friends. This shows her that he too is vulnerable and might be feeling

Key information

for survivors

afraid. This provides some balance and reminds the survivor that she does have some control over the situation. It also explains why he is desperate to defend himself, and that he will be fighting very hard not to lose the case.

Although the perpetrator is in court as a result of his crime, he is also there because the survivor has taken a stand by reporting him and looking for justice. In this way, she is 'taking her power back'.

Witnesses

The survivor is often the main witness in the State's case. She will sit in the witness box opposite the prosecutor, and she will be able to see the accused. In rare cases, the survivor can give her testimony in a closed room via CCTV (closed circuit television), which means she does not have to see the accused. However, most survivors will unfortunately have to give their testimony in the courtroom.

Other witnesses usually include the first-report witness. This is the first person that the rape survivor told about the rape. The Investigating Officer from the South African Police Service (SAPS) will be called as a witness to describe evidence that corroborates or matches the evidence given by the survivor, and the doctor

or nurse that completed the forensic medical examination will be called as an expert witness to tell the court about the medical findings that support the survivor's evidence. Other witnesses may be called, for example, to speak about DNA evidence.

Look at p. 58 to 60, where we explain the protective measures for adult and child witnesses.

The court orderly

It is a requirement that a court can only hear cases if a court orderly is present. The court orderly will be a member of the South African Police Service. It is the duty of the court orderly to provide security to the court.

If your client feels afraid for her physical safety in the courtroom, remind her that there is a police official present, and that their job is to protect her and keep the environment secure.

The stenographer

It is important that everything that is said in court be recorded. This is so that if there are any questions about the fairness of the case at a later stage, the court recording can be checked. The person who is responsible for this is called the stenographer. This person will make sure that the equipment is recording throughout the trial.

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for survivors

There will be a microphone at the witness box. This microphone is not there to make the witness's voice louder – it ensures that everything that is said in court is recorded.

Members of the public

There are often members of the public in the courtroom. They might include witnesses in other trials waiting for their cases, or the friends and supporters of the accused. The law says that while the survivor in a sexual offence case is giving her evidence, these people can be asked to leave the courtroom. This is called having her evidence heard 'in camera'. This rather confusing term just means that the survivor gives her evidence in a closed court – 'camera' is a Latin word meaning a closed room.

Many magistrates will automatically decide that the survivor's evidence should be heard in camera. However, it is a good idea for the survivor (or her counsellor) to remind the prosecutor at the consultation to ask for this. This information should be included in the checklist for the survivor – see p. 65 to 66 for an example of this. However, this legal rule means that only members of the public must leave. All the other role-players, including the accused, will stay in the courtroom.

The survivor can ask if one or two people who are supporting her can stay in the courtroom, such as a counsellor or family member. The person whom she chooses cannot be a witness in the case who has not yet testified. A counsellor who is also going to testify in the case may not be present to support the survivor. This is because witnesses may not hear the testimony of others in the case until they have given their own account of what happened.

Note to the counsellor

If the survivor's supporters cause any disturbance (such as making a noise) during the trial, they will be asked to leave the court, and the survivor will have to continue without their support. It can be difficult to watch someone you care about being questioned and cross-questioned in the way that often happens in court. Under no circumstances should the supporters make a noise, call out or move around in court, since this is not in the best interest of the survivor.

Key information

for survivors

At court before the trial starts

It is important to prepare the survivor for what will happen at the court before the trial starts. In the following section we explain this process and give some practical hints.

Will the survivor have to see the accused outside the courtroom?

It is common for survivors to arrive at court on the day of the trial only to see the accused and/or his family and friends outside the courtroom. Sometimes the accused or his friends try to intimidate the survivor. At the very least, this can be upsetting and distracting to the survivor. It is crucial to avoid this contact if at all possible.

Speak to the prosecutor (or the court social worker) to make sure that the survivor arrives as early as possible, and that a separate waiting area is available for her until the trial starts. Many courts have a special waiting room for survivors in sexual offence cases. If the court does not have a separate waiting room, the survivor can ask if there is an office where she can wait. This must be arranged with the prosecutor before the day of the trial. Make sure the survivor knows where she must go, and to whom she must report when she arrives at court.



NB: Wherever the survivor waits, make certain that the prosecutor knows where to find her.

At most courts, witnesses are asked to leave the building during the lunch break. This can mean that the survivor has no choice but to wait outside the building with the accused. To avoid this, she can ask the prosecutor to arrange for her (and the people who are there to support her) to wait inside the court building during the lunch break.

See the court checklist on p. 65 to 66.

At what time will the trial start?

The survivor and other witnesses will be sent a notice, or subpoena, which tells them what time to appear in court. This is usually 9am, although the trial may only start much later. The survivor must report to the prosecutor as soon as she arrives, and must not leave without the permission of the prosecutor. Witnesses often have to wait for a long time before the trial starts or before they are called to testify.

Note to the counsellor

This waiting can be made easier if the survivor takes something with her to help pass the time. This can be a book or magazine to read, knitting, or she can take a notebook and pen to write down her feelings about being at court.

Key information

for survivors

Key info

(This is also a useful activity before and after the day of the trial, because it will help her to deal with the natural anxiety she feels.) She can also ask a friend to go with her, which will help to distract her if she feels anxious. Remind her to take small comforts, such as chewing gum or sweets, cigarettes, a flask of tea or change for a vending machine. She should also take a packed lunch, even if she is struggling to eat because of nerves. It is important that she keep up her energy levels by drinking liquids and getting sugar into her body. Toilets in court buildings seldom have toilet paper, so taking toilet paper or tissues is a good idea.

Will the survivor be able to talk to the prosecutor before court starts?


The survivor must let the prosecutor know that she has arrived at court. (If the prosecutor hasn't met with the survivor yet, it becomes even more important for the survivor to arrive early and immediately find the prosecutor.)

Look at p. 13, where we discuss the consultation with the prosecutor.

It may be difficult to find the prosecutor. This is because prosecutors are usually managing

more than one case, and so their attention is often divided. It may be intimidating to find the prosecutor rushing around organising other cases, and this can be upsetting when the survivor needs to get information about what is happening with her particular case.

If the counsellor or a supportive friend or family member is accompanying the survivor to court, it may be better for this person to take responsibility for tracking down and talking to the prosecutor.

Hint: It sometimes takes persistence to get clear information from the prosecutor.  Very few survivors understand the court process, and they may get confusing information or hasty explanations that don't make sense to them. If the case is postponed or struck from the roll, ask the prosecutor to write down the reasons why. If you run into any problems, you may want to invoke the Batho Pele principles, in which state officials are committed to 'people first' service delivery.

Key information

for survivors

The trial

The purpose of the trial is for the State (represented by the prosecutor) to prove that the accused is guilty, by presenting evidence to the court about what happened. The defence will try to show that the accused is not guilty by presenting evidence that he did not commit the crime, or by making the magistrate question or doubt the evidence that the State presents. The magistrate will listen to all of the evidence presented by both the State and the defence. She or he will then make a decision as to whether the accused is guilty or not guilty according to the law.

The trial usually consists of the following steps, each of which is discussed in detail in the following pages.

1. The accused's plea

2. The State's case

- Language
- Giving evidence
- Important things for the survivor to remember when giving evidence
- The rest of the State's case

3. The defence case

4. The magistrate's verdict

- Finding of not guilty
- Finding of guilty and decision about sentence
- Mitigating factors
- Aggravating factors

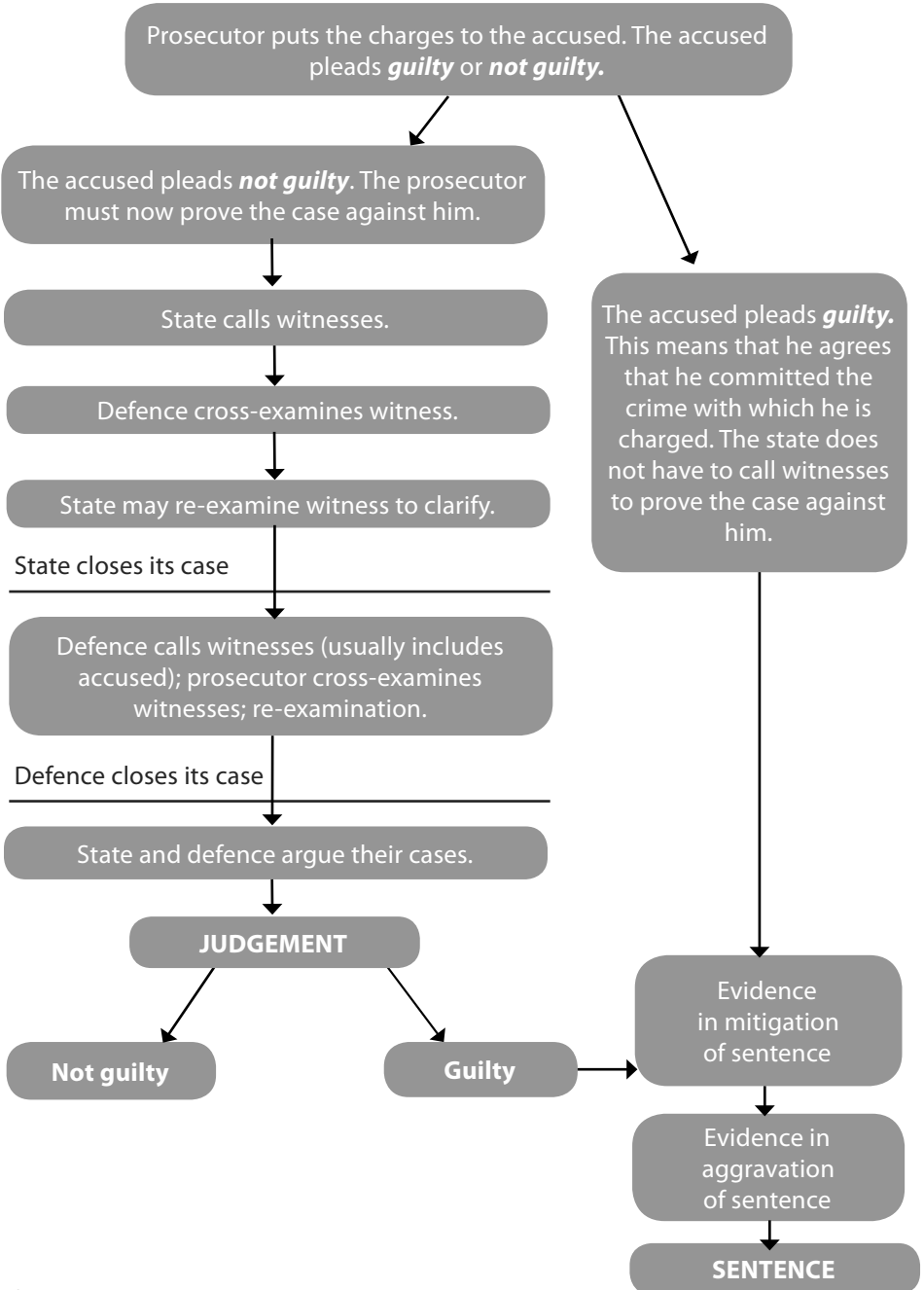
5. Victim impact statement

6. Sentencing

- Minimum sentencing legislation

7. Parole

Criminal Trial Process



Key information

for survivors

The trial

1. The accused's plea

At the start of the trial, the accused will be asked if he pleads guilty or not guilty to the charges.

If the accused pleads guilty, the court will not have to listen to evidence. It will move directly to deciding what the accused's punishment should be.

If the accused pleads not guilty, the prosecutor must present evidence to prove to the court that the accused is guilty. In other words, the trial will go ahead as we describe below. Most people accused of a sexual offence plead not guilty.

2. The State's case

The State will put its case to the court first. Generally, the survivor is the first witness to be called.

Note to the counsellor

The court environment is usually unfamiliar to the survivor. Even if members of the public are asked to leave the courtroom while she testifies, there will still be some people present who are familiar with the court environment and at home in it (the magistrate, the prosecutor and the defence lawyer). It can be intimidating for the survivor to walk in and be faced

with all of these people, as well as the accused. The accused might try to intimidate her through body language or facial expressions at this time, and even his defence lawyer might seem hostile. Some may use tactics to try and make the survivor feel uncomfortable, because it will help the defence to win their case if she feels scared or defeated before they have even begun, but most defence attorneys will simply go about the business of defending their client by using the law.

The survivor may feel disempowered by the social status of the defence lawyer. She needs to understand how important she is to the trial – it cannot go ahead without her – and that she has a right to be heard and to assert herself through the trial process.

It might help to tell the survivor that the accused is being forced to face the consequences of his actions simply by having to show up in court. Most accused men are afraid that they might go to prison if they are found guilty. They will do everything possible to win the case, and escape being punished for their actions. The accused will most likely hide his fear from the survivor, and will want her to believe that he still controls her, as he did during the rape.

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for survivors

Even if the survivor is frightened of the trial process, recognise and honour the courage that has brought her to this point. While she is giving her evidence, she is the most important person in the courtroom, and the most powerful resource the State has. Everyone else in the courtroom is there for the sole purpose of hearing what she has to say.

Before she walks into the courtroom, the survivor must prepare herself for seeing the accused. It is a good idea to use visualisation techniques (imagining or role-playing the scene with a supportive friend or counsellor) to prepare for this.

Language

The language used in courts is usually very formal and may be difficult to understand, especially when technical legal terms are used. The survivor has the right to ask for clarification; if she does not understand a question, she may ask for it to be explained in terms she understands.

The survivor also has the right to give her evidence in her first language. If necessary, the court will appoint an interpreter for this purpose. This should be raised with the prosecutor before the trial. If the survivor notices that the

translator is not reporting what she says accurately, she should tell the magistrate right away.

Hint: Court interpreters are usually fluent in the African languages spoken in that area and English or Afrikaans. If the survivor needs an interpreter for a language that is not generally spoken in that area, for example, German or Swahili, the prosecutor must be informed of this well before the trial so that they can organise a special interpreter. The same applies in the case of survivors who need a sign language interpreter.



Giving evidence

This section is divided into three parts:

a) Evidence in chief:

The witness is questioned by the prosecutor.

b) Cross-examination:

The witness is questioned by the defence lawyer.

c) Re-examination:

The prosecutor questions the witness on issues that were raised by the cross-examination that need to be clarified.

Key information

for survivors

a) Evidence in chief

It is vital that the survivor tells the magistrate everything that she or he needs to know about what happened. The survivor must understand that the magistrate does not have any information about the details of the case – she or he is hearing about it for the first time. The magistrate must make a decision based only on what she or he hears in the courtroom.

Before starting to give her evidence, the survivor will be sworn in – this means she is asked to swear an oath that she is prepared to tell the truth. Once she has been sworn in, she may not tell a lie while giving evidence, no matter how embarrassed or intimidated she feels. To tell a lie under oath is considered a criminal offence.

She will be asked to state her name and give her personal details to the court.

Hint: If the survivor does not want the accused to know her home address, she should tell the prosecutor this before going into the courtroom. (Look at the court checklist on p. 65 - 66).



The prosecutor will ask the survivor questions about what happened.

This may include questions about:

- Whether the survivor knew the accused before the rape, and what sort of relationship they had.

- Whether there were drugs or alcohol involved in the rape, either on the part of the accused, or the survivor, or both. This is extremely important, because drugs and alcohol affect the ability to consent. It is not a crime to be drunk; it IS a crime to have sex with someone too drunk to consent – that is the law.

- The events leading up to the rape.

- Details of the rape itself. This will include questions about the exact physical acts that took place. The survivor must explain exactly what happened, naming the parts of the body that were involved.

- What the survivor said or did to let the perpetrator know that she did not consent (agree) to have sex with him. This applies to cases where the accused alleges (claims) that the survivor consented to sexual intercourse.

- What happened immediately after the rape, and what her state of mind was at the time.

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for survivors

• Who the first person was that the survivor told about the rape. If the survivor took a long time or even a few days to tell someone what happened, she may be asked why she didn't tell somebody sooner. Many survivors feel they are to blame for not telling somebody immediately, even though rape is an incredibly difficult thing for anyone to talk about. The survivor should explain how she felt at the time, and describe what sort of relationship (for example, business, personal, family, distant, close) she had with people with whom she came into contact, but did not tell. This will help the court to understand her actions and reasons for not speaking about the rape immediately.

Note to the counsellor

Many survivors find questions about the rape and the parts of the body extremely invasive and embarrassing, and don't understand why they are necessary. Make sure the survivor understands that she has to give these details to the court so that the State can prove that what the accused did falls within the legal definition of rape. Help her to use words like penis, anus and vagina in a counselling session before the trial, so that she can practise saying them out loud in front of another person.

The survivor may also struggle with questions about what she said or did to let the rapist know that she did not consent to sex. She may feel that the prosecutor and others are blaming her for what happened. This is normal – people have a natural tendency to question themselves after experiencing a shock or trauma. This is where social attitudes towards sexual violence play a role. If the survivor was knocked down and injured by a drunken driver, she might ask 'Why did I cross the road just then?' But her friends would respond 'It's not your fault – you couldn't have known'. But in cases of rape (even though it is the rapist who makes the decision to commit a crime), society often responds by saying 'But why did you wear that dress?' Or 'Why did you let him buy you a drink?' and so on.

It is important to address the issue of self-blame and self-doubt during the counselling process. There will be many 'if only's' and 'what if's', and the survivor should be given a chance to voice her concerns and self-doubt in the counselling environment. Sometimes a rapist will try to make the survivor believe that the rape was her fault (he was 'forced' to rape her because of who she is, what she did or what she said). This can be extremely difficult for the

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for survivors

survivor, and it may lead her to feel responsible for the rape. Because these are such painful issues, some survivors avoid bringing them up in counselling.

It may be helpful to remind the survivor that the rape happened only because the rapist decided to commit the crime – he is therefore responsible. The survivor was not in control at the time, the rapist was. It can also be helpful for the survivor to reflect on what she did to survive the attack. Discussing these issues in counselling can have an effect on how the survivor feels about being questioned in court about her actions.

b) Cross-examination

In most cases, the accused will have a defence lawyer, whose job is to act on behalf of the accused. If the accused does not have a lawyer, he will cross-examine the witnesses himself.

The goal of the defence is to have the accused found not guilty of the crime. During cross-examination, the defence lawyer will do everything possible to try and make the magistrate doubt the State's case. This is because the defence lawyer does not have to prove that the accused is innocent. She or he only has to give the magistrate grounds for reasonable

doubt that the accused committed the crime. Because the evidence given by the survivor is the strongest resource the State has, the defence will almost always try to discredit her evidence, by suggesting that she is lying or mistaken.

In order to create reasonable doubt, the defence may suggest that:

- the police have arrested the wrong man
- evidence was incorrectly collected or handled, and therefore cannot be relied on
- the survivor consented to sex with the accused.

Depending on what the accused's story is, the defence lawyer may also try to suggest that:

- the survivor is confused about who really raped her, and has identified the wrong man
- the survivor is lying and has good reason to lie
- the survivor did not do or say enough to show the accused that she was refusing to have sex with him
- the survivor didn't fight hard enough to try and stop him from having sex with her

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- the way the survivor was dressed was too sexy and seductive
- the survivor led the accused to believe that she wanted to have sex with him by dressing or behaving in a certain way.

The defence lawyer may also try to unnerve and confuse the survivor by:

- addressing her in a way that makes her feel unimportant (speaking to her as if she were a child, for example)
- repeating the same questions but asking them slightly differently each time, to trap the survivor into contradicting herself
- taking the survivor's own words and twisting them around
- making her feel responsible for the rape.

It often comes as a shock to the survivor to have a lawyer treating her in this way. This can make her feel intimidated and defeated. She might become withdrawn and give quieter and shorter answers to the court, or she might become angry, aggressive and careless about how she answers. This is exactly what the defence is aiming for.

Note to the counsellor

The tactics used by the defence can be very traumatic for the survivor, and may undermine her confidence and ability to cope. These issues must be discussed in counselling beforehand. It might help to point out that these tactics are part of the job the defence lawyer is being paid to do to win the case – she or he is not personally attacking the survivor, even if it feels like it.

The following are more examples of scenarios that the defence might present in court:

- The accused and the survivor were in a sexual relationship, and when the accused broke up with her, the survivor made up a story that he had raped her, in order to get revenge on him.
- The survivor was flirting with the accused and wanted to have sex with him. But because he didn't like her, or was married or had a girlfriend, he said no. To get back at him, the survivor made up the story that he raped her.
- The survivor and the accused had consensual sex, but afterwards she felt guilty, and in order to protect her reputation, she claimed to have been raped.

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- The survivor may indeed have been raped, but the accused has never seen her before, and cannot understand why she thinks he was the one who assaulted her.

The stories made up by the accused are often distressing to the survivor, especially since they are usually told to the court in such a way that they sound plausible (believable). The accused may take things that really happened, and use them as the starting point for the lies that follow. This is even more frightening than when outright lies are told.

Note to the counsellor

Remind the survivor that it is normal for the accused in rape cases to make up lies to tell the court. As distressing as this is, encourage the survivor to concentrate on what she has got to say, and to try not to engage with the lies of the accused. Some survivors experience extreme anxiety at the thought of the accused making up terrible stories and lies about them. The survivor may feel defeated before she even goes into court (if she hears these lies beforehand) or they may make her feel defeated while she is giving her evidence. It might help to remind the survivor that because the accused has pleaded not guilty, he will have to lie in order to escape responsibility for his actions.

In most rape cases, the defence will rely on myths and common false ideas about rape. In the past, two main tactics were to argue that the survivor was drunk or under the influence of drugs, or to claim that she had many previous sexual relationships. These tactics relied on false logic by implying that a woman who drank and had sex with many people was unlikely to refuse sex. Now, however, the law states that if a person is too drunk to consent, any sexual act is an offence. In addition, the defence may not bring up the survivor's previous sexual history unless they can show that it is legally relevant. But the defence may still try these tactics. Also note that the defence is no longer allowed to use the fact that the survivor took a long time to report the rape against her.



NB: The defence attorney may only refer to the rape survivor's previous sexual history or behaviour if:

- it is fundamental to the accused's defence and his right to a fair trial
 - it is something specific that is relevant to the incident
 - it is likely to disprove evidence that the prosecution has given
 - it is needed to explain evidence on or injury to the survivor.
- The defence attorney may not refer to the rape survivor's

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previous sexual history if this information:

- makes the survivor seem not credible
- makes it seem that the survivor was likely to consent to the offence
- undermines the survivor's personal dignity and right to privacy.

When it comes to alcohol and substance abuse, the law says that a person cannot give consent to sexual acts if they are under the influence of drugs, alcohol, medicine or any substance that severely affects their judgement.

After asking their main questions in cross-examination, the defence must put the accused's version of events to the survivor, and ask her to respond. Remember that, although this may sound outrageous and upsetting, the defence lawyer is legally required to do this.

c) Re-examination by the prosecutor

When the defence is finished with the cross-examination, the prosecutor has an opportunity to ask the survivor questions about anything raised by the defence in cross-examination. The prosecutor is not allowed to ask questions about any new issues at this time.

Important things for the survivor to remember when giving evidence

- The survivor should always tell the truth and stick to the same story. When faced with the accused's version, she may be tempted to add or leave out details, especially if she feels that these make her look bad. For example, she might say that she drank two beers when she actually had six or seven. If the defence can then prove that she lied about the amount of beer she drank, the defence will say that she is also lying about being raped; in other words, that she is an unreliable witness.

- She must answer all the questions asked, even if they seem repetitive, silly or annoying.

- If she does not understand a question, she must ask the defence to repeat it, and to use different words, if necessary.

- If she does not know the answer to a question, it is fine to say so. However, she must not say that she does not know the answer to a question just to avoid answering.

- If she needs to go to the toilet, drink some water or just take some time to compose herself, she should ask for a break. (The magistrate may not always agree to this.)

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- If she needs to think about a question, she must take her time to do so. This is better than giving the court the wrong information. Remember that the defence will make sure that the court hears everything that the defence wants it to hear, and it is important that the survivor tries to do the same.

- She does not have to give the court the same information over and over again. If the defence keeps asking the same question repeatedly, the prosecutor should try to put a stop to this by objecting to these questions. If the prosecutor does not stop this, the survivor can ask the magistrate if she must answer the question again.

- The survivor does not have to answer questions about previous sexual relationships with other people (besides the accused) unless the magistrate says that these are relevant to the case. The prosecutor should stop this type of questioning as well.

- The survivor is not allowed to have a copy of her statement or any written notes with her when she gives evidence.

- Although most cases are recorded, magistrates usually write down notes of all evidence.

The magistrate might interrupt the survivor while she is giving evidence so that the magistrate can take these notes properly. This does not mean that the magistrate is feeling irritated or impatient with the survivor. It is important for the survivor to speak slowly and clearly.

- The magistrate may ask questions if there is anything that she or he does not understand. Although this usually happens at the end of re-examination, the magistrate can also ask questions as the process of presenting evidence goes along.

The rest of the State's case

Other witnesses for the State can include:

- the doctor or the district surgeon who performed the medical examination
- the first person that the survivor told about the rape
- any people who witnessed the rape or the events leading up to it
- experts on DNA material (semen, hair, skin, etc.).

These witnesses will also be questioned by the prosecutor, cross-examined by the defence lawyer, and possibly re-examined by the prosecutor. These witnesses may not come into the court to

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listen to the proceedings of the trial until after they have testified. So, for example, if the first-report witness is someone close to the survivor whom she relies on for support, that person will not be allowed in court while she gives her evidence. They will have to wait outside until after they have given their own evidence.

When the state prosecutor has called all of the State's witnesses, and presented all of the evidence it has to prove the case beyond a reasonable doubt, she or he will close the State's case. This means that the State cannot call any further witnesses.

Hint: After the survivor has given her evidence, she can choose to sit in court and listen to the rest of the case. This is because it does not matter if she hears what other witnesses say, as this can no longer influence what she tells the court.



Note to the counsellor

In the case of experts (such as the doctor who did the examination) or witnesses with a lot of credibility (a police officer, for example), the defence may repeat the same questions in many different ways in the hope that the witnesses will contradict themselves or show uncertainty. If this involves intimate or embarrassing details, it can be distressing to listen to these points being repeated. Most survivors will want to hear what is said, but they should prepare themselves for the experience.

3. The defence case

If the defence feels that the State has not proved its case, they can ask that the case be dismissed at this point without even presenting their evidence. It is not unusual in a rape case for the defence to do this, if they are relying on discrediting the survivor in order to win their case.

The magistrate must then decide whether the case should be dismissed at this point, or whether the defence must go ahead and present their side. If the magistrate decides that the case should be dismissed, the accused will be found not guilty.

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If the magistrate decides that the case should go on, the defence will present its side by calling witnesses to support the accused's version of what happened. Usually the accused is the first witness called for the defence. (The accused can also choose not to be a witness.) The process for the defence witnesses, including the accused, is the same as for the State witnesses. The difference is that the evidence of these witnesses is led by the defence lawyer, after which they are cross-examined by the prosecutor.

4. The magistrate's verdict

After hearing all of the evidence in the case, the magistrate will consider this information as well as the relevant legal issues, and make a decision as to whether the accused can be found guilty or not. The accused can only be found guilty if the State has proved its case beyond a reasonable doubt.

Look at p. 19, where we discuss the term 'reasonable doubt'.



NB: The survivor might ask during pre-trial consultation if her case is legally strong, and what her chances are of success or failure. This kind of discussion is best left up to the prosecutor, as there are many different factors that influence the outcome of a case.

Finding of not guilty

Because of the principle of reasonable doubt, sometimes people who have indeed committed a crime may be found not guilty. This does not necessarily mean that the magistrate believes that the accused is innocent. It simply means that there was not enough evidence to take the State's case beyond reasonable doubt.

Once an accused is found not guilty, there is nothing further that can be done by the survivor to change the outcome of the criminal case. The accused will go free and be able to continue with his life. However, she can still make a civil case against him.

Look at p. 62, where we discuss this option.

Note to the counsellor

Some people believe that if the accused is found not guilty, it means that he is innocent and that he did not commit the crime. Sometimes members of the survivor's own family or community believe that this is what a not guilty verdict means. It can be very difficult for the survivor when these people choose to believe the rapist's version of the story.

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Some survivors feel a sense of personal failure if the accused is found not guilty. They may feel that this is a reflection on their performance in court. It is important to highlight the challenges involved in trying rape cases and to get accurate information from the prosecutor about the reasons for the verdict so that the survivor has a better understanding of the reasons for the court's decision.

Finding of guilty and decision about sentence

If the magistrate believes that there is enough evidence, the accused will be found guilty of rape. It will then be necessary to decide on an appropriate punishment. In order to make this decision, the magistrate may listen to evidence as to why the perpetrator should receive a light punishment (such evidence is described as mitigating factors), as well as evidence as to why he should receive a harsh sentence (this is described as aggravating factors).

Mitigating factors

The defence lawyer will present the mitigating factors to the court. These are factors that may make the crime seem less serious or more forgivable, or that would be a reason to give the accused a lesser sentence. The defence will present this information to try to

persuade the magistrate to 'go easy' on the accused.

Possible mitigating factors include that:

- he is very young or very old
- he has a family to support
- this is the first time he has been found guilty of an offence
- he is sorry for what he did and shows remorse
- he is prepared to get treatment or counselling
- he is prepared to make up for his wrongdoing, for example, by doing community service.

Aggravating factors

The state prosecutor will present the aggravating factors, or factors that add to the seriousness of the crime. The purpose of this is to encourage the magistrate to give an appropriately heavy punishment for the crime.

Possible aggravating factors include:

- the degree of violence and disregard for the survivor's rights during the rape
- the extent of the harm and the impact or effects of the rape on the survivor and her life
- the fact that the rapist has been convicted of similar crimes in the past
- the fact that the rapist has shown no remorse

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- the fact that society regards this as a serious crime and that the levels of rape in South Africa are extremely high (the need to 'send a message')
- the fact that the rapist is incapable of benefiting from treatment or counselling.

Note to the counsellor

At this point, the counsellor may be called to testify about the impact of the rape on the survivor. See p. 61, where we discuss this.

5. Victim impact statement

Unfortunately, the severity of the impact of rape on someone's life is often misunderstood and underestimated, even by magistrates. It can therefore be helpful to the court if the survivor prepares a statement that gives details about all the aspects of her life that have changed as a result of the rape.

The statement could include details about:

- the emotional impact of the rape
- changes in sleeping and eating patterns
- changes in lifestyle

- the effect that the rape has had on her relationships with other people
- the impact of the rape on her health (mental and physical)
- the negative impact of the rape on her work or school performance
- changes in her social activities
- medical expenses and therapy costs
- the trauma the rape has caused to her family
- the survivor's view of the future.



NB: It is vital that the counsellor does not prompt the survivor when she prepares this statement. All information in the victim impact statement must come from the survivor and be in her own words. The statement should be given to the prosecutor at the consultation before the trial starts. The prosecutor has the option of asking the survivor questions about the impact of the rape on her life when she gives her evidence during the trial. This means that the survivor does not need to give evidence again at the sentencing hearing.

Look at the checklist on p. 65 to 66.

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6. Sentencing

It is very difficult to predict what the sentence will be, since there are no hard and fast rules. The general principle is that the magistrate must decide on a sentence that fits each individual case and each individual accused, at the same time as following the requirements of the law.

The court can only enter into a sentence agreement after the survivor has had the opportunity to speak to the prosecutor regarding the sentence agreement and the inclusion of some sort of compensation to the survivor for damages.

Minimum sentencing legislation

In the past, there were big disparities in the sentences given in different courts for very similar offences (some perpetrators were getting very lenient sentences, while others were getting much heavier punishment). As a result, minimum sentencing legislation was introduced in 1997 (Criminal Law Amendment Act 105 of 1997). These new laws are intended to make sure that the seriousness of the crime is recognised and acknowledged by giving an appropriate punishment. Sentencing is very complicated, so if the case gets to that stage, the prosecutor should be available to answer any questions.

This law says that:

- the first time that someone is found guilty of rape, he must receive a sentence of ten years in prison
- the second time someone is found guilty, he should be sentenced to fifteen years
- the third time, he should be sentenced to twenty years.

This law also states that a life sentence should be given in cases where:

- the survivor was under sixteen years old
- the survivor was mentally or physically challenged
- excessive violence accompanied the rape
- it was a gang rape (with more than one rapist)
- the rapist knew that he was HIV-positive when he raped the survivor.

These are the general rules, but the magistrate is allowed to give a lighter sentence if she or he believes that there are good reasons to do this.

The regional court has the jurisdiction to hand down a life sentence. The rapist may apply for parole (early release under supervision) only after 25 years. If he reaches the age of 65 in a correctional facility, he may apply for parole if he has served 15 years

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of the life sentence. All life sentences are sent to the High Court for confirmation.

Hint: If the survivor is unhappy with the sentence given to the rapist, she can discuss the possibility of the State appealing against the sentence with the prosecutor. She must do this as soon as possible after the end of the case (no longer than one week), because the prosecutor has a very short time in which to register the appeal. The final decision about whether or not to appeal against a sentence lies with the prosecutor.



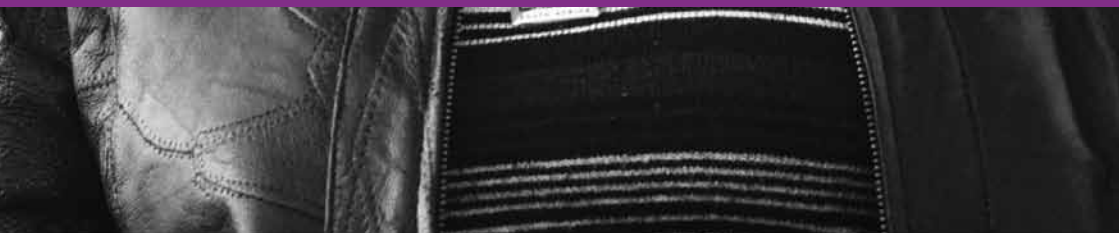
7. Parole

The court has to inform the survivor that she has the right to make representations (to give her opinions and reasons for denying parole) when parole is considered, or to attend any parole hearings.

If the survivor wants to do this, she must inform the relevant Parole Board in writing. The Parole Board will then inform the survivor in writing when and to whom she should make representations, and where the meeting will take place. She must get at least 30 days notice.



Additional
information



Additional information

In this section, we provide more information about the trial and the criminal justice system, based on concerns that survivors often raise during pre-trial consultation.

It will not be possible to discuss all of this information in detail with the survivor during the pre-trial consultation sessions. However, it is important for the advisor doing pre-trial consultation to be familiar with this information, in case the survivor has questions about any of these issues. It is also useful for the counsellor to have this information, so that she can help the survivor come to terms with the challenges of taking the trial all the way through to the finish, and with the results of the trial.

Postponement of the trial date

A major concern for survivors in the build-up to the trial is the long waiting period for a trial date to be set. It also often happens that on the date set for trial, the case is postponed. The first trial date is usually set anywhere between four to eight months after the case is reported to the police, or from the time that the perpetrator is arrested. (It can be even longer than this.) This delay is because there is a very big backlog of cases waiting to be heard in our courts; the investigation may also take some time to complete.

A state prosecutor and magistrate are assigned to each courtroom. More than one case is booked for a courtroom on any given day (usually three or four trials per day). The witnesses for all of these cases will be subpoenaed to come to court on that day. The reason for this is so that if for any reason the first case cannot continue, there will be another case ready to go to trial so that the court is not left

unused, and the time of the prosecutor and the magistrate assigned to that court is not wasted.

The following are some of the reasons why a case might not go ahead on the planned trial date.

Witnesses not arriving at court

This may be because the witnesses were not informed that they should go to court. The investigating officer is supposed to deliver a subpoena to all witnesses to inform them that they must be at court on a specific day. If the police do not deliver the subpoena to the survivor, she will not be at court on the day of the trial, and the court may decide to strike the case off the roll (throw it out) instead of postponing it, without even informing the survivor. If a case is struck off the roll for this reason, it can usually be reinstated.

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Hint: If the survivor's case is struck off the roll because she was not at court on the trial date, she must immediately contact the prosecutor to explain why she was not at court, and to discuss the reinstatement of the case.



moralise the survivor, who keeps preparing for her day in court. The defence often hopes that if they can get the case postponed enough times, the survivor might decide to let the matter drop so that she can get on with her life.

Priority cases

If a case is postponed halfway through the trial, it will be given priority on the postponement date over cases in which the trial has not yet started. This means that if the survivor's trial starts, and then has to be postponed at the end of the court day because it is not yet finished or because all of the witnesses were not present, it must proceed first at the next court date before any other new trials can begin.

Delaying tactics of the defence

All people accused of a crime in South Africa have the right to legal representation. To ensure that the accused has a fair trial, the State provides legal representation for the accused if he can't afford this himself. The accused can also choose to represent himself and not have a lawyer at all.

It is a common defence tactic to use the accused's right to legal representation to create delays in the trial. These delays often de-

Often what happens is that an accused who initially said that he didn't want a lawyer arrives at court on the trial date and says that he has changed his mind, and now wants a lawyer. Alternatively, the lawyer who was hired can claim that the accused has not paid them, and they can therefore no longer represent him. This means that the accused can now apply for a State lawyer (legal aid), who will need time to prepare for the case. In cases like these, the court will have to give the accused a postponement to ensure that he has a lawyer, and that his lawyer is properly prepared for trial. These tactics can postpone a trial two or three times. Where there is more than one accused, these delays can stretch the case out even longer.

The magistrate has the discretion to allow as many postponements as he or she believes necessary to ensure a fair trial for the accused. If the magistrate feels that a matter has been postponed too many times, and that the defence is

delaying the case on purpose, the magistrate may order that the case go ahead regardless. However, magistrates are reluctant to do this, because denying the accused his right to legal representation can mean that a finding of guilty in the case can be set aside if the accused appeals to a higher court after the trial.



Hint: It may sometimes be necessary to ask the senior public prosecutor at the particular court to ensure that the court prosecutor opposes any further requests for postponements by the defence.

Note to the counsellor

Survivors may become very disheartened by these postponements. It is very difficult to come prepared to testify, only to be sent away again. The frustration this causes often results in the survivor losing hope and confidence in the trial process. It's important to alert the survivor to the possibility of postponements and to help her find ways of coping with them.

Withdrawal of charges or refusal to prosecute

Withdrawal of the charges by the survivor

A survivor may decide that she wants to withdraw the criminal charges after reporting the case to the police. Because the State has taken responsibility for the case, it is no longer up to the survivor to decide whether or not to take the case to trial. However, in most cases where the survivor asks that the case be dropped, the State will allow this. But if the prosecutor feels that the case is very strong, he or she may refuse her request to drop the charges and decide to continue with the trial anyway.

Withdrawal by the State

The prosecutor may decide that there is not enough evidence to take the matter to trial and prove the case beyond reasonable doubt. In some cases, this decision not to prosecute is taken without consulting with the survivor.

Hint: If the prosecutor decides to withdraw the charges against the accused, the survivor can ask the prosecutor to explain the reasons for this decision, on the basis of the Batho Pele principles.



Additional information

Bail

After the suspect is arrested, there will be a bail hearing in court. The purpose of this hearing is to decide if the accused should be given bail or if he will be kept in custody (prison) until the trial is over. If he is in custody, the accused must appear in court within 48 hours of his arrest, at which time he can apply for bail. The hearing may be postponed for another seven days for further investigation for bail purposes.

'Getting bail' means that the court can decide that an accused who has been arrested should be allowed to deposit a certain amount of money, after which he can be released. The amount of bail that is set is designed to make sure that the accused will return to court on the date set in order to get his money back – it is not a fine, nor is it an indication of how seriously the court takes the accusation made against him. Going out on bail means that he will remain free instead of staying in prison until the case is over.

When bail is given, there will always be certain conditions. The most important condition is that the accused must come to court on all the court dates and not attempt to avoid the trial. If he is not at court, and he can't give a good reason for his absence,

he can be re-arrested and will remain in prison until the end of the trial. His bail can be cancelled, with the State keeping his bail money. Other conditions for bail can include that the accused is not allowed to contact, intimidate or threaten state witnesses (including the survivor). If the accused does not breach (break) any of his bail conditions, his bail money will be returned at the end of the trial, regardless of whether he is found guilty or not guilty.

The magistrate should take into account many different factors when deciding whether or not the accused should be granted bail. These factors include whether:

- the accused is likely to leave the country to avoid the trial
- there is a chance that the accused will commit another crime while waiting for trial
- the accused made any threats to the survivor during the sexual offence, or if the accused is likely to intimidate the survivor in the time before the trial.

Unfortunately, in many bail hearings, evidence about threats to the survivor and the possibility of intimidation by the accused is not brought to the attention of the court. This means that many

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accused may be given bail when there are actually good reasons for them not to get bail. If there is any information about threats or the possibility of intimidation, this must be brought to the attention of the investigating officer as soon as possible, so that the court can be told about this at the bail hearing.

Intimidation by the accused

Many survivors are exposed to intimidation, coercion, manipulation or pressure from the accused, or his family and friends, during the period after the rape and before the trial. These tactics can range from threats of harm to the survivor (or to her family members) and even death threats, to bribes offered to the survivor and/or her family to try to get her to drop the charges. The rapist and his friends may also spread malicious rumours and gossip to discredit the survivor and make people believe that she is lying.

The rapist uses these strategies to create doubt in the survivor's mind about her ability to succeed with the case, to make her believe that he is still in control, and to keep her feeling helpless. Some rapists even threaten to sue the survivor for 'telling lies' about them.

If the accused has been released on bail on condition that he is not allowed to contact, intimidate or threaten the survivor, she must immediately report any threats to the investigating officer. This means that the accused will be called to court to explain why he should not be kept in custody and his bail money not be taken away.

Note to the counsellor

Intimidation tactics can be frightening for the survivor, because during the rape, the rapist managed to overpower and violate the survivor, causing psychological, emotional and physical damage. She might believe that the rapist will be able to continue to control her.

It might help for the counsellor to emphasise to the survivor that in standing up and making a case against the accused, she is taking her power back. The potential consequences of the trial for the accused are serious, and he is now fighting for his freedom. One of the ways he is likely to do this is to make the survivor believe that he still has control over her and the case, and that he is able to cause the same pain to her as he caused when he raped her.

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Witness protection

Some accused may threaten the life or safety of the survivor or her family members. In most of these cases, the accused does not follow through on his threats. However, there are exceptions. The fear the survivor feels in this situation is usually made much worse by the experience of being raped, where the perpetrator carried out his threats and acted violently. It is therefore important to take these threats seriously.

Unfortunately, there are not many options available to rape survivors in this position. Although the State currently runs a witness protection programme, this programme is not always effective in addressing the needs of rape survivors, because it makes such huge changes in the survivor's life, and because the intense need for secrecy can be very difficult to live with. For instance, to enter the programme, the survivor must be prepared to move to a new town and agree not to make any contact with the people who support her and who are close to her. This means that she will be cut off from the majority of her family and friends, a crucial support system in the time after the rape. Nevertheless, the Witness Protection Programme is still an important resource to consider if the survivor's life is at risk. To find out more about wit-

ness protection, speak to the investigating officer or the prosecutor handling the case.

Another option is to move to a place where the accused cannot find the survivor, with friends or extended family living in a different area, for example. Some community shelters (for example, shelters for abused women) may also be able to help.

The survivor might decide that the best way to protect herself is to drop the case against the perpetrator. If she chooses this option, she may feel that the perpetrator is still controlling her. It is important to help her to make informed decisions, and to respect these decisions.

Specialised sexual offence courts

Because sexual offences can be difficult cases for the State to prove, specialised Sexual Offence courts (SOCs) have been established at many of the regional courts. These courts hear only sexual offence cases. The prosecutors in these courts should have special training in understanding and prosecuting sexual offence cases. These courts also

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have special facilities, such as separate waiting rooms for witnesses, and special evidence rooms and equipment for child witnesses. Most SOC's are situated in urban areas, and only cases that happen in an area that is covered by the SOC's jurisdiction can be heard there.

Protection of witnesses while giving evidence

Protective measures for adult witnesses

There is a legal provision that under certain criteria allows an adult witness to give their evidence in a separate room to the courtroom, using a closed circuit television system (CCTV). The court will only allow this if they believe it will prevent the survivor from experiencing prejudice or harm, it is in the interests of justice and public safety, it prevents delay, and provided that it ensures that the prosecutor and the accused can still question a witness and observe the reaction of that witness.

The court must provide reasons for refusing the use of CCTV in the case of a child who is younger than 14.

It is important not to lead the survivor to believe that she will be able to use CCTV when giving evidence – the court will only allow this in exceptional cases. In most cases, the complainant will have to give her evidence in the courtroom.

However, it is worth asking the prosecutor to consider applying to the magistrate to use this system, and to explain why this is important and will be helpful. Even if the prosecutor does not apply, or the magistrate does not allow it, they will gain awareness of the difficulties experienced by survivors when testifying in court.

If the prosecutor does want to apply to the magistrate to use the CCTV system, the counsellor might be asked to write a report or to give evidence to the court about why this system would help the survivor to tell the court what happened to her.

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Note to the counsellor

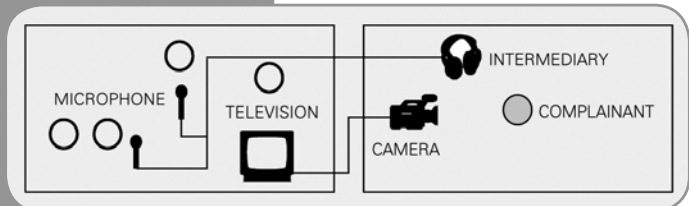
Many survivors feel great fear at the thought of facing the accused and speaking in his presence. The prospect of being spared this by using the CCTV system would come as a great relief. However, for the survivor to be promised this, only to discover on the day of the trial that she must testify in court, can be extremely disempowering. Rather make sure that she is fully prepared to give her evidence in the courtroom.

If the accused does not have a lawyer, he will be entitled to put his questions to the survivor himself. This means that even where the CCTV system is used, the voice she will hear cross-examining her will be that of the accused. It is important that she should be prepared to deal with this possibility.

Protective measures for child witnesses

If the survivor is under the age of 18, the prosecutor may apply to use the intermediary system when the survivor gives her evidence. This means that the survivor will be in a separate room and the CCTV system will be used. A person (usually a social worker) will act as an intermediary. The intermediary will wear headphones and listen to what is being said in court. (The survivor does not directly hear the questions put by the prosecutor, defence attorney or magistrate.) The intermediary will then convey the question to the survivor, whose answer will be viewed and heard by the court via the CCTV system.

The intermediary system is not used automatically in all cases, and the prosecutor must apply to the magistrate to allow the use of this system. The magistrate decides whether or not the system should be used.



Additional information

When can a counsellor be called to give evidence?

The counsellor can be called to give evidence at different stages during the criminal trial.

- Before sentencing (where the accused has been found guilty and the magistrate has to decide on his sentence): The counsellor may then be called to give evidence about the emotional impact of the rape on the survivor.
- Where the court has to decide whether or not to make use of the CCTV system or the intermediary system (if the survivor is under the age of 18 years): As explained above, there are certain 'tests' that the court must use to decide whether to use these protective measures. Some of the aspects that the court must consider include the emotional state of the survivor, and how she might respond to giving evidence in the presence of the accused. The counsellor can often provide important information on these aspects.
- Sometimes the counsellor may be called to give evidence during the main part of the trial (where the court determines whether or not the accused is guilty). However, this is very unusual.
- Alternatively, the counsellor may be asked to write a report without actually having to testify.



NB: As a general rule, it will always be the prosecutor who calls the counsellor to give evidence. It is crucial for the counsellor to meet with the prosecutor beforehand, and to discuss the questions that she will be asked. It is also important to discuss the issue of confidentiality of counselling records, since defence lawyers occasionally ask counsellors questions about these records, and may even ask the court to order the counsellor to bring these records to court. It is essential to discuss such a defence request in detail with the prosecutor, as well as your organisation, before bringing confidential records to court.

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Appeal against the outcome of the case

It is not possible for the survivor to appeal against the outcome of the case. This is because a criminal case is between the prosecution (the State) and the accused, and not between the survivor and the accused. This means that only the accused and the prosecutor can appeal if they disagree with the outcome of the case.

At present, the prosecutor can appeal against a finding of not guilty only in very limited circumstances.

The prosecutor can appeal against the sentence (in other words, where the accused has been found guilty, but the prosecutor believes that the sentence given by the court is too light.) At the same time, the accused can appeal both against the finding that he is guilty, and against his sentence.

Making a civil case against the rapist

As well as laying criminal charges with the police, the survivor can also choose to sue the rapist in civil court (regardless of whether or not the criminal court has found him guilty). In civil cases, it is easier to hold someone responsible for their actions, as here the basic principle is that the magistrate's decision will be based on a

'balance of probabilities'. This is easier to prove than 'beyond reasonable doubt'.

If the civil court finds the rapist is responsible, he will not go to prison, but he will have to pay money to the survivor. If a rapist has no money or property, then efforts to sue him are not advisable. Also, in order to make a civil case, the survivor must hire a lawyer, which usually costs a lot of money. This means that this course of action is not open to many South African women.

Note to the counsellor

Anxiety is a constant battle for survivors facing trial, and this is where counselling before the trial plays an important role.

As a counsellor you should use all the wisdom available to you to help the survivor, but you will also need to deal very specifically with the anxiety relating to the trial. Together you need to work on strategies for coping with panic. The following suggestions have been useful for survivors in the past:

- Rescue Remedy is a homeopathic remedy for panic with no harmful side-effects. Drops are taken in a glass of water. (It's available at most chemists without a prescription, and is inexpensive.)

Additional information

- Beta-blockers are prescribed medication used to treat high blood pressure that has side-effects that take away the physical response to anxiety. They stop the heart racing, and the trembling, sweaty-palmed, nervous stomach feelings that make anxiety worse. A doctor's prescription is needed, so this has to be arranged in advance.
 - Give the survivor something to hold in her hand to focus on in court, such as a semi-precious stone, prayer beads or a photo of a loved one. Any small object that symbolises support and care can be a tangible reminder that she is not alone when she is giving evidence.
 - Advise her to ignore the accused completely, and to face only the prosecutor or the magistrate. When speaking in court and answering the questions of the defence, she can turn her body to face the front of the court. However, she may prefer to look steadily at the accused or his defence attorney to show that she is not intimidated.
 - During cross-questioning, the defence might bombard her with questions. Remind her to take a moment before replying – it is helpful to take a breath before speaking.
 - She may ask for water in court, if this is available. Remind her to take small sips, to avoid dryness of the mouth.
 - Let her know that it is okay to break down in court if she becomes emotional. This can show the magistrate the very real and immediate way the rape has affected her. (She should not be coached to cry – simply tell her that she should not worry about trying to appear a certain way in court.)
 - Help her to evaluate her expectations realistically and to focus on her own achievable goals for appearing in court.
 - Reassure her that she has all the information she needs through the court preparation, and that she is as ready to do this as she will ever be. (Be careful not to make it sound like it will be easy, because it won't be. Rather reflect on her strengths and the experiences that she has survived to illustrate her courage up to this time – let her know that you believe in her.)
 - Let her know that there are people at your organisation who believe in her and will be thinking of her and wishing her well through this process.
- There are also useful materials you can give to her to read if she is the kind of person who will find this useful. See p. 73.**



Resources



Resources

Court checklist

Date of trial: _____

Court and courtroom: _____

Prosecutor: _____

Telephone number at court: _____

Before going to court:

1. Write out a list of all of the areas of your life that have changed since the incident, including emotional and practical changes. The purpose of this is to give the court an idea of how the rape has affected you.
2. Try to arrange a meeting with the prosecutor before the trial. The detective in your case or your counsellor can help you with this if necessary.

When you meet with the prosecutor:

1. Before going to court to meet the prosecutor, read through your statement (if you have been able to get a copy) and note if anything is incorrect or has been left out. Write this down. Explain why it is not correct. Give this to the prosecutor at the consultation before the trial.
2. Ask the prosecutor to show you the courtroom and where you and everyone else will be sitting, so that you can get an idea of what the room looks and feels like.
3. Ask the prosecutor if you can give your evidence to the court in a closed court (which means the public will be asked to leave). Remember that if this is granted, you can still ask to have someone who supports you (such as a counsellor or a family member) in the courtroom. You can also ask the prosecutor to apply to the magistrate to use the closed-circuit TV system.
4. If you need a translator, let the prosecutor know about this.

Resources

On the day of the trial:

1. When you arrive at court, ask if there is a separate waiting room for witnesses that you can sit in. If there is no special room at the court, ask if there is another place (such as an office) where you can wait that will help you to avoid seeing the accused and his supporters before the trial starts. Make sure that the prosecutor knows where to find you for the trial.

2. Remember that you can ask for financial assistance to cover your transport costs for travelling to court. You can also ask for a note to confirm that you were at court if you need this for work. Speak to the prosecutor or the court orderly to arrange this.

Remember these things when you are testifying:

- Always tell the truth.
- If you are unsure of a question, ask for it to be repeated.
- If you need to take a break, ask for one.
- Try to turn your back on the accused, and face the magistrate.
- Take a token to hold in your hand to remind you of a safe place and of people who love and believe in you.

Notes:

Pre-trial consultation record

Rape Crisis, Cape Town

This information is confidential and may only be accessed by members of Rape Crisis, Cape Town, with the client's consent.

The counsellor must fill in this document before referring her client for pre-trial consultation.

Name of pre-trial advisor: _____

A. Client information:

Brief evaluation of your client's current emotional state and feeling regarding the trial:

B. Police and medical information:

Police Station: _____ IO: _____

CAS#: _____

DS/state doctor? Yes No

Copy of statement attached? Yes No

Copy of J88 attached? Yes No

Other documents attached? Specify: _____

Pre-trial consultation record

Rape Crisis, Cape Town

C. Court information:

Date of trial: _____

Which court: District Regional High Court

Courtroom #: _____ Name of prosecutor: _____

Has a consultation with prosecutor been arranged? Yes No

When? _____

Number of accused: _____ Name/s of accused: _____

Does the accused have a lawyer? Yes No

Was bail granted? Yes No

Has accused had any contact with complainant since the attack?

Yes No

If yes, describe:

Did the complainant take any steps against the accused subsequent to this contact (e.g. by contacting the police)?

If yes, describe.

Pre-trial consultation record

Rape Crisis, Cape Town

D. Postponements of the trial:

Is this the first trial date? Yes No

If no, describe any postponements to the case. Include dates and reasons given for postponing.

E. The trial:

The accused's plea: Guilty Not guilty

Defence arguments: _____

Is a report required from the counsellor?
(If yes, attach a copy of report) Yes No

Is counsellor required to testify in court? Yes No

Was case heard in camera? Yes No

Intermediary system Yes No

Other protective measures
(e.g. closed-circuit TV): Yes No

Did the complainant give evidence about
the effects of the incident on her life? Yes No

Pre-trial consultation record

Rape Crisis, Cape Town

F. Outcome of the trial:

Guilty Not guilty Other

Specify other: _____

Sentence: _____

G. Complainant's general comments about the criminal justice system:

COMPLAINTS ABOUT MEMBERS OF THE CRIMINAL JUSTICE SYSTEM

Police

Concerns regarding the conduct of a police official should be directed to the Station Commander of the relevant police station. The telephone numbers for all police stations can be found in the blue pages at the back of the Telkom telephone directory. Complaints should be directed to the Station Commander, the Independent Police Investigative Directorate (IPID) and the SAPS Provincial Commissioner in the province. Write down the exact nature of your complaint, including all the details of the case.

The Independent Police Investigative Directorate (IPID)

The IPID is an independent body that has been established to address complaints that are made against SAPS members and MP's (Municipal Police Services). www.ipid.gov.za

National:	Tel: 012 320 0431	Fax: 012 320 3116
Eastern Cape:	Tel: 043 706 6500	Fax: 043 706 6526
Free State:	Tel: 051 406 6800	Fax: 051 430 8852
Gauteng:	Tel: 011 220 1500	Fax: 011 333 2705
KwaZulu-Natal:	Tel: 031 310 1300	Fax: 031 305 8214
Limpopo:	Tel: 015 291 9800	Fax: 015 295 3409
Mpumalanga:	Tel: 013 754 1000	Fax: 013 752 2602
Northern Cape:	Tel: 053 807 5100	Fax: 053 832 5615
North West:	Tel: 018 397 2500	Fax: 018 381 1495
Western Cape:	Tel: 021 941 4800	Fax: 021 949 3196

SAPS Provincial Management

National:	Tel: 012 393 1000	
Eastern Cape:	Tel: 040 608 8413	Fax: 040 608 8416
Free State:	Tel: 051 507 6561	Fax: 051 507 6500
Gauteng:	Tel: 011 274 7859	Fax: 086 630 1686
KwaZulu-Natal:	Tel: 031 325 4825	Fax: 031 325 4746
Limpopo:	Tel: 015 290 6227	Fax: 015 290 6162
Mpumalanga:	Tel: 013 762 4838	Fax: 013 762 4547
Northern Cape:	Tel: 053 839 2840	Fax: 053 833 1275
North West:	Tel: 018 299 7001	Fax: 018 299 7002
Western Cape:	Tel: 021 417 7100	Fax: 021 417 7389

Resources

Prosecutors

Queries about a specific case should be directed to the senior state prosecutor at the court at which the matter is to be heard. Complaints about the case or about decisions made by the prosecutor should be made to the relevant regional director of public prosecutions.

This complaint should be made in writing.

National: Tel: 012 845 6000 Fax: 012 421 0797

Eastern Cape: Tel: 047 501 2655 Fax: 047 501 2653
Grahamstown Tel: 046 602 3000 Fax: 046 602 3062
Port Elizabeth Tel: 046 602 3000 Fax: 046 602 3062

Free State: Bloemfontein Tel: 051 410 6000 Fax: 012 843 682

Gauteng: Johannesburg Tel: 011 220 4000 Fax: 011 220 4232
Pretoria Tel: 012 351 6700 Fax: 012 323 0866

KwaZulu-Natal: Durban Tel: 031 365 2561 Fax: 031 304 4466
Pietermaritzburg Tel: 033 845 4410 Fax: 033 394 6891

Northern Cape: Kimberley Tel: 053 807 4500 Fax: 053 832 9434

Western Cape: Cape Town Tel: 021 487 7000 Fax: 021 487 7167

Resources

Contact numbers

The following are organisations working in the field of violence against women who offer legal advice and support.

Rape Crisis Cape Town Trust

Tel: 021 447 1467 Fax: 021 447 5458
Tel: 021 684 1180 Fax: 021 637 9432
Tel: 021 361 9228 Fax: 021 361 0529

POWA

Tel: 011 642 4345 Fax: 011 484 3195

Tshwaranang Legal Advocacy Centre

Tel: 011 403 4267 Fax: 011 403 4275

Helpful reading

E Bass and L Davis *The Courage to Heal: A Guide to Survivors of Child Sexual Abuse* New York 1994

H Britton, J Fish and S Meintjes (Eds) *Women's Activism in South Africa* University of KwaZulu-Natal Press 2008

Correctional Services Act 111 of 1998 Government Gazette

Criminal Law (Sexual Offences and Related Matters) Amendment Act. No. 32 of 2007 Government Gazette No. 30599

Criminal Procedures Act No. 51 of 1997 Government Gazette

Department of Justice and Constitutional Development *The Service Charter for Victims of Crime in South Africa*. Available: <http://www.npa.gov.za/files/Victims%20charter.pdf>.

J Herman *Trauma and Recovery: The Aftermath of Violence from Domestic Abuse to Political Terror* New York 1997

D Smythe and B Pithey *Sexual Offences Commentary* Cape Town 2011

Pre-trial consultation resources

Rape Crisis Cape Town Trust Telephone support:

Observatory +27 (0)21 447 1467
Counselling line - +27 (0)21 447 9762

Athlone +27 (0)21 684 1180
Counselling line - +27 (0)21 633 9229

Khayelitsha +27 (0)21 361 9228
Counselling line - +27 (0)21 361 9085

www.rapecrisis.org.za
rapecrisis.mobi

Readers are encouraged to copy any section of this booklet, but please acknowledge the Rape Crisis Cape Town Trust Cape Town Trust.



the doj & cd

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