

DEPARTMENT OF JUSTICE
NATIONAL GUIDELINES FOR PROSECUTORS IN SEXUAL OFFENCE CASES

1. General introduction

The present arbitrary/haphazard approach to victims of sexual assault has proved to be ineffective and in most cases leaves the victim with a sense of betrayal by the courts (often referred to as "secondary victimization").

Victims of sexual assaults (especially women) are being perceived as revengeful, deceitful or dishonest and are often not treated with the necessary respect: thus the need for a protocol for the treatment and protection of victims and witnesses in the criminal process.

Victims and witnesses often do not feel part of the criminal process and yet they fulfill a valuable and important role: thus the need for making their roles more meaningful and to obtain the optimal cooperation from them.

With our newfound constitutionalism, there is a need for an approach which is underscored by the constitutional value of equality, comprising the equal protection and treatment of victims in the area of criminal justice.

2. Specialist prosecutor

A specialist prosecutor is the ideal person for this type of case. In offices where there is only one prosecutor, the burden will obviously fall on this person. However, in big offices prosecutors must be selected or should be identified to handle these matters. These prosecutors are expected to exhibit the necessary interest and sympathetic attitude which such cases require.

1. The principle is that the prosecutor who first handled the case should follow it through the trial stage until its conclusion. Changing prosecutors during the course of the trial must be avoided at all cost.
2. It is imperative that the prosecutor who takes the case to trial, ensures that the case docket has been fully investigated before the trial commences so that no unnecessary delays occur.

3. Consultation with the victim

The prosecutor must consult thoroughly with the victim before the trial commences. The prosecutor must ascertain what fears the victim has and attempt to allay these fears. It is often useful to familiarise the victim beforehand with the court room itself and the interpreter, if applicable. All the court proceedings must be explained to the victims so that they can fully understand. The victims need to be treated with the utmost empathy and respect at all times.

4. Consultation with accredited health care practitioner

The prosecutor must also consult thoroughly with the accredited health care practitioner (AHCP) whenever medical evidence is available. The prosecutor must also ensure that she/he is familiar with all the medical terminology as well as the implication of the findings of the district surgeon, so that they can properly lead the evidence of the district surgeon in a coherent manner.

5. Consultation with police

Where possible the prosecutor must consult with the police who investigated the case, particularly those likely to be called as witnesses. Discussion to ensure that all necessary documents and exhibits are available will assist the smooth running of the case.

6. Special treatment of and assistance to victims and witnesses

All witnesses in sexual offence cases, as well as AHCPs, should be assisted without undue delay. The prosecutor must make all efforts to ensure an expeditious and fair procedure and avoid unnecessary delays. However, should it be unavoidable that a case cannot be finalised on a particular day, these witnesses must be informed timeously so that a new date and time can be arranged. These cases should be finalised as soon as possible.

1. The victims of sexual offences should not be exposed to the accused, his family or his friends outside the court room. An office or waiting room must be made available to them to ensure their privacy.
2. The prosecutor must try to improve the communication link with the victim. The victim must know where to contact the relevant prosecutor at his/her office so as to facilitate being kept informed of all aspects of progress of the case. The victim should be informed of the role, scope and duration of the case as well as other relevant information. If decisions are made about the handling of the case (eg., to withdraw a charge) the victim must be informed about this in a manner which assists them to understand the reasoning.
3. Prosecutors must always bear in mind the general principle that witnesses must not be together with the prosecutor when consulting about their statements or the evidence they will give.
4. The prosecutors must try to minimise inconvenience to the victims and witnesses, protect their privacy (in case of child victims, this will include ensuring the confidentiality of information concerning the child victim/witness). Where necessary, prosecutors must take steps to ensure the safety of witnesses and to protect them, (and their families) from intimidation or harassment, ie., by assisting in the arrangement of witness protection.
5. The prosecutor must make every effort to assist with witness fees and, upon request by the victim/witness, to assist in notifying the employer (or relevant authority) where the prosecution of the crime causes his/her absence from work.

7. Proceedings in camera

The prosecutor must also inform the victim of section 153 of the Criminal Procedure Act (No 51 of 1977) and the importance thereof. Proceedings held in camera may reduce the trauma for the victim. However, the choice should lie with the complainant.

The evidence of the AHCP can also be held in camera when requested.

1. If the complainant wishes to have a friend or a member of their family in the court to assist them, the prosecutor must argue this aspect so that the complainant can have the necessary support. The support person should not be someone who could become a witness in the trial.
2. In terms of section 154(3) of the Criminal Procedure Act, no information which may reveal the identity of a witness who is under 18 years of age, may be published. Where a witness does not fall within the ambit of that subsection, the prosecutor ought to request the court to issue an appropriate direction in terms of section 154(1) of the Act where the provisions of that subsection are applicable.
3. Prosecutors should also take note of section 335A of the Criminal Procedure Act, which largely prohibits the publication of identifying information about the accused.

8. Proceedings with the use of intermediaries

When children testify, the prosecutor should generally apply to the court for permission to make use of the closed circuit camera system to protect the child from direct confrontation.

The decision is, however, one for the child and the prosecutor should assist the child to make an informed decision.

In terms of section 170A of the Criminal Procedure Act evidence through intermediaries may be accepted. This provision is only in respect of children under 18 years of age. If the court does not have this facility, there are mobile closed circuit camera units which can then be made available. The ideal would be for each and every court to be equipped with a closed circuit camera system.

This order is not automatically granted by the court, as the final decision will be left in the discretion of the magistrate.

9. Bail

The general approach should be that applications for bail must be opposed. If bail is, however, granted, the prosecutor must request special conditions, eg., if the victim is related to the offender, a condition forbidding contact should be requested. If the offender resides with the victim, the prosecutor must insist on a condition that the offender resides at some other place.

The prosecutor can also request special conditions, for instance that the offender is not allowed to contact or come into contact with the victim; that the offender is not allowed within a certain kilometre radius of the victim's house, etc. In suitable cases, prosecutors may invoke section 50(6) of the Criminal Procedure Act and request a postponement of the bail application.

It is vital to inform the victim of the result of any bail application.

10. Proceedings in court

The prosecutor must oppose any unnecessary delaying tactics or adjournments at the request of the defence. Trials which are finalised after many months or years are greatly detrimental to the victim.

1. The prosecutor must object to unnecessary aggressive and badgering cross-examination of the victim and/or witnesses.
2. The prosecutor is also reminded of the provisions of section 227 of the Criminal Procedure Act. In particular, subsection 227(2) only allows evidence of the sexual experience of the complainant to be admitted with the leave of the court if it is satisfied that such questioning is relevant.

11. Sentencing

Prosecutors should place before the court evidence relating to the impact (physical, emotional or financial) the crime has had on the victim's life.

1. Where the available evidence pertaining to aggravating circumstances has not been placed on record during the trial, this must be done after conviction. When the merits and complexity of a matter before court demand expert witnesses, they should be called to testify. An example is the problems encountered on treating sexual offenders such as paedophiles. The provisions of section 286A of the Criminal Procedure Act, which allow persons to be declared dangerous, may be useful.
2. Because of the seriousness of this type of offence, a special effort must be made by the prosecutor to address the court fully in every case. The prosecutors must not hesitate to call for a sentence of imprisonment.
3. When arguing for imprisonment the shortcomings and/or disadvantages of other sentencing options must be highlighted. For example, a suspended sentence or a sentence of correctional supervision will usually result in the offender being released back into his own home. This is obviously totally inappropriate where the victim resides in that home.
4. The prosecutor should consider prosecuting all cases of assault and indecent assault involving children under the age of 18, in the regional court, for purposes of proper sentences.

12. Appeal

Should the prosecutor be of the opinion that the sentence imposed is not appropriate, she/he must immediately contact the office of the Attorney-General to consider a possible appeal against the sentence in terms of section 310A of the Criminal Procedure Act. The prospects of a successful appeal on sentence will be enhanced where all the relevant evidence has been placed on record by the prosecutor.

