



ATTRITION OF RAPE MATTERS AT THE PROSECUTION STAGE OF THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM

EVIDENCE AND RECOMMENDATIONS FROM A NATIONAL RETROSPECTIVE STUDY OF REPORTED RAPE CASES

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INTRODUCTION

The Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007(1) provides a legal framework for responding to sexual offences and an integrated response framework for victim-friendly service provision including the prescription of directives for the different actors within the criminal justice system. The National Prosecuting Authority has responsibility for witness preparation, prosecution of the offender and court-support referrals to health and social support services. Section 66 of the Act describes the way in which sexual offence cases should be dealt with in general, including the circumstances in which a charge may be withdrawn or a prosecution stopped (2). Prosecutors' decisions take place within a context determined by law and policy, institutional rules and practices, and what might be described as society's unwritten rules for thinking about rape. In relation to the law, prosecutors work within the bounds determined by the Constitution(3), the Sexual Offences and Related Matters Amendment Act, the Criminal Procedures Act, relevant case law and the common law. Prosecutors make the decision to proceed with reported rape case if there is prima facie evidence from the police investigation, or to decline to prosecute the case (nolle prosequi). If the prosecutor proceeds with the case, they should present it to the court on behalf of the state, cross-examine defence witnesses and assist the court in arriving at a just verdict. The prosecutor's role also includes influencing the delivery of a fair sentence, based on the evidence presented and the sentencing standards outlined in Section 66 of the Sexual Offences and Related Matters Amendment Act.

Case attrition is a complex, multi-stage process which prosecutors influence within the context both of prosecutor-led police

investigations, as well as court proceedings. Victim-related, crime characteristics and system factors determine the progression and outcomes of reported cases (4). Available evidence of case attrition in South Africa has been generated from localised studies and studies have demonstrated how case evaluation and court practice varies across courts (4-9). Recent, nationally representative studies of attrition of rape cases at different stages of the criminal justice system are lacking. Recent research is necessary to monitor progress as well as to inform current and national response to sexual offences.



RESEARCH METHODS

To fill this critical gap and to add to the evidence required to improve national response to sexual offences, the SAMRC and partners conducted a national study aimed to describe attrition of rape matters within the criminal justice system and investigate the factors associated with it (10). The research study was commissioned and formed part of the Foundation for Professional Development (FPD)/USAID Increasing Services for Survivors of Sexual Assault in South Africa (ISSASA) programme. A sample of 3952 cases reported at 170 police stations across South Africa in 2012 were retrospectively analysed. Data was extracted from case dockets, medical examination forms, charge sheets, trial transcripts, court room observations. This research brief outlines key findings of case management at the prosecution stage of the system. This includes factors associated with prosecutorial decision making, commencement of trials and trial outcomes from analysis. Qualitative findings are also presented about prosecutor motivations when enrolling cases.



PROSECUTORIAL DECISION-MAKING

HALF OF REFERRED CASES REFERRED TO PROSECUTORS ARE DECLINED

Prosecutor actions are a key contributor to attrition; first, at the point of the first referral for the decision to prosecute and secondly by the subsequent withdrawal of half of cases enrolled before the trial starts. Prosecutors declined to prosecute almost one in every two cases referred to them by police (i.e. 47.7% of referred cases). Prosecutors were more likely to proceed with cases in which stranger perpetrators had been detected, and cases where physical violence was used and weapons displayed. They were less likely to proceed with cases where the victim was intoxicated. These findings likely reflect biases about ‘real rape’ or convictability in a trial, which seem to influence the prosecutorial decision to enroll cases, and has been documented previously (4, 7). Of the referred cases, there was no difference in the prosecutorial decision by victim age or provincial distribution.

EARLY VICTIM WITHDRAWAL MAKES IT IMPOSSIBLE TO PROSECUTE CASES

It is a requirement that prosecutors to provide reasons for declining to prosecute cases on the cover of case files. The most common reasons documented on case dockets for declining to prosecute were related to the victim. These reasons include victims wanting to get on with their lives, disappearing, resolving matters, refusing to co-operate or becoming untraceable. These reasons accounted for two thirds of cases declined by prosecutors. Victim-related factors were higher among the adult victims with 85.9% of declined cases in this age group being due to victims wanting to get on with their lives. An even higher proportion of adolescent cases were declined due to this reason (91.9%) and this warrants further investigation. Our study, and others before, have however shown that victim’s decisions are influenced by the perceived empathy of the investigating officer and this in turn is influenced by factors such as work stress and vehicle access (4, 8). This challenges the assumption that victim non-cooperation is inevitable and cannot be influenced. The findings reiterate that victim withdrawal remains a problem for securing justice in the South African context. Interventions are necessary to keep victims actively engaged and committed to pursuing cases through the criminal justice system.

PROSECUTORIAL DECISION MAKING IS INFLUENCED BY THE QUALITY OF POLICE INVESTIGATION

The second most frequent documented reason for declining to prosecute was that the evidence collated during the police investigation was insufficient. This accounted for about a third of declined cases. The reason of insufficient evidence was more common among child victims under 12 years of age (40.1%) compared to the adolescent and adult victims. Insufficient evidence could have been the result of delayed reporting, lack of victim, first report or other witness statements, failure of investigators to visit crime scenes and collect evidence, delayed or failure to submit specimens to the Forensic Scientific Laboratory and in a considerable proportion of cases the perpetrator had not been detected and inappropriately referred for prosecution. Prosecutors were less likely to decline to prosecute cases in which SAECKs had been completed and sent to the Forensic Scientific

Laboratory. The influence of policing to progression of cases in this study reflects evidence that shows that the police investigation stage is a key attrition point in the processing of rape cases (4).



TRIAL PROCEEDINGS AND CONCLUDING MATTERS

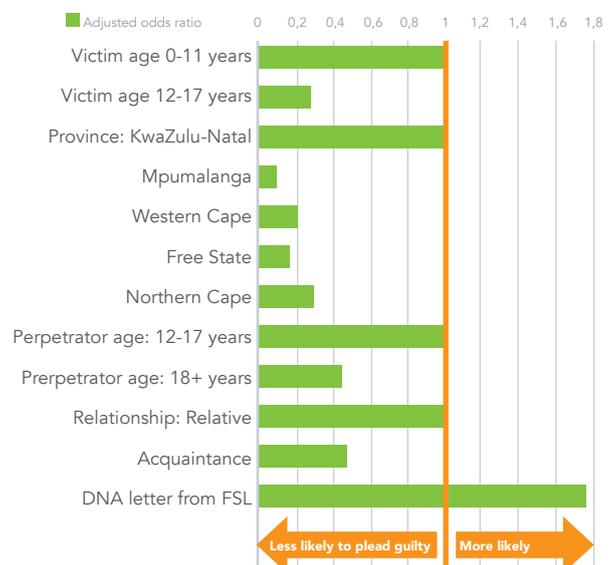
LESS THAN ONE IN FIVE CASES MAKE IT TO TRIAL

Prosecutors withdrew almost half (46.3%) of cases they had enrolled before trial started. This was more common for cases with the under 12 child victims or disabled victims and for cases involving multiple perpetrators. Cases of the disabled and children require more careful victim and witness preparation and expert assessments to secure successful outcomes. The result was that of the cases included in the study, only 18.5% went to trial.

OVER A TENTH OF PERPETRATORS IN CASES WITH TRIAL PROCEEDINGS PLEADED GUILTY.

In 13.1% of cases in which court proceedings commenced, the perpetrators pleaded guilty. Cases with guilty pleas are an important prosecutorial achievement. Perpetrators in cases where a DNA sample had been found by the Forensic Science Laboratory were 77% more likely to plead guilty. This shows that DNA evidence has started to become important in securing justice, yet there are significant gaps in the collection and processing of evidence, starting from the crime scene visits, appropriate completion of SAECKs, with many SAECKs still not being sent to the FSL. In some cases, processing of DNA was still taking too long and some DNA results only became available after the trial. This resulted in some young children’s cases where the DNA was matched with the perpetrator’s, but he was found not guilty of rape.

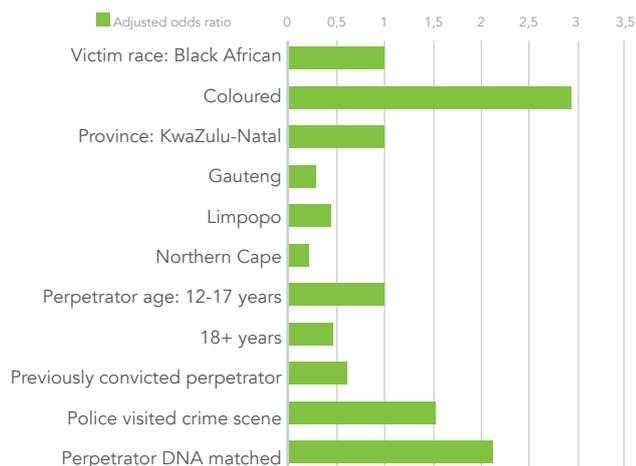
Perpetrators of adolescent victim rapes, acquaintance perpetrators and adult perpetrators were less likely to plead guilty. There were also interprovincial differences in perpetrators pleading guilty and the guilty pleas were less likely in Mpumalanga, Western Cape, Free State and Northern Cape provinces when compared to the reference KwaZulu Natal province. Guilty pleas were not different in the remaining provinces.





ONE IN TWELVE CASES CONCLUDED WITH GUILTY CONVICTION

Only 8.6% of all cases were finalised with a guilty verdict for a sexual offence. This was 45.6% of the cases in which trials commenced. Convictions were 50% more common when police had visited the crime scene and twice as common when perpetrator DNA was matched. Where perpetrators pleaded not guilty, the cases were twice as likely to result in a guilty verdict if there was DNA that matched the accused. Convictions were not associated with injuries found during the medical examination.



SENTENCING OF RAPE PERPETRATORS IS VARIED

Of the 239 prison sentences handed for rape convictions, 11.8% were life sentences, 64.4% were sentences more than 10% and 23.8% of sentences were less than 10 years. In 12% of cases adults received a suspended sentence. Many of the sentences deviated from minimum sentences for rape and 53 appeared to be quite inappropriate, for example fines (3.4%) and suspended sentences (12.1%) given to adults for rape.



COURT ENVIRONMENT AND ADMINISTRATION

GENDER STEREOTYPES AND RAPE MYTHS STILL INFLUENCE PROSECUTION AND ADJUDICATION

There was evidence of rape myths and gender stereotypes continuing to have a bearing in cases during prosecution. Some magistrates drew inappropriate conclusions based on these, some prosecutors led irrelevant evidence on the complainants' sexual history and failed to challenge the same from the defense. There was also evidence of inappropriate weight given to the accused family's views in trials and sentencing. This displays a lack of understanding of the role of families in creating the moral climate in which rape is perpetrated and further suggests rape was not always seen as a very serious crime by families of the accused and courts alike. Further training on gender, the context of rape and the law is needed in this regard.

SPECIAL MEASURES ARE NOT BEING APPLIED APPROPRIATELY

Section 170A of the Criminal Procedures Act sets out "special measures" which allow for testimony of the complainant via an intermediary in cases where the complainant is a minor, or has a

mental age less than that of an 18-year-old. Section 153 of the Criminal Procedure Act allows for in-camera proceedings (including testimony via closed-circuit television) and although not contained in legislation the use of anatomical dolls is suggested in the Sexual Offences Court Model as set out in the Department of Justice and Constitutional Development's report on the adjudication of sexual offence matters (11). Nevertheless, there were very few recorded instances of special measures being provided by the court for example the use anatomical dolls and intermediaries. This implies that either special measures were available and acceded to by the magistrate but this was not recorded, or alternatively the magistrate did not accede to application or that the court lacked the special measures required for sexual offences cases. Moreover, there was little evidence of use of expert witnesses such as a child psychologist or social worker to enable the court to better understand the circumstances of child rape and later reactions. Courts could have been assisted in many cases by expert witnesses but these were not called.

WORK PERFORMANCE TARGETS INFLUENCE PROSECUTION

Prosecutors make decisions about rape cases which are informed by the availability and quality of evidence in the docket, their "feel" for a complainant, and how their court's systems are arranged. The resources available to prosecutors, are also important considerations, as are their performance measures which play an important role in deciding which cases are set down for trial and the amount of time that is allocated towards their preparation and prosecution. From our study, prosecutors signed performance contracts in which they committed to achieving a 69% conviction rate in sexual offences cases. This was in addition to the requirement that they finalise 15 cases per month. Qualitative interviews with prosecutors showed that the performance targets set for the number of cases finalised in a month, as well as the percentage of convictions secured for rape may have negative impacts on the decision to proceed with a rape case.

CASE OVERLOADS AT COURTS AFFECT PROCESSING OF CASES

In some courts, many cases (up to 15) are set down daily for trial. This is often an impossible undertaking that saw most trials being crowded out. This also saw cases being rushed through court and pleas being accepted to meet targets. Another effect of court targets appeared to be a fragmented approach to the day that saw many matters dealt with in small parts: bail, first appearances, postponements, judgements and sentences.

POOR LANGUAGE INTERPRETATION IS EVIDENT FROM TRIAL TRANSCRIPTS

A considerable amount of information in rape cases is lost in translation. This problem pervades the criminal justice system from taking of statements in the vernacular and recording these in English and then having these agreed as a true record by complainants, to translation in court. Police members were routinely expected to act as interpreters without any formal training or assessment of language skills. Some of the court interpreters did a poor job and the interpretation by police officers in taking statements is a concern. The experience of translation could have been alienating for victims and there is considerable potential for courts to be misled due to poor interpretation.



TRIAL TRANSCRIPTS LACK CRUCIAL INFORMATION

The system of recording trial proceedings is deeply flawed. In 20% of transcripts obtained there was important information missing from the recorded information. This included omissions of the complainant's age, the relationship between the complainant and the accused, the testimony of the complainant, as well as swearing in of interpreters and setting out the details of minimum sentencing. It cannot be ascertained if the court failed to swear in interpreters or describe the details of minimum sentencing or alternatively if this was simply not recorded, in the case of transcripts that were not complete. Nearly half of the accused were not informed about minimum sentencing which might apply or it was not recorded, rendering sentences vulnerable to appeal. In the case where crucial information is omitted this is an incomplete record of proceedings and would require the court to reconstruct the record if the accused decided to appeal the judgement. Incomplete recording of trials may be explained by malfunctioning equipment in some courts.

DOCUMENTATION AND ARCHIVING RECORDINGS CAN BE IMPROVED.

Only 20% of the requested transcripts were made available by courts over a prolonged time and after many follow ups. Reasons for failure to locate recordings included unavailable or missing audio recordings, records that had been destroyed or they were unable to provide the recordings unless further details about the perpetrators were availed. Some of the charge sheets had gone missing and could not be traced, and some charge sheets may have been destroyed but there was no disposal list. In some cases, there was lack of co-operation from court personnel, for reasons such as, old cases that could not be found in storage, cases that could not be retrieved using their new system and cases that could not be found using ICMS without the researchers providing names of accused and complainant.

WHAT CAN BE DONE

PROSECUTION:

- Cases identified as having insufficient investigation should be sent back for this to be completed and reasons for failure to do this should be provided and monitored
- Case closure by prosecutors should be monitored to identify and reduce the impact of target chasing on premature closure of cases
- Multi-sectoral audit processes should be established in courts to review decisions not to prosecute cases and focus especially on non-evidentiary aspects of such decisions
- Prosecutors should be encouraged to call expert witnesses to enable appropriate interpretation of child complainant behaviour and their use should be monitored
- Performance targets for prosecutors should take into account the nature of rape cases and include attainable quality measures that do not impede justice for victims

COURT ADMINISTRATION:

- Courts should be encouraged to use special measures especially intermediaries for child witnesses and

anatomical dolls. These should be provided when requested.

- Special measures such as operations of the court in official languages other than English and Afrikaans should be investigated to enhance access to justice
- Competency of translators in courts should be tested and their work should be assessed to ensure quality.
- First language statement taking should be enabled, with professional translation where required
- Courts be fitted with microphones for all relevant court personnel and all conversation be audio-recorded so that complete records of proceedings can be made and digitally retained.
- Interventions are necessary to overhaul trial record keeping and transcription services to improve the quality of records and their availability for appeals through monitoring and evaluation of the system

ADJUDICATION:

- Further training should be provided to presiding officers to ensure that rape myths about 'real rape being violent' are not brought to play on verdicts
- Circumstances for deviation from minimum sentencing should be actively reviewed and presiding officers should be engaged on patterns of deviation

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