

CHAPTER 4

ADJUDICATION

4.1 INTRODUCTION

In the adjudication of crimes against children the ‘best interests of the child’ is paramount. In this regard, Section 28(2) of South Africa’s Constitution, article 3 (1) of the Convention on the Rights of the Child, article 4 of the African Charter on the Rights and Welfare of the Child, and articles 16 (1) d and (f) of the United Nations Convention on the Elimination of all Forms of Discrimination against Women enshrine the ‘best interest of the child’ standard as a ‘paramount’ or ‘primary’ consideration in all matters concerning children. However, it has been argued that the ‘best interest’ standard is problematic in that, *inter alia*: (i) it is ‘indeterminate’, (ii) the different professionals involved with matters relating to children have different perspectives regarding the concept; and (iii) the way the criteria is interpreted and applied by different countries (and indeed, by different courts and other decision makers within the same country) is influenced to a large extent by the historical background to and the cultural, social, political and economic conditions of the country concerned, and also by the value system of the relevant decision maker (South Africa Law Commission: Review of the Child Care Act, Report and Draft Children’s Bill; December 2002:14). The South Africa law commission (SALC) recommends the inclusion of the ‘best interest of the child’ clause in the new Children’s Bill. This is done based on the strength of South Africa’s commitment to the African Charter on the Rights and Welfare of the Child.

From a criminological perspective, adjudication of crimes against children include the treatment and punishment of offenders and their victims by the criminal justice process. This chapter will examine the most probable course of events, from the time the crime is reported to the police, and the police considers criminal proceedings, to the detention and arrest of the suspect, followed by the charge, bail, prosecution and sentence. This chapter will also set out some of the offences which can be charged and some decisions will be quoted and penalties for the various offences. The presentation of evidence, particularly that of the children will also be discussed. Attention will also be given to the legal processes in some countries as

well as the situation in South Africa.

4.2 LEGAL PROCESS

4.2.1 England

Before 1908 sexual crimes against children were offences under law and heard in ecclesiastical courts in England. During that year the British parliament passed the punishment of sexual offences Act of 1908. Lord Halsbury opposed the Bill on the grounds that the discussion of such matters in court would be worse than the acts themselves (Honore 1978:70).

Presently, the Sexual Offences Act of 1956 spells out the definitions of sexual offences against children and punishment for offenders as follows:

Rape

Section 1 (1) of the Sexual Offences Act 1956 states that it is a felony for a man to rape a woman. Updated and enlarged by s.46 of the same Act, it means that it is an offence for a man (or boy) to rape a woman (or girl).

The Sexual Offences Amendment Act 1976, Section 1, further defines the offence rape as follows:

1. (1) For purposes of s.1 of the sexual offences Act of 1956 a man commits rape if as follows:
 - a) he has unlawful sexual intercourse with a girl who, at the time of the intercourse, does not consent to it, and
 - b) at the time he knew that she does not consent to the intercourse, or is reckless as to whether she consents to it.
2. It is hereby declared that if, at a trial for a rape offence, the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury has to attend to in conjunction with any other relevant matters in considering whether he so believed (Hall & Martin 1992:54).

For an indictment for rape to succeed it must be proved that the accused had sexual intercourse with the complainant without her consent. This applies, even when the offence is alleged to have been committed against a girl under the age of 16, although, sometimes in such cases the prosecution will not have to prove much more than the age of the girl, since at a young age a girl will not have the understanding or knowledge to know whether to consent or resist (Hall & Martin 1992:55). In R.v. Barrett (1873) L.R.2C.C.R.81, the defendant was convicted of raping a girl of 14 years of age. She was blind and hardly capable of understanding anything that was said to her. She passively obeyed all directions and had to be dressed and undressed. It was argued that she was incapable of consenting and that the jury was correct in convicting the defendant.

Unlawful Sexual Intercourse

Sections 5 and 6 of the Sexual Offence Act 1956 specify the offence of unlawful sexual intercourse with a girl under the age of 13 years and 16 years respectively.

It does not serve as a defence that the accused was told, and reasonably believed, the girl to be above the age of 13 or 16 years as the case may be (R.v. Prince (1875) 39 J.P.676). Consent of the girl is no defence. If the defendant was indicted for an attempt to commit the offence, the evidence was that he had attempted to have sexual intercourse with the girl, and that she had consented to the attempt, it was argued that the fact of her consent was immaterial. Held: the defendant was properly convicted (R.v Beales (1865) L.R. 1 C.C.R.10) (Hall & Martin, 1992:55-56). The maximum penalty for an offence under s. 5 (which is triable on indictment only) is life imprisonment and seven years for an attempt.

Incest

Section 10-11 of the Sexual Offence Act 1956 describes the offence of incest as committed by a man and a woman respectively:

By a man

10. (1) Is an offence for a man to have sexual intercourse with a girl whom he knows to be his daughter, granddaughter, sister or mother

By a woman

11. (1) Is an offence for a woman of the age of 16 years or over to permit a man whom she knows to be her grandfather, father, brother or son to have sexual intercourse with her by consent.

The punishment of incest by a man is a maximum of 7 years imprisonment and 2 years for an attempt. If a girl is under 13 years and if so charged in the indictment the penalty is a maximum of life imprisonment and 7 years for an attempt. Punishment for incest by a woman is a maximum of 7 years and 2 years for an attempt (Hall & Martin 1992: 57-58).

Regarding a person's conviction of an offence under s.10 of the Sexual Offence Act 1956 against a girl under the age of 18 or an offence under s.11 of this Act against a boy under that age, or of attempting to commit such an offence, the court may, by order divest that person of all authority over the girl or boy. An order divesting a person of authority over a girl or boy under the foregoing section may, if that person is a parent or guardian of the girl or both remove that person from the guardianship. The court may also, under this section, appoint a person to be the guardian of the girl or boy during his or her minority or any less period (Hall & Martin 1992:60).

Indecent Assault

The Sexual Offences Act, sub-section 14 and 15, set out the offence of indecent assault regarding a woman or man respectively:

Section 14(2) A girl under the age of 16 cannot by law give any consent, which will prevent an act being an assault for the purposes of this section.

Section 15 (1) A boy under the age of 16 cannot by law give any consent that will prevent an act being an assault for the purpose of this section.

There is no definition of indecent assault in the Act but there are several helpful decisions. In R.v. Court (1986) 84 Cr. App. R. 210, the alleged indecent assault consisted of spanking a girl over her shorts. When the defendant was interviewed, in answer to a question as to why he did it said: "I don't know - buttock fetish". At the trial, he admitted the assault, but denied that it was indecent. The defence sought to exclude the above answer on the grounds that it was a secret uncommunicated (to the girl) motive, it can not be indecent assault, which by reference to the overt circumstances was not indecent. It was upheld on appeal, but it was not necessary for the prosecution to prove that the girl knew or thought the assault upon her was indecent. The essential element in the offence was the intention to commit the assault knowingly or being reckless about the existence of circumstances, which were shown to contravene standards of decent behaviour relating to sexual modesty or privacy. Proof of further indecent intention was not required. However, if evidence of an indecent purpose or motive existed, it did not have to be excluded as irrelevant and it was open for the prosecution to adduce available evidence of an admitted secret motive, which actuated the accused to commit the offence (Hall & Martin 1992:64-65).

Hall and Martin (1992:65) also reported that an indecent assault does not have to be an assault or aggressive or hostile. For example, in the case of Faulker v Talbot (1981) 74 Cr.App.R.1, where a woman who touched the penis of a consenting boy under 16 prior to intercourse. The defence argued that, since it was not an offence for a woman to have sexual intercourse with a boy under 16, the touching as a prelude to intercourse could not be an offence. This argument did not succeed. An indecent assault included an indecent touching; and it did not have to be rude hostile or aggressive (as some older cases suggested). Consent was irrelevant, since the boy was under 16, and since the touching was intentional and without lawful excuse, the offence was proved (Lord Lane, C.J.) (Mason (1969) 53 Cr. App. R. 12

overruled). In order to constitute an indecent assault against a child under 16, the act complained of must be in itself inherently indecent or it must be one that is hostile or threatening or an act which the child has demonstrated to be reluctant to accept (Hall & Martin 1992:66).

4.2.2 South Africa

The Constitution of South Africa, Act no. 108 of 1996, includes the Bill of Rights, which enumerates a number of provisions aimed at ensuring the protection, promotion and respect of human rights of all South African people. Rights specific to children are described in section 28 of the Bill and in terms of section 28 (2), the child's best interest are paramount in every matter concerning the child. The relevant subsection with regard to abuse is section 28 (1) d which ensures that every child has the right to be protected from maltreatment, neglect, abuse or degradation. However, the above section does not specifically provide for protection against sexual abuse, but abuse includes all forms of abuse including sexual abuse. According to section 10 of the constitution everyone has the right to have their dignity respected and protected. Sexual abuse violates this inherent dignity and is also a form of violence in contravention of section 12 (1) c. It further contravenes section 12 (1) e and section 28 (1) d in that it constitutes inhuman and degrading treatment.

Domestic Legislation and policies

A number of domestic legislations and policies in South Africa facilitate the practical implementation of children's rights and government policies as set in the Constitution and in international laws. While some of these were enacted prior to the Constitution coming into effect and to South Africa acceding to international laws, most of them are enacted after these events, to specifically ensure the practical realisation of promises espoused in the Constitution and in international laws. National legislation that aims to protect children from sexual abuse includes:

The Child Care Act no. 74 of 1983 (as amended).

The Sexual Offences Act, no. 23 of 1957 (as amended).

Other sexual offences against children operate in terms of common law, example rape, indecent assault and incest.

Domestic Violence Act, no. 116 of 1998

The Criminal Procedure Act, no. 51 of 1977

The National Policy Guideline for sexual offences

The Multi-Disciplinary Child Protection and Treatment Protocol.

It must be pointed out that the adjudication of sexual crimes against children begins when such crimes are reported to the police. In South Africa there are laws that makes it mandatory to disclose any offences against children.

The Duty to Report Child Abuse

Disclosure by a child often leads to a report being lodged with the appropriate authorities. Universally, there are two approaches to reporting sexual child abuse, namely mandatory and voluntary reporting. Mandatory reporting occurs where a designated person is under an obligation to report a case of sexual child abuse that comes under his or her attention under specified circumstances. Voluntary reporting occurs when there is no obligation on a person to report abuse, even if he or she acquires the knowledge of abuse in the context of his or her profession (SAHRC: RSOAC, 2002:19).

The statutory duty to report crimes against children is set out in section 4 of the Prevention of Family Violence Act, no. 133 of 1993 (section 4 is one of the only 2 sections that remains operative in the Act) and section 42 of the Child Care Act, as amended. Section 4 of the Prevention of Family Violence Act provides for the

mandatory reporting to a police official, Commissioner of Child Welfare or to a social worker by any person who examines, attends to, advises or cares for any child in circumstances which ought to give rise to a reasonable suspicion that such child has been ill-treated, or suffers from injury, of which the probable cause was deliberate.

It must be noted that mandatory reporting is not without problems, because of divergent views regarding the purpose of reporting. Where a reporting system is not accompanied by adequate infrastructures to ensure appropriate responses, the child's vulnerability is inevitably increased. Mandatory reporting is further criticised for its potential to reduce child abuse to a social phenomenon exclusive to indigent communities, which can further distort the already distorted public opinion regarding the causes of child abuse (SAHRC; RSOAC, 2002:19).

Despite the existence of a statutory framework for reporting child abuse in South Africa, reporting cases remains low and although an increase in cases reported to the police is often estimated, the possibility of a significant amount of cases going unreported still exists. Research (Wynberg Sexual Offences Court Evaluation Report 1997) has shown that a number of victims of sexual offences opt not to vindicate their experiences of sexual abuse through the criminal justice system. Reasons advanced for the failure to report cases to the police hinge on the fear of secondary victimisation at the hands of the legal system. The Human Rights Watch Report (2001) further reports patterns whereby schools devalue children's reports of sexual violence and harassment. Report by students are often accompanied by inappropriate or incomplete measures of the school authorities to confront the violence, often discouraging the children to seek help or where complains were lodged, from pursuing them.

4.3 CRIMINAL JUSTICE PROCESS

4.3.1 The role of the police

Research singles out the police as the first line of support for most persons who have suffered sexual abuse (Ciet Africa Report 2000:16; (Wynberg Sexual Offences Court Evaluation Report).

It must be underscored that a good police response to victims of sexual abuse is likely to vindicate the victims' experience of abuse, thereby increasing his or her confidence in the criminal justice system. Conversely, a poor response is likely to invalidate the victim's experience, thwart his or her confidence in the criminal justice system, discouraging him or her from resorting to the criminal justice for assistance in the future, thereby increasing the victim's vulnerability to further abuse. It is therefore critical that the police respond to reports of sexual abuse with empathy, patience, professionalism and sensitivity.

The role of the police in sexual abuse cases is set out in the Criminal Procedure Act 51 of 1977, National Policy Guidelines and the Gauteng Multi-disciplinary Child Protection and Treatment Protocol. In terms of the framework set out in these documents, the role of the police in sexual abuse cases includes accepting criminal complaints, arresting the perpetrator, opposing bail, investigating the criminal complaint and gathering evidence. The police must also forward the case to the prosecution for a decision on whether to prosecute or not and keeping the victim appraised of the progress of the case.

Receiving criminal complaints

It is the role of the police to receive criminal complaints, which may come to the attention of the police when reported by the child, parents or caregivers or by referral by the Director- General of Welfare, acting in terms of section 42 of the Child Care Act and regulations promulgated in terms of the Act. Lodging a complaint with the police sets the adjudication process in motion.

Once a rape or an indecent assault case has been reported to the police, it will be referred to the Child Protection Unit (CPU) where one exist in the locality or a specialist member where a CPU does not exist. The Multi-Disciplinary Protocol provides for careful cooperation between the police and the Welfare Department, as the criminal process may not always be in the best interest of the child (SAHRC; RSOAC 2002:22). A child must, however, be treated with care, patience, respect and empathy. A child must not be have to make a statement in public at the

Community Service Centre (Charge Office). He or she must be allowed the opportunity to relate the incident in private.

Investigating and collection of evidence

After a docket is opened, an investigating officer is allocated to the case, whose duties include tracing the perpetrator if no arrest has been made, obtaining evidence and any other information necessary to secure a conviction. The police must then oppose bail in the interest of justice that the perpetrator be detained in custody, keep the complainant appraised of the progress regarding the case, inform the child or parents if the perpetrator is released on bail. The police must liaise with the prosecutor regarding the direction of the investigation and present the docket with the necessary evidence to the prosecutor and prepare the child for court.

It must, however, be borne in mind that investigation is a critical stage in the adjudication process of sexual offences against children, because the manner in which an investigation is conducted will determine whether a prosecution will ensue and if it does the standard of evidence presented in court. To secure a conviction, it is the role of the investigating officer to take a statement from the child with sufficient detail to cover all the elements of the alleged offence. The investigating officer also takes statements from other witnesses in order to support the evidence and the child's statement or prove an element of the alleged offence. He or she also ensures that the child attends a forensic medical examination if the Community Service Centre officer has not yet referred the child. If the child has already been for the forensic medical examination, the investigating officer ensures that the forensic medical report is collected from the examining medical officer and safely kept in the docket. Once all the statements are taken down, and necessary evidence to secure a conviction is collected, the investigating officer will place the docket before the prosecutor for a decision whether or not to prosecute (SAHRC; RSOAC, 2002:23).

Every sexually abused child has to undergo a medical examination, in order to gather forensic evidence. The National Policy Guidelines recognises that a child may undergo a forensic examination prior to lodging a criminal complaint. This can happen if the child does not want to lay a charge but requires medical treatment

before laying a charge, or is simply unaware of the process to follow. It is, however, not only the child who is required to undergo a forensic examination, the perpetrators may also be subjected to such examination as part of an evidence gathering process. Such examinations are conducted in terms of sections 37 (2), 222 (2) and 225 of the Criminal Procedure Act 51 of 1977 in cases where the perpetrator is arrested early enough to obtain meaningful forensic evidence.

4.3.2 The Role of the prosecutor

The prosecution function lies with the National Prosecuting Authority (NPA) by virtue of powers vested in it by the National Prosecuting Authority Act 32 of 1998. The role of the prosecutor is primarily to ensure justice where there has been transgressions of the law. The prosecutor is described in the NPA Policy Directives as “the people’s attorney” who represents the administration of justice in the prosecution of criminal offences. He or she has the task to assist the court to arrive at a just verdict by guiding the police through the investigation process, making decisions to prosecute, addressing the court regarding bail, present evidence in court, argue cases and help the court arrive at a just sentence in the event of a conviction (SAHRC; RSOAC, 2002:26).

When prosecuting sexual abuse cases, the prosecutor is bound by the Criminal Procedure Act. He or she also derives guidance from the National Policy Guidelines and the NPA Policy Directives. The Multi-Disciplinary Protocol does not set any standards for prosecutors. The NPA Policy Directives, however, sets general minimum standards for prosecutors in the execution of their duties, while the National Policy Guidelines set guidelines for the management of sexual offences (SAHRC; RSOAC, 2002:26).

The decision to prosecute

According to the NPA Policy Directives Part 4 A 3 and 4 (SAHRC; RSOAC, 2002:26), when the prosecutor receives the docket from the investigating officer, he or she has to decide whether or not to proceed with a prosecution. He or she can only make a decision after assessing all available facts, information and

circumstances, if there are prospects of a successful prosecution. When such a decision is made, he or she is required to consider the possibility of diverting the perpetrator from the criminal process. Diversion is normally considered if the perpetrator is a juvenile. The seriousness or lack thereof regarding the matter (this factor is considered in terms of the *de minimis* principle) is also considered. In terms of this principle trivial cases are normally not prosecuted, on discretionary grounds, that is, compassion is applied. Overall, a decision to prosecute consists of weighing the demands of fairness and consistency, the need to protect the victim and the community from crime and to respect the offender's presumed innocence.

When the prosecutor is of the opinion that the docket does not have sufficient information to enable him or her to decide whether or not to prosecute, he or she may refer the docket, with clear instructions, back to the investigating officer for further investigation. Once the investigation is complete, he or she decides in which court the matter is going to proceed and starts making preparation for a trial. In South Africa, the trial of sexual offences takes place in a court known as the Sexual Offences Court.

4.3.3 Specialised sexual offences court

A specialised Sexual Offences Court is a court based at regional level and dedicated to sexual offence cases. It was first established in Wynberg, Cape Town in 1993, in response to the increase in sexual offences in the region. The objectives of the court are to improve the inappropriate and insensitive treatment of victims of sexual offences in the criminal justice system, create an integrated approach to the management of sexual offences by various agencies and ultimately, improve the reporting, investigation, prosecution and conviction rate of sexual offence cases. This court differs from ordinary regional courts because two prosecutors, with an interest in sexual offence cases, instead of one, are assigned to each court. This enables the prosecutor to spend a sufficient amount of time to prepare cases. Prosecutors take turns to present their cases in court, therefore allowing each other sufficient preparation time (Wynberg, Sexual Offence Court Evaluation Report, 1997). Unlike other courts where dockets change hands each time the perpetrator appears in court. In sexual offence courts prosecutors are allocated a docket from

the time a decision to prosecute is made and once allocated, the prosecutor sees a case through to the end.

4.3.4 Trial procedure

The trials of rape and indecent assault cases are the culmination of the processes initiated when the complainant lays a charge of sexual abuse. It is during the trial that the child's allegations of sexual violence and the accused defences to those allegations are tested. The quality of evidence gathered during the investigation, and the cooperation of all role players throughout the case normally determines the outcome of the cases. The complainant normally expects a conviction of the accused, to vindicate the child's experience of the sexual violence. It is in this regard that the diligence with which the prosecution is carried out becomes important. The child's preparedness for the trial, or lack thereof will also determine the child's performance when called upon to testify.

The adjudication of rape and indecent assault cases of children is very complicated and sensitive and as a result, the cautionary rules are often used in the trial of these cases in order to arrive at a fair and just verdict.

Cautionary Rules

During the adjudication of sexual offences against children, the cautionary rules are used. Cautionary rules are evidentiary rules of practice that require presiding officers to exercise caution when they accept the evidence of certain categories of witnesses (Hoffman & Zeffert 1988:572-582). They (Hoffman & Zeffert) point out that such rules are based on the assumption that the witness adducing the evidence, for some reason, has diminished credibility.

According to Hoffman and Zeffert (1988:572), three types of cautionary rules must be applied in sexual offences against children namely, caution against women and (girl) children in rape cases, caution against the evidence of a child witness and caution against the evidence of single witnesses. They state that these rules evolved because the collective wisdom and experience of judges have found that

certain kinds of evidence cannot safely be relied on, unless accompanied by some satisfactory indication of trustworthiness, such as corroboration.

Cautionary rule in rape cases

The rational behind the application of caution regarding evidence from women and (girl) children in rape cases is explained as follows in the South Africa Law Commission's report (SALC) 1985 on Women and Sexual Offences and the Commission refused to scrap this rule. In the report, the SALC indicates that rape usually takes place in secret and it is easy to lay a false charge and difficult to refute it. Furthermore, a complainant can be motivated by an emotional reaction or an innocent man may be falsely accused because of his wealth and the complainant may be forced, by circumstances, to admit that she had intercourse and then willingly represent intercourse as rape (SALC`'s Report 1985).

After this report, the rule became the subject of legal scrutiny until repealed by the Supreme Court of Appeal in a landmark ruling in the case of *S. v. Jackson*. Upholding the State's argument that the notion that women are habitually inclined to lie about being raped was without any basis. The court found that the rule is based on an irrational and outdated stereotypical perception that women are unreliable. Since the majority of complainants in rape cases are women, the court ruled that the rule discriminates against women (SAHRC; RSOAC, 2002:32).

Pithy, Combrink, Arthz and Naylor (SAHRC; RSOAC, 2002:32) points out that, although the Jackson judgement is hailed for scraping the discriminatory cautionary rule in rape cases, it has been criticised because it leaves latitude for the continued application of the cautionary rule in rape cases by citing with approval an English judgement, where the court held that in order for the rule to be applied in rape cases, there needs to be an evidential basis for suggesting that a complainant is unreliable. However, in the Draft Sexual Offence Bill, the South Africa Law Commission (2002) recommends that a provision be included in the Proposed Bill to preclude the automatic application of the cautionary rules pertaining to sexual offences victims and children and further extend the application of the proposed clause to all children.

Cautionary rule against the evidence of a child witness

Like the evidence of women and (girl) children in sexual offence cases, the evidence of children is treated with caution. It has been argued that the evidence of a child witness is objectionable because children's memories are unreliable, children are egocentric, highly suggestible, have difficulty distinguishing facts from fantasy, often make false allegations (particularly of sexual assault) and children do not understand the duty to tell the truth. This rule has been steadfastly applied in South Africa and in other countries without interrogation and without regard for its lack of legal basis (Meintjies 2000:39).

Menitjies (2000:43) states that it was not until 1989 that the British Home Office Committee under the leadership of a Court Judge, Mr. Justice Piggot, questioned the blanket application of the cautionary rule against children. He called upon the courts to open up to what other disciplines can teach them about the features of children's evidence. The Judge advocated a new and more targeted approach to the admissibility of the evidence of children. He argued that there is nothing wrong with the current approach of seeking corroboration of children's evidence, the only problem occurs when the courts starts losing sight of why corroboration is necessary. Age and immaturity are simply not sufficient grounds for seeking corroboration.

In *The State.v. S* (Regional Court Judgement) the court acquitted a father on charges of sodomising his two children after finding that, given the applicability of the cautionary rule against a complainant in sexual offence cases, the evidence of a child witness and the evidence of a single witness in that case, the State's evidence had to be of extremely high quality to be admissible. Inevitably, the compounded effect of three cautionary rules, when applied in one case makes a conviction virtually impossible. On appeal, the court overturned the acquittals arguing with reference to the Jackson judgement, the rational for doing away with the discriminating nature of the compulsory application of rules in sexual offence cases (SAHRC; RSOAC 2002:33). Within this same premise, Judge Fagan (SAHRJ 2000:220) argued that there is no justification for treating children as less reliable than adult witnesses.

However, in order to be responsive to the reality of children, the courts need to take into account the cognitive and emotional developmental reality of children when assessing a child's evidence. The fact that a child is less developed than an adult and hence less able to withstand vigorous cross-examination, less equipped to deal with equivocal statements and with less developed communication skills, must instead dictate in the child's favour rather than a sweeping unfounded assumption that a child is inherently unreliable as a witness. It must be pointed out that statutory intervention may be necessary to settle the existing uncertainty regarding the judicial approach to the admissibility of a child witness. In this regard, the recommendation by the SALC stated above will be a better settlement.

Cautionary rule against the evidence of single witnesses

As with the other cautionary rules, the cautionary rule against a single witness developed because of judicial practice and over the years, courts have warned against too much reliance being placed on the evidence of single witness (South Africa: Gauteng Multi-Disciplinary Child Protection and Treatment Protocol (GMDCTP)). Despite a clear statutory provision in section 208 of the Criminal Procedure Act that an accused may be convicted of any offence on a single evidence of any competent witness, courts continue to apply caution when assessing the guilt of an accused person based on the evidence of a single witness.

De Villiers, JP is often blamed for creating a leeway for the continued and unabated application of the cautionary rule against single witnesses. In the *Mokoena* case, the judge warned that section 208 should only be relied upon where the evidence of a single witness is clear, and satisfactory in every material respect. The section should not be invoked where the witness has an interest or bias adverse to the accused, where he or she has made a previous inconsistent statement or where he or she contradicts him or herself in the witness box. Hoffman and Zeffertt (1988:579) have expressed regrets at the application of De Villiers *dictum* as a salutary guide to the interpretation of section 208. They warn against blanketly adhering to the approach followed by De Villiers in the *Mokoena* case, lest too much focus on the witness's interest or bias distracts one from assessing the possibility that the

witness's testimony is substantially true.

It should be noted that the cautionary rule against a single witness is applied in most sexual offence cases as incidents of sexual violence against children often takes place outside the public domain. Thus, if courts follow the approach in the *Mokoena* judgement, that children's memories are unreliable, that children are egocentric, highly suggestible, have difficulty distinguishing fact from fantasy, often make false allegations and that children do not understand the duty to tell the truth, the likelihood of the admissibility of the evidence of a single witness becomes remote when assessing the evidence of single witness in a sexual offence cases. This accounts for the low conviction rates of sexual offence cases against children (SAHRC; RSOAC 2002:34).

4.4 THE CRIMINALS

4.4.1 Punishment according to charges

Before any punishment can be imposed, the court usually refers to the case of *S v Zinn*, in which the court laid down criteria for a balanced sentence. In this regard, the triad consisting of the crime, the offender and the interest of the society must be considered.

Rape

In terms of the draft Sexual Offence Bill (SALC, 2002), rape refers to any person who unlawfully and intentionally commits any act which involves the penetration, to any extent whatsoever, by the genital organs of that person into or beyond the anus or genital organs of the person committing the act, is guilty of the offence of rape. For the crime of rape, life imprisonment may be imposed, but the South African approach is not to impose such a punishment unless it was accompanied by aggravating circumstances.

Indecent assault

Any person who intentionally commits an act which causes penetration or commits an act with other children below the age of 16 years or persons who are mentally impaired, to the extent contemplated in paragraphs (a) to (d) of section 1(vi) of Sexual Offence Bill, is guilty of an offence committed against a child or mentally impaired person, as the case may be, and is liable, upon conviction, to a fine or imprisonment for a period not exceeding two years.

The following tables show the frequencies of the empirical findings of this research regarding rape and indecent assault, when a case is reported to the police.

Table 4.1 Restraining order was issued

Restraining Order	Frequency	Percentage
Yes	5	7.04
No	66	92.96
Total	71	100

Table 4.1 indicates in how many cases restraining orders were issued against the perpetrator of child rapes and indecent assault in this study. According to the table, only in 5 cases (7.04 %) restraining orders were issued, and in 66 cases (92.96%), no such orders were issued. This partly explains why sexual crimes against children are on the increase. It was discovered in this research study that the issuing of a restraining order is linked to the crime the perpetrator was accused of.

Table 4.2 Restraining order versus 'crime accused of'

Has a restraining order	Crime accused of		Total
	Rape	Indecent assault	
Been issued?			
Yes	2 2.82 40.00 3.57	3 4.23 60.00 20.00	5 7.04
No	54 76.06 81.82 96.43	12 16.90 18.18 80.00	66 92.96
Total	56 78.87	15 21.13	71 100.00
Frequency Missing = 25			

Chi-Square 4.8778; DF 1; Prob 0.0272

According to table 4.2, statistical significance exists between the decision to issue a restraining order against the perpetrator, and 'the crime accused of'. The above cross tab indicates that more restraining orders are issued when the perpetrators are accused of indecent assault. Conversely, in 54 cases of child rapes, no restraining orders are issued. This means that, if a perpetrator is accused of child rape, the probability of a restraining order becomes very low. The reason why most of the perpetrators in this study are not issued with a restraining order is because most of the perpetrators are neighbours and strangers who can not be found by the police.

Table 4.3 Status of the perpetrator in terms of arrest

Status of the perpetrator	Frequency	Percentage
Arrested	35	44.87
At large	41	52.56
Others	2	2.56
Total	78	100

Frequency Missing = 18

Table 4.3 shows the status with regard to the perpetrator and arrests by the police. In this study, in 35 cases (44.87%) the perpetrators are arrested and in 41 cases (52.56%) the perpetrators are still at large.

Table 4.4 Outcome of case investigated

Outcome of case	Frequency	Percentage
Arrested	20	25.97
At Large	55	71.43
Others	2	2.60
Total	77	100

Frequency Missing = 19

Table 4.4 shows the outcome of the cases that are under investigation. The table indicates that in 20 cases (25.97%) the perpetrators are arrested and the cases go to court. While in 55 cases (71.43%), the alleged perpetrators are at large.

Table 4.5 Outcome of the case versus crime accused of

Outcome of case	Crime accused of		Total
	Rape	Indecent assault	
Arrested	19	1	20
	24.68	1.30	25.97
	95.00	5.00	
	32.20	5.56	
At Large	38	17	55
	49.35	22.08	71.43
	69.09	30.91	
	64.41	94.44	
Others	2	0	2
	2.60	0.00	2.6
	100.00	0.00	
	3.39	0.00	
Total	59	18	77
	76.62	23.38	100.00
Frequency Missing = 19			

Chi-Square 6.1230; DF 2; Prob 0.0468

Table 4.5 shows a statistical significance regarding the outcome of the cases and the crimes perpetrators are accused of. The results of the cross tab, indicated in 19 cases of rape the perpetrators are arrested and in 1 case of indecent assault, the perpetrators are arrested and sent to court. Meanwhile, in 38 cases of child rapes, the suspects still remain at large, as well as in 17 cases of indecent assault.

It must be pointed out that in more rape cases than indecent assault, the suspects remain at large. The reason for this still remains that strangers and neighbours who cannot be found by the police, committed these child rapes. The cases thus remain in police files and subsequently go missing.

Aims of punishment

The aims of punishment, for any convicted person of a crime, receives approval from the Appellate Division as in the case of *R v Swanepoel* where the court summed up the 'ends' of punishment as follows:

The ends of punishment are four in number, and in respect of the purposes to be served by it, punishment may be distinguished as (1) deterrent (2) prevention (3) reformation (4) retribution. Of these motives the first is the essential and all-important one, the others being merely accessory. The Appellate Division in *S v Khumalo*, *S v Whitehead* and *S v Mathee*, have confirmed these four aims. Courts have tried to reconcile these two criteria (the triad and the ends of punishment), for example in *S v Viljoen*: "With due consideration for the aims of punishment, namely deterrence, prevention, rehabilitation, retribution and the relevant circumstances of the crime and the factors of the persons of the individual". The Viljoen case thus mentions the four aims of punishment as well as two legs of the triad, leaving out the community. In the Whitehead case the court again tried to combine the aims of punishment with the two legs of the triad and the previous convictions of the accused (Naude 2001:197-198).

Due to these complexities of punishment and sentencing, expert witnesses are usually called upon to assist the court in handing down a fair, just and balanced

sentence. The expert normally does this through the preparation and presentation of a pre-sentence evaluation report on behalf of the convicted offender (Criminologist, Psychologist, Probation officer etc).

Pre-sentence evaluation report

In South Africa, Judges and Magistrates receive very little training in the “art” of sentencing. They also receive little, if any, training in the social sciences. Since sentencing is a human process, with the implicit predictions regarding outcomes of sentences (in terms of the objectives of punishment) it requires knowledge of human dynamics (Cloete 2001:8). That is in order to pass a sentence that will protect the community, render the offender less violent, deter offenders and potential offenders and bring positive changes to the offender’s attitude and behavioural patterns. Judicial officers therefore need to have knowledge of the relevant aspects of certain social sciences, particularly criminology.

In this case, criminology deals with such relevant aspects as human motivation, the aetiology of crime, crime prevention, rehabilitation strategies and the theories of punishment, which are seldom covered, in the legal studies curricula. In order to pass a rational and effective sentence, Judges and Magistrates require the assistance of people with an in-depth knowledge of such aspects.

It is a fact that once an accused has been found guilty, the judicial officer is confronted with the most difficult and morally most demanding task to formulate the most appropriate and effective sentence. Hence, the major remedy for the problem of subjective and intuitive sentencing is the pre-sentence investigation and presentation.

As expert witnesses in the criminal court, it is their role to assist the court in gaining a more complete picture of the offender as persons. This includes the developmental history, social environmental and social functioning, the social and psychological dynamics of the crime, their motivation for and attitude towards the crime, their potential for positive change, and the appropriate resources of the community.

Once expert witnesses have an idea of the type of punishment available to the courts, they will factor into the *quantum* of the sentence. The court can also expect guidance from them regarding the amount of the fines and the length of imprisonment. In order to assist the court in this respect, it is imperative for the expert to understand the criteria which the court uses in order to individualised the sentence, to make the severity of the sentence fit for the individual concerned directly (Cloete 2001:197). They will assist the court to rank the importance of the various criteria, since a conflict may exist between these criterianand the court will have to exercise its discretion when choosing between them.

An example of the above may be where the accused is a psychopath who has committed a series of rapes with aggravating circumstance. According to the retributive aim, the damage caused by the accused is so great that a severe penalty is indicated. Deterrence is not that important in this case, because unhealthy people or mentally unstable people are not likely to be deterred by the punishment or lack of punishment.

It must, however, be pointed out that to apply the triad to the above scenario is also difficult to come by. According to Cloete (2001:198), the community feels itself endangered by the specific offender and will prefer him to be locked up and the keys thrown away. The victims will probably prefer that the rapist be executed. When the court looks at his personal circumstances, however, his weakened powers of resistance seem to indicate a less severe sentence, something like imprisonment, suspended sentence under certain conditions, or correctional supervision under very strict conditions.

Matters are further complicated by the different philosophies of the determinists and the indeterminist when dealing with offenders, and the expert and the court may have different priorities. The expert witness will probably focus on the offender and his specific problems. The court will be very conscious of the interest of the community and their demands (Cloete 2001:199).

As indicated above, the expert witness is expected to advise the court on a proper type of sentence, keeping in mind the entire spectrum of punishment, and then use

the criteria in determining the severity of that type of punishment.

4.4.2 Sentencing

A sentence is a measure imposed by the court on an accused that is found guilty of an offence; it concludes the trial process in court Glick (1995:463) defines a sentence as ‘a criminal sanction that is imposed by the court on a convicted defendant’.

Minimum sentence

The Criminal Law Amendment Act 105, of 1997 provides for the imposition of minimum sentences regarding certain serious offences. Section 51 of the Act states that persons convicted of certain serious offences listed in Schedule 2 of the Act must be given a mandatory sentence, unless the judicial officer imposing the sentence is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. Rape is one of the offences listed in this Schedule. However, an empirical study by the SALC has shown that the severity of incidents of rape with aggravating circumstances that were committed after the implementation of the Act has increased when compared to pre-implementation sentences. The study thus questions the effectiveness of the minimum sentence approach prescribed by the Act as a crime reduction mechanism.

In this regard, the SALC has proposed a draft Sentencing Framework Bill, which seeks to address sentencing disparities in a number of ways. It explicitly lays down the prime sentencing principle that all sentences must be proportionate to the seriousness of the offence. Seriousness, in terms of the draft Bill, is to be determined by the degree of harmfulness of the offence and the degree of culpability of the offender.

Repeat offenders

The Criminal Law Amendment Act provides for a mandatory life sentence of offenders who are convicted of two or more offences of rape, but who have not yet been sentenced for such convictions. Repeat sex offenders for rape are therefore liable to a minimum sentence of life imprisonment. In 1997 the bail provisions were tightened. Section 60 of the Criminal Procedure Act was amended to determine that if an accused person is charged with an offence listed in Schedule 6 of the Act, such a person must remain in custody. The onus is on the accused to prove to the court that exceptional circumstances exist that permit his or her release. Schedule 6 offences include rapes where the victim was raped more than once or by more than one person; where the victim was raped by a person charged with having committed two or more offences of rape or any person knowing he has HIV or AIDS.

The South African courts seem to punish cases of sexual crimes against children more severely than physical crimes against children. However, of the few South African cases available for scrutiny, it appears that rape and indecent assault of children is viewed in a particular serious light.

It must be indicated that in South Africa, in the year 2000, 1 551 convictions were made by the Child Protection Units (CPU), in 2001, 2112 convictions were made. In 2000, however, only 369 out of 1551 cases were finalised, while 378 out of 2112 cases were finalised in 2001. The sentences imposed on offenders include fines and imprisonment. But in this study, out of the 97 cases studied only 3 were finalised in court.

Criminal statistics show that in 1995 in England and Wales, courts for indictable sexual offences sentenced 4600 men and 100 women and a further 2250 were cautioned (Home Office 1995). When the figures are broken down further to those offenders where the victim was known to be under 16, there were 1350 cautions, 3284 prosecutions and 2554 conviction (of which 34, 30 and 19 respectively were female offenders). In these countries, the criminal justice response to sexual child abusers is highlighted by the following data for the most offence types in 1995 (Home Office):

1. Indecent assault on female aged under 16 resulted in 1440 convictions (1787 prosecutions); 31 percent received a community sentence and 57 percent immediate custody.
2. Indecent assault on a male aged under 16 resulted in 331 convictions (392 prosecutions); 29 percent received a community sentence and 61 percent immediate custody.
3. Unlawful sexual intercourse with a girl aged under 16 resulted in 203 convictions (195 prosecutions); 33 percent received a community sentence and 42 percent immediate custody.
4. Rape of a female aged under 16 resulted in 111 convictions (330 prosecutions); 4 received a community sentence and 48 percent immediate custody.

In some of the 16 cases referred to the Pretoria High Court for sentencing this term alone, (August 4 to September 26) from the regional courts, the courts handed down various sentences (Pretoria News 12/08/2003:4).

The newspaper reported that the Pretoria High Court sentenced a rapist to life imprisonment for raping a nine years old girl. The man, who was her uncle, raped the girl four years ago. The court heard that the uncle raped the nine-year-old during the night, while others were asleep. It was not the first time that he had raped the child.

In June, the rapist of a three-year old was sentenced to a life behind bars, the accused told the court that the child had asked for sex, enjoyed it and had even removed her clothes.

Another child rapist blamed alcohol and dagga for the fact that he raped a two a year old. He got 20 years behind bars. Acting Judge Louis Visser at the time said a mitigating factor was that the accused 'left the impression of someone who had deep remorse for what he had done.'

In a related case, a man was jailed for 15 years for raping a 13-year-old girl. The court was told that, after the rape the man gave the girl R5 and said if she told

anyone, he would instruct his sister, a sangoma, to bewitch her. The girl testified that it was not the first time that the man had raped her and that he had previously given her R100 (Daily Sun, 10/09/2003:1).

In another case, a paedophile was found guilty of 14 counts of indecent assault on young boys and sentenced to 15 years in prison (Pretoria News, 09/08/2003:2).

Based on the analysed dockets for this study, the researcher has discovered that the following sentences have been imposed on the accused, in the cases that were finalised in court.

Case 9

The accused in this case was found guilty of raping a 17-year old school girl and was sentenced to 12 years in jail.

Case 10

The accused in this case was sentenced to 4 years in jail and 5 years suspended for raping a girl.

Case 13

In this case, the accused was charged and found guilty of raping a young girl. He was sentenced to 15 years in prison.

The fact that from the 96 dockets studied only three sentences were handed down indicates that the secret nature of the offences, and the incompleteness of the dockets hamper the finalisation of cases.

4.4.3 Treatment of offenders

Therapy for sex offenders has become part of sentencing of sex offenders in recent years. This mostly applies to those offenders who act without their free will, the biologically innocent and the person who is subjected to urges or impulses. Henry Giaretto, one time director of the Child Abuse programme in California is the pioneer

of the sympathetic treatment for sex offenders and his treatment programmes won acclaim all over America (Maree, 1995:145).

In South Africa, section 296 of the Criminal Procedure Act provides that a court which convicts a person of any offence may order, in addition or *in lieu* of any sentence that the person be detained at a treatment centre established under the Prevention and Treatment of Drug Dependency Act, of 1992. The courts will do this if they are satisfied, from the evidence or from other information before them (including a report of a probation officer), that such a person is a person described in section 21 (1) of the South Africa's Correctional Services Act 111 of 1998.

Consequently, if the Correctional Services Act is read with section 296 of the Criminal Procedure Act, a person will be eligible for admission to a treatment centre if the person is dependent on drugs and consequently squanders his means or injures his health or endangers the peace. If this person harms his own welfare or the welfare of his family, or fails to provide for his own support or for that of any dependant whom he is legally liable to maintain, they may also be admitted to a treatment centre.

There is a further provision to section 296 of the Criminal Procedure Act that states that such order shall not be made in addition to any sentence of imprisonment (whether direct or as an alternative to a fine) unless the operation of the whole of such sentence is suspended.

In terms of section 52 of the Correctional Service Act, 111 of 1998 persons on parole may be subjected to community corrections (provided that the person who is to be subjected to community corrections agrees to the stipulated conditions and undertakes to co-operate in meeting them).

With regard to the treatment of all sexual offenders as part of the sentencing process, the SALC believes that the period of correctional supervision provided for in section 276 (3) of the Criminal Procedure Act is too short to be effective for sex offenders. The commission in the Discussion paper 102, amend section 276 of the

Act and provides for a person who is convicted of any sexual offence, if practicable and if the convicted person demonstrates the potential to benefit from treatment, include the attendance of and participation in a sex offence specific accredited treatment program. The cost of this program shall be borne by the convicted person himself or herself, or the state, if the court is satisfied that the convicted person has no adequate means to bear such cost.

The commission further states that, although section 276 (3) of the Act provides that a sentencing court may impose imprisonment together with correctional supervision, it must be noted that the rehabilitation of sexual offenders is a long-term strategy. The Commission points out that correctional supervision is a rather short-term solution as it can only be imposed for a fixed period. In an attempt to address this, the Commission recommends that the period of correctional supervision be extended from three to five years.

The researcher will now discuss the treatment of victims of sexual offences by the criminal justice system, especially in the courts in South Africa.

4.5 THE VICTIMS

4.5.1 The Victim and the criminal justice system

When criminal charges are brought against the perpetrators of rape and indecent assault, the child and the family become involved in a process that is long and exhausting. Herman (1981:165) points out that in America, prosecution of child sexual offences takes place from four months to over a year, during which period, unless restricted by the courts, the defendants who are at large are able to exert pressure on the victim to drop the charge. This also occurs in South Africa if the defendant is a family member of the victims.

Preparing for court

When a charge of rape and indecent assault has been instituted against the accused, and the prosecutor decides to prosecute, the prosecutor, who will present

the victim's case in court, is responsible for all the court preparation that needs to be done. After enrolling the matter for trial, the prosecutor will issue a subpoena to the child and all the other state witnesses, specifying the date, time and court in which they are required to report in order to testify. In terms of the National Policy Guidelines, the prosecutor is required to thoroughly consult with the child, all witnesses who will testify on behalf of the state, the investigating officer, social worker.

During consultation with the child, the prosecutor is required to go through the police statement with the child to refresh his or her memory and clear any inconsistencies. The prosecutor must ascertain what fears the child has and attempt to allay these. He or she is also required to explain the court process and familiarise the child with the courtroom.

Trial procedures

The trial is the culmination of the processes initiated by the complainant when charges of sexual abuse were laid. As indicated above, it is important that the child is prepared for trial so that he or she may know, at any given point in the trial, where the process is and what is expected of him or her.

It is during the trial that the child's allegations of sexual abuse and the defence of the accused against those allegations are tested. The quality of evidence gathered during the investigation, and the cooperation of all the role players throughout the case normally determines the outcome of the case. The child and his or her family and the community at large normally expect a conviction of the accused, to vindicate the child's experience of the sexual abuse. Thus, the diligence with which the prosecution is carried out becomes important. The child's preparedness for the trial or lack thereof will also determine the child's performance when called upon to testify.

4.5.2 The victim in the court setting

The court procedure is a painful and difficult experience for the child victims, as she or he must relive his or her experiences mentally and orally. They are alone in the witness stand and frightened by the procedures and testimony which they may not understand when confronted by the accused whom she or he loves, fears or hate.

In an attempt to help the child during this period, special measures have been taken to reduce the normal court spectacle in the cases of child victims in South Africa. The Criminal Procedure Act makes provision for measures aimed at accommodating special needs of child witnesses. These include in-camera proceedings, the prohibition against publication of a child's identity and the use of intermediaries.

In-camera proceedings

Generally, criminal proceedings take place in an open court. Section 153 of the Criminal Procedure Act provides an exception to this general rule. In terms of this section, the public may be excluded from trial where it appears to the court that there is likelihood that harm may result to any person if such person testifies in open court.

It should be noted that the constitutionality of section 155 was questioned. The issue was, however, settled in *Nel v Le Roux* where the constitutional court held that, although the section violates the accused's rights to a public trial which is guaranteed in section 35 (3) (c), such violation is justified in terms of the limitation clause.

In cases where section 153 applies, the court must *mero muto* order the courtroom to be cleared. Notwithstanding section 153's orders, judgement and sentence will be given in open court if the court is satisfied that the identity of the complainant or witness as the case may be, will not be revealed.

There is no doubt that section 153 is instrumental in protecting children who have

suffered sexual abuse when they testify in court. It also guarantees children protection during the criminal justice process, thereby encouraging children to come forward (SAHRC; RSOAC, 2002:30).

Prohibition against publication of a child's identity

To alleviate the vulnerability of children, who have suffered sexual crimes, from further violence, section 154 of the Criminal Procedure Act prohibits the publication of certain information relating to criminal proceedings. This prohibition includes that the identity of any complainant may not be published if the court has made an order in terms of section 153 (3) or information relating to a charge referred to in section 153 (3), if the accused has not appeared in court or if the accused has appeared, but has not pleaded to the charge.

Use of intermediaries, close circuit television and one-way mirrors

The Criminal Procedure Act contains provisions that makes it possible for the child witness to testify outside court, namely section 170A and section 158 (3). In terms of section 170A when during criminal proceedings, the court is satisfied that testifying in open court will expose a child under 18 years to undue mental stress or suffering, the court may appoint a competent person as an intermediary. This enables the child to give evidence through the intermediary. An intermediary is a person appointed by the court pursuant to section 170A to enable child to testify outside court by assisting the court in relaying questions from the prosecutor, court and defence to the child and child's response back to the court. This is normally done through the close circuits' television (CCTV) where a court is equipped with such a device. A child and the intermediary sit in a room adjacent to the court from where the child will answer questions posed to him or her. The court is able to see the intermediary and the child through the CCTV. Where a court is not equipped with CCTV, a one-way mirror is used. The use of these devices is authorised in terms of section 158 (3) of the Criminal Procedure Act.

However, it must also be underscored that the constitutionality of section 170A was attacked in *K v The Regional Magistrate NO and others* where it was argued that (a)

the use of intermediaries impair proper cross-examination, thereby infringing on the accused's rights to a fair trial, (b) the physical separation of the child from the accused violates the accused right to a public trial. After examining the purpose of section 170A, the court found that ordinary procedure in the criminal justice system are inadequate to meet the child's special needs and that the section was designed to address these special needs. The court equated the role of the intermediary to that of an interpreter and found that the use of an intermediary does not exclude the accused right to cross-examine the child. The court further found that separating the child from the court does not violate the accused right to a public trial.

Victim impact statement

In a bid to secure a fair and balance sentence, victim statement impact are now being presented to the court. According to Naude (1995:15), it is a document that is intended to provide information to the court about the physical, financial, emotional and psychological effects suffered by a victim, and, where relevant, his or her family as a result of a crime.

This document also provides the court with the circumstances surrounding the crime and the manner in which it was executed, the identity and character of the victim and the victim's or the family's opinion of the defendant.

As a result of the advantages of this document to the victim and the courts the South African Law Commission (1998:38) recommends that a victim impact statement be fully recognised in South Africa as part of sentencing hearing. Such statements may only be admissible in cases where they furnish the courts with particulars that are not already before the court, that the statement must address the actual physical, psychological, social and financial consequences of the offence to the victim.

Due to the pains, sufferings of the abuse and the trauma experienced in the criminal justice process, child victims are usually recommended therapy, treatment and placement of the victims by the courts.

4.5.3 Post-trial procedure

In therapy, children who have been subjected to sexual abuse commonly express their feelings in the following words: "... I am damaged, I am powerless, why me? I feel confused, I often feel sad, people think I am ugly, sometimes I wonder why I am alive..." (Potgieter, 2000:56). These expressions are indicative of the profound and devastating effects of sexual violence on children. Expression of sexual violence negatively affects a child's internalisation of the 'self' and adversely affects the child's interaction with other people.

Sexual abuse is even more devastating on a child when perpetrated by someone close to the child. What aggravates the child's devastation in such cases is the nature of the relationship with the perpetrator. Abuse is the last thing the child expects from the perpetrator, as the child often looks up to the perpetrator for protection. Where the perpetrator has a close relationship with the child, the child normally first experiences the sexual act as love, and as intrusion fear and hate intensifies, the child develops feelings of confusion (Potgieter 2000:57).

Potgieter (2000:58) also points out that the child's experience of abuse is further compounded during the criminal justice process, as this process does not take the child's cognitive development into account. During this process, children re-experience intrusion, helplessness, aggression, threats, feelings of guilt, being bad and lack of faith in what they have told the court. These feelings are often further aggravated by negative court outcomes. Discharge of the accused is likely to cast doubt on the child's truthfulness and self-esteem, and contributes to the child's feelings of guilt and self blame.

In view of the above discussion, it is evidently clear that post-trial arrangements are critical to the child's healing process. In some cases, if a child was privileged enough to received therapeutic interventions when the case of sexual abuse was reported to the police, such interventions are unlikely to proceed after the trial has been finalised. It must be noted that the National Policy Guidelines do not recognise the role of the social worker in the child's healing process after disposal of the criminal matter. On the other hand, the Multi Disciplinary Protocol (MDP 2000:90)

entitles a child, who has been abused, to treatment for the trauma suffered. This is because the trauma can occur before, during and after the statutory process. It further provides for the termination of specialised child protection and treatment services when (a) the involvement of Child Protection and Treatment Services Professionals is no longer necessary and (b) only when a treatment plan for all parties involved has been completed (Child Protection Protocol 2000:98). Therefore treatment of the child must continue, even after disposal of the criminal matter.

Treatment

It is pivotal for a child, who has suffered sexual abuse, to undergo therapeutic treatment. Although the MDP emphasises that treatment for the child must be kept separate from the criminal process and that ideally, treatment must not be offered by a statutory social worker, the Protocol also recognises that this is not always possible in the South African context because of scarce resources. The Protocol therefore encourages statutory social workers to incorporate therapy in all areas of their work (SAHRC; RSOAC 2002:35). The MDP provides for the following forms of treatment for the child: trauma debriefing, crisis intervention counselling, supportive counselling, specialised therapy, psychological assessment, group therapy and support groups.

Placements

After any form of abuse, the safety of the child has to be guaranteed as part of the child's healing process. Although, in certain instances, the removal of a child may be seen as an easy route to a child's safety, it is not always the best option. The MDP emphasises that children yearn to stay where they belong, with their families. It is extremely difficult to convince a child of his or her worth after removing him or her from a family which is perceived unworthy, but with whom the child identifies. The protocol encourages welfare workers to, in recognition of this reality, to focus their efforts on assisting families to build safe relationship and caring interactions.

The Child Care Act makes provision for the removal of a child if the child is considered to be a child in need of care. A child in need of care is a child who *inter*

alia lives in or is exposed to circumstances that may seriously harm his or her physical, mental or social welfare. A child is also considered to be in need if the child is in a state of physical or mental neglects or has been physically, economically or sexually abused by his or her parents/caregiver or by a person in whose care or custody the child is. Any child who has been sexually abused (whether by a family member, neighbour or stranger) may, depending on the circumstances of each case, qualify as a child in need of care in terms of section 14 (4) of the this Act.

A children's court may, pending an inquiry into whether a child is a child in need of care, authorised the removal of a child to a place of safety if, during any proceedings before the court, it appears to the court that it is the interest of the welfare and safety of the child to be removed to a place of safety. The court may also ratify the removal of a child to a place of safety by a social worker, a police or other authorised officer if the child is removed in circumstances where the delay in obtaining authority will be prejudicial to the child. In terms of section 14 (2) of the Act, during the inquiry, the court may request a social worker to furnish it with a report regarding the circumstances of the child and his or her parents/caregiver. In terms of section 15 (1), at the point of inquiry the court may order that a child be returned to the parent or guardian in whose custody the child was before the inquiry, subject to supervision by a social worker and or compliance with any conditions that the court may determine; (2) that the child be placed with a suitable foster parent designated by the court subject to supervision by a social worker; (3) that a child be sent to a children's home or a school of industries designated by the Director-General of Welfare.

Once granted, an order for the removal of a child is subject to revision by the children's court every two years, section 16 (1). The order may be extended for a further two years at a time until the child turns 18, section 16 (2).

4.6 CONCLUSION

In this chapter, the researcher examined the legal processes in the adjudication of child sexual offenders in England and more specifically in South Africa. In the case of England, punishment for charges of rape, indecent assault, incest, and unlawful intercourse were discussed. Punishment and charges of rape and indecent assault

of children were analysed in terms of the existing domestic legislation, policies and draft bills in South Africa.

The criminal justice processes were also discussed, taking the role of police into consideration when they receive complaints, investigate and collect the evidence. The role of the prosecutor as per his or her decision to prosecute was also scrutinised. The sexual offences court in South Africa was discussed with special focus on the trial procedure and the cautionary rule often applied in the trial of sexual offence with regard to children. Within this section, the aims of punishment and punishment of offenders according to charges and the pre-sentence evaluation reports were analysed. Sentencing of sexual offenders was discussed in terms of Criminal Law Amendment Act. The treatments of sexual offenders were also discussed.

The researcher also discussed the victim in the criminal justice system. Aspects such as the preparations for court, the trial procedures, victims in the court setting, in-camera hearings, prohibition against the publication of a child's identity, use of intermediaries and victim impact statements were also discussed. Post-trial procedure such as therapy for victims, treatments and placements of child victims of sexual crimes were discussed.

In conclusion, with regard to legal processes the offender has the legal and circumstantial advantages over the victim, owing the number of withdrawals and discharges of cases of rape and indecent assault of children. However, attempts are being made to secure the conviction of child sexual offenders and to assist child victims, especially in the draft Sexual Offences Bill and the Child Care Act.

In the next chapter, attention will be given to the prevention strategies of rape and indecent assault of children. In this regard, government policies and legislation that have been put in place in the prevention of these crimes will be addressed.