

**EVALUATING THE ROLE OF INVESTIGATORS DURING BAIL APPLICATION**

by

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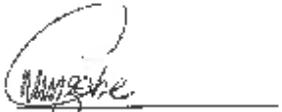
## **ABSTRACT**

Every victim wants to see the perpetrator or offender of serious crimes convicted for their criminal actions. Each victim in a case is supported by witnesses and the community in wanting accused persons to be locked away behind bars. Having the accused persons locked away in prison is an achievement of every role player involved in the process of putting that accused where he/she belongs. The ultimate goal of investigation is to see successful bail opposing to ensure the safety of witnesses. There are accused who are released from custody by the court despite many attempts made by an investigator to keep that criminal in custody until trial.

Victims and witnesses are struggling to get their offenders punished for the crimes they committed. It is the wish of every investigator of crime to satisfy every complainant in cases but it does not always happen, not because of any lack of skills, but because of many factors which come along with the successful prosecution in a case. Once the accused is released on bail, the chances and hopes of putting him/her back in prison are equal to the chances of getting him/her back in the community for good. This difficulty is caused by the fact that, once the accused is out on bail he/she might evade trial or the docket will be in and out of court for further evidence until the court declines to prosecute.

## DECLARATION

I, Ntombenhle Cecilia Dube declare that the dissertation titled. "The evaluation of the role of investigators during bail application" submitted for the Master of Arts in Criminal Justice at the University of South Africa, is my own original work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.



NC DUBE

2016

## EDITOR`S DECLARATION

### DECLARATION

I, Maria Petronella Roodt, hereby declare that I have proofread and edited the MA dissertation titled "Evaluating the role of Investigators during bail application" by N C Dube.

My qualifications are as follows: BA with major in English, BA Hons (English) and MA in English (Applied Linguistics) and an MA (Higher Education Studies).

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MP Roodt

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I would like to thank my parents for their encouragement during my studies. My younger sisters, Xolile and Sibongile, thank you for taking care of my family when I was out doing research and for calling me their hero, making me persevere and complete my dissertation. I would like to thank my daughters Sibahle and Phumla for understanding when I could not be there for them during this study.

To all the participants who supported me, especially the Phoenix Cluster Detectives, thank you for supporting me during this research; your input is much appreciated.

## **DEDICATION**

I dedicate this research to my newly born son Bonke Kuzwayo, who was born whilst this research was in its final stages and to his father Gee Kuzwayo.

**God Bless you all.**

## **ABBREVIATIONS**

CD	:	Constitutional Development
CP	:	Control Prosecutor
CPA	:	Criminal Procedure Act
CPS	:	Crown Prosecution Service
DPP	:	Director of Public Prosecutions
SPP	:	Senior Public Prosecutor
DOJ	:	Department of Justice
N. D.	:	No Date
NGO	:	Non-Governmental Organisation
NPA	:	National Prosecuting Authority
PAGAD	:	People against Gangsters and Drugs
SA	:	South Africa
SAPS	:	South African Police Service
UNISA	:	University of South Africa
UNODC	:	United Nations Convention against Corruption
VIS	:	Victim Impact Statement

## **SUMMARY AND KEY TERMS**

Witnesses are intimidated and even murdered by accused that were arrested and charged but were released on bail by the court. The investigators need to know their roles in the bail application process. The granting or denying bail depends on the magistrate or judge deciding on the case, but the magistrate or judge depends on the evidence presented in the docket by the investigator.

Investigators deny bail for the accused to remain in custody but the court releases the accused ignoring the investigator's concerns. Safety of witnesses is not very important during bail application as the court has many aspects to consider before the accused is released or denied bail. It is up to the investigator to consider the safety of witnesses and gather evidence for bail application that will ensure that the accused is denied bail. This study contains information that will assist investigators in knowing their role and what is required in bail application. It also entails information that will let investigators work independently not to rely on prosecutors' guidance on gathering of outstanding evidence.

### **Key terms:**

Criminal investigation; investigator; bail application; prosecutor; evidence; witnesses; accused; releasing of accused; safety of witnesses; prosecution; requirements of bail application.

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# CHAPTER ONE

## GENERAL ORIENTATION

### 1.1. Introduction

The release of accused persons constitutes a problem for investigating officers because victims and witnesses complain to the investigating officers, asking why the accused was granted bail. Although it is the constitutional right of an accused to apply and to be released on bail, the victim and witnesses regard it differently. The victims or witnesses complain to investigating officers that they are intimidated by the accused that were released on bail. Witnesses are threatened with further harm and therefore they often fear to proceed with cases. There are no specific cases, as this has been experienced in different cases where investigators intended to deny bail. This becomes a problem because the community loses confidence in investigating officers and the justice system itself, regarding the system a failure. Davis and Snyman (2005:107) mention that some jurisdictions explicitly acknowledge that the victims` safety is to be considered in relation to the bail decision. Therefore in the South African system no consideration is given to victims.

The law is also concerned about the interest of witnesses, in terms of Section 299A (1) (f) (1) of the Criminal Procedure Act 51 of 1977, a witness has the right to make representations in certain matters with regard to the placement of a convicted person on parole. In terms of Section 299A (3) of the Criminal Procedure Act 51 of 1977, the prosecutor may enter into a plea and sentence after the victim has been afforded the opportunity to make representations. Therefore, according to this legislation, the role of an investigator is to liaise or communicate with the prosecutor about the importance of witnesses` safety.

## **1.2. Problem Statement**

Creswell (2009: 42) describes a problem as “the issue that exists in the literature that leads to a need for the study”. According to Wiersma (1995:404), the problem statement describes the context for the study and it also identifies the general analysis approach. Therefore the problem that lead to the need for this study is the researcher`s concern about the role of investigators during bail applications in the Phoenix policing area. Creswell (2009: 98) mentions that a research problem may originate from many potential sources.

In the past, with regards to the first appearance of the accused in court, the investigating officers applied to the court for the accused to be remanded for seven days before the bail consideration in certain cases. The dockets were sent to court with a letter requesting the accused not to be released on bail whilst the investigating officer was gathering information on bail consideration. The court was able to grant this permission without any consultation with the investigating officer. This process was later changed and the court started to ignore the letters sent by investigating officers and accused were granted bail, despite the fact that the investigating officer had written a request for a remand. Enquiries made to the court revealed that it was expected by the court for investigating officers to be in court physically when presenting the letter requesting a seven days remand. Requesting that the accused remain in custody in this manner before a formal bail application has previously been an acceptable norm by courts, and although there are no sources or written policies that are found at this stage, the norm is applied across the country. The researcher has seen similar letters in one of the specialised units (Durban Commercial Branch) where they also request the accused to be remanded in custody prior to a formal bail application. The problem exists when the court and the investigators have no clarity on the role of investigators during bail application.

## **1.3. Aim and the objectives of the study**

According to De Vos, Strydom, Fouche and Delport (2002: 107-119), the aim is the dream and the objective is the steps one has to take one by one. Pate (1999-2013) mentions that while your aims give your research thematic and theoretic direction, objectives provide concrete steps on how to manifest those concepts and theories. The researcher therefore had an aim to be achieved and set objectives how to fulfil

that aim. Babbie and Mouton (2012: xxvi) state that the most common types of research objectives are exploration, description and explanation and that exploration is the attempt to develop an initial, rough understanding of a phenomenon. In this study the researcher wanted to evaluate the role of investigators during bail applications.

**1.3.1. The aim of this study was:-**

- To evaluate the role of investigators during bail application for a successful bail denial.

**1.3.2. The objectives set for this study were:-**

- To evaluate the role of investigators during bail application.
- To identify the requirements for a successful bail application.
- To explore and understand national and international best practices of the role of the investigators during bail applications
- To formulate recommendations based on findings of the study for the attention of investigators.

**1.4. Purpose of the Study**

According to Locke, Spirduso and Silverman (2013: 22) the purpose statement indicates why the researcher wants to do the study and what the researcher intends to accomplish. The purpose of this study was to evaluate the role of investigators during a bail application to achieve a successful bail application.

Babbie and Mouton (2012:345) explain that formative evaluation is done to provide feedback to people who are trying to improve something. Therefore the findings and the recommendations of this study will be disclosed to the head of investigators to improve bail application processes. Babbie and Mouton (2012:337) mention that evaluation is commissioned for purposes of programme management, improvement and refinement. The researcher evaluated the roles of investigators with the purpose of improving bail application processes. Investigators will understand their responsibilities better and be able to discharge their tasks more effectively during bail application. Successful bail applications will lead to successful prosecutions, as

unsuccessful bail applications sometimes destroy cases, because some criminals escape trial once they are granted bail with the result that cases are withdrawn.

## **1.5. Research Questions**

Creswell (2013: 140) states that new questions may arise during data collection, and, as with all qualitative research questions, they may change or evolve into new questions as the research proceeds. Terre Blanche, Durrheim and Painter (2011: 540) explain that a research question refers to the question that the researcher wants answered and the phenomenon to be investigated. De Vos et al. (2002:107-119) believe that one aim of a qualitative method is to discover important questions, processes and relationships. In order to get a full understanding of the role of investigators during bail application, the researcher focused on the following research questions:

- What are the requirements of a bail application?
- What is the role of investigators during bail applications?

Terre Blanche et al. (2011: 540) cite that the research question is sourced for different reasons from different backgrounds or environments, including an exploratory investigation on what to study and personal speculation and experience. The researcher has used personal experience as she had been involved in unsuccessful bail proceedings for reasons unknown, as the court never informed the investigator the reasons for granting bail.

## **1.6. Key Concepts**

Leedy and Omrod (2005: 31) stated that the purpose of defining concepts is to prevent misunderstanding. Dubin (1989: 27) declared that concepts are those aspects of the world that constitute the subject matter of a given scientific discipline. The meaning of key words which constitute the subject investigated in this study is explained:-

### **1.6.1. Accused**

According to Van Rooyen (2008:15), an accused is a suspect who has been formally charged in a court of law for committing one or more crimes.

### **1.6.2. Witness**

Gilbert (2010:106) defines a witness as a person who sees or knows by personal presence and perception.

### **1.6.3. Bail**

Davies, Croall & Tyrer (2010:493) define bail as the release of a suspect or defendant before the conclusion of a case, under an obligation to return at a specified time to the police station or court. Delaware (2013) defines the bail as the amount of money a defendant must post to be released from custody until the trial is heard.

### **1.6.4. Investigator**

According to Orthmann and Hess (2013:11), an investigator is a person who systematically seeks evidence to identify the individual, who committed a crime, locates the individual and obtains sufficient evidence to prove in court that the suspect is guilty beyond reasonable doubt.

### **1.6.5. Prosecutor**

Reid (2009:439) defines the prosecutor as a person who presents the case for the state and who is responsible for securing and organising the evidence against the defendant as well as for arguing cases that go to trial.

### **1.6.6. Evidence**

Siegel, Knupfer, and Saukko (2000: 28), regard evidence as information, whether personal testimony, documents or material objects, that is given in a legal investigation, to make a fact or proposition more or less likely.

## **1.7. Value of the Study**

The findings of this study may contribute to restore trust in the criminal justice system as a whole, provided that bail applications are conducted successfully. The granting of bail to criminals is unacceptable to most witnesses or victims and most witnesses blame the police when criminals are walking free. It may also benefit other investigators and other law enforcements agencies who will be seeking information on certain aspects covered by this study.

- **SAPS (South African Police Service)**

This study will also benefit the SAPS because if investigators execute their tasks effectively by opposing bail successfully, the safety of most witnesses will be guaranteed and evidence or exhibits will be recovered which may result in a successful prosecution. Successful prosecution is one of the aspects the SAPS is very concerned about. According to the SAPS, when one case is registered on SAP 6 it adds to the number of cases registered nationally and also when one case is finalised or resolved it has an impact on the national statistics.

- **Entire South African community**

The findings of this study will benefit the victims and witnesses who demand for the accused to be kept in custody and who fear for their lives when the accused is released on bail. The community will benefit, because more possessions in property crimes will be recovered since recovery of property is not guaranteed if the accused is out on bail. It will also restore the trust of the community in the police, because if expectations are not met, the community loses trust in the police.

- **UNISA (University of South Africa)**

The researcher is of the opinion that more positive results in the college of law will add credibility towards the institution as a whole. If this study can bring change in the justice system, the institution will be recognised as making a positive contribution. This study will benefit the students who want to study investigation. The information gathered will be valid and reliable from trustworthy sources and can be used and be transferable by other researchers if published.

## **1.8. Research Design**

According to Mouton (2001:55) a research design is a plan or blueprint of how one intends conducting the research. "A research design focuses on the end product formulating a research problem as a point of departure and focuses on the logic of the research" (De Vos et al., 2002:137). The researcher conducted the research using an empirical research design, as the researcher relied on primary information. Babbie and Mouton (2012:76-78) illustrate that an empirical research design uses primary data which refer to data that are collected personally by the researcher

through interviews, observation or whatever method. The researcher therefore used an empirical research design.

### **1.9. Research Approach**

Babbie and Mouton (2012:270) mention that qualitative researchers always attempt to study human action from the perspective of the social actors themselves. In this study the researcher evaluated the role of investigators during bail application. The researcher therefore used a qualitative research method as it is the approach best suited to study human actions. Babbie and Mouton (2012: 270) add that the primary goal of studies using this approach is defined as describing and understanding rather than explaining human behaviour.

Therefore a qualitative research approach was appropriate for this study as the researcher was not concerned about the number of incidents with regards to bail applications. This study focused on the role of investigators in the bail application process to achieve a successful bail application, which is to understand social actions. Understanding social actions is mentioned by Babbie and Mouton (2012:270) who emphasise that the main concern in qualitative research is to understand social action in terms of its specific context rather than attempting to generalise to some theoretical population.

### **1.10. Sampling**

Leedy and Ormrod (2013:152) explicate that sampling depends on the research question(s) that the researcher wants to answer. De Vos et al. (2002: 201) state that many methodologists suggested that random sampling is the only technique available that will ensure a chance of drawing a sample. However, De Vos et al. (2002:201) believe that probability sampling is based on randomisation whilst non-probability sampling does not implement randomisation. In this study the researcher used non-probability sampling as it does not implement randomisation. Randomisation was not suitable for this study, as the participants required for this study were investigators who were involved in bail applications. The researcher chose non-probability sampling namely purposive sampling because the participants

that were targeted for this study were selected according to their expertise or their experience in the field.

The population that was targeted for this study was the investigating officers of Phoenix police stations in KwaZulu Natal. For the purpose of benchmarking the researcher utilised investigating officers of the Phoenix Cluster, KwaZulu Natal. The Phoenix Cluster consists of three police stations namely Phoenix, Verulam and Tongaat Police station. All these police stations use one court where formal bail applications are conducted.

- **Investigators**

De Vos et al. (2002:200) state that there are different opinions with regard to the minimum number of respondents that should be involved in an investigation. However Grinnell and Williams (1990:127), suggest that 30% is sufficient to perform basic statistical procedures. Therefore in this study the researcher utilised 30% of possible respondents. The 30% was selected from the investigators of the Phoenix Cluster. The Phoenix Cluster consists of 3 police stations namely Phoenix, Verulam and Tongaat police stations. All 3 police stations use the same court, the Verulam court. In all three police stations the researcher selected 10% of investigators/ participants who were involved in bail applications. The Phoenix SAPS consists of 76 investigators, therefore 6 investigators were interviewed. The Verulam SAPS has 42 investigators and 4 investigators were interviewed whereas the Tongaat SAPS consists of 30 investigators and 2 investigators were interviewed. The targeted participants were investigators who had more experience in bail applications. The names of the participants were purposefully selected with the assistance of their supervisors according to their experience in the bail application process.

### **1.10.1. Non-probability Sampling**

Terre Blanche et al. (2011:139) state that non-probability sampling refers to any kind of sampling where the selection of elements is not determined by the statistical principle of randomness. The researcher therefore selected the sample according to the work experience of the participants in this study and not according to randomness. The researcher used a purposive sampling technique in non-probability, which was not representative of the population.

According to Welman, Kruger and Mitchell (2006: 204), the qualitative researcher usually obtains individuals with whom to conduct unstructured interviews by means of purposive sampling. Welman et al. (2006: 204) further explain that in this type of sampling preference is often given to key informants who, on account of their position or experience, have more information than regular group members and/ or are better able to articulate this information. The researcher therefore used non-probability purposive sampling which will be discussed below.

### **1.10.2. Purposive Sampling**

Neuman (1997: 205) states that the researcher uses purposive sampling to select unique cases that are especially informative and to identify particular types of cases for in-depth investigation where the purpose is less to generalize to a larger population than it is to gain a deeper understanding of types. Bless, Higson-Smith and Sithole (2013:177) agree with Neuman (1997:205) regarding purposive sampling as a qualitative approach and that the researcher will purposefully choose participants on the basis of some specific criteria that are judged to be essential. The researcher therefore purposefully chose the participants amongst the investigating officers who were involved in bail applications and experienced in the bail application process.

### **1.11. Data Collection Methods**

According to Welman et al (2006:134), the researcher must consider which data collection method is the most appropriate in the light of a research problem and the particular population in question. Welman et al. (2006:134) further state that once the researcher has decided on a particular research design, the researcher has to obtain research participants according to a chosen sampling procedure in order to carry out the research. Welman et al. (2006:9) reiterate that qualitative researchers use unstructured interviewing and detailed observation processes to gain better information about the views of the subject. The researcher conducted the research by means of a qualitative research design. This study required a detailed observation process to gain better information about the views of the investigators who are involved in bail applications and the granting of bail to accused persons. The researcher used unstructured interviewing since the population of investigating officers targeted for this study were believed to be comfortable with unstructured interviewing because of their day-to-day duties.

Terre Blanche et al. (2011: 303) believe that the researcher should opt for a series of in-depth interviews with a single person, in which trust is established over an extended period if the researcher wants to know something more weighty, such as trying to understand why people act in a certain way. Data are collected by means of interviews and literature from the library, internet and media for referencing to distinguish the developments in this study. Data from literature are collected from published books, government publications and law enforcement published journals.

#### **1.11.1. Interviews**

According to Welman et al. (2006: 189), the first basic principle of historical research is that researchers should give preference to primary (verbal evidence) rather than secondary (literature) information sources whenever possible. Interviews were conducted with investigators who are working with bail application. Welman et al. (2006: 211) also indicate that field notes can be described as detailed notes made in writing and/or tape recordings, and observation, which are compiled during qualitative interviewing. In the researcher's experience data collected by taking notes during interviews in the work environment as an investigator has given the researcher incredible results in obtaining information.

The researcher therefore collected data by means of detailed notes made by hand during interviews. As mentioned by Welman et al. (2006:204), the qualitative researcher usually obtains individuals with whom to conduct unstructured interviews by means of purposive sampling. Terre Blanche et al. (2011: 307- 315), report that recording the interview makes it possible to reconstruct the content and process of the session in a fairly reliable way. Some interviews were recorded in the participant's handwriting, while others were written down by the researcher.

#### **1.11.2. Literature**

Welman et al. (2006:35) stipulate that the researcher should bear in mind that the author of a secondary source may be presenting the original source in such a manner that it gives credence to particular biases. Welman et al. (2006:35) further point out that with each transfer of information from one source to another, the information may be inadvertently or deliberately distorted.

The researcher collected information from different sources of information and integrated and analysed different ideas to avoid bias and distorted information.

Welman et al. (2006:213) also argue that the researcher should consult a variety of reports on the topic that is being analysed. In this study the researcher visited libraries and consulted other sources of information (literature) for new developments in the role of investigators during bail application and learnt about other researchers' perspectives on this topic.

### **1.12. Data Analysis**

According to Ryan and Bernard (2017: 48) the search for cultural models involves being alert to patterns of speech and to the repetitions as theme identification is one of the most fundamental tasks in qualitative research. Similarly, Terre Blanche et al. (2011: 322- 330) suggest that the researcher must analyse qualitative data by interpreting the data by means of social constructing analysis, discourse, effects and contexts.

#### **1.12.1. Interviews**

The researcher identified and interpreted the themes while keeping the original information as obtained from the participants.

#### **1.12.2. Literature**

The researcher analysed the data by coding as one of the steps in interpretation of data analysis. Data were coded by highlighting similar information. The cut-and-paste function was also used to note similarities for purposes of categorising information gathered into suitable research questions. Data collected were also forwarded to a professional analyst for interpretation. Some of the subheadings were moved to research question one and some were moved to research question 2 because of similarities. Other subheadings were moved next to other subheadings for consistency.

### **1.13. Validity**

Neuman (2006:196) states that validity means truthful and that qualitative researchers are more interested in authenticity than in the idea of a single version of truth. Neuman (2006:196) adds that authenticity means giving a fair, honest and balanced account of social life from the viewpoint of someone who lives it every day. Bless et al. (2013: 157) also contend that in external validity the sample must reflect the experiences of the population. In this study the researcher ensured that the

investigators were well experienced in dealing with bail applications to ensure that the results in findings are valid and transferable by other researchers. The researcher ensured that the participant responded on own experience and on behalf of others in the population of investigators.

### **1.13.1. Interviews**

The researcher therefore collected data from participants who were personally involved in the application of bail and who are well informed about the role of an investigator during a bail application. Bless et al. (2013: 155) state that when measurement instruments are used in inappropriate ways, very powerful reactive effects can be produced. Data collection in qualitative studies rely more on natural methods, such as interviews. The way in which they are conducted should be in accordance with cultural and other social and environmental factors. In this study the researcher ensured that the findings were valid by conducting interviews with consideration of the participants` cultural backgrounds. The literature review was approved by the supervisor and it was piloted with independent experienced investigating officers to ensure validity.

### **1.13.2. Literature**

In recent studies that the researcher consulted, some researchers or authors are of the view that reliability and validity have lost their meaning in qualitative research.

Bless et al. (2013:157) and Sekaran and Bougie (2013: 350) agree that the concepts of reliability and validity, as used in quantitative research, lose their meaning when applied to qualitative research. The researcher collected and organised the data from other sources and no amendments were made. According to Bless et al. (2013: 157), validity of the design is measured in terms of two dimensions: internal and external validity. Bless et al. (2013: 157) further mention that in qualitative research, external validity is referred to as transferability and that external validity examines the extent to which the results of the study can be generalised. The literature used was relevant to the topic and only current literature was used to ensure validity.

## **1.14. Reliability**

Bless et al. (2013: 157) believe that the concepts of reliability and validity, as used in quantitative research, lose their meaning when applied to qualitative research. They therefore suggest that dependability as a concept is similar to, but not the same as, reliability and that dependability demands that the researcher thoroughly describes and follows a clear research strategy. Also Sekaran and Bougie (2013:350) agree that reliability and validity have slightly different meanings in qualitative research in comparison to quantitative research, but state that reliability in qualitative research includes category-and inter-judge reliability.

### **1.14.1. Interviews**

Babbie and Mouton (2007:119) testify that reliability is a matter of whether a particular technique, applied repeatedly to the same object would give the same results and also that it is important to ask questions about what the respondents are likely to know. They further state that if the respondent is asked the same question twice with the same response, it is likely that the information is reliable but if the respondent has different answers on the same question it is unlikely that the information is reliable. The researcher measured the reliability of the information by first testing the respondent by means of simpler questions on things they to know which the researcher also knew.

### **1.14.2. Literature**

The researcher ensured that the obtained information or collected data are valid and accurate as the information was collected from trustworthy sources that are accountable for their information. To ensure reliability of literature all sources used are acknowledged by giving a complete list of references. No unpublished sources were used in this study.

## **1.15. Ethical Consideration**

### **1.15.1. Permission to Conduct a Study**

Creswell (2013:57) mentions that prior to conducting a study it is necessary to obtain university approval from the institutional review board for the data collection involved in the study, as well as local permission to gather data from individuals and sites at an early stage in the research. In this study the researcher obtained authority from

the university research board that approved the research. No data were collected whilst waiting for approval. The researcher also obtained permission from the SAPS management to interview investigating officers.

#### **1.15.2. Privacy**

Terre Blanche et al. (2011: 61) remark that the essential purpose of research ethics is to protect the welfare of research participants. Melville and Goddard (1996:45) state in order to avoid doing harm to people one must guard against both physical damage and psychological damage. People have a right to privacy and the researcher must keep data collected confidential. In this study the researcher made sure that no names were used and the data collected from participants will be stored safely and will remain confidential.

#### **1.15.3. Consent**

De Vos et al. (2002:74) believe that it should be ascertained that the consent of participants is voluntary and informed, without any implied deprivation or penalty for refusal to participate. The participants were treated with dignity and consent was obtained from respondents. Respondents who did not want to give consent were not forced to participate but they were replaced to balance the sampling.

#### **1.15.4. Plagiarism**

Welman et al. (2006:181) explain that “certain ethical considerations, concerned with such matters as plagiarism and honesty in reporting of results, arise in all research”. Terre Blanche et al. (2011: 61) also mention that “research ethics involves more than a focus on the welfare of research participants and extends into areas such as scientific misconduct and plagiarism”. The researcher quoted sources and references as trained and as required.

The researcher was aware of consequences faced by unethical research; therefore the researcher collected data and obtained information as required and of an ethical standard. De Vos et al. (2002: 67) regard violation of privacy, the right of self-determination and confidentiality as being synonymous. Therefore the requests of participants who wanted to remain anonymous were respected as their responses were not named. The researcher is aware of the UNISA student policies and rules on copyright infringement and plagiarism and is aware of the consequences faced by a student who violates such policies. The researcher ensured that all citations are

marked and authors are acknowledged accordingly and that the produced work is the researcher`s own work.

### **1.16. Chapter Layout**

Chapter layout ensures that the report is well- structured and gives an overview of what to expect in the research report and to have a picture of what has been covered. The chapter layout of this study is as follows:-

#### **Chapter: General Orientation**

In Chapter 1, the problem statement was discussed to elaborate on the problem and to show the need of this study. The Aim and the objective of the research and the research questions were discussed. Purpose of the study and the value of the study were also discussed to give an insight on the importance of this study. Research design, research approach, Data collection methods were also discussed. The validity and reliability of this study were discussed to elaborate on the meaning

#### **Chapter 2: The requirements of bail application**

In this chapter the bail application, different types of bail and the purpose of bail application are discussed. The fact that an accused on bail constitutes a threat to witnesses is also discussed to show the importance of keeping the accused in custody until the case has been finalised. The preferred method used by investigating officers to oppose bail during bail application is also discussed. The rights of witnesses and the rights of an accused person during bail application are discussed. The understanding of Criminal Law in bail application is also discussed. The criminal justice system is discussed to elaborate on different role players making up the criminal justice system.

#### **Chapter 3: The role of investigators during bail application**

The criminal investigation and prosecution processes are discussed, as well as the roles of investigators and of prosecutors during bail application. Furthermore, the value of cooperation between investigators and the prosecutors during bail application, the role of witnesses in the bail application and the value of denying bail in forensic investigation are explained. Different types of evidence and especially evidence needed in order to oppose bail during bail application are also explicated.

Reasons why the granting of bail may destroy evidence are given. Finally the accused's access to information during a bail application and the challenges faced by the investigator in opposing bail are discussed.

#### **Chapter 4: Findings and Recommendations**

This chapter presents the findings and recommendations relating to the aim and the research question of this study. Findings on what was identified during the research and recommendations on what needs to be done to address issues are discussed.

## CHAPTER TWO

### THE REQUIREMENTS OF BAIL APPLICATION

#### 2.1. Introduction

Any investigator who wants to keep the accused in custody should be knowledgeable about the requirements of bail application for a successful bail denial. Although not all cases amount to imprisonment, the investigator should know if the accused is capable of causing further harm, no matter how small the committed crime is. There are many different reasons why an accused is released on bail, for instance insufficient evidence to link that accused with the case. Cross (2010: 8) describes the role of the Crown Prosecution Service as to decide whether there is sufficient evidence, public interest to prosecute a suspect and enough evidence to prosecute the case in court.

#### 2.2. Suspect in criminal case

According to Van Rooyen (2008:14), each and every criminal case has a suspect. Therefore it is the responsibility of a South African Police Service (SAPS) to trace and arrest the suspect. During the arrest there are different procedures that need to be followed in order to have a successful prosecution. This includes reading the suspect the rights of an arrested person and recovering of exhibits if possible. According to Van Rooyen (2008:14), a suspect is someone who law enforcement officers have reason to believe may have committed a crime. Furthermore, Van Rooyen states that people remain suspects as long as law enforcement officers are investigating allegations against them. In this case a suspect is not involved in bail application. A suspect is a person who is detained (in police custody), but not yet charged.

Some suspects are released by investigators after spending a few hours and sometimes a night in police cells. They are released before they can be charged if the investigating officers find no evidence against them. The police do release suspects by means of SAP 308 (South African Police 308) in which case they do not

even take the suspect`s fingerprints. The role of the investigator is to find evidence against the detained suspect before charging the suspect. Once formally charged, the suspect gets involved in the bail application.

**Table 1: Difference between suspect, detainee and accused**

<b>Concept</b>	<b>Suspect</b>	<b>Detainee</b>	<b>Accused</b>
Definition	Someone who law enforcement officers have reason to believe may have committed a crime but has not been charged.	As a person who is held in police custody.	As a suspect who has been formally charged.
Section 35 of the South African Constitution Act 108 of 1996	To have the right to remain silent, to a legal representative, to be charged and be released on warning or on bail, and to be taken to court within 48 hours, etc.	Has a right to challenge the reasons for the detention and to be released if there are no lawful reasons for being detained.	To be treated as an innocent person, right to have a lawyer, not to be forced to give evidence, to be informed about the charge against him/her, to appeal against his/her conviction sentence etc.
Bail Application	A suspect does not apply for bail because the suspect is not formally charged.	The detained is normally the suspect in police custody but not yet charged. After being charged, the accused can apply for bail as an accused.	An accused that is in custody in respect of an offence is entitled to be released on bail.

Participants were asked about the meaning of a suspect. Eleven participants (n=11) described the suspect as an arrested person who has not attended a court, a person who has committed a crime but not yet charged, whereas one participant (n=1) did not know the correct definition of a suspect. The literature described the suspect as a person who law enforcement believes has committed a crime.

### **2.3. The rights of an accused during the bail application**

Bekker, Geldenhuys, Swanepoel, Terblanche and Van der Merwe (2005: 140) mentioned that an accused that is in custody in respect of an offence shall be entitled to be released on bail at any stage preceding the conviction in respect of such an offence. Wallace and Robertson (2011:217) point out that the perpetrator of a crime is guaranteed certain rights, these rights are explained to the perpetrator early in the criminal procedure process and it is added that violation of these rights may result in the case being dismissed. The authors further state that when these types of incidents occur, it is difficult for the victim to understand why the defendant goes free. Smit, Minaar and Schnetler (2004: 36) believe that when police officials are granted discretion, they must prevent infringing the rights of individuals as far as possible. This implies that police should be aware that not all criminals are guilty of the offence and when the police officer infringes upon the rights of persons, it destroys the case.

The rights of a suspect and of an accused person are similar, and when the arrest is made, the suspects must be informed of their rights accordingly, as stipulated in Section 35 of the Constitution Act 108 of 1996. If the arresting officer fails to inform the suspect about his/her rights, it might have an impact on the bail application process. Section 35 (5) of the Constitution Act 108 of 1996, states that any evidence obtained in violation of any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

According to the Constitution of the Republic of South Africa, Act 108 of 1996 in the Bill of Rights Section 35 (1) provides that every *arrested person* has a right: to remain silent:- to be informed promptly of the right to remain silent; and of the consequences of not remaining silent; not to be compelled to make any confession

and admission that could be used and to be brought before a court as soon as possible. Hiemstra, as quoted by Nesor, Naude and Prinsloo (1998: 43), maintains that the remorse and willingness to make restitution and the accused's status in the community should also be taken into consideration. Hiemstra, as quoted by Nesor et al. (1998:43), adds that the additional disadvantages in sentencing, for example, are to consider whether the offender was to lose a driver's licence and employment. Even in the olden days when police brutality was not a serious matter, the police were expected to treat suspects with dignity. What was pointed by Nesor et al. (1998: 43), many years ago; is still a fact in South Africa, as consideration is placed more on the consequences to be faced by the accused than what the community feels about the accused.

The Criminal Procedure Act 57 of 1977 Section 60 (9), states that the court shall decide the matter by weighing the interests of justice against the right of the accused to personal freedom and in particular the prejudice the accused is likely to suffer if he/her were to be detained in custody. Accused persons are well aware that the law also protects them. That same law that protects the criminals makes the police job difficult; because of this law the accused are not cooperative during investigative interviewing. When the accused is cooperative, there is a confession and admission to the crime. Once the accused's representatives learn of the dangers of admitting they decide to change the defence, making allegations that the information given to the police was given under "duress," implying that the accused was tortured. Once such allegation is made, the court changes its focus and in some cases it destroys the whole case.

Social Agencies e.g. Social Welfare from the Department of Social Development, go as far as researching the background of the accused in order for the accused to get a lighter sentence. This is done as a court procedure which determines the period and the type of sentence to be imposed, which in most cases lessens the sentence, with the result that the offender gets out of prison and commits another, if not the same offence. This has been the researcher's experience in many cases. Section 36 of the Constitution Act 108 of 1996, states that the Rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on equal human dignity and freedom.

## **2.4. The difference between an accused offender and a perpetrator**

There are many terms used to address persons who have committed a crime from wrong doers, criminals, suspects, offenders, perpetrators, accused, up to prisoners and inmates etc. In this study the focus is on the accused as discussed above. The terms “offender” and “perpetrator” will not be used in this study, although these are the terms which are mostly used when criminal acts are described. Holtzhausen (2012:6) describes the offender as a person who has a tendency for criminality; that is the state, quality and fact of being criminal. Therefore an offender is the term used for a person who is frequently committing crime and whose identity is not known. Where bail application is concerned, the first-time offender is likely to be released on bail, depending on the nature of the crime committed. A well-known offender is unlikely to be released on bail, also depending on the nature of the crime, since not all crimes committed are denied bail. The difference is that the offender and perpetrator’s identities are not always known, but the accused’s identity is always known. It is the role of the investigator to investigate the background of the accused to know whether the accused is a first-time offender or well-known offender in order to oppose bail. Holtzhausen (2012:6) mentions that offenders are people who have been unduly exposed to and influenced by adverse social and personal conditions that lead to criminal behaviour and actions bringing them into conflict with the law.

Participants were also asked to differentiate between a perpetrator and an offender. The participants (n=12) all had different views on the meaning of “perpetrator” and the “offender”. Two participants (n= 2) stated that an offender is a person who is accused to have been involved in the commission of an offence and the perpetrator as a person who initiated the offence. Ten participants (n = 10) did not differentiate between the concepts, but described both as a person that is responsible for committing an offence, but who has not been apprehended. The literature defines the offender as a person who has a tendency for criminality; that is state of mind, quality and fact of being a criminal.

## **2.5. Witness in a criminal case**

Usually there are a number of witnesses who are involved in a criminal case. Gilbert (2010:106) defines the witness as the one who knows by personal presence and perception. This study is about the witnesses who are directly involved in the case and who have a personal interest in a case in order to protect them from their offenders.

According to the researcher's point of view, many people at a crime scene may be witnesses, but only a few witnesses can give evidence that is admissible in court. This implies that the witness who has not been at the crime scene cannot present something that was heard from another person. Davis and Snyman (2005:112) emphasise that the key witness is often the victim of the offence, but witnesses are not always victims. However, whether the witnesses were present during the commission of the offence or not they are all concerned about the outcome of the case and are very interested in the bail application. Witnesses in a criminal case are not always against the accused, often there are witnesses who testify in favour of the accused. The witnesses who testify in the alibi (the statement of the accused) are trying to rescue the accused from prosecution. Gilbert (2004:119) declares that there are three general requirements assigned in a further effort to determine the reliability of witness testimony namely, that the witness was:

- Conscious during the event
- Physically present during the event
- Psychologically and mentally attentive.

Participants were asked to explain the meaning of "witness" and how witnesses are involved in bail application. Seven (n=7) participants had similar views on the description of a witness by stating that a witness is a person who appears before court to testify verbally with regard to an alleged offence. One participant (n=1) did not answer the question, while four (n=4) participants stated that a witness is anyone who saw the crime being committed. In the literature the witness is defined as the person who knows by personal presence and perception.

## **2.6. The rights of witnesses in the bail application**

“Care must be taken to ensure that victims understand how the process works and what their rights are, for many years, victims were perceived as simply another witness to the crime” (Wallace and Robertson, 2011: 216). Davis and Snyman (2005:106) name a number of rights which are to be offered to victims of crimes. Another right mentioned in the list is that victims have the right to be informed of the outcome of all bail applications and any bail conditions which are designed to protect the victim from the accused.

Section 7 (1) of the Witness Protection Act No.12 of 1998, states that witnesses who have reasons to believe that their safety or the safety of any person close to them is or may be, threatened by reasons of being a witness, may apply for themselves or for any person close to them to be placed under protection. The Act continues to say that such application may also be made on behalf of the witness by the investigating officer of the case in which the witness testifies. Prosecutors also have a duty to protect witnesses against any harm that may cause them not to testify in court. Part 16 of the Prosecution Directives as cited Bekker et al. (2005: 11), instructs prosecutors regarding the protection of witnesses, that:-

- Prosecutors must at all times consider the safety of witnesses.
- If a prosecutor has a reason to believe that the safety of a witness or related person is being threatened, he or she may with the consent or on behalf of the witness make an application for protection.
- Where a witness is opposed to being placed under protection, prosecutors are referred to the provision of Section 185 of Act 51 of 1977.
- Where the interest of a witness is threatened as contemplated in section 158 (3) (e) of Act 51 of 1977, the prosecutor must bring an application in terms of section 158 (2) for the witness to give evidence by way of close circuit television if available.
- Request for defence access to the docket should be opposed where witnesses may be intimidated or tampered with should their identity be made known through disclosure of the contents of the docket.

Wallace and Robertson (2011: 216) are of the view that the victim of any crime is often the forgotten party in the criminal justice system and that families of murder victims can often not obtain information regarding the case and they are often ignored by overworked and understaffed criminal justice personnel.

According to the White Paper on Safety and Security (1999 - 2004: 21) victims and witnesses play an important role in assisting the police in the collection of evidence and through participating in the process of prosecution. Davis and Snyman (2005:112) set out major challenges faced by the criminal justice system in relation to its engagement with victims of crime. These challenges include the following:-

- Protecting witnesses and victims against intimidation and threats for their safety related to their role as witnesses in the criminal justice system.
- Improved protection of victims against repeat victimisation using the Domestic Violence Act (Act 116 of 1998) and other strategies.
- More consistent standard of delivery of service to victim to assist them in accessing services and minimising secondary victimisation particularly in relation to vulnerable victims.
- Providing information to victims and witnesses regarding their cases and participation in the criminal justice process.
- Better collection and use of evidence victims and other witnesses by officials of the criminal justice system.
- Improvements in legislation and practice to improve the restoration and compensatory elements of the criminal justice system.

When one compares the rights of criminals to the rights of the victims and witnesses, it is astounding to realise that the arrested person, the detainee, the accused person, or even the imprisoned person has more rights than that of an innocent person. Section 35 of the Constitutional Rights has many pages of rights for a single criminal. All the rights in section 35 of the Constitutional Rights favour the accused at different stages, whereas the same Constitution does not have much to say on innocent persons. This is the reason why the country is known to have so much crime. Witnesses and victims do not have many rights in bail application. During the interviews in this study one participant even mentioned that witnesses do not have

any rights. Davis and Snyman (2005:107) indicate that some jurisdictions explicitly acknowledge that the victim's safety is to be considered in relation to the bail decision. In other countries as pointed out by Wallace and Robertson (2011: 288) and Daigle (2012: 86) the importance of the impact criminals have on the victims of crime has been considered. In other countries the victims have rights to express their feelings about the impact caused by the crime. This right is known as the victim impact statement. This victim impact statement (VIS) is the statement that presents the victim's point of view to the sentencing authority (Wallace and Robertson, 2011:288). However, Wallace and Robertson (2011: 288) also mention that the law on admissibility and use of victim impact statement is based on use of the evidence during death penalty cases.

Daigle (2012: 86) states that there are reasons to expect the victim impact statement to benefit victims as they give the victim the right to be heard in court and allow their pain and experience to be acknowledged in the criminal justice system. The researcher agrees with the VIS that the victim and witnesses should have an opportunity to say how they feel, as some victims suffer great losses and they want to let the court take cognisance of the impact caused by the criminal in order to give an acceptable sentence. In bail application cases the victim's expectation is to keep the criminal behind bars until sentence has been given. Therefore in this case the role of the investigator is to inform the prosecutor about the victim's expectations. The investigator is the person that is close to the court personnel and has the duty to introduce the witness and/ or the victim to the prosecutor. In a bail application the court will not know how the victim feels about the release of an accused unless it is mentioned by the investigator. Mokoena (2012:30) points out that although hearsay evidence is admissible in bail application, it carries less weight than if the persons who have personal knowledge of the facts testify themselves.

## **2.7. The role of witnesses in the bail application**

Davis and Snyman (2005:112) illustrate that in order to make effective use of witness evidence, the criminal justice system needs to work in a way which is responsive to witnesses and also supports police and prosecutors in making effective use of witness evidence. The witnesses give guidance whether to oppose bail or not. They are the ones who complain about intimidation if there has been any and who have to

indicate to the investigator the consequences of letting the accused free by remaining calm whilst others beg for the accused to be released on bail. As discussed above, in terms of Section 299A (1) of the Criminal Procedure Act 51 of 1977 (3) states that the prosecutor may only enter into a plea and sentence agreement after the victim has been afforded the opportunity to make representations.

Davis and Snyman (2005:107) claim that in relation to the decision whether to proceed with prosecution against the perpetrator, the victim also has a level of power in minor cases like assault, but in serious cases it is regarded as an obligation of the state to institute prosecution. The purpose of the Criminal Justice System is to fight crime and to punish the offender etc. In the same way, another purpose of the Criminal Justice System should be to satisfy the victim or witness in order to show him or her that something has been done.

Joubert (2001:44) stipulates that the presence of witnesses is also vital for a successful prosecution and that consultation with witnesses is crucial, since it will ensure that a witness does not get caught off guard by a question from the prosecutor, or that the prosecutor is not surprised by an answer from the witnesses. Davis and Snyman (2005:111) also maintain that the core business of the criminal justice system is that of holding perpetrators of crime accountable for their actions. The researcher agrees with the author however, the prosecution should also involve witnesses in the granting of bail for their perpetrators.

There are victims and witnesses who pursue cases for their personal gain, who implicate cases and demand that the accused be kept in custody. In such cases it is for the state to prove that the crime has been committed but that the victim's expectations are too high, For instance, a woman who files a marital rape case against her husband and urges the prosecution to deny bail with the intension of being free at home. In such a case the evidence of marital rape may be available, but the chance of proving the victim's wrong intension is mild. According to the Study Guide for Investigation of Crime III (Jones, 2002:14), the demands on a prosecutor's time and the caseloads that most prosecutors carry make an in-depth preparation with each witness a virtual impossibility but even a short time spent in preparation is valuable. Similarly, Smit et al. (2004:45) are of the view that new laws

and constitutional court rulings had the effect of increasing the workload of the police and prosecution services in the transformational challenges. This implies that because of the workload, investigators and prosecutors experience challenges in paying attention to individuals' expectations. Dilulio (1993: v), believe that effectiveness refers to carrying out justice system activities with proper regard for equity, proportionality, constitutional protections afforded to defendants and convicted offenders, and public safety. Furthermore, they define efficiency as a means to economically apply available resources to accomplish statutory goals as well as to improve public safety.

For the criminal justice system to be effective, the acknowledgement of victim or witness's expectations is important to reduce unnecessary complaints that destroy the image of the justice system, as one factor leads to another. If victims are not happy about the safety measures they might stop reporting any criminal activity. This will give freedom to the criminals, because they would know that they would not be reported. Once it gets to such a stage, crime will escalate until it affects the economy so negatively that international investors will not want to invest in the country where safety is unpredictable.

As mentioned earlier by Smit et al. (2004: 225) that research indicates that people do not approach the police due to fear or a lack of faith in the institution. Daigle (2012:85) has a similar view as he states that it seems that when police meet victims' expectations, they report high levels of satisfaction. According to Chandek and Porter (1998: 1), when victims' expectations are not met, they report lower levels of satisfaction. Daigle (2012: 85) believes that police are the first level of criminal justice with which crime victims interact, and therefore the responses that the victims receive from them may shape how they view the criminal justice system as a whole and may impact their future dealings with the system.

If one of the requirements in the bail application is the victim's or witness's opinion on bail, the victim or witness will be satisfied how the matter is handled. Knowing that the victim impact statement is used during the sentencing processes to assist in the verdict, the view of victim/witnesses can also be vital in decision making during the bail application. Ashworth, as cited by Davis and Snyman (2005:107), also suggests that prosecutors must always think very carefully about the interest of the victim

which is an important factor when deciding where the public interest lies. However, the South African Criminal Procedure Act 51 of 1977 Section 60 (10) states that the court has the duty to weigh up the personal interests of the accused against the interests of justice. In this case the interest of the victim, witnesses and the community is not weighed up or prioritised by the Criminal Procedure Act when it comes to the granting of bail.

In the pilot study when one investigator was asked about the role of witnesses during bail application, he responded by mentioning that witnesses are not included in the bail application. This, however, is what Davis and Snyman (2005:112) illustrate in the effective use of witness evidence by mentioning that the criminal justice system should respond appropriately to the needs of different types of witnesses, including victims who are vulnerable due to the nature of the offence against them. Gilbert (2004:37) agree with Smit et al. (2004:225), by illustrating that victims of crime may not report violations to the police if they feel that nothing will be done if the investigative functions do not occur like the recovery of exhibits and arrest of the assailants. Davis and Snyman (2005:112) indicate that witnesses are one of the most important assets of the criminal justice system in investigating and prosecuting criminal offences.

Participants were asked about the role of witnesses in the bail application. Participant number (n= 9) stated that witnesses` role in bail application is to inform the court whether the accused is a danger to them or not, while participant number two (n=2) stated that witnesses are not involved in bail application, because if witnesses are called during bail application their identity will be exposed. Participant number one (n=1) did not answer this question.

## **2.8. Accused on bail being a threat to the witnesses**

Witness Protection Act No.112 of 1998 preamble states that it was established for the protection of witnesses to regulate the powers, functions and duties of the Director. This means that the safety of witnesses was a concern and there was a need for witness protection. The Department of Justice (DOJ) and Constitutional Development (CD) (2012/2013: 407) explained that the office for Witness Protection provides a support service to the criminal justice system by protecting threatened

and intimidated witnesses and related people by placing them under protection. This implies that the state is aware that witnesses may be in because of the existence of the witness protection programme to protect the witnesses. However the researcher is of the opinion that witness protection is not enough. Criminals should be kept away from the society and from witnesses. Witnesses are intimidated by the free movement of their offenders. The conditions that are in place for witnesses to be kept safe in witness protection are a torture themselves. Witnesses who are under witness protection live in isolation away from their families, they do not work and cannot freely connect with the world. In fact, they seem to be in custody themselves.

Gilbert (2004:117) states that victims of particularly violent crimes in which their lives may have been threatened may experience such fear that they may hesitate to blame the criminal. Therefore if the accused is released on bail the witness tends to fear to continue with the case, fearing to face the accused in court and then see him outside the court after appearing. Davis and Snyman (2005:101) confirm that even when a suspect has been arrested, victims are vulnerable to intimidation, assault and even murder from suspects after they have been released on bail.

The danger of offenders released on bail has been a concern even internationally. Davies et al. (2010:288) point out that the result of increasing concerns about the possibility of dangerous offenders being released on bail, culminated in the Bail Act of 1993 in which the prosecuting authorities limited rights to appeal against bail decisions made in court. The accused that is out on bail can be a threat to the witnesses. The accused can intimidate and influence witnesses not to testify against them in court. The accused can threaten with violence and make promises of compensation to the witnesses in order to stop them from testifying.

Davis and Snyman (2005:103) highlight that the hardship in which victims are exposed to in their engagement with the criminal justice system may also be experienced by other witnesses as they may be amplified by threats and harassment by the accused and the accused's associates. Smit et al (2004:47) mention that unscrupulous accused people can use witness statements to identify witnesses who might testify against them and then see to it that such witnesses are intimidated not to testify to weaken the prosecution's case. This implies that the accused who knows

the identity of witnesses can impose a definite threat. This can be done by the criminal who is out on bail since the criminal who is in prison if the bail has been denied successfully, cannot effectively intimidate witnesses. If the accused is in prison whatever threat that is sent to the witnesses will be of no value as the witnesses will have confidence. According to the researcher's point of view, the courts and law enforcement always assume that prisoners and accused persons will escape if they are let loose. That is why they are always hand-cuffed; leg-ironed, or locked in cells before appearing in court. There is an assumption of escape. The same should be done to the witnesses; there should be an assumption that if bail is granted the witness will be in danger as to deter the witness from testifying in court.

Davies et al. (2010:288) indicate that the fears of excessive numbers of offences committed by offenders while they are out on bail led to the provisions in the Criminal Justice and Public Order Act 1994 to remove the right to bail for a person charged with committing a further indictable offence while on bail. The South African bail conditions also state that the accused should not commit another crime whilst on bail. Wallace and Robertson (2011:222) explain that in recent years, the defendant's dangerousness came under scrutiny in establishing bail. Wallace and Robertson (2011:222) point out that preventative detention allows the court to deny bail based on finding that the defendant may commit further crimes if released.

Wallace and Robertson (2011:14) are of the view that a victim may be blamed and seen as responsible for the crime and that a negligent act by a victim should not be considered as an invitation to be a crime victim. Davis and Snyman (2005:101) also mention that even when a suspect has been arrested, victims are vulnerable to intimidation, assault and even murder from suspects after they have been released on bail. According to Davis and Snyman (2005:101) it is confirmed that an accused who is released on bail is indeed a threat and danger to the victims and witnesses.

Davies et al. (2010: 284-286) the international authors, maintain that both the police and the courts can make a decision about holding an accused person in custody prior to conviction and that the police must decide whether to release arrested persons on bail or to detain them. Davies et al. (2010: 284-286) further indicate that after 36 hours accused persons must appear before the magistrates in court, who may return them to police custody for a further 36 hours and after this time they must

again be returned to the court. The researchers Davies et al. (2010) illustrate international detention procedures. The South African detention procedure is also the same but the duration is different since South African law states that the first appearance in court should be within 48 hours. This procedure is followed by the investigating officers when they apply for the seven day remand of an accused person. After the seven days the accused must appear in court again for a formal bail application and can be released if the investigating officer finds no evidence to deny bail.

There are witnesses who turn against their co-accused and give incriminating evidence in favour of the prosecution, but these witnesses may not be safe if the accused is out on bail. State witnesses are mentioned in Section 204 of the Criminal Procedure Act 51 of 1977. Section 204 of the Criminal Procedure Act authorises witnesses to give incriminating evidence in favour of the prosecution. Hiemstra (1985: 79) illustrates that the indemnity for section 204 of the Criminal Procedure Act 51 of 1977 is for an accused who is used as a witness against the other accused, thereby escaping prosecution. The common expression is that the accused has turned State Witness by testifying against his/her co-accused. Therefore these witnesses might be intimidated. The investigating officers should ensure that these witnesses are protected until the trial is over.

Participants were asked if the accused that is released on bail can cause harm to the witnesses. All participants (n=12) were of the view that the accused who is out on bail can intimidate witnesses by means of violence, influencing them to accept compensation or he/she can even eliminate witnesses. The literature indicates that victims are vulnerable to intimidation; assault and even murder by the accused after they have been released on bail.

## **2.9. The Requirements of Bail application**

During bail application, the officer needs to understand the bail procedures, the bail application, the purpose of bail application and all the other requirements in order to deny bail effectively. Davies et al. (2010: 493) define bail as the release of an accused before the conclusion of a case, under an obligation to return at a specified time to the police station or court, where failure to do so can result in punishment. Criminal Procedure Act 51 of 1977 Section 58, on the effect of bail states that *“an accused (already been charged) who is in custody shall be released from custody upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his bail and that he shall appear at the place and on the date and at the time appointed for his trial or to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned”*. Karmen (2013:203) indicates that in bail, the accused persons are given the chance to raise money and to post bond guaranteeing that they will show up at their hearings. Delaware (2013) states that the purpose of bail is to ensure the accused’s appearance in all court trials and hearings. Therefore bail ensures that the accused appears in all court trials without keeping him/her in custody.

Bekker, Geldenhuys, Joubert, Swanepoel, Terblanche and Van der Merwe (2005:135) stipulate that the failure of an accused to appear in court and to comply with other bail conditions may ultimately result in cancellation of bail, forfeiture of bail money to the state and the re-arrest of the accused. According to Karmen (2013:203), the amount of money for bail is usually determined by the judge and is set according to the nature of the offence and the record of the defendant.

### **2.9.1. Types of bail**

Bekker et al. (2005:137-139) and Mokoena (2012:15) discuss two types of bail, the bail granted by police and bail granted by the court/ prosecution. The South African criminal Justice System has the same types of bail, known as the station bail and the court bail.

#### **- *Bail granted by police***

Bail granted by police (station bail), is the bail granted after the arrest. The accused is offered to pay bail for petty cases and in cases where the court would have granted the accused bail. Wallace and Robertson (2011:222) indicate that for certain

types of offences a bail schedule is established and made available at the police station and if the accused can pay the amount listed on bail schedule the accused is freed and ordered to report to a judge at a predetermined time.

Similarly, in the South African Criminal Procedure Act No. 51 of 1977 Section 59 (1) (a) states that an accused who is in custody in respect of any offence, other than an offence referred to in Part II and Part III of Schedule 2 may, before the first appearance in a lower court, be released on bail by any police official. Section 59 of Criminal Procedure Act continues to state that in consultation with the police official charged with the investigation, if the accused deposits money at the police station, the sum of bail money must be determined by such police official.

- ***Bail granted by court***

Court bail is the bail granted in court by the magistrate. There are cases where bail is granted at the station by prosecutors. In this case bail is granted, but in order to release the accused, the police call the prosecutor who then visits the station, reads the docket and grant the bail. The bail in this case is granted by prosecutor but at the station before 48 hours of court appearance. Mokoena (2012:18) emphasises that prosecutors are empowered to grant bail to suspects even before their first appearance. Section 59 A of the CPA 51 of 1977, confirms this arrangement by stating that the prosecutor authorised thereto in writing by the Attorney-General concerned, may, in respect of the offences referred to in Schedule 7 and in consultation with the police official charged with the investigation, authorise the release of an accused on bail.

Participants were asked about the requirements of bail application for a successful bail denial. All participants were in line with the literature. All participants (n=12) stated that sufficient evidence to link the accused with the case is a requirement of the court. The literature also emphasises the requirement for sufficient evidence to link the accused with the crime committed. Participants were also asked about the types of bail. Four participants (n=4) mentioned court bail, station bail and bail granted by a prosecutor. Eight participants (n= 8) were in line with literature by referring to station bail and court bail. The literature mentions two types of bail, the bail granted by police and the bail granted by the court.

### **2.9.2. The bail application**

Wallace and Robertson (2011: 222) assert that in more serious cases the suspect is taken to court for a formal bail hearing. This means that the bail hearing or bail application is the bail done in court, because a bail hearing is not done at a police station. Barrow (1998:60) explains that the accused who is in custody in respect of an offence shall, subject to the provisions of Section 50 (6) and (7), be entitled to be released on bail at any stage preceding the conviction in respect of such offence, unless the court finds that it is in the interest of justice that the accused be detained in custody. Mokoena (2012: 26) believes that the focus at the bail stage is to decide whether the interest of justice permits the release of the accused pending trial, and that entails in the main, protecting the investigation and prosecution of the case against hindrance. This implies that the focus at the bail stage does not weigh the interest of the victim's protection which is the reason why this study wanted to investigate the interests of victims and witnesses to protect them.

According to section 35 (1) (f) of the Constitution, everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interest of justice permits, subject to reasonable conditions. The right to bail requires that the judge considers the defendant's individualized circumstances in setting bail. These factors include the nature and circumstances of the offence (Wallace and Robertson, 2011:222). In South Africa every person who has committed an offence and is arrested is entitled to bail. The difference is that not all persons who have committed an offence are cooperative and are trustworthy. Also the release of an offender depends on his/ her ability to pay, as the amount of bail might be beyond his/her means. Karmen (2013: 203) claims that getting bail is a major problem for defendants who are poor and who have no prosperous friends and relatives. Karmen (2013: 203) further states that the prosecutor usually recommends a high figure for bail, while the defence attorney argues for a sum that is within the defendant's reach.

There are factors that can help the prosecution in deciding bail. There are criminals who co-operate with the court proceedings fearing further punishment, and there are those who are altruistic who commit crime for others like their families in order to survive. Some of these criminals believe that if they cooperate there will be a lesser

punishment, the same as the offender who pleads guilty. They do not confess to fight crime, but they confess in order to help themselves out of the situation. Mofokeng (2012: 28) points out that, detectives are complaining that prosecutors do not understand the tough job of the police as they accept guilty pleas that do not punish criminals harshly enough. In the same note Davies and Snyman (2005:112) mention that the accused may plead guilty to the charge but the primary job of the court is to confirm the guilty plea.

In any case these factors assist the investigator in deciding to oppose bail. The accused may plead guilty but the investigator still has to decide whether to deny bail or not, although the final decision lies within the prosecution. Upon the investigator's decision, the accused that is not entitled to bail is the accused that poses a danger to his victims and witnesses. The same applies to an accused who is a flight risk, who was arrested after many attempts, or an accused who is wanted by the angry community like serial killers, serial rapists, and child rapists. According to investigators these accused are not entitled to bail. Karmen (2013:202) explains that bail can be denied for an accused who has a history of being a flight risk to avoid prosecution or one who has tried to interfere with the administration of justice by intimidating a witness. Wallace and Robertson (2011:222) indicate that in the U.S. the right to bail was considered important in the way that the drafters of the U.S. Constitution included it in the Bill of Rights, but their Eighth Amendment of the Constitution states that excessive bail shall not be required, However that does not mean that all defendants have a right to bail for all crimes.

### **2.9.3. The purpose of bail application**

Section (61) (a) of the Criminal Procedure Act 51 of 1977 (2012: 60) states in the bail application of an accused in court that, an accused who is in custody in respect of an offence shall, subject to the provisions of section 50 (6), be entitled to be released on bail at any stage preceding the conviction in respect of such offence, if the court is satisfied that the interests of justice so permit. Bekker et al. (2005: 136) indicate that the purpose of bail is to strike a balance between the interest of the society and the liberty of an accused. According to the researcher's point of view, the purpose of a bail application is for the accused to exercise his/her rights as mentioned in the Constitution of the Republic of South Africa.

The Constitution of the Republic of South Africa Act 108 of 1996, Section 12, states that everyone has the right to freedom and security, which includes the right:-

- Not to be deprived of freedom arbitrarily without just cause,
- Not to be detained without trial,
- To be free from all forms of violence from either public or private sources, and
- Not to be tortured in any way, not to be treated and punished in a cruel inhuman and degrading way.

However, the court can still deny bail which is depriving the accused the right to freedom, even though the Constitution set out the above -mentioned rights for the accused. In terms of Section 36 of the Constitutional Bill of Rights Act 108 of 1996, the Limitation of Clause authorises the limiting of rights by authorised individuals where necessary. This implies that the court is allowed to deny bail, keeping the accused in custody. The purpose of bail denial by investigators is to secure the attendance of the accused in court, to avoid the accused from evading the trial, to ensure that witnesses and the victim are safe and they are not intimidated or killed, and to ensure that the accused himself is safe from vigilantism.

Participants were asked to explain the purpose of bail application. Four participants (n=4) stated that the purpose of bail application is to ascertain if the accused is eligible for the release, while another four participants (n=4) stated that in bail application the investigating officer strives to prove to court why the accused should not be released on bail and it is the accused request to be released. Three participants (n=3) stated that the purpose of bail application is for the investigating officer to provide court with information to decide whether to grant the accused with bail or not. One participant (n=1) stated that every accused has a right to bail. Literature is not clear why bail application is important for an accused.

## **2.10. Circumstances under which bail can be granted by court**

Sometimes investigators and victims are confused by the court decision to grant bail. The investigators who deny bail have reasons why the accused should remain in custody, but often the court has its own reasons why the accused should be granted bail. The circumstances under which bail can be denied are known by the court and only the court can decide. Mokoena (2012:26) believes that in determining whether the accused has to be granted bail, the court may take into consideration the strength of the state's case. The researcher does not agree with this, because the strength of the case is not the reason why the accused is released on bail. There are cases where the state will have strong evidence against the accused, but the court will still grant bail. Section 59A (3), states that the effect on prosecutorial bail is that the person who is in custody shall be released from custody upon payment of his bail. The old research conducted by Barrow (1998:32) is still valid. Barrow (1998: 32) believed that the refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where any of the following grounds are established:-

- 2.10.1. Where there is the likelihood that the accused, if released on bail, will endanger the safety of the public and of any particular person and the public interest, and will commit a schedule 1 offence.
- 2.10.2. Where there is the likelihood that the accused, if released on bail will attempt to evade trial,
- 2.10.3. Where there is the likelihood that the accused if released on bail, will attempt to influence or intimidate witnesses to conceal and destroy evidence, or
- 2.10.4. Where there is the likelihood that the accused if released on bail will undermine and jeopardise the objectives and the proper functioning of the criminal justice system including the bail system.

In this case, the investigator should present the case personally in court to answer all the questions the court may have. The reason for this is that the bail hearing is normally heard in one day and the decision is made on the same day. Section 60 (6) of the Criminal Procedure Act 51 of 1977, states that in considering whether the

ground in subsection (4) (b) have been established, the court may, where applicable, take into account the following factors, namely the emotional, family, community and occupational ties of the accused to the trial place.

Participants were asked what caused the court to release the accused on bail when the investigating officer has denied bail. They stated that insufficient evidence provided by investigators will compel the court to release the accused. The literature states that the court looks into different aspects in order to deny bail. The court looks into the likelihood of crime which may be committed and the likelihood of harm to witnesses by the accused if released on bail.

### **2.11. Method of denying bail in bail application**

Mokoena (2012:30) suggests that neither the Criminal Procedure Act nor the rules of evidence are specific on the form which the evidence in a bail application should take. However for the accused, Mokoena (2012: 30) suggests that affidavits may be presented in the evidence during the bail application proceedings. In this case the best way of opposing bail for the investigating officer is to physically testify in court, informing the court why the accused should not be granted bail. There is a bail application form which is completed by an investigating officer who is denying bail. The form is used to inform the court about reasons why the accused should not be granted bail

In other cases prosecutors accept a statement from the investigating officer which explains the importance of denying bail for the accused. In some cases the court accepts the docket diary entry where the investigating officer requests in one sentence that the accused be kept in custody. This is what confused investigators in this study where a request has been made by the investigator to remand the accused in custody, but the court still releases the accused. It has been mentioned by other participants that the best way to oppose bail is to appear in court personally, discuss the case with the prosecutor and put a person on the witness stand if needs be. Most (n=10) of the participants preferred to oppose bail by giving evidence personally. Mokoena (2012:30) mentions that it is an established practice that informal statements be made by both the prosecution and the defence, instead of leading oral evidence and presenting affidavits. This gives investigating officers a good chance of being heard.

Participants were asked about the preferred methods of opposing bail. Most (n=10) of the participants preferred to oppose bail by giving evidence personally. Two (n=2) stated that they prefer to submit an affidavit and present evidence in court personally. The literature does not indicate which the best way of opposing bail is, but one source consulted suggests that affidavits may be presented in the evidence during the bail application proceedings.

## **2.12. Protection of the accused during bail application**

Sometimes the community can act very violently towards criminals. Some communities have vigilante groups who do not believe in the justice system. These groups are extremely dangerous, because if the suspected person is out in the community these groups take the matter into their own hands by assaulting the suspect and this may even result in death. The most well-known vigilante group is in the Cape Flats (Cape Town), known as PAGAD (People against Gangsters and Drugs). Rabasa, Chaik, Cragin, Daly, Heather, Cregg, Karasiek, O'Brien and Rosenau (2006: 39) explains that PAGAD was founded in 1996 to eradicate gangsterism and drugs, restoring social order in the community. According to Wikipedia (2014: 1), PAGAD was originally initiated by a handful of neighbourhood watch members from a few coloured Cape Town townships who decided to organize public demonstrations to pressure the government to fight the illegal drug trade and gangsterism more effectively. However, PAGAD increasingly took matters into their own hands, believing the police were not taking enough action against gangs.

Another well-known vigilante group was in Kwa Mashu (KwaZulu Natal) known as Amasinyora and was known of killing people accusing them of being involved in criminal activities (Dlamini, 1990-1994:148). Beside these groups there are a number of incidents where the community attacked suspects like rape suspects for raping minor children. There are other incidents where the community protested by the court gate for the accused not to be released and when that accused was transported out of court the people became violent and attacked the van that was transporting the accused. One may assume that if the accused is released he will be beaten to death by the angry community.

Section 60 4(a) and (d) of the Criminal Procedure Act 51 of 1977, emphasises that the interests of justice do not permit the release from detention of an accused where any of the following grounds are established:

- Where there is the likelihood that the accused, if released on bail, will endanger the safety of the public, any particular person and will commit a Schedule 1 offence.
- Where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order and undermine the public peace and security.

In the case of public's concern about the release of an accused, the law also considers the fact that the accused may be in danger if he/she is released on bail. It is mentioned in Section 60 (8A) of the Criminal Procedure Act 51 of 1977, states that the court may, where applicable, take into account the following factors:-

- a) Whether the nature of the offence and the circumstances under which the offence was committed is likely to induce a sense of shock and outrage in the community where the offence was committed.
- b) Whether the shock and outrage of the community might lead to public disorder if the accused is released.
- c) Whether the safety of the accused might be jeopardized by the release.
- d) Whether the sense of peace and security among members of the public will be undermined and be jeopardized by the release of the accused.
- e) Whether the release of the accused will undermine and jeopardize the public confidence in the criminal justice system.

However, it seems as if this section of Criminal Procedure Act is not properly implemented because in some cases criminals are released on bail while members of the community are protesting outside court for the accused not to be released. Mokoena (2012: 27) points out that the strength and weakness of the case plays a crucial and decisive role in the granting of bail. This implies that there are factors that do not allow court to deny bail even though the community is boycotting the release of an accused.

According to Davis and Snyman (2005:308), vigilantism is a more extreme form of collective action which is victimization by community members who are not necessarily the direct victims of the suspect. Davis and Snyman (2005:309) describe

vigilantism as humiliation in public, beatings, whippings, burning and even murder. Vigilantes are defined as a self-appointed group of citizens who undertake law enforcement in their community without legal authority: typically because the legal agencies are thought to be inadequate. It is also mentioned that the activities of vigilantes are commonly committed by individuals who do not have an idea that their actions are associated with vigilantism. Therefore keeping the accused in custody by the request of the community is also important in order to protect the accused him/herself.

Participants were asked why it is important to safeguard the accused. Ten (n= 10) participants felt that the community may take matters into their own hands. They felt that safeguarding the accused is important for him/her to have a fair trial. One participant's (n=1) response was not valid. Another participant (n=1) felt that protection of the accused is important so that he can stand trial because the accused is innocent until proven guilty. Most participants' responses were in line with the literature and the law in believing that the community may take matters into their own hands. The law states clearly that the accused may be denied bail if the granting of bail may cause public disorder.

### **2.13. The protection of investigators on bail application**

Investigators themselves are in danger. Some criminals believe that if the investigator dies the case will be closed. According to the Annual Report for South African Service 2009/2010 (Cele, 2010: xviii), 107 members died while on duty in the 2009/2010 period. In the report it is mentioned that 25 members who were murdered were from KwaZulu Natal. The report further stipulates that when police officers are off duty, they are at their most vulnerable, as they face attackers alone, thereby raising the risk of being killed. According to South African Press Association (2014), two people, including a Warrant Officer, were arrested for allegedly plotting to kill investigators probing a top cop Major General Tirhani Maswangayi's murder. This implies that investigators are not safe either. Investigators do fear for their lives when investigating cases, even cases against colleagues.

SAPS investigators investigating other SAPS officials are also concerned about their lives when it comes to charging their own colleagues. The investigators are

threatened by anonymous calls and they are told not to gather further evidence and not to produce particular dockets to court. However, some of the charged police officers do understand that if the investigator is killed, the case will go to another investigator and the case will proceed.

According to the researcher`s experience in the investigation of corruption against police officials, there are not many cases where police officers are denied bail. The court believes that police officers are traceable because their fixed addresses are in the police system. The charged police officers are therefore trusted that they will not evade their trial. In this case the court does not consider the safety of witnesses and victims. However, the investigators of police cases (internal investigation) fear to deny the bail of their charged colleagues because of threats. Another form of protection that is important for investigators is that of civil claims. Because of the rights that are given to criminals, investigators and police officers as a whole system are sued.

This fear may interfere with the effectiveness of police work and can contribute to deficiencies in the investigation. Investigators are careful in everything they do, fearing to be charged and sued for an unlawful arrest and unlawful detention. Mofokeng (2012:32) states that in the pursuit of justice it should be borne in mind that victims and the accused have fundamental rights that may get abused, resulting in unnecessary pain and suffering and civil claims against the state, as a result of the attitude between the two parties towards each other. This confirms that a civil claim is also a concern of state and investigators try by all means available not to be sued. In the instruction document relating to the arrest and detention of suspects as cited by Mokoena (2012:16), the National Commissioner of Police listed a number of concerns which have in certain instances led to successful civil claims against the South African Police Service. These concerns may interfere with the effectiveness of criminal investigations.

## **2.14. The criminal law in the bail application**

Joubert (2013: 9) suggests that the different forms of conduct that are punishable are described by criminal law, which also determines the requirements for each offence. Cross (2010:3) mentions that criminal law labels certain kinds of behaviour as being unlawful, and sets out the rules for deciding when a crime has been committed. Similarly Davies et al. (2010:10) point out that in most countries certain behaviours are criminalised through criminal law and that criminal law gives guidance regarding the elements of a crime. For criminal behaviour to be punished, specific procedures are to be followed. Therefore the Criminal Procedure Act is there to give guidance on the types of procedures. Joubert (2013: 16) illustrates that the Criminal Procedure Act (CPA) provides for procedures and related matters in the criminal proceedings. The investigator must gather evidence which will prove beyond reasonable grounds that the crime committed was unlawful and that the accused had an intention to commit such crime and in terms of the Criminal Procedure Act the accused will not be granted bail.

The purpose of criminal law, according to Clarkson (2005: 262), is to prevent harm caused by offenders to others and to protect the interest of the powerless in the society. It also strives to manage the risk to the public created by dangerous situations. In the case of a bail application, the purpose of criminal law would be to deny bail to the accused in order to protect the interest of the powerless in the society. Since the purpose of opposing bail is to protect further harm by offenders it is therefore clear that it is the purpose of criminal law to protect the society from harmful offenders.

Davies et al. (2010: 9) mention that the content of criminal law provides the starting point of the criminal justice system by defining behaviour that is to be regulated through the use of the criminal law. However Cross (2010:183) believes that judges, magistrates and juries have a great deal of scope to inject their own values into the criminal law. Investigators must also see the culpability of the offender to know whether the accused is capable of committing such crime or not. Depending on the offence committed, the investigator may not oppose bail for the accused who committed the crime whilst intoxicated, mentally ill or under the required age because of culpability but investigator leave it to the court discretion. Davies et al.

(2010:43) state that the principle of criminal law is that a person should not be punished unless the act committed is blameworthy. Where there is no intention there is negligent. Some of negligently committed crimes cannot be denied bail unless the investigator is forced to oppose bail to keep the accused away from the angry community as provided in the Criminal Procedure Act 51 of 1977. Cross (2010:3) feels that the behaviour of other agencies is not acceptable as the police and other criminal justice organisations use their own power, discretion and working rules far more than they consult the criminal law.

Participants were asked about criminal law in bail application. Three participants (n=3) were not sure of an answer in regard to criminal law and bail application. Five participants (n= 5) stated that criminal law provides that there must be a sufficient evidence to prove a case beyond reasonable doubt and participants added that there must a link of the accused with the committed crime. Four participants (n= 4) stated that criminal law states that every accused has the right to apply for bail. The literature states that criminal law gives guidance to which acts are punishable or not.

### **2.15. The value of bail denial in the prosecution**

Mofokeng (2012: 31) suggests that prosecutors and investigators should discuss dockets and rectify problems prior to court appearance for speedy trials: in turn improving the problem of backlogs and quality of prosecutions. The backlogs mentioned by Mofokeng, constitutes problems for investigators. Investigators are responsible for a number of cases which sometimes requires investigators to appear in more than one court on the same day. Backlogs can be caused by a number of reasons: the investigators being ignorant and taking their own time in attending cases or the shortage of staff/ investigators, where more cases are reported in a short period of time. This can also be a reason since the Phoenix population is growing rapidly. A number of RDP houses have been allocated in the Phoenix policing area which might increase cases for investigators.

Granting bail to the accused who ends up evading trial causes additional work for an investigator, because the accused must be traced again which prevents the investigator from focusing on other matters. The value of bail denial in simple terms

would be the finalisation of the case, where the accused will remain in custody until the case is finalised. Some offenders when they are released on bail, do not attend court until their cases have been withdrawn from court. Therefore this is not a way of combating crime if the accused goes free and unpunished. Denying bail will benefit the prosecution because it is the prosecution that is blamed by the community whenever the accused is released. The prosecution is even blamed by investigators themselves when the accused is at large after being released on bail (*At large is court terminology which means that the accused cannot be found*). Denying bail is more important in domestic violence cases when it is often assumed to be petty cases. The reason for this is that witness identities are known in domestic violence cases. That will make it difficult for witnesses to testify as they encounter the accused persons at home. Prosecution, as well as the investigation is blamed by witnesses when families rely on the criminal justice system to rehabilitate their accused family members. Smit et al. (2004: 225) point out that the research indicates that sometimes people do not approach the police due to fear and a lack of faith in the institution, and that one of the reasons for non-reporting was that the respondents did not believe that the police could solve their cases.

The aspect of bail is very important in family violence situations and effort should be made to gather information and forward to the prosecutor to present to the judge during a bail hearing (Wallace and Robertson, 2011:222). It is not necessary to deny bail when the witnesses feel safe to testify, knowing that they will not be harmed. Witnesses will have a full commitment in cases. Denying bail can be of value for the prosecution because as mentioned above, the accused will be available for the whole prosecution process. A finalised case is a huge success for all role players, including the prosecution. Wallace and Robertson (2011:222) indicate that the safety of any person and of the community is made a relevant consideration in setting bail. Therefore if the accused person evades trial, it also constitutes a failure of prosecution, because it may be that the accused evaded trial after he/she was released on bail.

The objective of prosecution is to combat crime by successfully prosecuting the offenders and eliminating the innocent (those who are wrongly accused). Gilbert

(2004:105) points out that the purpose of finding evidence is to connect or eliminate the suspect from the crime committed. Similarly, investigators have a goal of combating crime by means of charging the criminals and taking them to court. However, Hara (2007: 2) is of the view that deciding on prosecution and making prosecution policy is an important constitutional principle in England and Wales, Canada and, generally throughout the Commonwealth.

Participants were asked about the value of denying the accused bail. Three participants (n= 3) felt that denying bail will secure the attendance of the accused in court and thereafter the accused may be convicted. Five participants (n= 5) stated that prosecution will finalise cases in a shorter period. Four participants (n= 4) stated that denial of bail will ensure attendance of witnesses in court without being intimidated and the investigator will investigate with no-one interfering with witnesses. The literature emphasises that if bail is denied witnesses will be protected, especially those of domestic violence and that the accused will not evade trial.

## **2.16. The Criminal Justice System**

Cross (2010:13) believes that without criminal justice, criminal law cannot be enforced. Also without criminal law, criminal justice has nothing to enforce. Therefore criminal law and criminal justice do need each other. Smit et al. (2004: 255) describes the Criminal Justice System as the term that is used to include all participants in the process of identification of a crime which includes police, justice and correctional services but not limited to include social services and non-governmental service providers. In the list of role players Cross (2010: 9) added other government departments like Home Affairs and the Ministry of Justice as agencies that form part of the Criminal Justice. Similarly, Davies et al. (2010:8) state that criminal justice is about society's formal response to crime and is defined in terms of a series of decisions and actions taken by a number of agencies in response to crime. However, according to Zedner (2004) the public plays a vital role in criminal justice at every stage of the process, as most of incidents of crime are reported to the police by the public.

King (1981: 12) mentioned that the purpose of criminal justice is prevention and neutralisation of the following facts:

- The implicit presumption of guilt, support for the police and a high conviction rate.
- Rules protecting the defendant against error or abuse of power and the presumption of a defendant`s innocence until proven guilty.
- The treatment of the social causes behind offending rather than punishment of the offence and discretion and expertise of decision makers.
- The minimisation of conflict between people working in criminal justice and of money spent on the process, and the importance of and acceptance of records.
- Court values, which reflect community values and criminal justice agents` control over the process.
- The deliberate alienation and suppression of the defendant, the presence of paradoxes and contradictions between the rhetoric and the performance of criminal justice, and the ignorance of social harm caused by inequality in society.

Davis and Snyman (2005:111) mention that the core business of the criminal justice system is that of holding perpetrators of crime accountable for their actions. This is what concerns the community: once the case is reported to the police, justice must be done. That is why the community blames the entire justice system when the criminals are walking about freely a day after their arrest, while members of the public are protesting outside courts for the offenders not to be released on bail. The criminal justice system consists of many role players including the Department of Justice, NPA, SAPS, attorneys, correctional services, NGOs and victim empowerment.

**Diagram: 1. Role-players in Criminal Justice System**



Davies et al. (2010:7) regard neighbourhood watches and private security guards as part of criminal justice, which may be a surprise to those who think that the criminal justice system consists of court staff. Davies et al. (2010:4) mention a number of agencies that are involved in criminal justice namely the police, prosecutors, criminal defence services, courts, ministry of justice probation, prisons and youth justice.

In a pilot interview, when people around the court, were asked who make up the criminal justice system, the answer was the same that it is the police and court staff. In the eyes of the public it seems as if criminal justice is a combination of police, court prosecutors and judges. Researchers like Davies et al. (2010:8) and Cross (2010:8) list a number of role players who make up the criminal justice system and they are more than just the police and courts. Davies et al. (2010:4) describe the four key sub-systems that comprise criminal justice, namely law enforcement which involves police and prosecuting authorities, courts, the penal system that involves probation, prison etc. and crime prevention (the agencies that deal with crime free environments).

### **2.1.1. National Prosecuting Authority (NPA)**

Smit et al. (2004: 42) describe the National Prosecuting Authority as the service that is responsible for coordinating and assisting the traditional prosecuting structures throughout the country. The National Prosecuting Authority (NPA) consists of prosecutors who are able to convince the court to prosecute according to the evidence presented.

### **2.1.2. Department of Justice**

According to the Department of Justice (DOJ) and (CD) Constitutional Development (2012/2013: 402), is responsible for ensuring an accessible justice system that promotes and protects social justice, fundamental human rights and freedom: thus providing transparent, responsive and accountable justice for all. People tend to confuse the agencies involved in the Department of Justice and the agencies in the criminal justice system. The mandate of the Department of Justice and Constitutional Development is explained by the DOJ and CD (2012/2013: 403) that it seeks to provide a framework for the effective and efficient administration of justice. On the other hand, it seeks to promote constitutional development through the development and implementation of legislation and programmes that seek to advance and sustain constitutionalism and the rule of law; it also administers the Constitution and over 160 principal South African Acts.

### **2.1.3. The police**

Davies et al. (2010:4) explain that the police service includes police reservists, metropolitan police and city police. Also in South Africa the police service comprises of different agencies. Smit et al. (2004:11) point out that police and policing in South Africa is not the sole responsibility of South African Police Service (SAPS), and add that other agencies involved in policing are Metropolitan police, the South African Revenue Services (Customs), the Department of Home Affairs (Immigration) and the Private Security Industry. Therefore these agencies also form part of the criminal justice system as they are all involved in crime combating.

#### **2.1.4. Non-Governmental Organisations (NGOs)**

Davies et al. (2010:7) mention that there are many private citizens involved in the criminal justice system on voluntary bases, like lay visitors to police stations and, neighbourhood watch groups. In the Phoenix area there is a Non-Governmental Organisation (NGO) called Khulisa. Khulisa Social Solutions is used by the court for mediation, while petty cases and domestic violent cases are referred to Khulisa for counselling. After both parties have agreed on certain arrangements, Khulisa sends the report to court and then the court withdraws charges as per the victim's arrangement with Khulisa. Khulisa Social Services (2009-2014) explains that their restorative processes bring together those who have a stake in a particular offence to collectively and collaboratively identify harms, needs and obligations in order to heal and put things as right as possible, which also includes victim offender mediation

#### **2.1.5. Social Agencies**

Cross (2010:8) states that the criminal justice system consists of agencies who deal with those who have been sentenced by the courts, such as Youth Offending Teams who work with offenders aged between 10 and 17. Therefore the government Social Agencies form part of the criminal justice system. The social agencies conduct a thorough background search on criminals before sentencing and they forward the report to court for an appropriate sentence. Social agencies play an important role in the releasing and sentencing of juveniles. Khulisa Social Services (2009-2014) also points out that because of the Child Justice Act children who have committed an offence for the first time and who have taken responsibility for their actions are given an opportunity to undergo a diversion programme. The social agency's duty in an arrest is to submit the report to court, stating the living status of a child.

#### **2.1.6. Correctional Services**

Cross (2010: 8) further states that the criminal justice system consists of agencies like prison services which deal with those who have been sentenced by the courts. Prison services (Correctional Services) in South Africa have a huge impact on bail decisions. The overcrowding of prisons results in the court releasing the accused in certain cases. Therefore Correctional Services (South African Prison Services) can have an impact on bail applications.

Mokoena (2012: 16) confirms that the need to keep fewer suspects awaiting trial in prison has since been discussed at high levels of authority. According to Correctional Services Minister Sibusiso Ndebele, as cited by Ensor (2013) the Department of Correctional Services reduced the rate of overcrowding in the country's prisons to 28% from 38% in 2007- 08. Overcrowding has been a problem for the country as mentioned above, until the problem was resolved by reducing the numbers. Mokoena (2012:15) points out that keeping suspects in custody awaiting trial is in some instances desirable, but in other circumstances it simply translates into greater costs in terms of staffing and infrastructure. Therefore building more prisons in terms of infrastructure will contribute in reducing crime, rather than releasing criminals because of overcrowding.

#### **2.1.7. The Court**

Davies et al. (2010:8) indicate that courts make decisions about pre-trial detention, adjudicate on the guilt of the defendant, decide on the sentence for those convicted and ensure that the rights of the defendants are respected. Cross (2010:8) further mentions the court as one of the agencies in the criminal justice system. In South Africa and other countries the court consists of a judge for the High Court and above, and a magistrate for lower courts who decide on convicting and sentencing the offender.

#### **2.1.8. Defence Attorneys**

Cross (2010:9) emphasises that there are agencies which are also involved in the criminal justice system beside the mentioned agencies which are directly involved. Defence solicitors (attorneys), as part of the criminal justice system, represent the defendants in court and present arguments in favour of the defendant (Cross, 2010:9). Defence attorneys play a vital role in bail application and often contribute to the accused to be released a day after the arrest. The attorney's duty is to try and convince the court to release the accused on bail. They work hard to get loop-holes in the case explaining why the accused should be released.

#### **2.1.9. Victim Support Agency and Witness Protection**

Cross (2010:9) also regards the victim support agencies as part the criminal justice system which assists victims during the progression of the case. South Africa has a

victim empowerment agency which deals with victims of crime. Khulisa Social Services (2009-2014: 1) explains that Khulisa Social Services co-ordinates and facilitates different projects that include victim empowerment. According to the DOJ and CD (2012/2013: 427), Victim Empowerment is a programme that aims to improve services rendered to victims of crime. It is further mentioned that the NPA has court-preparation officials on contract who provide support to crime victims and especially abused children, in preparing them for court proceedings.

## **2.17. Summary**

The requirements of bail application have been discussed to give a clear understanding what is required from investigating officers for a successful bail denial. The above exposition of the Criminal Justice System shows that there are many aspects which are considered before the accused is granted or denied bail. The overcrowding of prisons, together with the rights of accused persons, gives the not – so- deserving criminals an opportunity to rehabilitate themselves in the community, leaving victims to question the criminal justice system. From what was discussed in this chapter it is clear that the investigator`s role is to gather evidence in a satisfactory manner in order to convince the court why the accused should not be granted bail.

## CHAPTER THREE

### THE ROLE OF INVESTIGATORS DURING BAIL APPLICATION

#### 3.1. Introduction

The role of the investigator during bail application is of equal importance to that of the prosecutor. Investigators often ignore the fact that their presence in court carries more weight in bail applications rather than just sending an affidavit to court to oppose bail.

Joubert (2010:41) mentions that the police officials investigating the case must gather all the relevant facts and evidence and present them to the prosecutor, and the prosecutor or state advocate will then decide, from a legal point of view, whether there is a prima facie case against the suspect in order to proceed with a criminal prosecution. At this stage the court may release the accused without any remand, or the accused is released for further evidence to be obtained and be filed in the court. Failing to appear in court may result in the court postponing the matter for petty reasons, releasing the accused in the process. The role of an investigator should be emphasised as the above can be avoided by the presence of the investigator who can respond when questions arise.

#### 3.2. Investigator in a criminal case

Dutelle (2014:7) describes the investigator as a specialised police officer who has significant experience in investigation. Allan Pinkerton, as cited by Wells, Bradford, Gilbert, John, Kramer, Ratley and Robertson (2012: 1 - 5), specifies the attributes a detective must possess: namely certain qualifications of prudence, secrecy, persistency, personal courage, and above all things, honesty. Allan Pinkerton, as cited by Wells et al. (2012: 1 - 5), emphasises what qualities a detective should possess: stating that detectives must add to the qualifications the same quality of reaching out and becoming possessed (*being emotionally involved*) of that almost boundless information which will permit the immediate and effective application of their detective talent in whatever degree that might be possessed. This implies that

not only the qualification is important, but also the skill of utilising the knowledge obtained in the qualification.

Participants were asked about the significance of an investigator in a criminal case. One participant (n=1) did not answer this question. Eight participants (n= 8) believe that an investigator is a detective whose main task is to gather information to reveal the truth. Three participants (n=3) stated that an investigator is a person who collects information pertaining to cases in the investigation of a crime. The literature describes an investigator as a specialised police officer who has significant experience in investigation.

### **3.3. Criminal investigation**

Bekker et al. (2005:56) explain that the initial investigation is conducted by the police as a result of a complaint received from the public, instructions received from prosecuting authorities or their own initiative. Van Rooyen (2007:38) describes crime investigation as the process of identification of people and physical objects from the time the crime is committed until the guilt of the perpetrator is either proven or disproved in court. He further adds that crime investigation involves the lawful tracing of people and instruments which may directly or indirectly contribute to the reconstruction of a crime situation and supply information about the person involved in it. The researcher agrees with the aforementioned and one wants to add that all the mentioned facts in the criminal investigation require witnesses.

Witnesses are important, even in cases where perpetrators can be convicted by forensic evidence where there is no eye witness because the expert who tested the forensic evidence is also a witness who can be called to testify in court if needed. This witness is not directly affected in the case but it is a witness who is involved in the criminal investigation who can be affected by the outcome of the case. This witness can also question the decision made by court if the witness is certain that the evidence he/she discovered, proved the case beyond reasonable doubts. In criminal investigation all role players who played a part in finding evidence against the accused are interested in the outcome of the case. "On another case a pathologist was surprised by the five years sentence on an accused that stabbed the deceased in the eye but died in her home two weeks later. The pathologist informally asked the investigator what was the reason for such sentence". After discovering the cause of

death the expert witness pathologist expected a longer sentence than the one imposed on the accused.

Criminal investigation is no longer a localised law enforcement tool used to control violent crime; instead criminal investigation has become a process for achieving justice that is available to all facets of the population (Van Rooyen, 2008:3). This implies that in the society very few cases are opened for the purpose of punishing the perpetrator. In some cases one may find that the complainant opened the case for his or her own reason or benefit, for example victims in criminal cases are only available for court while their recovered property is still with the police, and once they receive back their possessions they are no longer interested in the case. According to the study guide for Reactive Criminal Justice (Cilliers, Marais, Ovens and Van Vuuren, 2004: 6) reactive policing (action after the crime/ investigation) is concerned with the restoration of order and its methods are repressive. Its instrument is coercive control and its aim is to curtail freedom through arrest, prosecution and suppression of violations of order. Mokwena (2012: 86) suggests that both criminal and forensic investigation be called investigation since there is a slight variation in these concepts.

Participants were asked about the meaning of criminal investigation. Two participants (n= 2) did not answer this question. Five participants (n=5) described criminal investigation as the enquiry of a criminal offence after or before a crime is committed. Five participants (n= 5) mentioned that criminal investigation is a process whereby the investigator collects and gathers evidence for court purposes. Literature describes criminal investigation as a process of identifying people and physical objects involved in the commission of a crime to prove or disprove the case in court.

### **3.4. The role of investigators during bail application**

The investigator's role in the bail application is to gather all facts beyond reasonable doubt to convince the court why the accused is to be kept in custody. Also it is to protect the victim and witnesses from intimidation as the release of an accused may cause the witnesses not to testify in court. In order to do that successfully the investigator must be skilled, experienced and well-informed on what to do. During the interviewing of participants in this study the participants had precise knowledge

of evidence that need to be gathered for a successful bail application. It is imperative that the investigators play their role in the gathering of evidence, including the facts that protect the witness involved in the case to avoid blame on their part. Smit et al. (2004:41) emphasise that the witness`s trust is in the investigators and often when the witness sees the investigator of the case, his/her fear diminishes.

Joyce (2013:201) believes that the police, in the course of an investigation, will have interviewed victims, witnesses and suspects and formed an opinion as to the most appropriate course of an action, based on their first-hand dealings with the key parties to a criminal incident. It is the role of an investigator to interview witnesses, as the strongest and most important evidence during bail application will be statements from the victim and witnesses. Palmiotto, as cited by Smit et al. (2004:50), mentions that both the prosecutor and the police have to make the other aware of their problems and even to help develop solutions for these problems. However, prosecutors are not always expected to be in favour of the police or the state but the prosecutor is expected to be on all sides by presenting all evidence fairly without being bias. The prosecutor is the mediator of both the state and the accused. As discussed above that an Attorney-General, as quoted by Smit et al. (2004:50), suggested that the duty of the prosecutor is to see that justice is done by placing before the court fairly all facts, including those in favour of the accused. Therefore it should be clear to police investigators that the prosecutors might not be in the favour of the investigating officer at all times, though they have the same goal.

According to the researcher, the role of the investigator during a bail application is to keep in mind the expectations of the victim/ witness and to know the consequences of granting bail to the accused. The investigator in a bail application is expected to oppose bail and keep the accused in custody and in order to do that the investigator must study the background of the accused to determine whether the accused can impose danger to the witnesses or not. Gilbert (2004: 542) indicates that police investigators assist the court by providing information that can help a judge to make a just establishment of innocence or guilt. In this case the investigator must also determine before-hand whether the suspect had the ability and opportunity to commit the crime. Knowledge of the background of the accused will assist the investigator when opposing bail to know what the accused is capable of. The information on warrant of arrest will show the investigator whether the accused is wanted at another

police station for another crime. The physical address of the accused must be confirmed by the investigator and a preliminary investigation must be done in the area where the accused lives to confirm if he is known by the neighbours. Studying the background of the accused is of vital importance for bail application, as some investigators try to determine the reasons for the offender to commit a crime.

According to Van Rooyen (2007:8), the knowledge of a human factor is an important resource for the investigator; also the ability to recognise strengths as well as weaknesses in the suspect will contribute greatly to the eventual resolution of a case. Knowing the reasons for offenders to commit crime can determine whether the offender is a flight risk or not. For example, if the offender committed a crime because of poverty at home, it is unlikely that the offender will evade trial.

Smit et al. (2004:48) set out a number of practical guidelines for investigators when preparing for trial namely:

- To conduct a comprehensive and thorough investigation,
- To maintain an open relationship with the prosecutor,
- To lawfully collect persuasive and incriminating evidence,
- To review the evidence and written statements,
- To assist witnesses, and
- To finalise preparation.

The guidelines mentioned above are for preparing for a trial, but presenting evidence during trial and evidence during bail application requires the investigator also to be prepared as mentioned above. Bennett and Hess, quoted by Smit et al. (2004: 51), emphasise that reviewing every aspect of the case before entering the courtroom is excellent preparation for testifying. There are guidelines available to assist the investigating officer who is preparing to oppose or deny bail. The investigator should oppose the granting of bail according to the terms set out in the Criminal Procedure Act 51 of 1977 Section 60 (7), states that the court may, where applicable, take into account the following factors:-

- a) The fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her,
- b) Whether the witnesses have already made statements and agreed to testify,
- c) Whether the investigation against the accused has already been completed,
- d) The relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated,
- e) How effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be,
- f) Whether the accused has access to evidentiary material which is to be presented at his or her trial, and
- g) The ease with which evidentiary material could be concealed or destroyed.

There are no other aspects that can guide the investigator to oppose bail. Gilbert (2010:63) says that during the concluding of inquiry, the preparation of a criminal case for court is the sole responsibility of the prosecutor, but in many jurisdictions the large caseload assigned to each prosecutor limits the actual time given to each case. It is therefore the investigator who should assist the prosecutor if the case preparation is to be a sound one. Joubert (2013: 227) emphasises that police officials must have a sound knowledge of the relevant statutory provisions, especially the Criminal Procedure Act, to ensure that they know the extent of their authority.

According to Mofokeng (2012: 32), no adequate studies have been conducted that deal with the cooperation and bridging the gap between general detectives and prosecutors. The role of Investigators is not only to appear in court and oppose bail, but the role includes knowing certain laws, the relevant statutory provisions that govern the whole proceedings, knowing how to gather evidence and where to look for evidence and knowing the expectations of the victims.

The safety of witnesses and the community at large is the responsibility of many other role players in the criminal justice system, including the investigator. The investigator's role is not to build up a case but it is to monitor the facts in a proper manner for a successful bail denial. Investigators should gather evidence for bail applications as if it was for a trial, to prevent cases from being withdrawn during the bail hearing. Police officials must have sound knowledge of the relevant statutory

provisions, especially the Criminal Procedure Act to ensure that they know the extent of their authority.

Participants were asked about the role of investigators during bail application. Ten participants (n= 10) stated their role is to present information and to bring forth evidence which will prove that the accused is not eligible to bail. Two participants (n=2) are of the view that it is to prove the danger towards witnesses, flight risk and any evidence which will prove that the accused is not eligible for bail. In the literature it is mentioned that investigators assist the court by providing information that can help a judge to make just decisions of innocence or guilt.

### **3.5. Prosecutor**

A prosecutor addresses the court for the purpose of explaining the charge and opening the evidence intended to be adduced for the prosecution (Bekker et al., 2005: 56). One Attorney-General, as cited by Smit et al. (2004:50), stresses that the clear and solemn duty of the prosecutor is to see that justice is done and it can be done if the prosecutor places before the court fairly all facts, not only the facts which are against the accused, but also those which are in his favour. Smith et al. (2004:41) indicate that if the prosecutors process cases slowly or do not apply their minds properly to an accused person`s request for bail, the number of awaiting trial prisoners increases.

#### **3.5.1. Director of Public Prosecutions (DPP)**

Smit et al. (2004: 42) describe the responsibilities of DPP`s as to oversee the prosecutors who work in their regions. The DPP decides on serious cases and gives approval to continue by authorising summons to prosecute when there is evidence and issues a withdrawal when there is no evidence. The DPP also gives authorisation in covert and overt operations or undercover operations where normal investigations cannot be conducted. For the DPP to give authorisation there must be an offence involved and evidence which will prove a case. Davies et al. (2010: 213) state that the task of the office of the Director of Public Prosecutions is to institute, undertake or carry out criminal proceedings and to give advice and assistance to

chief officers of police and other persons responsible for the prosecution of offenders. Bekker et al. (2005:56) point out that all investigations completed by the police for purposes of a prosecution must be submitted to the prosecuting authorities, as the police do not have the final say whether to prosecute or not, but the decision rests with the DPP concerned or his local public prosecutors. However, the police do have powers to prosecute in petty cases, where the accused is charged and a fine is paid at the police station. Furthermore, Bekker et al. (2005:56) state that it is impossible for the DPP to have full knowledge of each and every criminal matter in his/her jurisdiction. However, the DPP can formally and informally direct and control the decision of public prosecutors in his/her jurisdiction.

### **3.5.2. Senior Public Prosecutor (SPP)**

The prosecutorial staffs in the magistrate court are managed by the Senior Public Prosecutor (Smit et al., 2004:42). The SPP decides on cases whether to prosecute or to withdraw charges. Cases are opened in police stations and if the investigating officer is not certain whether to make an arrest or not, such cases are sent to the SPP for a decision. The SPP then issues a summons or declines to prosecute. There are other cases when an arrest has been made and because of lack of evidence, the court provisionally withdraws such cases and the Public Prosecutor (PP) instructs the Investigating officer to avail certain evidence. The court withdraws the case with the intention to re-enrol the case when evidence is available. After the investigating officer has finalised the investigation, the case is sent to the SPP for decision. The SPP then reads all evidence and if there is a case, the SPP issues a summons or declines to prosecute if the evidence produced does not amount to prosecution.

### **3.5.3. Control Prosecutor**

The SPP delegates some of his managerial and administrative duties and responsibilities to Control Prosecutors (Smit et al., 2004:42). One of the duties of the Control prosecutor is to decide on all new matters arriving in court for first appearance and whether to forward them for first appearance or not. The control prosecutor reads all witness statements and sees whether the matter is for court or for diversion. The Diversion is for minor cases where both parties go for counselling

or are made to agree on compensation. Bekker et al. (2005:56) argue that the police prepare a docket for submission to the public prosecutor who takes the decision whether to prosecute or not. The prosecutor has to exercise his discretion to prosecute by examining the witness statements and documentary evidence contained in the docket.

#### **3.5.4. Public Prosecutor (PP)**

According to the researcher's information, this is the prosecutor who works most closely with the magistrates or judges and presents cases to the magistrate. The public prosecutor also works closely with the investigating officer in every court appearance and informs the investigating officer when the next appearance of a case will be, as well as the evidence needed for that case. Smit et al. (2004:41) assert that the police detective service and the prosecution service perform a crucial role in the criminal justice system and that the functions of both services are closely interlinked and that weaknesses in one will detrimentally affect the performance of the other.

Joyce (2013:201) illustrates that the role of the prosecutor regarding charging is to read the file prepared by the police and then make a dispassionate decision based on their perception of events and in particular an assessment as to whether in their view the evidence amassed by the police would stand up in court. However, the author Joyce (2013:201) further mentions that in Scotland and England this resulted in many cases discontinuing as a result of poor case preparation and inadequate instructions given to advocates and other technical reasons.

Participants were asked about their definition of the meaning of a prosecutor. Eight participants (n= 8) stated that the prosecutor is a person who represents the case to court. Four participants (n= 4) stated that the prosecutor is a lawyer who represents the state in criminal proceedings and he/she decides whether to press charges or not. In the literature a prosecutor is defined as a court official, who institutes legal proceedings against an accused.

### **3.6. The prosecution**

Davies et al. (2010:213) describe prosecution as the process that is started either following the arrest and charge of a suspect, or after summons has been issued by a magistrate court. Smit et al. (2004:41) explain that the South African prosecution service and the court respectively prosecute and convict the accused persons who are found guilty of crimes with which they have been charged. This implies that for the arrested person to be convicted, he/she must be prosecuted by the prosecution. Prosecution can be done if the accused is linkable with the committed crime. Smit et al. (2004:41) further argue that a poorly performing prosecution service detrimentally affects the ability of the prison system to rehabilitate prisoners. Prosecution follows the Criminal Procedure Act to convict persons who violate the law as set out in criminal law. Joubert (2013:226) mentioned in the overview of the criminal justice process that, it is the Criminal Procedure Act that regulates the process of prosecuting persons who are responsible for the commission of offences. However, most convictions/ sentences are now based on decided cases rather than the Criminal Procedure Act.

Participants were asked if they know the meaning of prosecution. Eight participants (n= 8) described prosecution as a legal proceeding in which the accused person of a criminal offence is tried in court by the state. Two participants (n=2) stated that prosecution acts on behalf of the justice department and represents it during a case. One participant (n=1) did not answer while one response (n=1) was invalid. In the literature, prosecution is described as the process that is started either following the arrest and charging of suspect, or after summons has been issued by a magistrate court.

### **3.7. The role of a prosecutor during bail application**

According to the Attorney-General, as cited by Smit et al. (2004:50), the duty of the prosecutor is to see that justice is done, by placing before the court all facts, not only the facts which are against the accused, but also those which are in favour of the accused. Therefore, from the aforementioned it is clear that prosecutors should not

take sides or be biased towards the police and victims, but they must be objective and listen to the accused's side as well.

According to Mokoena (2012: 112), the function of the prosecutor in bail conditions as set out in terms of Section 62 (f) of the Criminal Procedure Act 57 of 1977, is not to ensure that the accused remains in custody at all costs, but they give effect to the interest of justice without taking sides. He further contests that prosecutors ease the passage to bail instead of steadfastly considering incarceration. Section 62 of the Criminal Procedure Act 51 of 1977, states that the court may add further conditions of bail on application by the prosecutor. However, those conditions are of an accused to be released on bail. The said conditions in respect of the safety of witnesses are not guaranteed. Whether the prosecutor sets out the conditions to be adhered to by the accused or not the only interest in the accused is to come out of the case completely. The Act states that the court may add any further conditions on bail:-

- a) With regard to the reporting in person by the accused at any specified time and place to any specified person or authority,
- b) With regard to any place to which the accused is forbidden to go,
- c) With regard to the prohibition of or control over communication by the accused with witnesses for the prosecution,
- d) With regard to the place at which any document may be served on him under this Act,
- e) Which in the opinion of the court, will ensure that the proper administration of justice is not placed in jeopardy by the release of the accused and
- f) Which provides that the accused shall be placed under the supervision of a probation officer or a correctional official.

According to the National Prosecuting Authority's policy manual for prosecutors, quoted by According to the NPA's policy manual for prosecutors as quoted by Smit (2004:50), the prosecution's primary function is to assist the court in arriving at a just verdict. In the event of a conviction, a fair sentence is based upon the evidence present and because prosecutors represent the community, they need to ensure that the interest of victims and witnesses are promoted without negating their obligation to act in a balanced and honest manner.

Harris (2011: 2) points out that regardless of their formal autonomy, police and prosecutors find themselves mutually dependent members of the same team, working together to address crime. This emphasises the teamwork between prosecutors and investigators. It is clear that the literature does not agree with the law, as Section 62 (f) of the Criminal Procedure Act 57 of 1977 compels the prosecutor to give effect to the interest of justice without taking sides. Also the investigators are of the view that prosecutors should side with investigators in ensuring that the accused is found guilty.

Gilbert (2004:542) says that the role of the prosecutor is very important throughout all phases of the trial process. He explains that the prosecutor and the criminal investigator work as a team to ensure that the most professional effort possible is presenting the State`s case to the judge. Smit et al. (2004:50) mention that investigating officers should be able to obtain legal assistance from the prosecution in complicated cases or if they lack knowledge about a specific crime. The researcher agrees with the author that the prosecution department should assist the investigating officers in gathering and presenting the required evidence. In a bail application the prosecutor can sit with the investigating officer and analyse the gathered evidence, leading the evidence to a successful bail denial by the investigating officer. However, as mentioned above, it is possible that the prosecutor will not assist investigators in gathering evidence against the accused, as it has been mentioned that prosecutors should not take sides.

According to the researcher`s information, the prosecutor decides whether to prosecute or not. There are different categories of prosecutors, namely a Public Prosecutor, a Control Prosecutor, a Senior Public Prosecutor (SPP), and the Director of Public Prosecutions. Hara (2007:2) suggests that prosecutors should be independent of influence, pressure or persuasion from those who have an interest in the outcome of the case. Fish, Miller, Braswell and Wallace (2014: 403) declare that the prosecutor will determine which evidence is necessary in building a case that establishes proof of a crime beyond reasonable doubt. Karmen (2013:190) states that sometimes prosecutors cannot do what is best for all of their constituencies simultaneously, as conflicts can arise between the aims of the government and the outcome desired by those who were harmed.

The role of the prosecutor in a bail application is to prepare the investigating officer for testifying before the magistrate. The prosecutor knows what evidence is needed for a successful bail application. He/she reads the docket and sees what is needed and tells the investigator to cover all aspects when he or she is on the stand. The prosecutor's role normally is to present the case to the judge or magistrate. He/she is the mediator between the magistrate, the accused and the investigating officer. He/she is also approached by witnesses or victims who are interested in the bail application.

The witnesses and victims are always interested in the outcome of the bail application. Some witnesses are interested in a negative way and others in a positive way. The negative way is when they plead to the court to grant the accused bail, saying the accused must not be in jail. These victims/witnesses are only concerned about compensation and/or light punishment, not a jail term. Other witnesses plead to the court not to release the accused, as they fear further harm. These witnesses communicate with the prosecutor in court during the bail application.

The prosecutors are supposed to listen to the witnesses' pleas, but they do not adhere to the pleas in all cases. During the pilot study one investigator mentioned that witnesses are not involved in the bail application. In the researcher's point of view, internationally the victim's pain or the impact caused by the perpetrator is acknowledged during the sentencing process, although it is done only in serious cases like murder cases. This is known as the Victim Impact Statement (VIS). According to the National Centre for Victims of Crime, quoted by Daigle (2013:86), it is less common where the victim may be allowed to make a Victim Impact Statement (VIS) during bail hearings, pre-trial release hearings and plea bargaining hearings. Karmen (2013:204) illustrates that the Victim Impact Statement enables judges to learn about the actual physical, emotional, and financial effects of the offence on the injured parties and their families. The researcher is of the opinion that the VIS can be very useful in deciding on bail, as the victim is the only individual who knows exactly how damaging it was to be involved in such an incident. Even witnesses who saw the incident cannot describe the impact felt by the victim, but they can only describe the impact it had on them.

According to Karmen (2013:204), Daigle (2013: 85) and Wallace and Robertson (2011:288), the Victim Impact Statement informs the court how the victim suffered during the incident or how the victim's family suffered in the murder case when their family member was killed. Here the victim/witness's pain is made known for a suitable sentence which will also satisfy the victim. Daigle (2013: 85) explains that the Victim Impact Statement (VIS) can be submitted by the direct victim and/or by those who are indirectly impacted by crime.

Daigle (2013: 85) mentions that not only may the victim enter a VIS at sentencing, but most states allow for the victim to make a VIS at parole hearings as well. Therefore, if South African prosecutors can use the Victim Impact Statement at bail hearings, the community will be able to experience the effectiveness of the justice system. Furthermore, most criminals fear the community more than they fear the justice system. This procedure can also reduce crime without bringing back the death penalty if criminals know that once they are caught, bail and their jail term will be decided by the victim.

The criminals know that the court may be harsh or lenient in punishment. For instance, there are criminals who walk around saying it is better to be in jail than to be outside, whilst others when arrested, beg to be transferred to prison (awaiting trial) rather than to be kept in police cells. The Criminal Procedure Act 51 of 1977 Section 60 (10) protects the criminals as it states that the prosecution does not oppose the granting of bail, but the court has the duty to weigh up the personal interests of the accused against the interests of justice. In this Act it is emphasised that the court weighs up the personal interest of the accused, not those of the victim or witnesses. If the court had to weigh the personal interests of the victim, probably there will be a reduction in crime.

Participants were asked what the role of a prosecutor during bail application constitutes. Seven (n=7) participants stated that the prosecutor's role is to prosecute the accused or to present the facts of the matter on behalf of the state. Four participants (n=4) stated that the prosecutor's role is to present cases to the magistrate and to guide the investigator on what is needed for a successful bail application. One participant (n=1) did not answer this question. The literature states

that prosecutors give effect to the interest of justice without taking sides and they ease the passage to bail instead of steadfastly considering incarceration.

### **3.8. The value of cooperation between investigators and the prosecutors during bail application**

*“Most of the courts have station allocations which makes it easy for the prosecutors and detectives to forge relationships. These practices should be embraced and encouraged across the country thus, encouraging both parties to get together prior to a court day before the courts roll so as to discuss the dockets in hand and to iron out any problems prior to appearing before the bench” (Mofokeng, 2012: 31).*

Smit et al. (2004: 48) emphasise that it is crucial that investigators and prosecutors work closely together and cooperate with one another with regard to the investigation and prosecution of crime. They add that the relationship between detectives and prosecutors should be one of efficient and close cooperation, with mutual respect for the distinct functions and operational independence of each profession. However, Bekker et al. (2005:56) are of the opinion that there is some form of co-operation between the police and prosecutors in the investigation of a case and its preparation for trial. Paragraph 8 of the Prosecution Policy issued by the NDPP, as cited by Bekker et al. (2005: 11) states that with regard to the investigation and prosecution of crime, the relationship between prosecutors and police officials should be one of efficient and close co-operation. Joubert (2010: 41) agrees with Bekker et al. (2005:56) by illustrating that ongoing cooperation between the investigating officer and the prosecutor is essential in order to present a well -prepared case to court. Joubert (2010:41) and Bekker et al. (2005:56) further mentioned that the presence of the investigating officer during court proceedings is also required. The investigator has the necessary background knowledge of the case which can be of great value to the prosecution. Smit et al. (2004:50) emphasise that it is crucial that the investigating officer and prosecutor consult before a prosecution is instituted to evaluate the strength and weaknesses of the state`s case.

Similarly, Gilbert (2004: 542) agrees that investigators and prosecutors should work closely together during the trial, saying that they should meet frequently before actual cases are presented to the court and the prosecutor's office should be accessible to police at all times. Bekker et al. (2005:56) add that the co-operation between officials who investigate crime and those who decide to prosecute and actually do prosecute crime is an important one. Smit et al. (2004:43) set out transformational challenges for prosecutors and investigators. The authors mention that the ruling had far-reaching implications for investigators and prosecutors: in the past information contained in the docket was considered privileged information, which the prosecution did not have to reveal to the defence: and that this was changed in 1995 when the Constitutional Court ruled that the "blanket rule" prohibiting an accused from obtaining access to the docket was too wide and infringed on an accused person's right to fair trial.

Some of the transformational challenges mentioned by Smit et al. (2004:45) are that:

- New laws and constitutional court rulings had the effect of increasing the workload of the police and prosecution services,
- Within a short period, investigators and prosecutors had acquired a range of new skills to successfully apprehend and prosecute guilty accused and
- The new constitutional and legislative framework weakened the operational efficiency of the police and prosecution services.

Osterburg and Ward (2014:308) stipulate that the prosecutor evaluates and marshals police evidence before initiating criminal proceedings to determine if the office standards for charging, indicting and convicting an offender have been met.

Guideline 20 of the United Nations Guidelines on the Role of Prosecutors, as cited by Hara (2007: 7), does not expect prosecutors to work independently, but it emphasises the need for co-operation between the prosecutors and other role players. It states that in order to ensure fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions. On the same note, Smit et al. (2004:41) emphasise that the police detective service and the prosecution service perform a crucial role in the criminal justice system and that the function of

both services are closely interlinked and weaknesses in one detrimentally affect the performance of the other. Police and prosecutors have the same goal of fighting crime: as pointed out by Harries (2011: 2), that police and prosecutors are dependent members of the same team working together to address crime.

However, Hara (2007: 2), points out that a prosecutor should be independent of influence, pressure or persuasion from those who have an interest in the outcome of that decision. Hara (2007:2) further explains that it is not just Government, but the Police Service, other investigative agencies, the court, and victims or the families of victims from whom the prosecutor should not only be independent but be seen to be independent.

Participants were asked about the importance of cooperation between investigators and the prosecutors during bail application. Eleven participants (n= 11) were of the view that a good relationship between the prosecutors and investigators will have a good impact on the bail application. One participant (n=1) stated that prosecutors can assist in making the victim safe by retaining the accused in custody. In the literature it is mentioned that a close relationship will aid in proper investigation as the prosecutor can be forthcoming in the case to present a well- prepared case to court.

### 3.9. The value of bail denial in forensic investigation

The investigation benefits if bail is denied successfully. Below is an example of successful bail application versus an unsuccessful bail application.

#### Bail Application

Unsuccessful	Successful
Accused will evade trial and be at large	Will result in a successful prosecution
Will result in withdrawal	Conviction
Warrant of Arrest	Sentencing and /or imprisonment
Poor Conviction rate / bad SAP 6	Good conviction rate
Bad Image and loss of trust/	Good Image and trust in the justice system
More cases reported	Lesser crime rate
More work for investigators	Manageable
More resources needed	Awards e.g. extra vehicles
More budget needed	-

### 3.10. Purpose of Evidence during bail application

An investigator who is not skilled in knowing what amounts to evidence will experience challenges in opposing a bail successfully. In order to oppose bail, there should be enough evidence that proves the case beyond reasonable doubt. Knowing what is evidence is critically important for every investigating officer and the police at large. Wells, Bradford, Gilbert, John, Kramer, Ratley, and Robertson (2012: 2.901) define evidence as anything perceptible by the five senses, which are invoked in the process of arguing a case like documents or reports, spoken words, recollection, data of various sorts and physical objects. Osterburg and Ward (2014: 360), Dutelle (2014:14), Wells et al. (2012: 2.901), Gilbert (2010: 52-53) and Fish et al. (2014:18) agree on the description and types of evidence as discussed below.

Participants were asked if they know what evidence is. Eleven participants (n= 11) were in line with literature in stating that evidence is information given personally, by means of documentation or in the form of material objects or used to establish facts in a legal investigation and admissible as testimony in court. However one participant did not answer this question. The literature describes evidence as anything perceptible by the five senses, which are invoked in the process of arguing a case.

### **3.10.1. Testimonial evidence**

Dutelle (2014:14) mentions that testimonial evidence consists of vocal statements that most commonly are made by a person who is under oath, typically in response to questioning. It can also be obtained from witnesses, victims, or suspects during the course of the investigation. During bail application testimonial evidence is the first evidence by an investigator that is important to convince the court in order to deny bail.

### **3.10.2. Real and/ or Physical evidence**

Dutelle (2014:15) combines the two types of evidence by explaining that real or physical evidence includes any type of evidence, which is anything with size, shape, and dimension and it can take any form. In a bail application real evidence might not be available, because of certain tests that are done to prove the link but the investigator can present to court what physical evidence is available on the case in question. Fish et al. (2014:15) state that physical evidence covers items of non-living origins; and it may also be used as corroborative evidence which tends to confirm or support the theory of the crime.

### **3.10.3. Direct evidence**

Dutelle (2014:16) describes direct evidence as the evidence that proves a fact without the necessity of an inference or a presumption, whereas Fish et al. (2014:18) regard direct evidence as the way to establish the fact without the need for further analysis.

### **3.10.4. Circumstantial evidence**

Dutelle (2014:16) explains that circumstantial evidence involves a series of facts that, through inference, proves a fact at issue. Fish et al. (2014:18) and Osterburg and Ward (2014:360) mention that most of the evidence examined in a forensic lab is circumstantial evidence. Gilbert (2010:52) says that indirect evidence, also known

as circumstantial evidence, does not directly prove a fact at issue but may establish a strong inference as to the truth of that fact.

Schwikkard and Van Der Merwe (2002:18) state that evidence consists of oral statements made in court under oath or affirmation or warning (oral evidence) and that it also includes documents (documentary evidence) and objects (real evidence) produced and received in court. Gilbert (2004:103) considers evidence to be any article or material a suspect leaves at a crime scene or takes from the scene, or that may be otherwise connected with the crime. Osterburg and Ward (2014:360) describe evidence as anything a judge permits to offer in court to prove the truth or falsehood of the question at issue. Osterburg and Ward (2014: 360) classify evidence as real, demonstrative or a testimonial which is orally given by witnesses.

Some police officials may have a problem in identifying certain evidence whilst others are ignorant of ways and means to properly search for evidence for many reasons, including a heavy work load. According to the evidence definition searching evidence, is not only done in crime scenes but evidence can be obtained kilometres away from the crime scene. This is the reason why investigators produce cases with insufficient evidence including the lack of skills where they do not know where to look for evidence. Van Rooyen (2008: 218) emphasises that in any investigation, knowing where to search for the information and to know how to find this information is crucially important.

The problem faced in this study is the granting of bail by the court when the investigating officer is opposing bail. The reasons for granting bail are not endorsed in dockets and therefore are unknown, but Cross (2010: 8) confirmed that insufficient evidence will not succeed prosecution. It may also be the case that the evidence obtained is sufficient to prosecute, but it was not obtained in an admissible manner. Section 35 (5) of the Constitution, 1996 states that evidence obtained in a manner that violates any right in Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. It is therefore crucially important that evidence seized is obtained in an admissible manner. An example of sufficient evidence, but which was not obtained in an admissible manner may be that of bank records/ documentation evidence. This means that the investigator who obtains a bank statement of an

accused without following the correct procedure (authority in terms of Section 205 of Criminal Procedure Act 51 of 1977), is violating the right to privacy of such person and therefore cannot prosecute with such evidence.

### **3.11. The purpose of recovering physical evidence**

The purpose of recovering physical evidence and the value of physical evidence is discussed below. Presenting of evidence during bail application is highly important, to prove to court how dangerous the accused may be. Gilbert (2004:105) claims that the investigator has no way of determining which evidence will have the greater significance at a later date. The ultimate purpose of recovering physical evidence is to aid in the solution of the offence by:-

- Establishing tracing, or identifying the suspect,
- Establishing the suspect's modus operandi or indicating similar modus operandi,
- Proving or disproving an alibi,
- Connecting or eliminating suspects,
- Identifying stolen property, contraband, and other illegal property,
- Identifying victims if their identities are unknown,
- Providing investigative leads, or
- Proving a statutory element of the offence,

### **3.12. The Value of physical evidence**

Dutelle (2014: 16) agrees with Gilbert (2004:105) in some points. Gilbert (2004:105) mentioned above the purpose of recovering physical evidence which may aid in the solution of the offence. Dutelle (2014: 16) discusses the value of physical evidence as follows:-

- It can prove that a crime has been committed or establish key elements of a crime,
- It can establish the identity of persons associated with the crime,

- It can place the suspect in contact with the victim or with the crime scene,
- It can exonerate the innocent,
- It can corroborate the victim`s testimony,
- A suspect confronted with physical evidence may make admissions or even confess,
- Court decisions have made physical evidence more important,
- Juries expect physical evidence, and

Negative evidence (absence of physical evidence) also may provide useful information (such as a fabricated case).

### **3.13. Evidence needed in order to deny or oppose bail during bail application**

Gilbert (2010:53) emphasises that an investigator must be able to determine the category of evidence pertaining to the case at hand. Joubert (2010:41) mentions that the police officials investigating the case must gather all the relevant facts and evidence and present them to the prosecutor. Based on these facts, the prosecutor or state advocate will decide, from a legal point of view, whether there is a prima facie case against the suspects and whether to proceed with a criminal prosecution. The investigating officer`s role is to collect as much information as possible on the background of the accused to prove to court whether the accused is a flight risk. With lack of evidence, the court will grant bail to the accused and in worse cases the court declines to prosecute as a result of insufficient evidence. As mentioned above, that Van Rooyen (2008:218) emphasises that in an investigation, knowing where to search for the first basic pieces of information is crucial and of equal importance as to know how to find such information. Locard`s principle states that every contact leaves a trace. Wilding (2012) explained that Locard`s principle is a concept that was developed by Dr. Edmond Locard (1877-1966). Wilding (2012) further mentioned that Locard believed that, no matter where a criminal goes, and what a criminal does, by coming into contact with things, a criminal may leave all sorts of evidence and they also take something from the crime scene with them. Therefore an investigator who believes this principle will know where to search for evidence.

When opposing bail, the prosecution should not avail the docket to the defence attorney. It is mostly known by law enforcement agencies that hearsay evidence is inadmissible, but what Mokoena (2012:29) revealed about hearsay evidence is crucially important. Mokoena (2012: 29) pointed out that hearsay evidence in bail application is admissible, as investigators, when giving evidence in the bail application stand opposing bail, represent the victims and witnesses when they make known to the court what the accused has done.

According to *S v Hudson*, quoted by Mokoena (2012:29), the court admitted hearsay evidence of a telex (telegraphy with printed messages received by tele-printers) implicating the accused in the alleged commission of an offence. For the investigator to present the hearsay evidence, the investigator must have read the statements in the docket with understanding in order to cope with cross examination and any questions posed. Joubert (2013: 227) emphasises that investigators need to have a thorough knowledge of criminal law to be able to take statements that contain all the required elements of the offence. In this case, before the investigating officer can present the evidence the investigator needs to ensure that the evidence in the statements is admissible and that all elements of a crime are present in the victims' statement. As discussed above, that according to Section 35 (5) of the Constitution Act 108 of 1996, evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair.

Participants were asked what evidence is needed in order to oppose bail. Eight participants (n= 8) stated that the investigator must present previous convictions, verify the accused's address, present proof of flight risk, pending matters, the warrant of arrest and investigate the relationship the accused has with witnesses. Four participants (n= 4) mentioned evidence linking the accused to the case, previous convictions, pending matters and addresses verification. The literature states that investigators need to have a thorough knowledge of criminal law to be able to take statements that contain evidence.

### 3.14. Accused on bail can destroy evidence

Gilbert (2010: 193) confirms that when a burglar becomes aware of a police investigation closing in, an attempt to destroy all linking evidence may be made, as burglars have been known to burn, bury, and even throw weighted stolen property (made to be heavy so that it does not float) into the ocean to avoid apprehension. The Criminal Procedure Act 51 of 1977 Section 60 (7) states that the court can deny bail if there is a reason to believe that the accused has access to evidentiary material which is to be presented at his or her trial. Also if there is a reason to believe that evidentiary material could be concealed or destroyed easily. Destroying of evidence is not only about exhibits or physical evidence, but evidence destroyed by the accused that is out on bail can also include testimony of witnesses. Smit et al. (2004: 47) point out that criminals use witness statements to identify witnesses who might testify against them and then see to it that such witnesses are intimidated not to testify to weaken the prosecution's case. Some offenders tend to negotiate cases and compensate witnesses or victims. They promise witnesses some kind of compensation in order for them not to testify in court. This intimidation of witnesses is done either politely or by threatening the witness.

As mentioned above, the investigator should oppose the granting of bail according to the terms set out in the Criminal Procedure Act 51 of 1977 Section 60 (7) state that the court may, where applicable, take into account the fact that the accused is familiar with the identity of witnesses and the evidence which they may bring against him /her: whether the accused has access to evidentiary material which is to be presented at his/her trial and the ease with which evidentiary material could be concealed or destroyed. This implies that if the accused is released on bail evidence can be destroyed. Destroying of evidence is also done by killing witnesses. In August 2013, Farlam expressed concern about murders linked to witnesses at an inquiry: *"It is a matter of concern because a number of people connected to this commission have been assassinated. It is a matter which I am sure is receiving attention from the authorities"* (South African Press Association, 2014).

In the case of physical evidence the accused who is out on bail will ensure that whatever evidence is hidden is destroyed. In murder cases the accused that is out on bail can burn bloody clothing used during the commission of the offence. An

accused can also ensure that whatever evidence that was handed to the third party is also destroyed before trial commences or before other witnesses hand the evidence to the police.

Participants were asked how the accused that is out on bail can destroy evidence. Two participants (n= 2) stated that the accused can interfere with witnesses by killing or paying them not to testify in court. Five participants (n= 5) stated that if the accused is released he/she would conceal or destroy physical evidence and may threaten witnesses. Five participants (n=5) were of the opinion that the accused would be in a position to influence witnesses not to proceed with a case either by violence or compensation. The literature confirms that an accused that is out on bail, seeing the investigation closing in, can destroy evidence to avoid apprehension.

### **3.15. Chain of Custody**

Gilbert (2010: 92) defines the chain of custody as the process in which evidence is handled from the time it is seized to the time it is disposed. Gilbert (2010: 92) further explains that being able to account for the location and possession of evidence is known as maintaining the chain of custody. He adds that the investigator must be able to account for evidence; and accounting responsibilities begin when the item is first located and do not end until the evidence reaches the courtroom. Similarly Dutelle (2011:6) mentions that through-out the entire process a proper chain of custody should be maintained to ensure that the collected evidence is admissible in court. Therefore the importance of the chain in collected evidence is vitally important in cases where the state relies heavily on physical evidence. The Chain of Custody is defined as the process in which evidence is handled from the time it is seized to the time it is disposed. Gilbert (2010: 92) emphasizes that if a break occurs in the chain the item will not be admitted as evidence in court.

The role of the investigator is to ensure that evidence presented in court is properly accounted for by ensuring that the chain of custody is presented. The investigator`s duty is to analyse all evidence produced in the docket to follow it up by linking it with statements. If evidence is presented with no statement supporting it from the evidence collector, the investigator should ensure that such statement is obtained prior to presenting the docket in court to prevent unnecessary delays.

According to Jackson and Jackson (2004: 57), a systematic approach to the documentation of the scene and the collection of the physical evidence presented is essential to ensure that all necessary steps have been taken which will recognise the potential of the physical evidence and that the evidence is admissible in a court of law. Similarly, Gilbert (2010: 93) states that by following strict accountability procedures, the chain of custody remains intact. This implies that the investigator must ensure that the presented evidence in the first appearance of the accused is accounted for to convince the prosecutor when opposing bail. If the prosecutor is not convinced upon reading the case docket the accused may be granted bail.

### **3.16. Accused access to information during bail application**

The Criminal Procedure Act 57 of 1977 Section 60 (14) states that no accused shall, for the purposes of bail proceedings, have access to any information, record or document relating to the offence in question, which is contained in, or forms part of, a police docket, including any information, record or document which is held by any police official charged with the investigation in question. Allowing an accused access to the case docket can destroy evidence given by witnesses. As mentioned earlier by Smit et al. (2004: 47), criminals use witness statements to identify witnesses who might testify against them and then see to it that such witnesses are intimidated not to testify to weaken the prosecution's case. Besides the accused being a threat to the witnesses, the evidence used against the accused can also assist the defence to destroy the case while it is still premature.

The Prosecutors Directives Part 16, as cited by Bekker et al. (2005:15), instructs prosecutors to protect witnesses and one of the instructions states that, prosecutors should oppose the request for defence access to a docket if witnesses may be intimidated or meddled with, should their identity be made known through disclosure of the contents of the docket. The accused and the defence are only granted access to information during trial and not for bail application, however the Criminal Procedure Act 57 of 1977 Section 60 (14) states that, unless the prosecutor otherwise directs. Mokoena (2012: 52) advises that the granting or refusal of copies of the case docket for the purpose of bail application does not derogate from the generally accepted access which is necessary for trial preparation. It is of vital importance for investigators to know that during cross examination, the defence

attorneys are aware of witnesses' weaknesses, as well as the investigators' weaknesses in presenting cases. Attorneys therefore look for loopholes which they can use before those loopholes can be rectified. The investigator's role is to prepare cases in a manner that will present no loopholes even if the defence had access to the premature case docket.

According to researcher's experience a good example where the defence can use the case against the state, is when investigators obtain as many statements as they can at once and in a rush to present them in court, they forget to commission statements. If such statement is seen by the defence before it is signed or commissioned, the defence will try by all means to void that statement before the magistrate; and it cannot be obtained again. Therefore denying access to information during bail application gives the investigators adequate time to prepare the investigation to close the gaps before they are attacked by the defence. However, Mokoena (2012: 52) points out that access to information is crucial for the accused's bail application and that the state may be compelled to divulge certain information within the case docket. It therefore requires skill of the investigator to prepare the bail application docket as though it was for the trial. The Bill of Rights of the Constitution also supports the access to information. Section 32 of the Constitution states that everyone has the right of access to any information held by the state. However, in terms of Section 36 of the Constitution, the limitation clause, these rights can be limited.

Participants were asked if the accused may be allowed access to information during bail application. One participant (n=1) stated that if the accused sees the docket he might get insight into the case and may try to destroy or use it against the state. Nine participants (n= 9) stated that the accused should not have access in order to protect witnesses' identity and to protect information for trial. Two participants (n= 2) stated that access to information depends on the magistrate who may deny access. The literature confirms that no accused shall, for the purposes of bail proceedings, have access to any information.

### 3.17. Court reasons of granting bail after investigators` denial to bail.

The court does not deny bail in cases where the evidence presented is insufficient. The prosecution must have sufficient evidence against the accused. The investigator must prove to the court that if the accused is released there will be challenges in finalisation of the matter. Mokoena (2012: 27) points out that the strength or weakness of the case plays a crucial and decisive role in the granting or refusal of bail. Similarly, Smit et al. (2004:50) mention that a police docket should contain sufficient information for a prosecutor to decide what evidence to present and which witness to call to testify. This is a problem concerning the society as there is a saying which says that "*criminals have more rights than the victims*". The Criminal Procedure Act 57 of 1977 Section 60 (9) states that the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely:

- The period for which the accused has already been in custody since his or her arrest,
- The probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail,
- The reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay,
- Any financial loss which the accused may suffer owing to his or her detention,
- Any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused, and
- The state of health of the accused.

Participants were asked what causes the court to grant bail after the investigator has denied bail. One participant (n= 1) did not know the answer saying he had many serious cases and cannot remember that happening to him in 29 years. Four participants (n= 4) stated that maybe the evidence presented is not sufficient to keep the accused in custody and also it depends on the medical conditions of the

accused. Seven participants (n= 7) stated that insufficient evidence produced during bail application will cause the accused to be released on bail.

### **3.18. Crimes committed by criminals who are out on bail**

This kind of act is mostly experienced by domestic violence victims and witnesses when the criminals know where to find their victims. Davies and Snyman (2005:102) mention that following the reporting of the offence, the victim or witness may face further victimisation at the hands of the perpetrator, and even after having served a sentence, the perpetrator may continue with his or her hostility towards the original victim or witness.

“The murder suspect, who allegedly shot his lover following a quarrel in Tongaat, was *released* on R2000.00 bail at the Verulam Court, while protesters gathered outside the building strongly opposing the bail application” (Naidoo, 2014:1). In this case this accused was released on bail, despite the fact that the community or protesters were opposing the bail. Whilst the accused was out on bail, he met the victim`s father outside court and asked him “are you happy that I`m going to jail?” The victim`s father was intimidated. When the accused was called to appear in court, it was discovered that the accused had fled. The accused fled the court as he was out on bail whilst the protesters were opposing bail. This is the issue that causes dockets to be withdrawn in court when the accused does not appear in court.

The warrant of arrest issued by the court does not carry weight for SAPS statistics (SAP 6), as such docket is archived with a brought forward date which means that it will be reopened every five years if the accused succeeds in hiding. Unless the accused is found in that case, the W/A does carry weight. Gilbert (2004:124) argues that criminal investigators should assure witnesses that any threats against them or acts of intimidation will be investigated and resolved by police action. The author added that to further ensure the safety and confidence of witnesses, witness protection units have been proposed. As a result of the court granting bail when the investigator is opposing bail, the accused can commit another crime.

### **3.19. Summary**

The roles of investigators and of prosecutors during bail application have been discussed to give clarity on what is expected from each role player. The above exposition gives a clear picture of what is required from the investigating officer in order to oppose bail. A missing statement which links the accused with the committed crime can amount to the granting of bail which may lead to a verdict not guilty for the accused. Investigators rely more on guidance from the prosecutor whereas prosecutors have their own mandates.

## CHAPTER FOUR

### FINDINGS AND RECOMENDATIONS

#### 4.1. Introduction

Evaluating the role of investigators during bail application was chosen as a topic for the investigating officers to understand their roles in the opposition of bail during bail application. The researcher formulated two research questions in evaluating the role of investigators during bail application. The research questions addressed the following:- recommendations

- What are the requirements of bail application?
- What is the role of investigators during a bail application?

The researcher decided to conduct this study because investigators oppose bail but the courts are still granting bail. Therefore the researcher formulated the two research questions to have findings and recommendations that will determine the exact role of investigators during bail application for a successful bail application.

#### 4.2. Findings

##### 4.2.1. Research Question 1: The requirements of bail application

The researcher discovered the following:-

- ***Requirements of bail application***

Theoretically, the participants are fully aware of what is required during bail application. In practice, however, participants do not practice what they preach in all cases, and they are often selective because of a backlog. They check cases and decide which cases bail denial can be done physically in court and on which cases bail denial can be done with an affidavit. In some cases bail denial using an affidavit works, in some cases the affidavit fails the court is not consistent. Investigators do

carry a large number of cases, which may require the investigator to be in more than one court on the same day, and therefore affidavits are used in some cases.

- ***Witness in criminal investigation***

It has been identified that some investigators have a clear understanding of the concept of “witness”, but other investigators do not understand the meaning of witness. These investigators might confuse the suspect from the witness and this gives a bad reputation of the South African Police Service investigators and it might cost the state, resulting in civil cases. Also this shows ignorance of an individual because, relevant tuition is presented during their first phase of training and they always engage with witnesses during the tour of their duties.

- ***The roles of witnesses during bail application***

It has been identified that in South Africa witnesses are not called in court during bail application, but their concerns are only revealed to the investigator. Witnesses` views on bail are not recognized.

- ***Accused on bail being danger to the witnesses***

This is a well-known problem which is confirmed by the existence of the Office of Witness Protection. Denying bail in order to protect a witness from the accused is not a concern for a court decision if the danger is unknown. The court only learns that witnesses are in danger once the threat and intimidation is reported.

- ***Criminal Law in bail application***

The participants do not have a correct understanding of criminal law. They work according to their experience and they are not well informed of legislation governing them in their duties. The literature emphasises that police officials should have a sound knowledge of the relevant statutory provisions, especially the Criminal Procedure Act to ensure that they know the extent of their authority. To know legislature will protect investigators from civil claims.

- ***Protection of accused during bail application***

It has been identified that the protection of an accused is also important to ensure a fair trial for the accused. Some bail oppositions are in favour of both the accused and the witnesses. In some cases the accused in custody is better off in custody than being released. Vigilantism is still a problem in some communities. In some

communities people become very weary with regards to cases and want to take matters into their own hands. It is important for investigators to oppose bail in the interest of justice.

- ***Protection of investigators during bail application***

Investigators get threats from the accused and their relatives and they are told not to pursue investigation. These threats can destroy serious cases as investigators might not oppose bail applications, because they fear for their lives. Also some investigators do not oppose bail applications because they fear civil claims if the accused is kept in custody.

#### **4.2.2. Research Question 2: The Role of Investigators during Bail Application**

The researcher discovered that:-

- The role of Investigators is not only to appear in court and oppose bail, but the role includes knowledge of certain laws, the relevant statutory provisions that govern the entire proceedings, knowing how to gather evidence and where to look for evidence and knowing the expectations of victims.
- The safety of witnesses and the community at large is the responsibility of many other role players in the criminal justice system, including the investigator. The investigator's role is not to build up a case, but to monitor the facts in a proper manner for a successful bail opposition. Investigators should gather evidence for a bail application as if it were for a trial to prevent cases from being withdrawn during the bail hearing.
- Police officials must have sound knowledge of the relevant statutory provisions, especially the Criminal Procedure Act to ensure that they know the extent of their authority. It has been identified that an investigators' role is to:-
  - Conduct a comprehensive and thorough investigation,
  - Maintain an open relationship with the prosecutor,
  - Lawfully collect persuasive and incriminating evidence,
  - Review the evidence and written statements,
  - Assist witnesses, and
  - Do final preparation.

- **Evidence needed in order to oppose bail**

One of the investigators could not explain what constitutes evidence which is a major problem, because if the investigators do not know what evidence is, they will have a problem during cross examination because their evidence will be doubted and the accused may be released. Attorneys look for loop-holes in order to create doubts and the court will see no reason to keep the accused in custody if the evidence is not tangible.

Investigators do know what evidence is needed in court for a successful bail application. The court does not only rely on what is presented by the investigator but the court also focuses on the accused`s interest.

- **The Value of Cooperation between prosecutors and Investigators during bail application**

Investigators also rely on prosecutors for guidance when there are challenges. However, the prosecutors are independent and do not take the side of investigators. The cooperation between the two parties, according to the literature is of utmost importance for cases to be resolved successfully. In this study it appeared as if the prosecutors and investigators are not working together and that there is no cooperation.

- **The roles of Prosecutors**

Investigators know what the role of prosecutors entails but they all believe that the prosecutors are there to guide the investigation; they even believe that prosecutors can assist in remanding cases where there is insufficient evidence. However, the court in some cases does remand cases for further evidence but, because of the backlog, some investigators see the court queries when the dockets are already due for court and by that time the investigator does not have enough time to attend to the court queries effectively.

- **Accused`s access to information**

For the safety of witnesses the accused is not entitled access to the docket during bail application. Such entitlement is only due to the accused during trial. It has been discovered also that the accused is allowed access to certain information during a bail application if it is insisted upon. This places witnesses at risk, because first information of the allegations are important for both parties. The first information of the allegations normally consists of the witness/victim`s` identity.

- **Courts granting bail after investigators` opposition to bail**

The court grants bail to an accused even after the investigator has denied bail because the court decides on the prejudice the accused is likely to suffer if he or she were to be detained in custody. The court grants bail for many reasons, including the following:-

- Insufficient evidence and ignorance by investigators,
- Overcrowding in prisons,
- Accused not a flight risk,
- Accused`s medical condition/ health,
- Accused is a first time offender, or
- Accused is not a threat to the witnesses.

In many cases the court does not consider the safety of witnesses, and the interest of the community, the release of the accused is considered after the interest of an accused has been considered.

### **4.3. Recommendations**

#### **4.3.1. Question 1: The Requirements of Bail Application**

The researcher recommends that:-

- A refresher course, mentorship or regular workshops be presented to investigators in order to keep them up to date with the laws and other investigation terms. This will equip the investigators to answer any questions that might arise from attorneys during cross examination in the bail application hearing.
- Investigators attend all bail applications cases, irrespective of their backlog, because it is imperative that the investigator successfully completes at least a few cases, rather than having all withdrawn and incomplete.
- Additional staff or more investigators are also recommended to avoid backlog excuses/reasons in ineffective performance.
- The investigators` assessment should contain tests on their knowledge in investigation skills which will include knowledge on some of the popular terms in their investigation knowledge, like a thorough understanding of Criminal Law, Criminal Procedure Act 57 of 1977, Law of Evidence, and Constitutional Rights Act 108 of 1996, especially section 35.
- Investigators should prioritise their roles as per their code of conduct. They should perform their duties in a manner that is not questionable and not to think of civil claims.
- The safety of victims and witnesses and the community at large is prioritised rather than prioritising the overcrowding of prisons, as this is also caused by the laws that are favouring criminals rather than victims and witnesses.
- The accused should be treated as a threat to the witnesses at all times. Witnesses should always be assumed to be in danger in the way that it is always assumed that a prisoner may escape.

#### **4.3.2. Question 2: The Role of Investigators during Bail Application**

The researcher recommends that:-

- A refresher course is also recommended for investigators in order to keep them up to date with their duties and with what is required from them. Their skills and knowledge should always be refreshed with workshop meetings and other course facilities.
- Witnesses be involved in bail application. Witnesses should be called to testify for their own safety. The victim should not be surprised by the accused boasting about being released from custody. In other countries a victim impact statement is made to assist the court in making certain decisions.
- Regardless of the directives to the prosecutors, it is recommended that prosecutors work together with investigators for a successful bail application. The prosecutors should continue guiding the investigation and only the magistrates should be left with independent and not unbiased decisions.
- Because of the killing of witnesses, it is recommended that the legislation protecting criminals in custody be revisited since the courts are often prejudiced that the accused is likely to suffer if he or she were to be detained in custody. It is therefore recommended that the courts decide on the safety of witnesses when considering bail applications.

#### **5. CONCLUSION**

Witnesses will always be in danger if the accused is released on bail. It is up to the investigator to prove to the court that keeping the accused in custody is more important than the overcrowding of prisons. Without the required facts it is clear that the lives of victims and witnesses are often in the hands of investigators and the criminal justice system as a whole. The prosecutor is said to be neutral and is not supposed to take sides, therefore investigating officers must know that they are on their own. Gathering interim evidence will not work if the investigator believes that the court will wait for further investigation. Insufficient evidence linking the accused with the crime committed in the case docket is said to be the main course of granting bail to the accused.

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## **ATTACHMENT A: INTERVIEW SCHEDULE**

### **TOPIC: EVALUATION OF THE ROLE OF INVESTIGATORS DURING BAIL APPLICATION**

#### **A: PERSONAL INFORMATION**

You are kindly requested to participate in this study where the researcher is evaluating the role of investigators during bail application. Your opinion and input is important and is highly appreciated. Your identity is not required. The information that you will provide during this interview will be used in this study and your identity will be safeguarded and protected at all times.

- a. Are you an investigator?
- b. How long have you been an investigator?
- c. Have you attended a detective course?
- d. Have you had bail application training?
- e. Have you ever had an unsuccessful bail application?
- f. What was the reason for the unsuccessful bail application?

#### **B: STUDY INFORMATION**

##### **1<sup>ST</sup> SECTION: REQUIREMENTS OF BAIL APPLICATION**

1. What is a suspect?
2. Do you know the rights of an accused in bail application and what are they?
3. What is the difference between the accused, offender and the perpetrator?
4. What is a witness and how does bail application affect witnesses?
5. Can you explain how the accused on bail can be a threat to the witnesses?
6. Explain what the rights of witnesses in the bail application are.
7. What is the role of witnesses in the bail application?
8. What are the requirements of bail application?
9. What is bail and what are the types of bail?
10. What is the purpose of a bail application?

11. What evidence is needed in order to oppose bail during bail application?
12. In your opinion, what causes the court to grant the accused with bail after the investigator`s denial to bail?
13. What is your preferred method of denying bail in the bail application?
14. Why is it important to protect the accused during bail application?
15. Why is it important to protect investigators during bail application?
16. What does the criminal law say regarding bail application?
17. How can denial of bail add value to the prosecution?

**2<sup>ND</sup> SECTION:        THE ROLE OF INVESTIGATORS DURING BAIL APPLICATION**

1. Describe what an investigator is.
2. What is criminal investigation?
3. In your own understanding, what are the roles of investigators during bail application?
4. What is a prosecutor?
5. What is prosecution?
6. In your own understanding, what are the roles of prosecutors during bail application?
7. What value can the relationship between the investigator and the prosecutor add to the investigation?
8. What is the value of bail denial in forensic investigation?
9. Briefly explain what evidence is
10. How can the granting of bail destroy evidence?
11. Can the investigator deny the accused access to information during bail application?
12. Under which circumstances should a police officer deny bail in terms of Criminal Procedure Act?
13. Can you elaborate on any incident where an accused, who was out on bail, committed another crime?

**ATTACHMENT B: LETTER OF APPROVAL**

**South African Police  
Service**



**Suid-Afrikaanse  
Polisiediens**

**Umbutho Wamaphoyisa Aseningizimu-Afrika**

Our Reference / U Verwysing / Inkomba Yakho  
My Reference / My Verwysing / Inkomba Yami  
Enquiries / Navrae / Buza  
Telephone / Telefoon / Ucingo  
Fax No / Faks No

25/7/12/2/3 (268)  
Colonel A.D. van der Linde / CAC R. Moodley  
031 – 325 4841 / 6116  
031 – 325 6022

THE PROVINCIAL COMMISSIONER  
KWAZULU-NATAL  
P O BOX 1965  
**DURBAN**  
4000

Ms N.C. Dube  
C/o Department of Health  
**PIETERMARITZBURG**

**RE: RESEARCH REQUEST: EVALUATING THE ROLE OF INVESTIGATORS DURING BAIL  
APPLICATION: MASTERS STUDY: UNISA: RESEARCHER: MS N.C. DUBE**

1. Attached, please find Head Office minute 3/34/2 dated 2014-04-07 from the office of Major General Menziwa regarding the above-mentioned matter.
2. Recommendation to conduct the said research has been granted in terms of SAPS Research Policy (NI 1/2006).
3. Approval from the office of the Provincial Commissioner is hereby granted to conduct the research on condition that the contents stipulated in paragraph 4 of Head Office minute 3/34/2 dated 2014-04-07 are adhered to prior to the commencement of the research study.

4. For any queries, please contact Colonel A.D. van der Linde at the following number:

Office: 031 325 4841

Cell: 082 496 1142

5. Thank you.

DEPUTY PROVINCIAL COMMISSIONER  
MAJ-GEN  
 P.E. RADEBE  
.....MAJOR GENERAL  
DEPUTY PROVINCIAL COMMISSIONER: OPERATIONS OFFICER: KWAZULU-NATAL  
P.E. RADEBE  
DATE: 2014-04-30