

EVALUATING THE ROLE OF CRIMINAL INVESTIGATORS DURING BAIL APPLICATION

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–Abstract–

Criminal investigators of the South African Police Service (SAPS) are undermined and discredited by society in all spheres of policing sectors. They are shrouded in controversy and often called useless, incompetent and illiterate. SAPS criminal investigators have come under lot of pressure and scrutiny by the media and the public when suspects get bail in a court of law. This article attempts to evaluate and analyse the role of criminal investigators during bail application. This research was carried out utilising a qualitative approach. Purposive non-probability sampling was used because the researchers selected the participants based on their expertise or experience in their field. Thirty-five interviews were carried out among criminal investigators deployed in the Phoenix, Verulam and Tongaat Police Stations of KwaZulu-Natal. The interviews were conducted following a phenomenographic approach to identify the participants' responses.

The challenges the participants perceived or had encountered when opposing bail were explored through in-depth interviews and analysed using thematic analysis.

The findings indicated that, in South Africa, witness views on bail application are not recognised. Moreover, security risk assessment is not being conducted before a suspect can be granted bail. The findings also revealed that prosecutors mostly work in silos during bail application, as criminal investigators are left out. The study recommends that detective commanders should engage consistently with their investigators and discuss a proper preparation of case docket, evidence gathering as well as factors that are considered by court during bail hearings. The study further recommends that the investigators consult constantly with the prosecutors to better advance their relationship and 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 by the court of law.

Key Words: criminal investigators, bail, prosecutors, witnesses, victims.

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1. INTRODUCTION

There is a lack of cooperation between SAPS investigators and court officials. It is very rare to notice the court officials engaging with the investigators beforehand to identify and rectify shortfalls from the case dockets so that the bail could be declined. As highlighted earlier, the investigators always find themselves on the defensive, where they have to answer questions from the victims and witnesses about why the accused was released on bail. Although it is the constitutional right of an accused to apply for and be released on bail, the victim and witnesses regard it differently. Witnesses are often threatened with harm and therefore they might fear to proceed with cases.

Releasing an accused on bail becomes a problem because the community loses confidence in the justice system itself, regarding the system a failure. Mujkanović (2014:29) mentions that, if a criminal justice system (CJS) guarantees victims and witnesses their rights and provides them with security and a feeling of safety, it can be considered efficient and effective. However, in the South African CJS, no consideration is given to victims. 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 who want accused persons to be locked away behind bars. It should be recognised that there is a need for friendship advancement between the court and criminal investigators to better

improve their work and defuse the complaints of society. The witness protection programme should be in place, no matter how big or the weight of the case, to make sure that all witnesses are protected by the state. It should be done. However, the witness protection programme has financial implications. It is the mandate of court to make sure that their mandate is executed.

According to the researchers' point of view, many people at a crime scene may be witnesses, but only a few 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, but can:

- Reconstruct the layout of the crime scene or the overview.
- Provide a full description of the suspects.
- Recollect every activity and the movements of the crime scene.

Witnesses are not always victims, and not all victims can testify by themselves. If the victim is an infant or deceased (a murder or culpable homicide case), those victims cannot be witnesses. Some victims cannot be used as witnesses, such as mentally ill persons, or minor children or infants in rape cases who cannot talk. The South African Police Service (SAPS) (2014) defines a victim as a person who has suffered physical, mental or emotional harm, including economic loss or substantial impairment of their fundamental rights through crime. Some victims of crime are more vulnerable to crime than others, besides the known vulnerable groups of elderly, women and children. Those who are more vulnerable than others are the less privileged, who cannot afford security fences at their homes, who travel by public transport, walking on roads and pathways because they cannot afford to purchase cars. According to the White Paper on Safety and Security (2016:24), there is substantial evidence that those who live in poverty are vulnerable and are affected by crime and violence. The White Paper on Safety and Security further indicates that they are the least able to access the CJS or victim support services and are therefore most at risk, most vulnerable and most affected by high levels of crime and violence.

2. THE RIGHTS OF WITNESSES AS VICTIMS IN RESPECT OF BAIL APPLICATION

The SAPS (2014) describes the Charter of Victims' Rights as a Government initiative that contains the minimum standards of service that victims are entitled to when visiting a police station. The victims are said to have the following rights when visiting a police station: the right to receive information from the police

when reporting a crime, a right to protection, a right to assistance, a right to be treated with fairness and respect for their dignity and a right to offer information during the investigation.

“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). 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 further states 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, Geldenhuys, Joubert, Swanepoel, Terblanche and Van der Merwe (2014:15), 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 Criminal Procedure Act (CPA) 51 of 1977;
- Where the interest of a witness is threatened as contemplated in section 158 (3) (e) of CPA 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; and
- 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.

In other countries, as pointed out by Wallace and Robertson (2011:288) and Daigle (2012:86), the importance of impact caused by criminals to victims has been considered in a victim impact statement (VIS). The VIS is the statement that presents the victim’s point of view to the sentencing authority (Wallace &

Robertson, 2011:288). 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 CJS. The researchers 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 that the criminal be kept behind bars until sentence has been given.

Therefore, 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. Mujkanović (2014:7) argues that the consequence of criminal behaviour affects victims in different ways – victims suffer material or moral damages, physical injuries and/or psychological harm.

3. THE SIGNIFICANT ROLE OF WITNESSES DURING BAIL APPLICATION

The witnesses are the centre of the contention in criminal care and they should play an important role during bail application. Although it is the discretion of the court to grant or deny bail, it is imperative that the court consider witnesses when applying its mind on bail. Joubert (2010:42) posits 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. The witnesses give guidance whether to oppose bail or not. Mofokeng and De Vries (2012:32) suggest that police detectives and prosecutors should forge relationships and encourage them to get together before a court day. For the CJS to be effective, the acknowledgement of victim or meeting witnesses' expectations is important to reduce unnecessary complaints that destroy the image of the justice system, as one factor leads to another. The purpose of the CJS is to fight crime and to punish the offender. In the same way, another purpose of the CJS should be to show the victim or witness that something has been done. As

mentioned above by Mujkanović (2014:29), the CJS should provide witnesses with a feeling of safety in order to be considered effective.

If victims are not happy about the safety measures, they might stop reporting any criminal activity. This will strengthen criminals' resolve, 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, or crime levels are high. The Institute for Economics and Peace (2014:33) indicates that crime and violence have significant multiplier effects on the economy by depressing savings, investments, earnings, productivity, labour market participation, and tourism. Daigle (2012:85) is of the view that when police meet victims' expectations, they report high levels of satisfaction.

If victims are not satisfied about how matters are handled by the CJS, they may contact the department that deals with victims of crime, the Community Safety and Liaison, which offers victim empowerment programmes. According to the Department of Community Safety and Liaison (2011), the directorate established victim-friendly facilities at priority police stations that would ensure that:

- Victims are treated in a professional, private, sensitive manner and referred to support services in the community.
- A win-win situation is created for victims and the police.
- The production and distribution of information Z-cards in the response to the State of the National and Provincial address in intensifying the implementation of the Victim Charter to help victims of domestic violence.

The SAPS (2014) defines the victim-friendly service as a service where the dignity and rights of victims are protected, and the victim is empowered and not subjected to secondary victimisation by the inefficiency of the members of the CJS. If one of the requirements in the bail application is the victim's or witness's opinion on bail, they 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. Under the South African Criminal Procedure Act 51 of 1977, section 60(10), the court has the duty to weigh up the personal interests of the accused against the interests of justice. In this case, the interests of the victim, witnesses and the community are not weighed up or prioritised by the Criminal Procedure Act when it comes to the granting of bail.

When called upon to testify during a bail application, the investigating officer should bring along the victim who is intimidated by the release of the accused and ask the court to hear the version of the victim before a bail decision is made. If it is not possible, the investigating officer can obtain a further statement from the victim outlining events that will inform the court about the dangers of releasing the accused. This is vital, because the bail application is done using the first reporting statement obtained by the community service centre (CSC) officials, which only deals with the incident at hand, and prior incidents are not mentioned or reported, especially in domestic violence cases. According to Gilbert (2010:37), victims of crime may choose not to report violations to the police if they feel that nothing will be done or if investigative functions do not occur, such as the recovery of exhibits and arrest of the assailants.

4. THE ROLE OF CRIMINAL INVESTIGATORS DURING BAIL APPLICATION

Although investigators do not have the final say on the granting of bail, it is essential that their role should have an effect and assist the court to take appropriate decision when dealing with bail. According to the investigators interviewed, in some cases they have no knowledge that the suspect is out on bail. This poses a risk to witnesses' safety as well as to investigators. All investigators interviewed indicated that there was no witnesses were present at any of the bail applications they attended. In some instances, they (investigators) were also not consulted when a bail application was conducted; therefore, they were unable to inform the witnesses about the outcome of the bail application. This comes as a surprise to both investigators and witnesses when the accused is out with bail without their knowledge.

5. ACCUSED ON BAIL BEING A THREAT TO THE WITNESSES

The preamble to the Witness Protection Act 112 of 1998 states that the Act 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 and Constitutional Development (DOJ & CD) (2012/2013:407) explains that the office for Witness Protection provides a support service to the CJS 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 danger, because the witness protection programme exists to protect the witnesses. However, the researchers is of the opinion that witness protection is not enough.

Criminals should be kept away from 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 (2010:117) 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. 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.

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. This is normally a rationale or excuse made by criminals in order to escape blame. In rape cases, victims are blamed for wearing short or mini-skirts or being drunk at the time of the offence. Other victims are blamed for walking at night, which is intended to discredit the witness's evidence by showing the character of the witness. Davis and Snyman (2005:101) 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. The investigating officer has a duty to prove that the accused is not eligible to bail by indicating if the accused has previous convictions or pending cases, by mentioning if the accused address has been verified. The investigator should present a proof of flight risk, for instance whether or not the accused was cooperative during arrest or tried to escape. The investigating officer can point out if the accused can cause harm to witnesses if released on bail.

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. Although it is not up to the police to decide, however the police can withdraw from opposing bail letting the court to decide.

Davies et al. (2010: 284-286) further indicate that after 36 hours, accused persons must appear before a magistrate 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. Davies et al. (2010) illustrate international detention procedures. The South African detention procedure is 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 criminal investigating 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 accused who become witnesses by turning against their co-accused and give incriminating evidence in favour of the prosecution. 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, which authorises witnesses to give incriminating evidence in favour of the prosecution. Section 204 of the Criminal Procedure Act 51 of 1977 is about an accused who is used as a witness against the other accused, thereby escaping prosecution. Such witnesses might be intimidated. The investigating officers should ensure that these witnesses are protected until the trial is over. They also require protection like that of the independent witness.

6. COURT REASONS FOR GRANTING BAIL AFTER INVESTIGATORS OPPOSE BAIL

The court does not grant 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. 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.

Gilbert (2010:542) indicates that police investigators assist the court by providing information that can help a judge to make a just establishment of innocence or guilt. Section 36 of the Constitution; the Limitation Clause, allows the courts to infringe the rights set out in the Constitution, such as the right to freedom. Looking at the notorious femicides occurring nowadays, this is one right that should be infringed in the case of femicide suspects, since it defies reason that the courts would release an accused on bail after only a few months of detention, if not weeks. Femicide is the killing of a woman by her male partner.

7. CRIMES COMMITTED BY ACCUSED 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, the 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. Gilbert (2010:124) argues

that criminal investigators should assure witnesses that any threats or acts of intimidation against them will be investigated and resolved by police action. The authors add 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 while on bail. In a recent case in 2018, a woman in Nongoma, KwaZulu-Natal, was killed by her partner who was out on bail in the rape case (Mthethwa, 2018). In this case, the suspect was charged with rape since he had shoved the knobkerrie into the woman's private part. He was later released on bail; he then went to the victim's residence, where he set the victim on fire by necklacing her. She later died in hospital. In this case, the court had clearly failed to protect the witness.

8. METHODOLOGY AND SAMPLING

The qualitative research approach was applied in this paper and non-probability sampling was employed to collect data (as described by Mouton and Babbie 2013:270). According to Leedy and Ormrod (2014:152), non-probability sampling is used when fewer units are analysed and in this paper, 15 investigators were interviewed. Literature forms a major part of this paper, as well as integrated empirical data from the investigators. Again, Leedy and Ormrod (2014:145) regard purposive sampling as an appropriate sampling method for a targeted population with particular expertise and experience on the subject matter. The researchers used purposive sampling, as they intentionally selected the investigators with such required knowledge and expertise in bail application for in-depth information.

9. FINDINGS

The researchers discovered the following:-

- It has been identified that, in South Africa, witnesses are not called in court during bail application. Witnesses' views on bail application are not recognised.
- This is a well-known problem which is confirmed by the existence of the Office of Witness Protection. The court only learnt that witnesses are in danger once the threat and intimidation are reported.
- A security risk assessment should be conducted in order to confirm the risk faced by victims and witnesses; the assessment should be performed by witness protection security and the victim empowerment office, using their reported incidents.

- The role of investigators is not only to appear in court and oppose bail, but the role includes knowledge of certain laws and the relevant statutory provisions that govern the entire proceedings.
- 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.

10. RECOMMENDATIONS

The researchers recommend the following:-

- It is recommended that detective commanders should engage consistently with their investigators and discuss a proper preparation of case docket, evidence gathering as well as factors that are considerable by court during bail hearings.
- It is recommended that the investigators consult constantly with the prosecutors to better advance their relationship.
- The accused should be treated as a threat to the witness at all times, especially those with previous convictions and those who committed serious offences. Witnesses should always be assumed to be in danger.
- Witnesses should be involved in bail application, especially in cases where the accused is known by the witness. Witnesses should be called to testify for their own safety.
- Regardless of the directives to the prosecutors, the prosecutors should continue guiding the investigation and only the magistrates should be left with independent and unbiased decisions.

11. CONCLUSION

Witnesses will always be in danger if the accused is released on bail. Without the required facts, the lives of victims and witnesses are often in the hands of investigators and the CJS 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 is said to be the main course of granting bail to the accused. Witnesses and investigators should form part of bail applications for them to have a full view of the outcome of the court.

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