

# THE SGBV HANDBOOK FOR PROSECUTORS





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## LIST OF ACRONYMS

<b>AG</b>	Attorney General
<b>CEDAW</b>	Convention on Elimination of Discrimination Against Women
<b>CSOs</b>	Civil Society Organizations
<b>CPC</b>	Criminal Procedure Code
<b>DPP</b>	Director of Police Prosecutors
<b>DV</b>	Domestic Violence
<b>FGM/C</b>	Female Genital Mutilation/Circumcision
<b>IGP</b>	Inspector General of Police
<b>IPV</b>	Intimate Partner Violence
<b>GBV</b>	Gender Based Violence
<b>SGBV</b>	Sexual and Gender Based Violence
<b>SGBVC</b>	Sexual and Gender Based Violence Cases
<b>VAW</b>	Violence Against Women
<b>MOH</b>	Ministry of Health
<b>MOJ</b>	Ministry of Justice
<b>GPF GCPU</b>	Gambia Police Force Gender and Child Protection Unit
<b>DSW</b>	Department of Social Welfare
<b>MWCSW</b>	Ministry of Women, Child and Social Welfare
<b>WBDSW</b>	Women's Bureau and Department of Social Welfare

# INTRODUCTION

The Government of The Gambia, in partnership with the United Nations Development Programme (UNDP) is implementing the Strengthening Rule of Law and Enhancing Justice and Security Service Delivery in The Gambia project (UNDP RoL project). The project endeavors to implement a holistic and comprehensive program which addresses both the supply and demand sides of justice delivery. The UNDP RoL project seeks to strengthen rule of law institutions to deliver quality services, to empower citizens in the exercise of their rights and to increase access to justice.

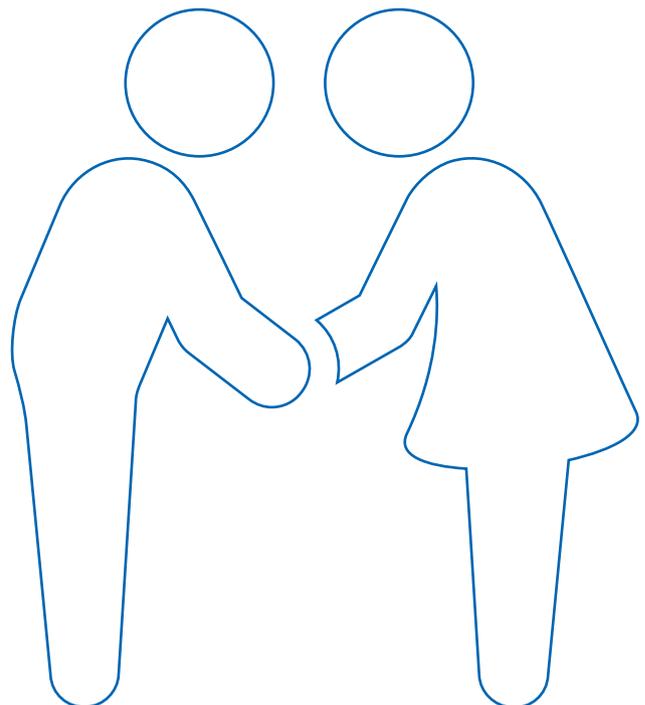
Sexual and gender-based violence (SGBV) poses significant risks to the health and well-being of women, girls, boys and men. It includes physical injuries, psychological trauma, unwanted pregnancy, and sexually transmitted infections. Though women and girls are the most vulnerable, SGBV negatively impacts whole communities. As part of its support to the Rule of Law Sector, the UNDP RoL project is supporting the Prosecutors of the Ministry of Justice and the Gambia Police Force to increase the prosecution and convictions of those who commit SGBV related crimes.

Currently, in The Gambia, there are responsible units within the justice institutions dedicated to preventing and responding to SGBV crimes. The Ministry of Justice has a SGBV unit, the Police has established a Gender and Child Protection Unit, and the Ministry of Women, Child and Social Welfare has a Women's Bureau and Department of Social Welfare. The Ministry of Health and Civil Society Organizations are also key players in the fight against SGBV. Despite these established units, there is a lack of coordination and resources to address SGBV offenses effectively. Compounding this difficulty are cultural and traditional beliefs which are obstacles to addressing SGBV openly.

## Legislation

The Gambia does have legislation that defines and criminalizes SGBV. In 2015, The National Assembly passed the Women's Act amendment 2015 criminalizing the procurement, performance, arrangement and/or assistance of any act of FGM. This Act also criminalizes the failure to report incidents of FGM/C. The Gambia also passed the Sexual Offenses Act, the Domestic Violence Act in 2013 and has signed the CEDAW.

While the legislation is in place and the rule of law institutions have dedicated units to address SGBV, to date no one has been prosecuted under the FGM legislation and conviction rates remain low. There is a critical need to equip investigators and prosecutors with technical expertise to bring justice to SGBV victims/survivors. This requires training on how to use a victim/survivor centered approach, improved interviewing skills, use of evidence in courts and legal arguments to increase SGBV conviction rates. In addition, it is imperative to strengthen the coordination between the prosecutors and police with SGBV service providers. Survivors are not only in dire need of justice but also psychosocial and sometimes economic and social support. A holistic approach to SGBV through a well-coordinated justice and social services structure needs to be established and available throughout the country.



# PURPOSE

## Purpose of the Sexual and Gender Based Violence Handbook for Prosecutors

This SGBV Handbook for Prosecutors is a simplified reference tool to enhance the capacity of prosecutors to investigate and successfully prosecute SGBV related offences. The Handbook simplifies the processes and procedures that should be followed from investigation to prosecution. It was developed after two consultants completed a training course in November 2019 with Prosecutors from the MoJ SGBV Unit, police prosecutors, the Police Gender and Child Protection Unit and trainers from Police school. A total of 36 personnel were trained on Investigation, Interviewing and Prosecution Skills for SGBV cases. The Handbook will be incorporated into the Police School curriculum.

## The SGBV Handbook focuses on 5 key concepts:

- ▣▣▣▣ Responding correctly and taking adequate action when SGBV incident is reported
- ▣▣▣▣ Sensitizing Prosecutors on SGBV and its consequences
- ▣▣▣▣ Guidelines and techniques for investigating SGBV incidents and offences
- ▣▣▣▣ Using a Survivor centered approach, particularly during interviews
- ▣▣▣▣ Improving Prosecution skills and techniques in Court

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# SGBV GLOSSARY

It is important to understand the basic concepts as well as the forms and dynamic in addressing SGBV in the Gambia.

## Child Marriage

Child marriage is also known as early marriage. It is the formal or informal marriage where at least one of the parties<sup>1</sup> is under the age of 18. In child marriage the issue of consent by either of the parties is irrelevant.

## Child Sexual Abuse

There is no agreed definition of Child Sexual Abuse, in general terms, child sexual abuse<sup>2</sup> can be defined as sexual contact with a child that occurs under one of three conditions:

- i. when a large age or maturational difference exists between the partners;
- ii. when the partner is in a position of authority over or in a care-taking relationship with the child;
- iii. when the acts are carried out against the child by using violence or trickery.

Child Sexual Abuse can be defined as any incident involving rape or sexual assault that is perpetrated against a minor, by force or under unequal or coercive conditions.<sup>3</sup>

## Coercion

Any act that covers several degrees of force and includes physical force; psychological intimidation; blackmail and other threats. Coercion is the act or process of persuading someone forcefully to do something that they do not want to do.<sup>4</sup>

Examples:

- a. when the person aggressed is unable to give consent – for instance while drunk, drugged, asleep or mentally incapable of understanding the situation.
- b. Forced marriage or cohabitation, including the marriage of children
- c. Forced abortion
- d. Violent acts against the sexual integrity of women, including FGM and obligatory inspection of virginity
- e. Forced prostitution and trafficking of people for sexual exploitation

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<sup>1</sup> UNICEF Definition

<sup>2</sup> Definition for an article by SOS Children's Villages UK - CHILDHOOD AND TRAUMA – SEPARATION, ABUSE, WAR

<sup>3</sup> [https://www.unfpa.org/sites/default/files/pub-pdf/-Facilitator1s\\_Guide\\_English\\_InDesign\\_Version.pdf](https://www.unfpa.org/sites/default/files/pub-pdf/-Facilitator1s_Guide_English_InDesign_Version.pdf), p. 55

<sup>4</sup> COLLINS COBUILD Advanced English Dictionary

## Consent

Giving consent, is when a person is able to and makes an informed choice and agrees freely and voluntarily to do something.<sup>5</sup> It is also important to note that consent can also be withdrawn. By definition, SGBV occurs without such consent, in other words it happens against a person's will.

## Domestic Violence

Domestic violence occurs when one partner exerts control over the other while dating, during marriage, or cohabitation. Domestic abuse involves injuring someone, such as a spouse, partner, or other family members within the domestic setting. The injuries caused by domestic violence can be either physical or emotional.<sup>6</sup>

Domestic violence definition this way "Any abusive, violent, coercive, forceful, or threatening act or word inflicted by one member of a family or household on another can constitute domestic violence."<sup>7</sup>

## Female Genital Mutilation/Cutting (FGM/C)

It is referred to as all procedures that involve partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons.<sup>8</sup>

## Forced Marriage

Forced marriages are marriages in which one and/or both parties have not personally expressed their full and free consent to the union. A child marriage is considered to be a form of forced marriage, given that one and/or both parties have not expressed full, free and informed consent.<sup>9</sup>

## Gender-Based Violence<sup>10</sup>

Gender-Based Violence (GBV), is also referred to as Sexual and Gender-Based Violence (SGBV) is any harmful act of sexual, physical, psychological, mental, and emotional abuse that is perpetrated against a person's will and that is based on socially ascribed (i.e. gender) differences between males and females. Gender-based violence<sup>11</sup> can be broadly defined into five categories:

1. Sexual violence (rape, sexual assault, sexual harassment)
2. Physical violence (hitting, slapping, beating)

3. Emotional violence (psychological abuse)
4. Economic violence (denial of resources)
5. Harmful traditional practices (forced/early marriages, female genital mutilation).

## Human Trafficking

The recruitment, transportation, transfer, harboring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.<sup>12</sup>

## Human Smuggling

It can be defined as a process that involves the movement of people within and outside a country. It can be seen as a favor or service being asked for and involve payments in many forms either monetary terms or sexual favors.<sup>13</sup>

## Intimate Partner Violence<sup>14</sup>

It refers to behavior by an intimate partner or ex-partner that causes physical, sexual or psychological harm, including physical brutal battering aggression, sexual coercion, economic abuse, psychological abuse, and controlling behaviors.<sup>15</sup>

**Circumstances of this Violence** is that - it occurs between intimate partners (spouses, boyfriend/girlfriend) as well as between other family members. This type of violence may include physical, sexual, and/or psychological abuse, as well as the denial of resources, opportunities or services.

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<sup>5</sup> Oxford English Dictionary

<sup>6</sup> Healthy Place.com 2019

<sup>7</sup> Mead's Encyclopedia of Law, 2nd Edition 2008, Domestic Violence Act 2013 clause

<sup>8</sup> (WHO 2013).

<sup>9</sup> UNICEF definition

<sup>10</sup> <https://www.unocha.org/story/sexual-and-gender-based-violence-time-act-now>

<sup>11</sup> [https://www.unfpa.org/sites/default/files/pub-pdf/-Facilitator1s\\_Guide\\_English\\_InDesign\\_Version.pdf](https://www.unfpa.org/sites/default/files/pub-pdf/-Facilitator1s_Guide_English_InDesign_Version.pdf)

<sup>12</sup> The *Protocol against the Smuggling of Migrants by Land, Sea and Air*, adopted by General Assembly resolution 55/25, entered into force on 28 January 2004

<sup>13</sup> Refer to footnote 14

<sup>14</sup> <http://www.endvawnow.org/en/articles/1474-terminology-and->

<sup>15</sup> (WHO 2013).

### Perpetrator

A person who commits, an illegal or criminal actor carries out a harmful, illegal, or immoral act.

### Psychological/Emotional Abuse

Is behavior that seeks to control an individual by inflicting emotional harm, which can include threats, intimidation, humiliation, coercion, it involves a person's attempts to frighten, control, or isolate another in words and/or actions as well as persistence in the behavior and can often leads to or is incorporated with other forms of violence.<sup>16</sup>

### Rape

Non-consensual penetration (however slight) of the vagina, anus or mouth with a penis or other body part or an any part of an animal. Also includes penetration of the vagina or anus with an object.

### Sexual Exploitation

Is any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially, or politically from the sexual exploitation of another.

### Sexual Harassment

Unwelcomed sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.<sup>17</sup>

### Sexual Slavery

The state, where a person exercises ownership over (a) person(s) (e.g. purchasing, selling, lending) who is/are forced to engage in sexual activity against their will.

### Sexual Violence/Sexual Assault<sup>18</sup>

Sexual violence is any sexual act or attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic that are directed against a person's sexuality using coercion. Sexual violence can occur in any setting, including at home and at work. Three forms of sexual violence are commonly distinguished: sexual violence involving intercourse (i.e. rape); contact sexual violence (for example, unwanted touching, but excluding intercourse); and non-contact sexual violence (for example, threatened sexual violence, exhibitionism and verbal sexual harassment). Online exploitation can also be a form of sexual violence.<sup>16b</sup>

### Survivor

A person who is able to continue living their life successfully despite experiencing difficulties. A person who copes well with difficulties and bad situations or afflictions and gets through a situation that often causes death.<sup>19</sup>

### Victim

Someone who or something that has been hurt, damaged, or killed or has suffered, either because of the actions of someone or something else, or because of illness or chance. A person harmed, injured, or killed as a result of a crime, accident, or other event or action.

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<sup>16</sup> Including sexual and domestic violence

<sup>16b</sup> INSPIRE: seven strategies for ending violence against children (WHO, 2016)

<sup>17</sup> (UN Secretary General, 2008).

<sup>18</sup> [https://hr.un.org/sites/hr.un.org/files/SEA%20Glossary%20%20%5BSecond%20Edition%20-%20202017%5D%20-%20English\\_0.pdf](https://hr.un.org/sites/hr.un.org/files/SEA%20Glossary%20%20%5BSecond%20Edition%20-%20202017%5D%20-%20English_0.pdf)

<sup>19</sup> Reference is made to the term "victim" above. 'Victim' is a term often used in the legal and medical sectors, while the term 'survivor' is generally preferred in the psychological and social support sectors to a person who has experienced sexual or gender-based violence because it implies resilience.

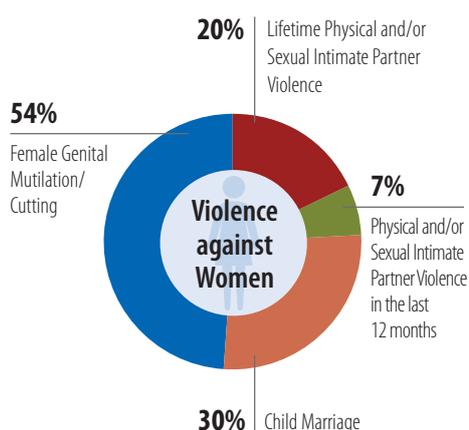
# MODULE 1

## OVERVIEW OF SEXUAL AND GENDER BASE VIOLENCE<sup>20</sup>

### Key Points: The Scope of SGBV

- **SGBV is a serious global problem.** It does not only occur in the outside world, it is happening in the Gambia. Some types of SGBV occur more frequently in some cultures and traditions.
- **SGBV affects women, girls, boys and men.** The majority of the data currently available on SGBV refers to women and girls, who represent the largest group affected. However the lack of data on the incidence of SGBV perpetrated against men and boys does not mean that they do not suffer SGBV, but rather that coming forward is problematic, or that data collected is not disaggregated by sex.
- **SGBV is always under-reported.** The number of individuals who report experiencing or surviving SGBV is likely much lower than the true number of SGBV cases.
- **Determining the prevalence of SGBV is extremely challenging.**

### Violence Against Women 2018



According to a 2018 demographic health survey conducted by the Gambia Bureau of Statistics (GBOS), the pie chart above shows the prevalence of Violence against Women.

SGBV is violence that inflicts harm on women, girls, men and boys and is a violation of several human rights. SGBV infringes on victims/survivors' human rights and reinforces the inequities between men and women often leaving life-long physical and emotional scars and sometimes resulting in death. SGBV is a pandemic that disproportionately affects girls and women. This has led to the UN General Assembly in 1979 to adopt the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>21</sup> CEDAW has been ratified and domesticated leading to the enactment of the Woman's Act 2010. This was done by the Government of the Gambia in its aim to address SGBV in the Gambia.

Some types of SGBV, sexual violence and domestic violence for example, occur in all cultures. SGBV also includes harmful traditional practices such as early or forced marriage and FGM/C. While women and girls constitute the vast majority of SGBV victims/ survivors, men and boys can also suffer from SGBV.

While many people think of SGBV in terms of physical violence, the other forms of violence, which maintain the unequal power dynamics such as psychological, sexual, emotional, or economic violence can sometimes have a greater impact. Violence does not have to be direct to be effective. The threat of violence can have a devastating impact on people's lives and the choices and decisions they make.

Often, the truth about the extent of violence faced by individuals, in particular women and girls, is minimized or denied. Some people say SGBV is pervasive because of "bad" men and therefore deny that it has anything to do with them and the socio- cultural fabric of society. Others blame women ("victim shaming") or argue that violence is justified because "she must have encouraged it". These attitudes are dangerous and diminish the seriousness and pervasiveness of SGBV, which allows perpetrators to escape justice.

According to a 2018 demographic health survey conducted by the Gambia Bureau of Statistics (GBOS), the prevalence of Violence against Women are as follows: Lifetime Physical and/or Sexual Intimate Partner Violence: 20%, Physical and/or Sexual Intimate Partner Violence in the last 12 months: 7%, Child Marriage: 30% and Female Genital Mutilation/Cutting: 54%.

<sup>20</sup> Refer to Annex 1 on page ....

<sup>21</sup> <http://www.un.org/womenwatch/daw/cedaw/>



**Perceptions and beliefs** are influenced by social factors, such as history, tradition, religion and social norms. It is important to note that Gender applies to both males and females and is a neutral term such the same way sex applies to either men or women.

**Examples of Sex**

Only women can give birth (this cannot be changed)



Only men can impregnate (this cannot be changed)

**Examples of Gender**

Women and men can have the same professions (engineers, etc)



Women and men can be caregivers to their children and cook and clean



**Key points**

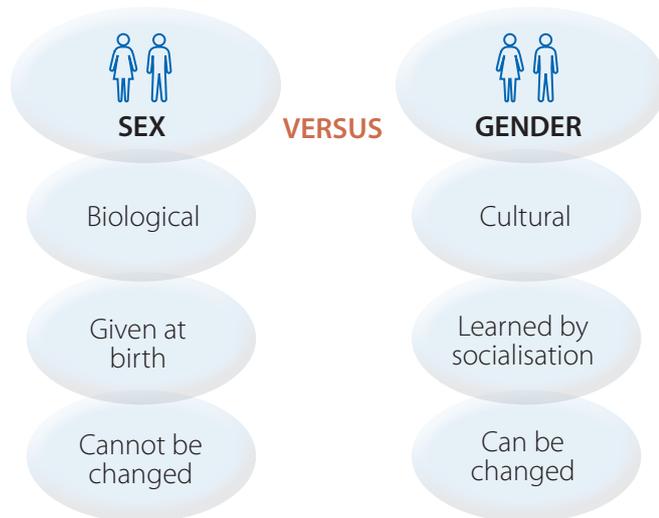
Messages about gender are taught and reinforced by society and by both men and women from a very young age.

Gender norms change over time and across cultures and traditions.

**1.1. Difference between Sex and Gender**

**Sex** refers to a label assigned at birth which indicates the biological differences between males and females. This biological difference is based on the reproductive organs and genitalia one is born with. It is one-way societies can be divided i.e., male and female.

**Gender** refers to the role or responsibilities of a male or female created by society. These are known as a gender or social roles. This can also include an individual's gender identity which may be different then the label assigned to them due to their reproductive organs or genitalia. Gender is learned through socialization on what it means to be a boy or girl, woman or man, in a particular society or culture. The important aspect of Gender is that it determines the roles, responsibilities, privileges, expectations and limitations of males and females in each culture. It includes the way men view themselves as men, and the way men view women as women. Similarly, it is the way women see themselves as women, and the way women see men as men.



**1.2. Factors that Increase Sexual Gender Based Violence**

In general, women are disproportionately affected by SGBV as they are perceived as commodities or objects. Social, religious, cultural beliefs and practices can place women and girls in the most vulnerable positions within a society. Discrimination, unequal power relations, toxic masculinity and misogamy are some of the root causes for SGBV.

These root causes are seen through the lack of economic or political opportunities for women to support themselves financially or to effect changes in the law for their benefit. Often the rights contained in legislation that in principle include women, are not upheld by justice actors. This includes law enforcement who do not arrest men for SGBV crimes even though a law has been violated due to social, religious or cultural beliefs.

The low prioritization for the education of the girl child is a contributing factor to higher rates of SGBV. SGBV is also known to rise exponentially in times of war, natural disasters or other social stresses. Often women who are not well educated or are not permitted to work are unable to leave abusive relationships because they lack economic resources. In some societies, this is done on purpose to make women dependent on men for their wellbeing.

All of these factors and their expression in daily life create a climate where women and girls are made highly vulnerable to SGBV. It is important to point out that this does not mean that victims are responsible for being sexually assaulted. It is to make one aware of the characteristics that can make a person more vulnerable than others. Individual risk factors **must not be used to blame people who have been victimized**, but to prevent sexual assault by helping people who are at greater risk.

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## *Responsibility for sexual assault always lies with the perpetrator.*

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### I. Individual Risk Factors

This includes:

- A major individual risk factor is the mere fact of being a girl or woman
- Poor understanding of rights due to lack of education
- Lack of education or livelihoods to leave an abusive relationship or environment
- Child custody laws that would force mothers to be separated from their children
- Lack of support and services or structures that allow easy access for reporting
- Poor or low income that prevents access to legal, medical or psychosocial services.
- Poor mobility, restricted or lack of freedom of movement leads to an inability to escape or seek support
- Coercion or threats from the perpetrator who holds a stronger social position as a husband or father.

### II. Social Risk Factors

This includes:

- Isolation/ostracization, stigmatization and discrimi-

nation based on the low value accorded to the girl child and women in a family setting.

- Discrediting victims or “victim blaming”. This includes judging the survivor, considering or referring to the survivor as hypersexual, asexual or “unclean”
- Poor peer, social support networks and weak society sanctions against SGBV perpetrators
- Lack of social understanding and acceptance of social norms that maintain women’s inferiority and submissiveness
- Deeply rooted gender norms and unequal power structures. Cultural norms that excuse male perpetrator behavior
- Lack of laws and policies or lack of enforcement against on SGBV.

### III. Environmental Risk Factors

This includes:

- Family, including extended family; considering the extended family setting in the Gambia where uncles live with nieces and there are unequal power dynamics
- Physical isolation
- Limited access to education
- Lack of privacy
- Lack of services and support being lack of coordination between sectors of SGBV
- Lack of understanding by service providers

### IV. Risk Factors for Perpetrators

#### *Individual, Relationship and Community Risk Factors*

- Alcohol and drug abuse should be flagged as a high risk factor
- Early sexual initiation
- Coercive sexual fantasies towards any gender
- Adherence to traditional gender role norms
- Hyper-masculinity
- Prior sexual victimization or perpetration
  - History of anger or rages
  - Poverty and lack of resources
  - Having been abused as a child
  - Witnessing of marital abuse and violence as a child

### 1.3. Forms of SGBV and Consequences

#### Forms of SGBV

##### Psychological

- **Psychological or Emotional abuse** – deprivation of resources, isolation from others, restricting or forbidding movement, manipulation, threats
- **Verbal abuse** – cursing, derogatory name calling, yelling, screaming

##### Physical

- **Physical abuse** – beating, punching, shoving, kicking
- **Domestic violence** – this includes acts or threats in each category from physical, sexual, verbal, emotional and economic abuse

##### Sexual

- **Sexual violence** - rape, attempted rape, unwanted touching, sexual assault (unwanted touching of breasts, buttocks, genital areas) or any other unwanted physical contact in a sexual nature
- **Early or forced marriage** – any marriage when one person is under 18 years of age.

##### Economic

- **Denial of services, opportunities or resources** – forbidding a person to work or earn income, use medical or psychosocial services
- **Trafficking and or smuggling of persons** – lack of economic resources, sexual or emotional abuse make women and girls vulnerable to traffickers.

#### Consequences of SGBV

SGBV acts have serious and sometimes life-threatening consequences for survivors. These can be direct or indirect, immediate or sometimes manifest in the long term. SGBV also impacts survivors' families, communities and even whole societies. The prevalence of SGBV in a community or society has shown to have significant negative impact on the economic health of that community or society.

### 1.4. Misconceptions of SGBV

- **Gender-based violence only affects certain kinds of people.** Gender-based violence can affect anyone. It cuts across class, race/ethnicity, religion educational level or personal history. Negative assumptions about

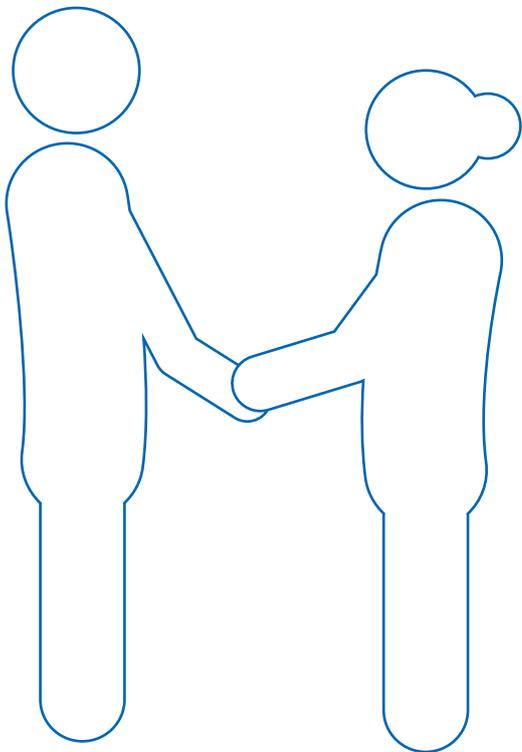
survivors of gender-based violence make it difficult for them to reach out for help.

- **Sexual assault is usually committed by strangers.** According to World Health Organization estimates, almost a third of all women who have been in a relationship have experienced physical and/or sexual violence by their intimate partner, and up to 70% of sexual assaults are committed by an intimate partner.
- **Perpetrators of violence are 'monsters' or 'sick outsiders'.** Perpetrators come from all walks of life. As a result, when survivors report violence perpetrated by their partner, an influential figure in the community, or someone who does not conform to the stereotype of a perpetrator, they are often not believed.
- **The way a woman dresses or acts causes gender-based violence.** Abusers often blame their victims in order to make excuses for their behavior. This is in itself abusive and shifts the focus away from the perpetrator. It is important that abusers take full responsibility for their actions and that the law is enforced and any attempt to blame those who are abused is dismissed.
- **Poverty and conflict are the cause of attacks on women.** There are many men living in conditions of poverty or conflict who are not violent towards women, just as there are many individuals in wealthy countries and in times of peace who are violent towards women. Whilst some studies have found poverty and violent conflict do increase the likelihood of certain kinds of gender-based violence, it is a global problem.
- **A person who has been raped or abused will be visibly upset when discussing her ordeal.** Each person reacts differently to gender-based violence. It is important to be aware of the wide range of reactions to such traumatic events. Some survivors never talk about what happened to them, or they may do so after several months or years, while others will disclose immediately.
- **False reporting is widespread or used by women in order to access services or settle scores.** Overall false reporting is rare: a much bigger issue is underreporting. Recent estimates indicate that only around 7% of survivors in developing countries officially report incidents of gender based violence and research suggests that the fear of losing out on housing and other services, or losing custody of children, prevents many gender-based violence survivors from coming forward to report incidents.

# MODULE 2

## SEXUAL OFFENCES AND THE LAW

*“The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behavior and its consequences.”<sup>24</sup>*



Sexual rights are legally recognized regionally and internationally as a fundamental human right. These have been developed in international and regional agreements, including:

- Programme of Action of the International Conference on Population and Development, Cairo, 1994<sup>22</sup>
- Platform for Action of the Fourth World Conference on Women, United Nations, Beijing, 1995
- African Charter on Human and People’s Rights on the Rights of Women in Africa<sup>23</sup>

### Examples of sexual rights include:



the right to decide when to have sex or not to have sex

the right to decide who to have sex with

the right to decide how to have sex

the right to have sexual pleasure

the right to have sex free from violence and coercion

the right to protect yourself against unwanted pregnancy and sexually transmitted infections including HIV

the right to have information and education about sex and sexuality

the right to sexual health services, including contraception, safe abortion and post abortion care

the right to exercise your sexual orientation

### Gambian Constitution

The Constitution of the Gambia enshrines values of freedom, equality and human dignity for all. It gives people:

- The right to enjoy equal protection and benefit of the law
- the right to dignity
- The right to security and freedom of the person which specifically incorporates:
  - The right to be free from all forms of violence from either public or private sources
  - The right to bodily integrity and psychological integrity including the right to make decisions concerning reproduction and to security and control over their bodies

<sup>22</sup> (ICPD)

<sup>23</sup> (Women’s Protocol)

<sup>24</sup> (Platform for Action of the Fourth World Conference on Women, United Nations, Beijing, 1995)

## 2.1. Sexual Offence Act 2013

Sexual Offences Act 2013 of the Gambia came into effect in 2015 and its purpose is to “*amend the law and procedure relating to the trial of rape and other sexual offences, and for matters incidental thereto*”. It addresses all known sexual offences and provides for punitive measures for perpetrators. The Act provides protection for all victims of sexual crimes especially vulnerable groups, including women, children and people who are mentally and physically disabled, against all persons. The Act defines rape, expands on evidence that is admissible in criminal proceedings, and provides penalties. It outlines the special duties of prosecutors and police.

Although, there is no specific definition of Sexual Violence in the 2013 Sexual Offences Act, Sexual Violence is generally defined as:

.....  
*“Any **sexual act**, attempt to obtain a sexual act, any unwanted sexual comments or advances or any acts to traffic or otherwise directed against a person’s sexuality using coercion, by a person regardless of their relationship to the victim, in any setting including but not limited to home and work.”*  
.....

For more in-depth understanding of what sexual acts include, the below are some provisions of the Act:

Sexual Act- this is defined under **Section 2** of the Sexual Offences Act as:

- a. The insertion (to even the slightest degree) of the penis of a person into the vagina or anus or mouth of another person; or
- b. The insertion of any other part of the body of an animal or of any object into the vagina or anus of another person, except where such insertion is, consistent with sound medical practices; carried out for proper medical purposes; or
- c. Cunnilingus or any form of genital stimulation, and “Vagina” includes any part of the female genital organ.”

**Section 3 (2)** under the Sexual Violence Act 2013 states the following to be “coercive circumstances”:

Coercive circumstances include, but are not limited to–

- the application of physical force to the complainant or to a person other than the complainant;
- threats (whether verbal or through conduct) of the application of physical force to the complainant or to a person other than the complainant;
- threats (whether verbal or through conduct) to cause harm (other than bodily harm) to the complainant or to a person other than the complainant, under circumstances where it is not reasonable for the complainant to disregard the threats;
- circumstances where the complainant is under the age of sixteen years;
- circumstances where the complainant is unlawfully detained;
- circumstances where the complainant is affected by –
  - physical disability or helplessness mental incapacity or other inability (whether permanent or temporary); or
  - intoxicating liquor or any drug or other substance which mentally incapacitates the complainant; or
  - sleep, to such an extent that the complainant is rendered incapable of understanding the nature of the sexual act or is deprived of the opportunity to communicate unwillingness to submit to or to commit the sexual act;
- circumstances where the complainant submits to or commits the sexual act by reason of having been induced (whether verbally or through conduct) by the perpetrator, or by some other person to the knowledge of the perpetrator, to believe that the perpetrator or the person with whom the sexual act is being committed, is some other person;
- circumstances where as a result of the fraudulent misrepresentation of some fact by, or any fraudulent conduct on the part of, the perpetrator, or by or on the part of some other person to the knowledge of the perpetrator, the complainant is unaware that a sexual act is being committed with him or her; and
- circumstances where the presence of more than one person is used to intimidate the complainant.

**Rape** under the Act:

The Act states under **Section 3 (1)**:

“Any person who intentionally under coercive circumstance –

- engages in a SEXUAL ACT with another person; or
- causes another person to engage in a sexual act with the perpetrator or with a third person,
- Commits the offence of rape.”

### Penalties of Rape

**Section 4** of the Act states:

In case of a first-time conviction –

- I. If the rape was not committed under circumstances such as intoxication by liquor or any drug or other substance which mentally incapacitates the complainant; or sleep, to such an extent that the complainant is rendered incapable of understanding the nature of the sexual act or is deprived of the opportunity to communicate unwillingness to submit to or to commit the sexual act;

**The individual would be liable for an imprisonment for not less than ten years.**

- II. Where the rape is committed under any of the coercive circumstances such as the application of physical force to the complainant or to a person other than the complainant; or threats (whether verbal or through conduct) of the application of physical force to the complainant or to a person other than the complainant; or circumstances where the complainant is unlawfully detained;

**The individual would be liable for an imprisonment for not less than fifteen years.**

- III. Where the complainant has suffered grievous bodily or mental harm as a result of the rape; the complainant is under the age of thirteen years or is by reason of age exceptionally vulnerable; the complainant is under the age of eighteen years and the perpetrator is the complainant’s parent, guardian or caretaker or is otherwise in a position of trust or authority over the complainant; the convicted person is infected with any serious sexually transmitted disease and at the time of the commission of the rape knows that he or she is so infected; the convicted person uses a firearm

or any other weapon for the purpose of or in connection with the commission of the rape;

**The individual is liable for a mandatory imprisonment for life.**

- IV. In the case of second or subsequent conviction where the rape was not committed under circumstances such as intoxication by liquor or any drug or other substance which mentally incapacitates the complainant; or sleep, to such an extent that the complainant is rendered incapable of understanding the nature of the sexual act or is deprived of the opportunity to communicate unwillingness to submit to or to commit the sexual act;

The individual would be liable for an imprisonment for not less than twenty years.

It must be noted that if there are justifications which the court believes should invoke a lesser sentence or an appropriate sentence, the court has the discretion to do so.

The Act notes the defilement of girl between the ages of sixteen and eighteen and states under **Section 5**:

.....  
*“A person who unlawfully has carnal knowledge of a girl between the ages of sixteen and eighteen commits an offence and is liable on conviction to imprisonment not exceeding seven years.”*  
.....

If, however the accused reasonably believed that the child was eighteen or above at the time of defilement, such can be used as a defense in court.

This section of the Act only refers to the girl child and it is a serious limitation of the Act that it does not include boys under 18 years of age. It is important to note that boys can also be victims of rape and under the age of 18 years, they are particularly vulnerable.

**Under Section 6 of the Act, it states that:**

It cannot be presumed that a boy under the age of fourteen is incapable of sexual intercourse. It however further states that if a boy under the age of fourteen is charged with the offence of a sexual nature, his criminal capacity would be determined in the same manner as any other criminal offence.

**Section 7 of the Act** abolishes the cautionary rule of evidence - meaning that no evidence of a complainant in judicial proceedings would be handled with special caution just because the accused is charged with a sexual offence.

**Section 11 of the Act** provides for special duties that prosecutors have in criminal proceedings of sexual offences cases. The Act provides:

In criminal proceedings at which an accused is charged with an offence of a sexual nature, the prosecutor shall consult with the Complainant in such proceedings in order-

- To ensure that all information relevant to the trial has been obtained from the complainant, including information relevant to the question whether the accused maybe released on bail and the imposition of any condition of bail; and
- To provide all such information to the complainant as will be necessary to lessen the impact of the trial on the complainant.

#### **Section 12 provides:**

In criminal proceedings at which an accused is charged with an investigation shall:

- Forthwith inform the prosecutor in such proceedings of any reason to believe that the complainant would be at risk if the accused is released on bail and of any other investigations involving the accused; and
- If bail has been granted to the accused, inform the prosecutor of any failure by the accused to comply with his or her conditions of bail as soon as he or she becomes aware of such.

#### **Under Section 13: A complainant of rape has the right:**

- To attend any proceedings where the question to consider is about granting of bail of the accused and conditions if bail is to be granted.
- To request the prosecutor to give evidence with regards to the question in proceedings.

If an accused in custody on a charge of rape, the person in charge of the police station shall as soon as possible, inform the Complainant concerned of -

- The place, date and time of the first appearance of the accused in court; and
- The rights of the Complainant as previously stated

If an accused who is in custody on a charge of rape intends to apply to the court for bail and the complainant has not been informed, the accused or his or her legal representative shall request the person in charge of the police station to inform the complainant accordingly, where upon such person shall so inform the complainant.

The person in charge of the police station when informing the complainant must prepare an affidavit stating;

- Whether the complainant has been informed of the accused application for bail and if not, the reason why he or she wasn't informed;
- The manner in which the complainant was informed, if he or she was informed; and
- The date and time when the complainant was informed.

Such an affidavit when prepared would be handed over to the judge or judicial officer presiding to be formed as part of the records of proceedings.

If a complainant attends the bail hearing and the hearing is adjourned, the complainant shall be informed by the court of the date and time of the next hearing.

Upon the complainant absence in a proceeding of a bail application, the court can enquire about his or her knowledge of the proceedings.

The court can continue the matter in the absence of the complainant if it is satisfied that the complainant has knowledge of the proceeding or can request the presence of the complainant if it is not satisfied.

However, if the court deems it necessary for a proceeding to continue as a matter of justice, it would continue regardless of the absence of the complainant.

If the complainant is not present, the prosecutor must inform the complainant about the outcome of the proceedings i.e. if bail has been granted and under what conditions or if proceedings have been adjourned, the date and time of the next proceeding.

If an accused who is in custody on a charge of rape is released on bail, the court shall make further conditions of bail to ensure that the accused does not make contact with the complainant concerned as provided for in **Section 14**.

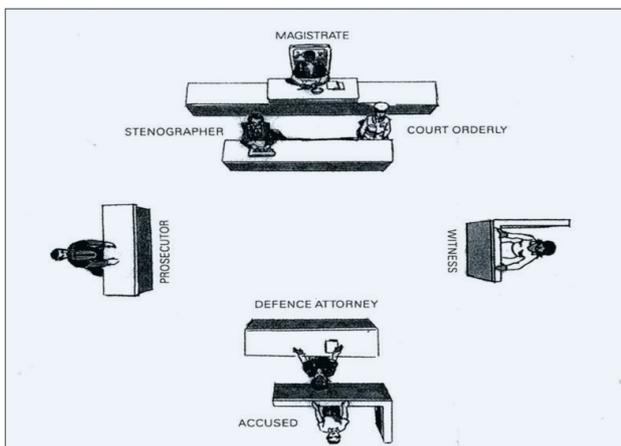
## 2.2. Sexual Offences: The Court System, Criminal Trial Process and Giving Expert Testimony

Difference between Criminal & Civil Cases

CRIMINAL LAW	CIVIL LAW
<b>State versus Accused</b>	<b>Plaintiff versus Defendant</b>
Initiated by survivor filing charges with police (no costs involved) <ul style="list-style-type: none"> <li>• Rape</li> <li>• Murder</li> <li>• Theft</li> </ul>	Initiated by plaintiff: must pay for own lawyer <ul style="list-style-type: none"> <li>• Divorce</li> <li>• Breach of contract</li> <li>• Damages arising from e.g. motor vehicle accident or rape</li> </ul>
State is represented by public prosecutor, accused may be represented by Private Lawyer on approval of AG	Both parties are usually represented by lawyers
Survivor of rape is a state witness, not party to the trial	Survivor is the plaintiff, and therefore a party to the trial
Burden of proof: 'Beyond reasonable doubt'	'Balance of probabilities'
Accused is found <b>guilty</b> (convicted)	Defendant held <b>liable</b>
If convicted: court can sentence to imprisonment	If held liable: court can order him to pay damages (including compensation for pain and suffering)

Roles of justice actors in the criminal justice system;

- Magistrate (or Judge in High Courts)
- Prosecutor: state employee, presents State's case
- Defense attorney/advocate: acts for the accused
- Witnesses: may be called by prosecution or defense
- Court orderlies: SAPS members, provide security
- Court stenographer: responsible for recording
- Interpreter: only if required



## 2.3. Providing Expert Testimony

When called to testify by the prosecution, the defense or the magistrate during trial or at the time of sentencing. (An expert is entitled to be in court during the testimony of the other side)

Who is an expert?

**Expertise:** defined as ability to assist the court or by reason of your special knowledge and skill you are better qualified than the court to draw inferences. Expertise is not necessarily based on formal qualifications, although at times that may be the case. The prosecutor or advocate calling you to testify will qualify you and thus establish your expertise. There are four aspects that the expert witness must state in his evidence:

Your qualifications that qualify you as an expert

- The facts and data you have established (Form J88)
- The conclusions and opinions you have reached (Form J88)
- The reasons for your conclusions and opinions (Form J88)

The witness must consult with the prosecutor before testifying, when called by the State. The defense is not allowed to consult with state witnesses without the permission of the prosecutor. Expert testimony must be accurate, objective and impartial.

Your role is not to get the accused convicted; it is to assist the court to make the right decision on the case. Thoroughly review the J88 and any notes you have before testifying.

### Practical Tips

- Always go to court the first time you are called
- Court session begin at 08:30; breaks occur at 11:00-11:15 and 13:00-14:00 and ends at 16:00. (The High Court starts at 10:00)
- If the magistrate is already in court, the session has begun and it is not appropriate to approach the prosecutor
- You may pass a note to an orderly, who can then pass it to the prosecutor
- If you are friendly with the prosecutor, you may be able to obtain his cell phone number, or he may obtain your cell number and he might call you when you are required

- Phone the prosecutor in morning to find out whether there is a possibility that you will testify

### Use of Memory Prompts

This is allowed but anything taken into the witness box must be made available to the defense, which will entitle the defense to cross-examine you on the document. Discuss this first with the prosecutor.

Do not take clinical notes into the witness box to refresh memory, unless you want them to be seen by the court and the defense.

Any handwritten notes etc. used in the witness box will be also bound by the same rule – never take anything into the witness box which you have not previously told the prosecutor about and gotten his agreement beforehand.

## 2.4. Domestic Violence and the Law

**Section 15** of the Domestic Violence Act of The Gambia defines Domestic Violence as: engaging in the following within the context of a previous or existing domestic relationship:

- An act under the Criminal Code Cap 10:01 which constitutes a threat or harm to a person under that Act.

Specific acts, threats to commit, or acts that results in:

- Physical abuse, namely physical assault or use of physical force against another person including the forcible confinement or detention of another person and the deprivation of another person to access adequate food, water, clothing, shelter, rest, or subjecting another person to torture or other cruel, inhuman or degrading treatment or punishment;
- Sexual abuse;
- Economic abuse; and
- Emotional, verbal or psychological abuse namely any conduct that makes another person feel constantly unhappy, miserable, humiliated, ridiculed, afraid, jittery or depressed or to feel inadequate or worthless.

To appropriately understanding the meaning of Domestic Violence, a few terms must be broken down.

### By virtue of S.16 of the Act:

A domestic relationship means a family relationship, a relationship akin to a family relationship or a relationship in a domestic situation that exists or has existed between a complainant and an offender and includes a relationship where the complainant –

Is or has been married to the offender:

- lives with the offender in a relationship akin to a marriage notwithstanding that they are not, or were not married to each other or could not or cannot be married to each other;
  - is engaged to the offender, courting the offender or in an actual or perceived romantic, intimate, or cordial relationship not necessarily including a sexual relationship with the offender;
  - and the offender are parents of a child, are expecting a child together or are foster parents to a child;
  - and the offender are family members related by consanguinity, affinity or adoption; or would be so related if they are married either customary or under any enactment or were able to be married or if they were living together as spouses although they are not married;
  - and the offender, share or shared the same residence or are co-tenants;
  - is a parent, an elderly blood relation or is an elderly person who is by law a relation of the offender;
  - is a house help in the household of the offender;
  - lives in or attends a public or private care institution and is under the care and control of the offender; or
  - is in relationship determined by the court to be domestic relationship.
- A court shall, in a determination under paragraph (j) of subsequent (1) have regard to –
    - the length of time the persons spend together;
    - the place where the time is ordinarily spent;
    - the manner in which that time is spent; and
    - the duration of the relationship

3. Without prejudice to subsection (1), a person is in a domestic relationship where the person;
  - is providing refuge to a complainant whom an offender seeks to attack; or
  - is acting as an agent of the offender or encouraging the offender;

Abuse under S.2 of the Act means, conduct that harms or is likely to cause harm to the safety, health, or wellbeing of the complainant.

Aggravated under the same provision refers to any act of domestic violence where:

- It has caused the victim to suffer wounding or grievous bodily harm

The court considers the incident or incidents to be so serious as to be aggravated, taking into consideration:

- Whether a weapon was used,
- Any failure to respond to warnings by the police, the court or any official body,
- Evidence of premeditation
- Whether the victim is particularly vulnerable and,
- Any other consideration the court considers appropriate

### Legal Provisions

#### Section 17: Prohibition of Domestic Violence

1. A person in a domestic relationship shall not engage in domestic violence.
2. A person in a domestic relationship who engages in domestic violence commits an offence and is liable on summary conviction to a fine not exceeding fifty thousand dalasi or to a term of imprisonment not exceeding two years or to both.
3. The Court may in addition to imposing a fine or a prison term, order the offender in a case of domestic violence to pay compensation to the victim as the Court may determine.
4. When a cause for complaint has arisen between persons in a domestic relationship and the persons do not cohabit, none of those persons shall enter into the residence of the other person without that other person's permission.

#### Section 18 & 19: Domestic Violence not justified by consent

The use of violence in the domestic setting is not justified on the basis of consent.

S.19 - Number of acts which would amount to Domestic Violence

1. A single act may amount to domestic violence
2. A number of acts that form a pattern of behavior may amount to domestic violence even though some of all of the acts viewed in isolation may appear minor or trivial.

#### Forms of Domestic Violence

Physical

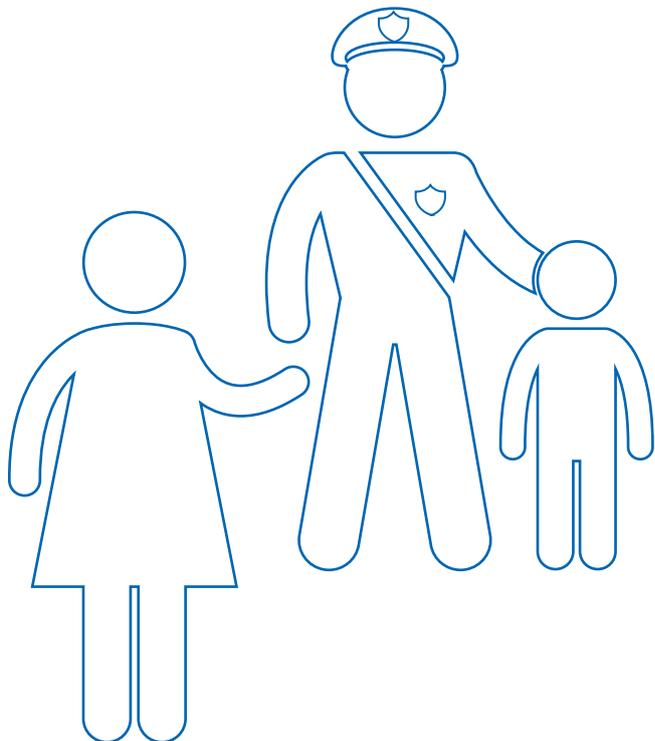
Emotional & Psychological

Verbal

Sexual violence

Public & private humiliation

Economic abuse



# MODULE 3

## INVESTIGATING SEXUAL AND GENDER BASED VIOLENCE

### 3.1. Methodologies for Conducting Investigations

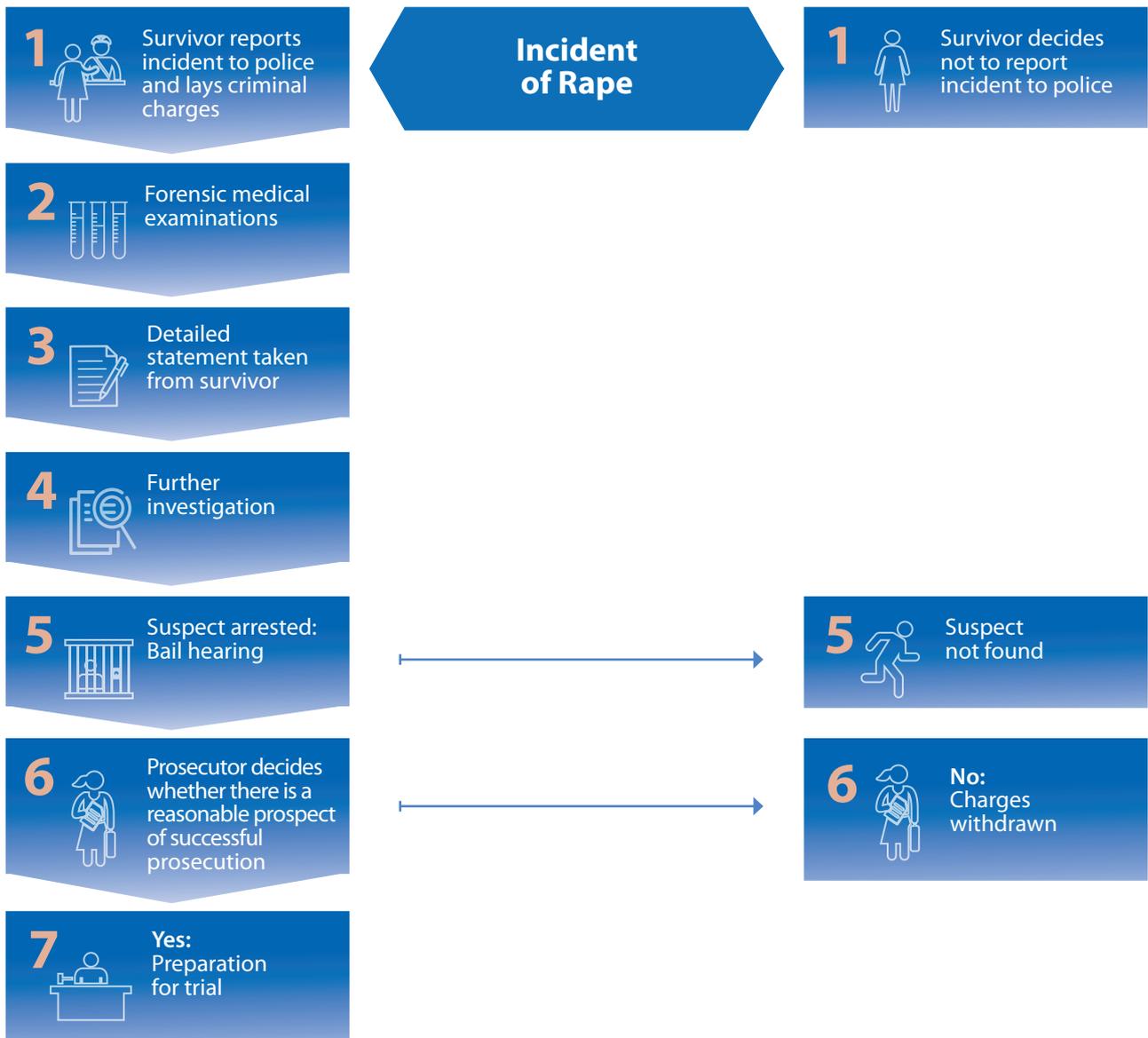
Under this module the investigator and prosecutors must understand the following;

- i. Elements of the offences; This refer to the facts that need to be proved in the course of investigations and prosecution. These elements comprise two things:
  - The **Prohibited Conduct** or Actus Reus (the act, modalities of committing the act, age of the victim, etc.).
  - The **Criminal Mind** or Mens Rea (the intent of the suspect).
- ii. Modes of liability; and
- iii. Procedures for lawfully collecting evidence

A “crime-based” investigation plan in SGBV cases is critical and must take into account:

- Immediate protections; safety and medical care for the victim;
- Taking of statement of victim, witnesses and the alleged perpetrator if apprehended
- Evidence gathering which could include searches and seizures
- Making an arrest
- Decision to charge
- Following up on the court proceeding

Below is an example of an investigation plan.



In the Gambia standardized methodologies are used to conduct investigation. The police will be the first responder to a victim of sexual violence. Most victims and community members are not familiar with the procedures of a criminal justice response to sexual violence. Therefore, it is the responsibility of the police to:

1. Patiently explain the legal process to the victim and what will happen next.
2. Provide contact information for the officer who will be handling the investigation.
3. Explain that disclosure is a process and encourage the victim that s/he may contact them with more information at any time.
4. Make sure to get the contact information, and location, of the victim and ask whether it is safe for someone to call or follow up with her.

It is important and necessary for the police to do the below;

- Gather evidence available as quickly as possible, notwithstanding lack of resources or logistics and forensic equipment.
- Respect the rights of all persons starting from the Victim/s witnesses and even the preparator/s as this could create a comfortable environment to ensure a smooth investigation.
- Endure that the victim does not experience further trauma and be able to make appropriate referrals where necessary.
- Resist interferences coming from the community and set aside own beliefs
- Keep confidentiality at all stages of the investigations

### Cultural Implications

In some societies it is a taboo to talk openly about sexual intercourse. In these circumstances, investigators should be careful to avoid direct references to sexual violence that may offend local customs.

Also, it is necessary to understand nuances and euphemisms used to describe body parts and sexual matters.

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*[In Uganda and Rwanda for instance, victims refer to sex by penetration as the perpetrator 'married me'; 'put his sex in me'; 'made me a woman'; 'spoiled me'; 'killed me with his thing,' or 'made me his wife']*

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In the Gambia one who manly hear a sexual violence being referred to as "he fell on me".

Cultural implications also may require investigators and prosecutors to seek "permission" from the head of the family before talking to female family members. Where these customs exist, investigators should talk to these authorities—be they fathers, brothers, village elders, or clan leaders— before approaching the victim or witness. Failure to seek approval in advance may result in the family head precluding the victim or witness from cooperating with investigators/prosecutors or put unnecessary strain on the witness.

### I. Needs of the Victims

Victims in sexual violence cases are often subjected to public scrutiny of their sexual past, shamed with the stigma of being 'dishonored' and even shun by their own families and communities. In many countries in the world, including The Gambia being a victim of rape or other sexually violent crimes carry severe social stigma. The physical and psychological injuries suffered by victims are aggravated by being ostracized and the resulting sense of isolation. Many women who had been raped or who suffered sexual violence generally did not reveal their experiences publicly, fearing that they would be rejected by their family and wider community, and be unable to reintegrate or marry.

HIV/AIDS is another source of social stigma. Because of the nature of the crimes, victims may be presumed to be HIV positive or suffering from other sexually transmitted diseases. In some cases, the stigma may extend to the children of sexual violence victims. The perpetuation of these stigmas may result in further traumatization and rejection for victims and their families. HIV testing and treatment must, therefore, be conducted with great discretion. Protecting the identities of victims and witnesses from disclosure helps reduce the risk of their being re-traumatized or ostracized, which may result from cooperating with investigations and presenting evidence in court.

In addition, resources must be in place, either internally or through referral procedures, for victims and witnesses to receive access to professional psychological and medical treatment and counseling services. Counseling services should be made easily (and confidentially) accessible to victims of sexual violence. As a matter of course, victims should be offered the opportunity to meet with a qualified counselor before, during, and after testimony

## II. Evidence of Sexual Violence Crimes Should be Collected from a Broad Array of Sources, Not just Victims

Factors to consider:

- Who are the possible witnesses and what kind of evidence can you solicit from them? (Note that observers or other eyewitnesses may have powerful testimony that can be used in court).
- Make an analysis of the legal elements and modes of liability applicable in the relevant jurisdiction (to ensure that critical information is not overlooked).
- Clarify the crimes being pursued and the types of evidence required to support possible charges.
- What investigative strategy/approach will you adopt to ensure that the different evidentiary standards are met?
- Develop interview checklist of areas to cover with witnesses to help ensure that evidence of sexual violence is properly gathered and documented.

## III. Initial Approach to Witnesses

An investigator's initial approach to a witness can greatly affect the witness's security and willingness to cooperate. To develop leads, investigators can ask witnesses to identify other persons who might be able to provide useful information or evidence. However, only investigators or a member of their team should contact the persons identified by existing witnesses. Otherwise evidence may be tainted if the first witness shares what he or she told the investigator with the second witness. Using witnesses to liaise with other witnesses on behalf of the investigator/prosecutor risks allegations of collusion. Also, to protect confidentiality, new witnesses should not be informed of how they came to the investigator's attention. The composition of an investigative team can help facilitate witness contact. Witnesses are generally

more comfortable talking to people of the same gender, age, and ethnic origin. Diverse investigative teams, composed of male and female members of different ages and ethnic origins and backgrounds, provide the greatest flexibility in reaching out to and getting cooperation from victims and witnesses. Wherever possible, the victim's preference for the gender of their investigators and interviewers should be taken into account when assigning staff.

Investigators/prosecutors also must understand the cultural implications of sexual violence in the particular society where it occurred. For instance, in some societies where victims of rape or sexual violence are viewed as having brought shame to their family or clan, the family members or the victims themselves may be unwilling to discuss any occurrences of sexual violence. Investigators need to be aware of these cultural sensitivities when making contact with witnesses and providing for their security.

At the same time, investigators must take into account that witnesses may not have disclosed to family members that they were victims of sexual violence. When speaking to family heads, investigators must be careful not to violate the victim's privacy by unwittingly disclosing confidential information about the nature of the crimes they are investigating. This approach is particularly important because any inadvertent disclosure could endanger the victim.

## IV. Selecting Interview Location

The location where an interview will take place is an important consideration. Interviews must be carried out in a secure and quiet environment that will help witnesses maintain their concentration, preserve their confidentiality, and ensure their safety.

A safe, secure, and sufficiently private place of interview will ensure that the witnesses are comfortable, can speak openly without fear of being overheard by third parties. Public places, like police stations, local administrative or government offices, or the witness's place of employment should generally be avoided, unless arrangements can be made to afford sufficient privacy.

You must also make considerations for the witness's family and work schedule. Where a witness has a small child who cannot be left at home, the interview should take place in a child-friendly location with a separate room where the child can play. A separate

room helps ensure that the child does not hear any distressing details recounted by the victim. To keep both the victim and child at ease, the investigator could arrange for the child to have a toy or drawing book to play with while the interview is proceeding.

## V. Conducting Interviews

When conducting interviews and taking statements, investigators must balance two competing interests: the need to acquire an accurate account while guarding against further traumatization of the victim.

Investigators/prosecutors must be prepared to stop an interview if it becomes too painful or traumatic for the victim to continue. Whenever possible, victims should never be left worse off as a result of the interview. If that seems likely to happen, then the investigative process with that victim should come to a close, and the investigator must try to secure the same evidence through other sources.

Evidence of SGBV can be collected from a broad array of sources, not just from victims. The guiding principle in conducting investigations of these crimes must be to avoid, to the maximum extent possible, re-traumatization of victims. It might be inevitable when victims recount their ordeal. Investigators, however, must avoid putting undue pressure or strain on victims of sexual violence—especially when victims are unable or unwilling to recount their experience.

When interviewing a witness, investigators must refrain from making any assumptions. For instance, investigators should not assume that, because a witness is young, old, disabled, or male, the witness has not experienced sexual violence. At the same time, it is important to remember that not every witness has experienced sexual violence but may nevertheless have information relevant to other crimes. Investigators should provide an open environment where every witness can narrate their own individual experience.

If note-taking or audio/visual recording is required, the investigator should explain why the interview is being recorded. Investigators should also explain that any statement obtained from the witness may need to be disclosed to the accused and put before the court if the accused is charged/indicted and the case proceeds to trial. Investigators should be aware and make witnesses aware that any notes they take reflecting questions actually put to the witnesses

and their response may need to be disclosed to the defense prior to trial.

Similarly, the investigator should acknowledge that the subject matter of the interview might be uncomfortable, embarrassing, painful, or otherwise difficult for the witness. The investigator should invite the witness to ask for a break whenever necessary.

The investigator also should encourage the witness to seek clarification where questions are difficult to understand or the witness is confused by what is being asked. Investigators should remind victims and witnesses that it is common for witnesses to not recall every particular detail of an event. What matters is that the witness be completely truthful throughout the interview.

From the outset of the case, victims and witnesses should be informed of their role in the judicial process; the purpose of examination in chief and cross-examination; the scope, timing, and progress of the proceedings; and the outcome of the cases. Accordingly, before any statement is taken, investigators should explain the trial process and its requirements to the witness. Investigators should be upfront with the witness by making clear that, if the case proceeds to trial, the prosecution will have to release the witness's name at some point to the court and defense as part of the judicial process. Investigators should also warn witnesses that they might have to face the accused in court.

These warnings are important because, as already seen, some rape or sexual violence victims may not have shared their ordeal with family members, including spouses. They also may not understand that an accused ordinarily has a right to see witnesses at trial or that identification of the accused is often done in court. Recognizing the likelihood that others may learn of their ordeal and that they will be required to confront the accused, might influence their decision as to whether they want to testify.

Throughout the interview process and in any interactions with the victim, investigators must demonstrate sensitivity to the psychological trauma the victim has experienced. Investigators must respond appropriately to victims when they become distressed in the course of the interview or investigation. Prior training on how to identify the symptoms of trauma or stress would assist investigators in knowing how to respond appropriately when the situation arises.

Monitor the witness's verbal and non-verbal signals. A witness's heightened tone of voice, facial expressions, nervous hand gestures, or slouching posture may signal anxiety or emotional fatigue. When observed, determine whether to take a short break is necessary, or if the interview should be postponed or if there is need to discontinue the interview altogether. The guiding factor in making this decision must be the witness's well-being.

Be alert to your own verbal and non-verbal communication when conducting interviews. Language can either have a negative or positive impact on the interaction between victims or witnesses and other people. To the extent possible, investigators should use simple language and phrases to ensure that information is communicated accurately and the victim is made to feel comfortable. The investigator's choice of words should inspire trust and confidence in witnesses so they are assured that the investigator is competent and knowledgeable.

In addition to language, investigators should be aware of the messages their non-verbal communication may send to witnesses. In some places, wearing a short dress might come across as indecent or unprofessional and may undermine the investigator's effectiveness. Similarly, investigators who cross their legs, lean on chairs, do not pay attention, or fold their arms while talking to a witness could be perceived as being either arrogant or disinterested in what the witness has to say. Investigators should be sensitive to these unintended signals when conducting interviews.

Investigators also should bear in mind that highly traumatic experiences, such as rape and other forms of sexual violence, will not always be recollected in detail by the witness during one meeting. Several meetings with the witnesses, as well as rephrasing the questions in different ways, may be required to obtain an accurate and full account. During each meeting, investigators should listen carefully and patiently, avoid interruption, make use of open-ended questions so that victims can clarify their narrations in their own words, and then ask clarifying questions where necessary to ensure full and accurate testimony.

Investigators must be careful not to lose sight of the individual victim or importance of the individual's circumstances. Among other things, this means that investigators should be patient and constantly alert

to the witness's security, psychological, and medical concerns, and be prepared to respond appropriately to those needs.

When a statement is taken from a witness, it should be recorded in writing and read back to the witness who should be free to modify the statement to ensure its accuracy and completeness. It should be carefully explained to witnesses before they sign the statement that they need to ensure that all the details contained within it are true and correct. Investigators should explain that any omissions or inconsistencies in the statement could be used to discredit the witness during trial. Once the witness agrees with the content of the statement, the witness should sign and date it. All the other persons present at the interview, including the interpreter, if any, should also sign the statement.

Lastly, witnesses should be encouraged to contact the investigator if they subsequently recall further details or wish to make amendments to their statement at a later date.

Following any interview with a victim of sexual violence, a trained counselor should meet with the witness to check on their physical and emotional well-being. Interviews require victims to talk about traumas that they may not have talked about openly before. It is important for witnesses to be de-briefed following an interview so their needs can be properly addressed.

## VI. Identification of Perpetrator(s)

Factors to consider:

- Can the victim or other witnesses present at the scene identify the principal perpetrator?
- Do they have any prior knowledge of the perpetrator?
- Under what circumstances did they make their identification?
- How much time did they take seeing/observing the perpetrator?
- What act, did they actually witness happening?
- Did the alleged perpetrator use force or threatened the use of force to commit the crime?
- What mental or physical harm or suffering was done to the victim?
- If acts do not amount to rape, what other forms of sexual violence should be considered?

## VII. Factors Relevant to Mode of Liability

- Find out if the accused is the only/ principal perpetrator;
- Consider whether other persons were present before, during, or after the crime and their proximity to the crime;
- Find out if the anyone assisted the principal perpetrator in committing the underlying crime before, during, or after its commission, including through words or gestures of encouragement or other forms of support;
- Find out if the accused coordinated his actions with others.

### 3.2. Interview Dos and Don'ts

#### I. Do not Judge the Victim

Sex crimes revolve around the aspect of consent and/or the lack of consent and/or inability to give consent and only that. It is important that investigators, prosecutors and courts refrain from forming personal judgments based on personal biases or prejudices rather than the evidence collected and presented. Investigators and prosecutors must however be aware of the typical defenses based on gender stereotypes that often arise in SGBV cases, some of which actually violate the victim's right to dignity and non-discrimination. Some factors such as poverty, class discrimination, character and past history might also be used against victims.

#### II. Listen to the Victim

The importance of listening during interview cannot be over emphasized. Listening is a key part of communication skills, as it facilitates understanding on the personal circumstances of the victim and maybe their personality. Effective listening will help the investigator or prosecutor pick up certain nuances like trauma, fear, intimidation, inconsistencies and gaps. If the victim feels that the investigator or prosecutor is not listening, they may get frustrated and close up.

The following is what to do when a victim is speaking;

#### I. Create an enabling atmosphere:

Give adequate space and or time for him/her to speak;

- Do not constantly interrupt with questions or interrupt to share your own experiences (It's not about you!);
- Do not answer your calls or speak to other people, etc. When you do that, it becomes difficult for the victim to say what he or she wants to say;
- Dedicate one on one time with the victim in a closed session interview;
- Use open ended questions to allow the victim to speak for a while and then follow up with short, probing or clarifying questions (however, be aware of personality differences, some people will not narrate but only answer questions asked);
- If the victim pauses due to failure to memory failure, fatigue, trauma etc. do not press on, be silent to allow the victim to compose themselves and their thoughts or even discontinue interview; and
- Ensure that the victim appreciates your language – one may realize much later in the interview that the silence she or he attributed to personality, trauma, fatigue etc. was actually due to lack of understanding. Avoid using technical terms, legal jargons, complicated English words, idioms, etc. that might be a barrier. Make adjustments to ensure that the victim understands your language.

#### II. Be flexible:

- It is important to know what issues need to be covered but an interview should not be unnecessarily formal – most people may not take too well to formality;
- Outline the objectives of the interview, confidentiality and protection guarantees and then allow the victim to answer at his or her pace and way;
- Follow his or her lead and explore what he or she is saying as you would in any conversation. If there are things that are not clear, follow them up with questions; and
- It may be necessary to use hypothetical questions or build hypothetical scenarios to probe or project difficult or sensitive issues around circumstances of the case.

### III. Show interest:

- Sometimes, it is important to listen without reacting or showing emotions even when facts are shocking or painful. However, it is important to project through your facial and body language that you are attentive and interested in what the victim is saying;
- It is a challenge to respond to the pain and anguish by validating it and yet to refrain from guiding the victim about what he or she should say but you must find a balance; and
- One of the deterrents to effective listening is failure to maintain eye contact with the victim because you are recording the events, so a balance between writing and eye contact is required.

### 3.3. Before Trial/Court

The paramount consideration must be ensuring that the needs of victims are at the center of everything done i.e. 'victim centered' approach. Where practical, this should include victim participation during sentencing.

At this stage, investigators 'handover' witnesses to the prosecutor. The prosecutor must then prepare the witnesses to give testimony in court.

Ideally, the DPP would have coordinated with the investigators on pertinent issues regarding the witnesses even before the handover takes place. This coordinated approach ensures that there is no gap in coverage during the critical time when the focus must be on presenting the witness's evidence in a coherent and logical manner to the court.

It helps if police investigators prepared a formal handover file containing all of the pertinent information about witnesses, physical and documentary evidence that was collected at the investigative stage.

At a minimum, the file should include the following information:

- A report from counselors who spoke to the witness after the interview with the investigator. This report will guide the trial attorney on how to approach the witness;
- The witness's complete contact details including all the names (nicknames and maiden names), phone number, place of resident, contacts and addresses of family members where practical etc.;

- Details about how the witness was identified and any protective measures put in place;
- A medical needs assessment form identifying the witness's state of health and related needs; and
- The witness's language preference, and any known preference relating to the gender of the interviewer or interpreter.

### Meeting with the Prosecutor

Counsel assigned to prosecute the case may not have previously met the witness. In these situations, particular attention must be paid so the witness will be put at ease before presenting their evidence in court.

- Prosecutor must introduce themselves to the witness;
- Inquire about the witness's needs and arranging, where possible, for those needs to be addressed; and
- It often helps witnesses feel at ease to ask after their well-being and comfort. Ensure that the witness is comfortable; ready to talk, might need water etc. If basic courtesies of this sort are bypassed, the witness may feel that the Trial Attorney do not care about the witness as a person, but only about the case.

### Preparing Witnesses for Court

- A meeting aimed at familiarizing witnesses with trial proceedings must be held. During this meeting, key aspects of witness' evidence should also be reviewed;
- Even where the attorney has met the witness before, for instance at the investigative stage, she/he must nonetheless ensure that all witnesses are adequately prepared to present their evidence in court;
- Flexibility is critical when preparing witnesses for trial, particularly victims of sexual violence. Each victim is unique and has different needs, aspirations, and fears depending on their personal circumstances. These factors should be kept in mind when preparing witnesses for trial; and
- The role of the Prosecutor is to ensure that evidence is presented in a coherent manner. This will require building rapport with the witness. This is very important because crimes of SGBV by their very nature cause victims to mistrust people.

The following may be useful to help build rapport:

- Demonstrate care and concern in a genuine way. The witness should be thanked for coming to the meeting; find out if they are comfortable, if they are ready to proceed with the meeting etc. Depending on their responses, appropriate measures and steps should be taken to make the environment more comfortable so the meeting can be productive;
- Use 'ice-breakers' before delving into the details of the witness's anticipated testimony. Touch on general topics – weather, trade, comments on village etc;
- Conduct this session in secure and comfortable environment. Provide some refreshment if possible – tea, coffee, water;
- Always interview a witness in the presence of a colleague;
- At this stage allow the witness an uninterrupted account. Use open-ended questions to draw out necessary clarifications or amplify particular points;
- Be empathetic to the witness's account and frame of mind. There may be a need during the interview for trial attorney to recognize the witness's distress or unease. You should acknowledge this – ask if the witness needs a break etc.; and
- Explain the trial process, including how evidence will be presented. Although witnesses should already have been given some of this information during the investigation phase, it is important that the trial attorney also prepares witnesses by helping them understand the trial process and what will be expected of them when they appear in court. This knowledge helps provide witnesses, particularly those who have been victimized, with some measure of control over the process.

Procedural matters to explain to witnesses before testimony:

- Where the courtroom is, where they will be seated in the courtroom when they testify, and approximately how long they will be on the witness stand;
- Who else will be in the courtroom when they testify (judges, prosecutors, defense attorneys, the accused, interpreters etc.) and the role those different individuals play in the trial process;
- Emphasize that English is the language of the court and the proceedings will take place in English.

Therefore, the witnesses should listen carefully in the language they understand and, once they understand the question, respond slowly with pauses so that interpreters can translate their response into English;

- Emphasize that before giving testimony, they will be asked to make a solemn declaration to tell the truth, and that not telling the truth could result in their being prosecuted for false testimony; and
- Take the witnesses through who will be asking them questions and in what order (examination-in-chief by the prosecutor, cross-examination by the defense counsel, re-examination by the prosecutor and that the judge may ask additional questions.

### Proofing the Witness

Proofing is a process whereby a prosecutor reviews the anticipated testimony and likely lines of cross examination with the witness before testimony. Proofing is not coaching where a trial attorney tells a witness what answer to give to a question.

**Where proofing is permitted, it should be part of any trial preparation:**

- Review prior statements and any other document that will be used during examination of the witness. Note: It is not uncommon for a witness to recall new evidence or clarify information in a previous statement during the proofing. When this occurs, prepare a supplement or amended statement and disclose it to the Defense as soon as possible and before trial.
- If the trial attorney intends to use exhibits, such as photographs, maps, or other documents, during a witness's testimony, he/she should show these exhibits to the witness beforehand so the witness can review them and understand how they will be used during the testimony. Adequate pre-trial preparation should identify all potential exhibits that may be used during the examination-in chief and cross-examination so witnesses are not taken unfairly by surprise in the courtroom.
- A key part of proofing is preparing the witness to respond to questions. Witnesses should be told that they must listen carefully before answering questions. They must understand that their evidence can only be presented in response to questions posed by office of the DPP, Defense Counsel or if clarification is required, the judges.

*Note: When testifying, witnesses cannot simply present their account of the events unimpeded by counsel or the judges. For example, witnesses may want to jump from introductory questions to describing details of the case. The Prosecutor must explain that it is necessary for the evidence to be presented in a logical way and, thus, witnesses must wait for questions to be asked. If witnesses jump ahead, their testimony may be cut off and their account might be difficult for the judges to follow.*

- Explain to the witnesses that objections may be lodged by opposing counsel and that their testimony will be interrupted while the judges consider the objection. Other interruptions in the proceedings, such as, side-bar conferences between counsel and the judges, or consultations with interpreters are also likely to occur. Let them know that such interruptions are part of the normal trial process; they are not intended to be disrespectful or discourteous to the witnesses.
- Some of the questions that will be asked in sexual violence cases may be particularly disturbing. They may require detailed descriptions of body parts and sexual acts. Witnesses must be prepared for this in advance. They should not feel ashamed, embarrassed, or outraged that they may be asked to speak openly about these matters.
- In some cultures, witnesses may prefer to speak about sensitive matters indirectly by using euphemisms. It is important for witnesses to understand that, if they use these euphemisms, they may be pressed to explain their meaning in more direct terms. Witnesses should be encouraged to speak in a straightforward manner, whenever possible, about their experience and to avoid ambiguous language that may be misunderstood.
- This need for clarity of language is particularly important where the elements of the crime require specificity. For instance, in some jurisdictions, rape requires proof that there has been penetration of the vagina. Proof of these elements often requires graphic testimony that many witnesses, particularly highly traumatized victims, must be prepared to present in a straightforward manner if their testimony is to be correctly understood.
- Questions from defense counsel during cross-examination may be particularly difficult for victims of sexual violence. These questions may be seen as hostile or inappropriate. Witnesses should understand that defense counsel is required to ask these questions to test the strength of the evidence against the accused, including matters of credibility.
- Explain to witnesses that under rules of procedure, materials to be used at trial must be disclosed to defense. This may include prior recorded statements. A common defense strategy is to point out inconsistencies between witness's testimony in court and prior statements. Witnesses need to understand that this line of questioning is generally accepted because it could be relevant to demonstrating that the witness's recollection may not be entirely accurate or reliable. Advise witnesses not to be argumentative or reluctant to answer defense counsel's questions. If necessary, the prosecutor will clarify any remaining uncertainty about the witness's testimony or prior statements during re-examination.
- Explain to witnesses that if questions from Defense counsel cross into objectionable areas or become abusive, witnesses should know that the prosecutor will lodge an appropriate objection. They will only be required to respond if the judges overrule the objection and direct the witness to answer.
- Remind the witnesses that they likely will have to face the accused and may be asked to identify the accused in open court. For many witnesses this may be the first time they have seen the accused since the incident. If the witness is not forewarned, this could prove deeply unsettling.
- Consequences of cooperation with the judicial process such as being ostracized or stigmatized by family and community members should be discussed with witnesses so they can make an informed decision before agreeing to testify. No prosecutor should opt for expediency in securing witnesses' testimony by not fully informing them of possible consequences of appearing in court. It is more important that witnesses fully understand the risks and choose to come forward once fully informed, instead of later finding themselves unwittingly vulnerable and exposed. To allow a witness to proceed to trial without knowing the full risks of testifying is a breach of trust that should not be tolerated.
- Give witnesses an opportunity to express their concerns, questions, and expectations about testifying. These concerns and expectations should be addressed from the outset in a clear and consistent manner that accurately conveys what can be done and what is not possible. For instance, if their expectation relates to medical attention: witnesses should see a qualified medical professional and receive explanation on what kind of medical attention they will get and to what extent.

## Tips to Give Witnesses When Giving Testimony

The witness should:

- Listen carefully to each question and if he/she does not understand, ask counsel to clarify. Do not interrupt the prosecutor, defense lawyer or magistrate or judge. Ensure that the lawyer has finished asking the question before answering.
- Always tell the truth. Do not guess. Say 'I don't know', 'I am not sure', 'I do not remember' etc.
- Do not volunteer information. Answer question asked and then stop.
- Do not argue with Counsel during examination. Do not argue with the Defense during cross-examination.
- Try not to get angry or lose your temper. Remain calm when being questioned, even if questions are being asked in a manner they think is aggressive or disrespectful.
- Speak clearly, loudly and slowly.
- Avoid exaggerations – 'always', 'never', 'too many times' etc. such is likely to lead to rigorous cross-examination.
- If you need a break, ask for it. Some people may be too timid to ask for bathroom breaks.

### 3.4. Presenting Testimony in Court

Once the DPP team decides that the witness's testimony will be required at trial and the witness has been fully prepared to testify, the prosecutor must make adequate preparations to arrange for the witness's appearance in court, presentation of evidence, and post-trial care. Each aspect will be discussed but first:

#### • Sensitivity and Respect for all parties in the judicial process

Throughout the process, the Prosecutor and judges should ensure that rape victims are treated with sensitivity, respect, and care when they come forward to testify. All parties to the judicial process, including judges, lawyers, and interpreters, should be trained on how to deal with victims of sexual violence and recognize signs of trauma. Judges and prosecutors must be ready to intervene when necessary to ensure that victims of sexual violence are not unfairly treated or harassed during their testimony.

Judges should be trained on the appropriate approach and decorum to adopt when questioning victims of sexual violence. This approach ensures that a delicate

balance is maintained in obtaining information to assist the court in reaching a fair decision, while also protecting the rights of the accused person, as well as the victim's dignity and privacy.

#### • Tolerance and respect

Judges should ensure that there is a tolerant and respectful environment in the courtroom. They should take an active role in monitoring proceedings to help minimize the potential trauma the victim may face while in the courtroom.

#### • Confidentiality is essential

To the extent possible, where the witness requests to testify in camera, that request should be considered bearing in mind the right of the accused to be tried in public. Protective measures imposed before trial should be strictly adhered to during and after trial. No names or identifying witness information should appear on any documents or reports filed by the parties or in any media reports relating to the proceedings.

#### • Victim-friendly court environment

There should be a victim-friendly court environment whereby the victims are guaranteed a safe and respectful atmosphere, without compromising the rights of the accused. [Discuss instances of accused trying to intimidate a witness by giving "warning" looks].

#### • Support Persons

Some jurisdictions also allow for a witness, particularly children, to have a support person present with them whilst giving evidence in court. This support is usually subject to the court's discretion upon application by the party calling the witness. In evaluating this type of request, the court should consider: the witness's age, the nature and circumstances of the alleged offence, whether the quality of the witness's evidence is likely to be diminished by reason of fear or distress, and the right of the accused to a fair trial. Depending on the applicable rules, a support person may be a witness's friend or family member, a professional counselor, or a person from a witness support group. Strict rules usually govern their involvement. For example, a support person cannot be a witness in the case; discuss the evidence with the witness before or during the court proceedings; communicate through word or body language with the witness whilst giving evidence; or otherwise participate in the proceedings unless asked a question by the court.

- **At the conclusion of testimony**

At the conclusion of their testimony, judges should thank witnesses for giving evidence. This basic courtesy provides official recognition of the witnesses' contribution to the justice system, and suggests no bias or partiality.

Where possible, after testifying, the DPP team should arrange a debriefing session between the witness and a qualified counselor. These sessions help settle the witness and reduce anxiety about what transpired in the courtroom and may provide some measure of closure.

- **Examination without re-traumatization**

Prosecution and defense counsel should be trained in effective ways of conducting examination-in-chief and cross-examination to minimize re-traumatization of witnesses. To effectively handle witnesses of rape and sexual violence during trial, counsel should adopt the following general approaches:

- Resolve outstanding disclosure, scheduling, and other procedural issues before the witness appears so valuable courtroom time is not wasted on counsels' arguments and the witness is not inconvenienced;
- Allow the witness to settle into answering questions before going straight to the traumatic incident of rape or sexual violation;
- While leading the evidence, only adduce relevant evidence thereby minimizing the witness's stress and limiting the scope of cross examination to areas relevant to the charges;
- Monitor the witness closely by maintaining polite eye contact and remaining alert to the witness's needs, including, for instance, making available a glass of water or tissue; and
- If witnesses become too distressed to proceed seek the court's indulgence for a short break in proceedings to allow them to compose themselves.

The conduct and scope of cross-examination;

- While the Defense unquestionably has a right to cross-examine witnesses, care should be taken to ensure that the questioning of sexual violence victims is not unnecessarily repetitive or harassing.

The Prosecutor must be alert for improper or overly aggressive lines of cross-examination. Counsel should object, for instance, to any misstatements or attempts

to mislead the witness as to their prior testimony or statements. Matters that intrude too far on the witness's privacy (such as prior sexual history) or safety (such as matters that could tend to reveal the witness's identity) should be challenged.

- **Allowing Victims a Role in Sentencing**

While no sentence can erase the loss and pain inflicted by those who have been convicted, sentencing remains critically important to all victims, particularly victims of sexual violence. Sentencing delivers a sense of justice to survivors by providing official recognition that a grave violation of their rights was committed. This official recognition helps restore a sense of power and personal dignity to those who have been victimized. Further, a sentence that reflects the gravity of the crimes can promote reconciliation by enabling survivors to move forward with their lives. To promote the interests of justice and the rights of victims, courts should give due consideration to the impact of the offender's criminal conduct on victims and survivors.

The testimony of victims during the adjudication of guilt stage of trial, of course, is essential to the determination of truth. But this testimony is filtered through evidentiary rules and the adversarial process. Victims are generally restricted to only answering the questions put to them by prosecution, defense counsel and the judges. Other matters, including the victim's personal opinion about the accused's conduct and the impact of that conduct on the victim's life, are generally excluded as irrelevant or too prejudicial.

Once guilt has been adjudicated, the Chamber in determining what sentence should be imposed must assess all of the circumstances surrounding the convicted persons' criminal conduct, including how that conduct impacted or continues to impact any victims or survivors. Statements from victims and survivors, including those who testified at trial as well as others who have been affected, are highly relevant and beneficial at this stage of trial.

Most fundamentally, victim impact statements assist courts to accurately assess the gravity of the offender's criminal conduct. Crimes have real and tragic consequences for victims and their families. To humanize the victims of prosecuted SGBV cases victims and survivors should be heard at sentencing.

Allowing victims and survivors to be heard at sentencing also promotes the rehabilitation of the accused. It impresses on persons whose guilt

has been adjudicated the seriousness of their conduct and provides them with an opportunity for meaningful reflection and moral education. This type of self-reflection is critical to rehabilitation because it forces those who committed the crimes to confront the human costs of their behavior and appreciate the norms that ideally will govern their future conduct.

The converse is also true. Convicted persons who remain unmoved by the pain, suffering, and loss they have inflicted demonstrate to the sentencing Court that they are not strong candidates for rehabilitation. This lack of remorse is a consideration in sentencing.

Lastly, allowing victims to be heard at sentencing promotes the healing process and recovery, and helps restore their personal dignity and respect. Victimization often results in feelings of powerlessness, fear, anxiety, and loss of social status. The possibility that what victims say could influence the sentence that will be imposed shows that their words have force and that the injustices inflicted on them will be punished.

In contrast, when sentences are handed down without victims being heard, they become alienated and disenfranchised. As the former United Nations High Commissioner for Refugees asked, "Is it fair and realistic to expect the survivors to forgive and to cooperate if there is no justice?" Allowing victim participation in the sentencing stage of trial promotes a sense of justice for victims irrespective of the sentence ultimately imposed.

National courts in both common law and civil law systems have long recognized that victims can and should have a role in the sentencing phase of trials. In the United States, for example, consideration of victim impact statements during the sentencing phase of trial is commonplace, especially in capital offence cases. The Court of Appeal of England and Wales has recognized the importance of knowing the impact of the offence on the victim before proceeding to sentencing. A recent Ministry of Justice code of practice entitles victims to read aloud a personal statement detailing this impact, at sentencing, subject to the court's discretion. In civil law systems, the concept of *Partie Civile* ensures victim representation at every stage of the trial proceedings, including sentencing.

At the international level too, there has been a growing acceptance that victim participation at every stage of trial, including sentencing, is necessary to ensure fundamental justice. The Rome Statute of the International Criminal Court reflects this acceptance.

Read together, Articles 68(3) and 76(2) of the Rome Statute expressly allow victim participation at every phase of the trial, including at sentencing.

### 3.5. Pertinent Trial Procedure Issues

#### I. Rights of the Accused

- All parties to a case must also bear in mind the rights of accused persons. These are extensively provided for in international and national laws. Some of the salient points are outlined below:
- No person should be charged with a criminal offence unless at the time, the act constituted an offence. This is known as the principle of legality or doctrine of *nullum crimen sine lege*.<sup>25</sup>
- An accused is presumed to be innocent until proven guilty beyond a reasonable doubt.<sup>26</sup> The prosecution must be able to prove beyond a reasonable doubt that the defendant committed the offence. In case of a reasonable doubt as to the defendant's guilt, he or she is entitled to an acquittal.
- An accused has the right to defend himself or herself in court in person or through a legal representative. Where a person is charged with a capital offence, he or she has a right to legal aid.<sup>27</sup>
- An accused shall be given adequate time and facilities to prepare a defense.<sup>28</sup>
- An accused (and his or her spouse) may not be compelled to incriminate himself or his or her spouse respectively. Note, however, that the right against self-incrimination does not apply to physical attributes. The defendant must submit to examination of his physical features or conduct, such as handwriting samples or fingerprints.

#### II. Corroboration

- Statements made by the witness (i.e. First Report)
- Statements made by the accused
- Circumstantial evidence for example, the distressed condition of the victim
- Direct Evidence from other witnesses
- Forensic reports

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<sup>25</sup> Article 24(5) – Constitution of the Republic of The Gambia (1997)

<sup>26</sup> Article 24(3) (a).

<sup>27</sup> Article 24(3) (d).

<sup>28</sup> Article 24(3) (c).

- Confessions
- Conduct of the accused
- Physical/documentary evidence

### III. Duty of Disclosure

Trial by ambush goes against the presumption of innocence and should be avoided. The prosecution should disclose to the accused person all relevant information, documents or other evidence obtained during the investigation that might reasonably be expected to assist the case for the accused person. The disclosure by the prosecution shall include –

- A copy of the charge sheet;
- The list of witnesses proposed to be called at the trial by the prosecution;
- Copies of statements made to the police during investigations;
- Copies of documentary exhibits proposed to be tendered at the trial by the prosecution;
- A list of physical exhibits to be tendered in court during the trial;
- Where any expert witnesses are proposed to be called at the trial by the prosecution, copies of any reports by them that are relevant to the case.
- The duty of the prosecution to disclose is continuous and where new information is received after disclosure has been made under the above section, the information shall be disclosed to the accused personas as soon as practicable.
- Disclosure should not include the telephone numbers and addresses of the victims and witnesses.
- The diary of investigations should never be disclosed.

### Prayers/Relief Sought

When any accused person is convicted by the High Court of any offence and it appears from the evidence that some other person, whether or not he or she is the victim or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed, the court may, in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person such compensation as the court deems fair and reasonable.

According to the Sentencing Guidelines Practice; sentencing options available to courts include:

- Reparation – that involves both restitution (restoration of property to the owner) and compensation (making good of damage resulting from the crime).
- The imposition of sentences of which restitution and compensation are elements, is one way of intervening for the sake of the victim.
- Court shall consider reparations in the following circumstances:
  - Where there is damage or loss or destruction of property including money, as well as physical, psychological, physiological or other injury;
  - Where there is loss or injury resulting from the commission of the offence.
  - In doing all this, court must consider the means of the offender as well as the reparation appropriate for purposes of restitution and compensation.

It is therefore crucial that Prosecutors remember to request reparations for victims of SGBVC when prosecuting such cases.

### Chain of Custody of Evidence

To present evidence at trial, the prosecutor must show that the evidence is what the prosecutor claims it to be and is in the same condition as it was at the time of the crime. To do so, the prosecutor will have to establish who had access to the item from the moment the crime was committed to the time of trial. Police and prosecutors must document this “chain of custody” for each item.



## MODULE 4

# INVESTIGATING AND PROSECUTING CASES INVOLVING CHILDREN

“[C]hild-friendly justice” refers to justice systems which guarantee the respect and the effective implementation of all children’s rights at the highest attainable level, bearing in mind the principles and giving due consideration to the child’s level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.

**Child-friendly justice** shows resemblance to a **child-sensitive approach**, **defined** as “an approach that [balances] a **child's** right to protection and that takes into account a **child's** individual needs and views,” by the United Nations Guidelines on **Justice** in Matters Involving **Child** Victims and Witnesses of Crime.

Its aim is to make justice systems more focused on children’s rights, more sensitive to children’s interests, and more responsive to children’s participation in formal and informal decision making concerning them. It is directly linked to the legal status of children under international human rights law, the recognition of which emerged in the twentieth century and resulted in a paradigm shift codified by the CRC in 1989—that is, the recognition of the child as a rights holder rather than a mere object of care and special protection because of his particular vulnerability.

As discussed in the previous modules, there are a number of sensitivities and difficulties involved in prosecuting sexual offenses. Overcoming the difficulties can be very challenging and even more so in cases involving children. There are high chances that trauma from sexual violence will affect the ability of a child to be objective, confident and open to interactions with the offender and the offender’s lawyer and the whole judicial system. This is why the concept of child friendly justice is very important in these cases.

“Child-friendly justice” refers to justice systems which guarantee the respect and the effective implementation of all children’s rights. It is justice that is:

- Accessible;
- Age appropriate;

- Speedy;
- Diligent;
- Adapted to and focused on the needs and rights of the child;
- Respects the rights of the child including the right to due process;
- Respects the right to participate in and to understand the proceedings;
- Respects the right to privacy;
- Respects rights to family life of the child and
- Respects the integrity and dignity of the child.

UN Guidelines on Justice in matters involving Child Victims and Witnesses of Crime recognize that children are vulnerable and require special protection according to their age, level of maturity and individual special needs and takes note that girls are especially vulnerable and may face discrimination at all stages of the justice system.<sup>29</sup>

### 4.1 Child Friendly Justice is Underlined by the Following Fundamental Principles:

International legal instruments, in particular, the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, provides that in order to ensure justice for child victims and witnesses of crime, professionals and others responsible for the well-being of those children must respect the following cross-cutting principles:

#### I. Dignity

- Every child is a unique and valuable human being and as such his or her individual dignity, special needs, interests and privacy should be respected and protected;
- Children should be treated with care, sensitivity, fairness and respect throughout any procedure or case, with special attention for their personal situation, well-being and specific needs, and with full respect for their physical and psychological integrity;
- Children shall not be subjected to torture or inhuman or degrading treatment or punishment.

<sup>29</sup> (<http://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf>).

## II. Non-Discrimination

- Every child has the right to be treated fairly and equally, regardless of his or her or the parent's or legal guardian's race, ethnicity, color, gender, language, religion, political or other opinion, national, ethnic or social origin, property, disability and birth or other status.
- Children shall not be discriminated against on any grounds such as sex, gender, race, color or ethnic background, age, language, religion, political or other opinion, national or social origin, socio-economic background, status of their parent(s), belonging to a minority group, property, birth, or other status.
- Specific protection and assistance may need to be granted to more vulnerable children, such as migrants, refugees, children with disabilities, street children, from minority groups, and children in remand homes. Vulnerable children often end up being in conflict with the law and being more prone to recidivism. It is important for prosecutors not to write them off and to treat them in a manner that is not discriminatory as a result of their background.

## III. Best Interests of the Child

Every child has the right to have his or her best interests given primary consideration. This includes the right to protection and to a chance for harmonious development:

### • Protection

Every child has the right to life and survival and to be shielded from any form of hardship, abuse or neglect, including physical, psychological, mental and emotional abuse and neglect.

### • Harmonious development

Every child has the right to a chance for harmonious development and to a standard of living adequate for physical, mental, spiritual, moral and social growth. In the case of a child who has been traumatized, every step should be taken to enable the child to enjoy healthy development.

*Note: This must be balanced with safeguarding the rights of accused and convicted.*

## IV. Right to Participation

Subject to national procedural law, every child has a right to express his or her views, opinions and beliefs

freely, in his or her own words, and to contribute to decisions affecting his or her life, including those taken in any judicial processes and to have those views taken into consideration according to his or her abilities, age, intellectual maturity and evolving capacity.

The best interests of children shall be a primary consideration in all matters involving or affecting them, i.e. do the actions or decisions to be made safeguard the life and survival of a child and actively contribute to his or her development.

The following should be considered in assessing the best interests of the child:

- Have their views and opinions been given due weight?
- Have all their rights for instance to dignity, liberty and equal treatment, been respected at all times?
- Have the relevant authorities taken into account all interests at stake, including psychological and physical well-being and the legal, social and economic interests of the child?
- Have the children been treated as full bearers of rights and allowed to exercise those rights in a manner that takes into account their capacity to form their own views on a case?
- This implies that all processes of the criminal justice system, from arrest, to evidence taking before and during trial as well as plea bargaining and sentencing should involve participation of children through seeking their views on options, processes and consequences.
- Consideration should be taken of the child's age, so that every effort is made to preserve their childhood and development as well as survival needs. This is all the more important particularly if a decision is made to detain them, and all through the trial period.

## V. Rule of Law

The rule of law principle should apply fully to children as it does to adults;

- Elements of due process such as the principles of legality and proportionality, the presumption of innocence, the right to a fair trial, the right to legal advice, the right to access to courts and the right to appeal, should be guaranteed for children as they are for adults and should not be minimized or denied under the pretext of the child's best interests;
- In cases where there is a conflict or inconsistency between laws (i.e. the Penal Code Act, the Criminal

Procedure Code, the Trial on Indictment Act or any other law) the Children Act or Constitution should take precedence in accordance with the Interpretation Act and other generally recognized principles of statutory interpretation.

In Uganda, regarding children who appear in the High Court, section 104 (3) of the Children Act provides that: "In any proceedings before the High Court in which a child is involved, the High Court shall have due regard to the child's age and to the provisions of the law relating to the procedure of trials involving children." This provision mandates the High court to apply among other standards, section 16 of the Children Act and Rule 4 (2) of the Children (Family and Children Court) Rules (SI 59-2).

Rule 4 provides the general principles as follows:

- The general procedures relating to trials of criminal cases in a magistrate's court apply to the trial of a criminal case in the court with the necessary modifications; and
- As far as possible, the court shall be so arranged that the magistrate presiding sits at the same table with—(i) the child; (ii) the child's parent or guardian (iii) the child's legal representative if any; (iv) the complainant or the prosecutor, who shall not appear in uniform; and (v) any other person permitted by the court such as the probation and social welfare officer;
- Crucially, evidence shall not be given from the witness box; and in any particular case, special safety precautions may be taken the magistrate presiding may deem fit.

Other provisions that can be effectively used to protect witnesses in SGBVC cases are sections 150 & 151 of the Evidence Act of Uganda which provides that the court may forbid any question or inquiries which it regards as indecent or scandalous, although the questions or inquiries may have some bearing on the questions before the court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

## VI. Establishing a Child-Friendly Environment

Further, the court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in it; appears to the court needlessly offensive in form. Prosecutors and Defense Counsel alike should avoid titillating questions, character assassination of children and other behavior geared towards intimidating and stressing child witness and adult victims of SGBVC.

### The Trial Process Should be Fair and Equitable for Children to Obtain True Justice

- Cases involving children should be dealt with in non-intimidating and child-sensitive settings. Before proceedings begin, children should be familiarized with the layout of the court or other facilities and the roles and identities of the officials involved. As far as appropriate and possible, interviewing and waiting rooms should be arranged for children in a child-friendly environment.
- Where possible specialist courts (or court chambers) procedures and institutions should be established for children in contact with the law. This could extend to the establishment of specialized units within the police, the judiciary, the court system and the prosecutor's office.
- Court sessions involving children should be adapted to the child's pace and attention span: regular breaks should be planned and hearings should not last too long. To facilitate the participation of children to their full intellectual capacity and to support their emotional stability, disruption and distractions during court sessions should be kept to a minimum.
- Language appropriate to children's age and level of understanding should be used. When children are heard or interviewed in judicial matters, judges, magistrates and other professionals should interact with them with respect and sensitivity.
- Children should be allowed to be accompanied by their parents or, where appropriate, an adult of their choice, unless a reasoned decision has been made to the contrary in respect of that person, whose presence for example could be threatening, embarrassing or intimidating the child. (Advisable in cases where parents are witnesses, to have them testify first so they can sit in court during the child's testimony)

- Interview methods, such as video or audio-recording or pre-trial hearings in camera may be used and considered as admissible evidence.
- Child victims and witnesses should be treated in a caring and sensitive manner throughout the justice process, taking into account their personal situation and immediate needs, age, gender, disability and level of maturity and fully respecting their physical, mental and moral integrity.
- Every child should be treated as an individual with his or her individual needs, wishes and feelings.
- Interference in the child's private life should be limited to the minimum needed but at the same time, the high evidential standards should be maintained in order to ensure fair and equitable outcomes of the justice process.
- All interactions should be conducted in a child-sensitive manner in a suitable environment that takes care of the special needs of the child, according to his or her abilities, age, intellectual maturity and evolving capacity.
- Interactions should take place in a language that the child uses and understands.

### Restorative Justice in Cases of Children in Conflict with the Law

Regarding children in conflict with the law, the model of child justice is restorative. This means that the usual measures of arrest, detention and "sentencing" need to be re-assessed when dealing with children, to ensure that the ultimate goal is rehabilitation and re-integration into society rather than incarceration.

### 4.2 Evidence from Children

Under the Common Law tradition, child witnesses were regarded with suspicion. The apparent spiritual immaturity of a child, his/her ability to appreciate an oath taken before God eclipsed into all sorts of concern. Most children were precluded from testifying "because of their supposed inability to understand the significance of the oath" in a religious sense. It is not clear whether the early justification for finding children incompetent was the child's susceptibility to adult influence, the child's inability to distinguish truth from fantasy, or a combination of these two presumptions. For whatever reason, until late in the eighteenth century, English courts did not permit children under the age of fourteen to give testimony.<sup>30</sup>

The Reliability Risks in Children's Testimony are discussed in Lucy S. McGough's publication as follows:

Children's capacity for observation and memory, skills critical to competent testimony, has enjoyed a renaissance of social science interest. Overtime, seven reliability risks potentially inherent in children's eyewitness accounts have been touted. These are: lack of sensory capability; lack of attentiveness; perceptual deficits; inability to perform complex cognitive tasks; propensity toward fantasy, sometimes even a complete inability to differentiate real and imagined events; memory-fade; and susceptibility to suggestions, particularly those made by authority figures. Similarly, developmental studies confirm that children are attentive observers of their world. In fact, young children appear to "encode" or make a more detailed initial mental record than do adults. With age comes a tendency to attend only to the "core details" of action. Adults ignore apparently irrelevant, peripheral information. Because reality does not so neatly sort into relevant and irrelevant detail, a child may be the only witness capable of providing a fact critical to resolving a legal dispute.

The fourth reliability risk, children's inability to undertake cognitively complex tasks such as estimating speed or distance, is demonstrably real; young children have been shown to be unreliable when asked to make judgments involving relativity or comparison. Furthermore, recent data suggest that mastery of time and space assessments occurs significantly later than at ages seven or eight. Most trial court judges are intuitively aware of this cognitive limitation and would suppress any attempt to elicit such testimony from a child. Thus, this reliability risk does not pose any practical difficulty for the legal system and does not imperil the validity of children's descriptive testimony.

The empirical data on these four factors suggests that if counsel, judge, and jury were summoned to the side of a six year-old immediately following an event and then questioned her about what she had seen, heard, or smelled in categorical language she could understand, they should attribute great weight to her account. Indeed, they should prefer her account to that of a similarly situated adult unless the dispute

<sup>30</sup> [Lucy S. McGough, 'Asking the Right Questions: Reviving the Voir Dire for Child Witnesses', Georgia State University Law Review Volume 5 Issue 2 Spring 1989 - (1988)] available at [www.readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=2254](http://www.readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=2254).

involves anchovies or camshafts or other phenomena presumably beyond her ken. Unfortunately, there is usually no early examination of a child witness, and disputes that ripen into lawsuits rarely come to trial quickly. These facts of life force us to confront the most serious reliability risks—memory-fade, fantasizing, and suggestibility.

Other jurisdictions such as Canada, over the past two decades or so, there have been dramatic changes in the understanding and awareness of the nature and extent of child abuse, as well as large increases in the number of reported cases. Thus more advanced justice systems have evolved to respond both to this growing understanding and to increased research regarding the reliability of child witnesses. Judges and legislators have introduced many substantive, evidential and procedural reforms, which have resulted in many more successful prosecutions in cases in which children are witnesses.

The United Nations Guidelines on Justice involving child victims and witnesses of crime, state: Age should not be a barrier to a child's right to participate fully in the justice process. Every child should be treated as a capable witness, subject to examination, and his or her testimony should not be presumed invalid or untrustworthy by reason of the child's age alone as long as his or her age and maturity allow the giving of intelligible and credible testimony, with or without communication aids and other assistance. In order to avoid the child witness coming face to face with the accused, different jurisdictions have adopted creative measures. In Canada and the United Kingdom, for instance, children may testify behind a screen, through closed circuit television cameras from an area adjacent to the courtroom which relay the proceedings by live link to the courtroom, and replaying evidence earlier recorded as close to the time of the crime as possible. Aids such as dolls may also be used in the interview process. Some of these practices were successfully adopted during the Justice for Children Special Sessions in Gulu, Uganda.

### An Inquiry/Voir Dire

In most common law jurisdictions, before a child below the age of 14 years can testify, a judge or magistrate must be satisfied that:

- The child is possessed of sufficient intelligence to testify;
- Understands the duty of speaking the truth; and or
- the nature of the oath;
- If the child testifies not on oath, that evidence must be corroborated by other material evidence.

For this purpose the court should ask questions to test the child's general knowledge and perception and find out if he/she knows the difference between truth and lies and the need to tell the truth. If the child does not possess sufficient intelligence nor understands the duty to speak the truth, his or her evidence cannot be received in court.

### Good Practices Established During Special Sessions In Gulu, Uganda

Judges remove wigs and gowns; lawyers were informally dressed;

- Relatives were allowed to accompany children to court – first the children were asked if they wanted to be accompanied. Those who said yes were accompanied. Simple, affordable “refreshments” for children were provided for them;
- Probation officers (and Fit Persons) prepared children for trial – told them what to expect before, during and after trial; attended to their needs, answered their questions etc.
- Child cases were heard in chambers; proceedings were all conducted in chambers – must balance this with accused right to be tried in public;
- Child sensitive language was used by court and all parties including the use of inquiries as opposed to interrogations;
- The press was excluded from the proceedings.

### Suggested Questions for a Voir Dire

To assess competency, voir dire questions should cover a wide area yet indirectly produce important information on the subject of competency. For instance,

What is your name?

How are you feeling today?

What are the names of your mother and father?

Do you have any brothers and sisters?

Do they live at home?

How old are you?

When is your birthday?

How did you get here today?

Do you know what building you are in now?

What town are you in now?

Where do you live?

What school do you go to?

What class are you in?

Who is your teacher?

What are your favorite subjects?

In Uganda, the Justice for Children Project, supported by UNICEF, trained a group of women as 'Fit Persons', whose role during the sessions was to prepare children (in any capacity) for court appearance in the following ways:

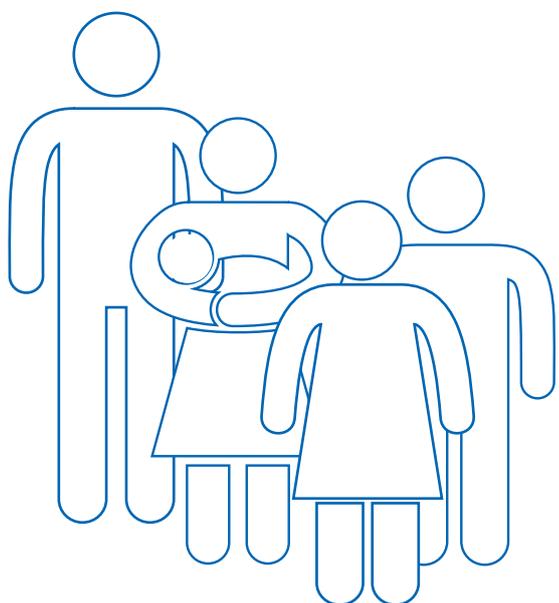
- Preparing them on what to expect in court and from the court environment;
- Telling them about the different court officials, their roles and how to address them;
- Explaining the plea taking process and its consequences;
- Outlining the typical progression of a case and what happens when a case is proved, what is the likely order to be given and its purpose;
- Making sure children understood their right to ask and be informed about any issue;
- Explaining who they should talk to in case of any need

Competency assessing questions should be not only simple and easy for the child to answer but should also help to relax the child through familiarity. General questions about the home and members of the family and Questions about schooling, including teachers, subjects studied, class standing, best friends at school, etc should be asked. If the child is very young, he/she should also be tested on ability to count, and read.

The following questions should be put to a child to assess if the child knows the duty of telling the truth and the difference between the truth and a falsehood:

- Do you know the difference between right and wrong?
- Do you know what a lie is?
- Is it right or wrong to tell a lie?
- What happens if you tell a lie?
- Do you know what it means to tell the truth?
- Do you promise to tell the truth today?

Questions about attendance at church, temples or Mosques; frequency of attendance, names of pastors, imams and other religious leaders, names of religious



books, basic knowledge of religious books etc can help to assess a child's understanding of 'oath taking'. Other questions may include the following:

- If you told the court a story, or something that wasn't true, what would happen to you?
- Is it a good thing to lie?
- What punishment do liars get?
- Who punishes liars?
- What would happen to you if you tell the truth?
- Do you know what a promise is?
- What happens if you break a promise?

### Understanding Victims' Challenges

It is important to keep in mind that the victim might be facing multiple challenges to his or her vulnerability as a child. Often, perpetrators target children and women who are already vulnerable in many respects.

### Difficulties Faced by Child Victims

- Difficulties in making a choice about being a witness
- Painful and traumatic memories
- Invasion of privacy particularly medical examinations of sexual organs
- Depression, shame, self-blame and low self esteem
- Anxiety about the future
- Being isolated
- Being unable to control their anger
- Being unable to express their needs
- Having negative thoughts and feelings about themselves and their future
- Trying to please everyone
- Living with HIV/AIDS and other sexually transmitted infections

### Role of Prosecutor/DPP/Investigators

- Assist the victim to understand the court proceedings;
- Address the safety concerns of the victims, their families and witnesses;

- Shield victims, their families and witnesses from any form of intimidation, harassment or inducement to withdraw or alter his or her complaint; avoid unreasonable or unnecessary delay in the disposition of cases. It is important for the prosecutor to be mindful of the fact that the victim is neither a party to the case nor the prosecutor's client, the state being the complainant. Therefore, the victim of any crime, including sexual assault and abuse, should be treated as the Republic's key witness but not as a party. This concept has two implications: The prosecutor's client is the Republic of the Gambia, and therefore the primary responsibility is not necessarily to secure a conviction, but to see that justice is done.

- Because the victim is not the complainant in the case, it is not his or her responsibility to push the case through each phase of the system. Once he or she has reported the case to law enforcement, the State has the responsibility to investigate the case, prosecute the offense where there is sufficient evidence, and ultimately punish the offender.

- The victim should not be asked to compensate the police for their time or resources to investigate the crime. Nor should the victim be asked to pay for an indictment. Such an approach would increase the marginalization of children as a vulnerable group as they or their parents/guardians will incur costs that they should not be incurring, which can act as a deterrent to access to justice.



# MODULE 5

## DRAFTING CHARGES AND INDICTMENTS

### 5.1. What is a Charge Sheet?

#### What is a charge and indictment?

An accused person is arraigned in court upon a charge sheet. A charge sheet is the document before the court which informs the court and the accused of the allegations leveled against the accused by the prosecution. In other words, the charge sheet contains the charge or charges against the accused person. A charge is therefore a statement of offence in a summary trial and in a trial on information (indictment). In a trial upon indictment, the charge sheet is known as the bill of indictment.

#### Who prepares charge sheet and bill of indictment?

The prosecutor prepares a charge sheet before the commencement of a trial. Police officers are the main prosecutors in the Magistrates' Courts. S. 28 of the Police Act provides:

"Any police officer may conduct in person any prosecution before any court of summary jurisdiction whether the complaint is laid in his name or not."

- S. 69(1) (a) of the Criminal Procedure Code (CPC) provides that criminal proceedings may be instituted by a police officer bringing a person arrested with or without a warrant before a magistrate upon a charge. S. 69(1) (b) further provides that criminal proceedings may be instituted by a police officer laying a charge against a person before a Magistrate and requesting the issue of a warrant or a summons.
- Legal practitioners employed at the Attorney General's Chambers, otherwise called Law Officers, State Counsel or Public Prosecutors can also prosecute in Magistrates' Courts. S. 85(1) (a) of the 1997 Constitution provides that the Director of Public Prosecutions shall have power in any case in which he or she considers it desirable to do so, and subject to the approval of the Attorney General, to initiate and undertake criminal proceedings against any person before any court for an offence committed against the law of the Gambia. S. 85 (3) further empowers the D.P.P to exercise these powers by him or her in person or by persons under his direction and control.
- S. 69 (1) (b) CPC also empowers a Public Prosecutor to institute criminal proceedings by laying a charge against a person before a Magistrate and requesting the issue of a summons or a warrant. By virtue of

these provisions therefore, law officers at the AG's department can draft and sign charge sheets in all courts including Magistrates' Courts.

- Under S. 175B of the CPC, the AG, or any person authorized by him may commence criminal proceedings in the High Court by filing with the Registrar of the High Court:
  - an information which shall be in the form of indictment and shall state in writing the charge against the accused; and
  - A summary of evidence which shall comprise a list of the witnesses whom the prosecution proposes to call at the trial and summary of the evidence to be given by each such witness.

S. 175D of the CPC further empowers the AG or any member of his professional staff designated by him to authenticate the information and summary of evidence by appending his signature thereto. Law officers are therefore usually the prosecutors before the High Court. Consequently, information in the High Court is drafted and signed by law officers.

### 5.2 Content of Charge Sheet and Indictment

Every charge sheet or information must contain the statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. (S. 110 of the CPC):

- A count of a charge or information shall commence with a statement of the offence charged, called the statement of the offence, s. 113(a) (i) CPC
- Note that the offence should be stated in the charge in its ordinary name instead of its technical name, without necessarily stating all the essential elements of the offence. See s. 113 (a) (ii)
- The statement of offence must also contain a reference of the section of the enactment creating the offence. Where an offence is defined in one section and the penalty for the offence is prescribed in another section, the charge sheet must state the penalty section as it is the offence creating section.
- The particulars of offence shall follow the statement of offence. The particulars of offence must give enough information about the accused person's act or omission that led to the commission of an offence.

- Note the provisions of s. 113 (a) of the CPC that “the particulars of offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary.” However, the proviso to this paragraph provides thus: “Where any rule of law or any act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require anymore particulars to be given than are required”
- Where a charge or information contains more than one count, the counts shall be numbered consecutively. See s. 113 (a) (IV) of the CPC. 4.
- The charge or information should contain the name of the accused person or accused persons. The accused person’s description and designation in a charge or information must be such as reasonably sufficient to identify him.
- Property or object in a charge or information shall be described in ordinary language and such as to indicate with reasonable clearness the property or object referred to.
- Where an accused person has a previous conviction which is intended to be included in the charge sheet, it is sufficient to merely state that the accused has been convicted of a previous offence at a certain time and date without stating the particulars of the offence. See s. 113 (h) of the CPC.

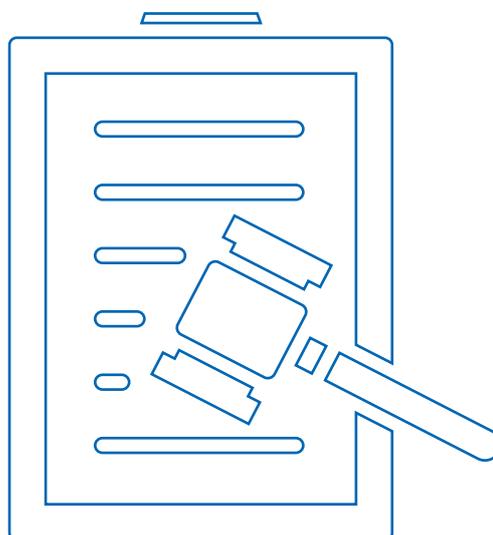
### 5.3 Forms of Charge and Indictment

#### The Magistrates’ Court – Charge Sheet

- **Heading:** A charge sheet is headed by the name of the court where the trial of the accused is to take place. If, for example, an accused is charged before the Kanifing Magistrates’ Court, the charge sheet would bear this heading.
- **The Charge Number:** The charge should bear a charge number, for example, CC/ 12/98.
- **The Title:** The charge sheet is titled as IGP v. the accused, for example, IGP v. Omar Barry. The accused person’s name and surname should be stated in full. See s. 113 (d) CPC. If he is known by an alias, that can also be listed in charge sheet. The accused person’s gender is usually indicated in the charge sheet in bracket as (F) or (M). The practice in the Gambia is that the accused person’s age and nationality are also spelled out. Stating the accused person’s age in

the charge sheet helps the court to know whether the accused is a child or an adult. The accused nationality is also important if the court wants to decide on whether to give the accused bail or not, especially if there is a likelihood that he might abscond. Note however that it is not mandatory to state an accused person’s age or gender in the charge sheet.

- **The Body:** This contains the charge or allegation made against the accused and the particulars of offence. The body is divided into two paragraphs. The first paragraph states the offence alleged against the accused. It also states the section of the enactment and the enactment allegedly contravened. The second paragraph is also known as the particulars of offence and it follows the statement of offence. Thus the name of the accused, the date when the offence was committed, the place of the alleged commission of the offence, how the alleged offence was committed and the name of the complainant are all indicated in this paragraph. If the accused is alleged to have committed more than one offence, each offence must be stated in a separate paragraph, and followed by the particulars of offence. The paragraphs are numbered consecutively and are called counts, for example, Count 1, 2, 3 etc.
- **The Signature:** The charge sheet is then signed by the prosecutor who drafted it. As we noted above the main prosecutors at the Magistrates’ Court are the Police or Public Prosecutor. Thus, the police officer who drafted the charge sheet signs it. When it is drafted by a law officer the law officer signs it.



# ANNEX

## Sample Indictment<sup>31</sup>

IN THE MAGISTRATES' COURT OF THE GAMBIA  
HOLDEN AT BRIKAMA

CRIMINAL CASE NO:

BETWEEN

THE STATE ..... COMPLAINANT

AND

TOMMY SMITH ..... ACCUSED PERSON

### CHARGE SHEET

COUNT

#### STATEMENT OF OFFENCE

Rape contrary to Section 3(1)a of the Sexual Offences Act 2013 Laws of The Gambia.

#### PARTICULARS OF OFFENCE

That you **TOMMY SMITH** on or about the 28th of January 2020 at Brikama Village in the Western Region of The Gambia within the jurisdiction of this Honorable Court Raped one **FATOUMATTA FATTY** a 10 (Ten) year old and thereby committed an offence

DATED THIS .....DAY OF FEBRUARY, 2020

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ASATRU COLE

STATE COUNSEL

FOR: DIRECTOR OF PUBLIC PROSECUTIONS

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<sup>31</sup> This is a sample indictment, not related to any ongoing or past case.

IN THE MAGISTRATES' COURT OF THE GAMBIA  
HOLDEN AT BRIKAMA

CRIMINAL CASE NO:

BETWEEN

THE STATE ..... COMPLAINANT

AND

TOMMY SMITH ..... ACCUSED PERSON

INFORMATION

The Honourable court is informed by the Honourable Attorney General on behalf of the state that the above mentioned person is charged as follows:

COUNT

STATEMENT OF OFFENCE

Rape contrary to Section 3(1)a of the Sexual Offences Act 2013 Laws of The Gambia 2009.

PARTICULARS OF OFFENCE

**That you TOMMY SMITH** on or about the 28th of January 2020 at Brikama Village in the Western Region of The Gambia within the jurisdiction of this Honorable Court Raped one **FATOUMATTA FATTY** a 10 (Ten) year old and thereby committed an offence

DATED THIS .....DAY OF FEBRUARY, 2020

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ASATRU COLE

STATE COUNSEL

FOR: DIRECTOR OF PUBLIC PROSECUTIONS

### **LIST OF WITNESSES**

1. FATOUMATTA FATTY
2. RICHARD FATTY
3. SARATA JATTA
4. HAWA JAGNE
5. DR OUMIE BAH

### **LIST OF EXHIBITS**

1. Cautionary and Voluntary statements.
2. Photographs.
3. Medical Report.
4. Witness Statements.
5. Birth certificate of the victim.

### **SUMMARY OF EVIDENCE**

1. FATOUMATTA FATTY - This witness will testify that she is the victim. She state how the caused meet her in the shared compound toilet and had carnal knowledge of her. She will further state all she knows about the case.
2. RICHARD FATTY: - This witness is father of the victim, he will state that the victim was at the toilet when the accused came to their compound. The fact that the accused passed then at the gate and went into the compound. He will state all she knows about the case.
3. SARATA JATTA: This witness is the cousin of the victim, she will state that she saw the accused lying on top of the victim in the toilet. She will further state all she knows about the case.
4. HAWA JAGEN: This witness will state that she is a police officer, she will further state she visited the scene of the incident. she will state all she knows about the case.
5. Dr OUMIE BAH: This witness will state that she is Doctor that examined the victim at the hospital and prepared the medical report. She will further state all she knows about the case.

IN THE MAGISTRATES' COURT OF THE GAMBIA  
HOLDEN AT BRIKAMA

CRIMINAL CASE NO:

BETWEEN

THE STATE ..... COMPLAINANT

AND

TOMMY SMITH ..... ACCUSED PERSON

Charge Sheet, Summary of evidence, List of witness statement and exhibits

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DATED THIS .....DAY OF FEBRUARY, 2020

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ASATRU COLE

STATE COUNSEL

FOR: DIRECTOR OF PUBLIC PROSECUTIONS





