

# Post-traumatic stress disorder in child sexual abuse prosecutions: Gaps and opportunities

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*The interface between psychiatry and the law has become common place. Reliance on psychiatry has certainly conduced to more informed court decisions to which it deserves high praise. With specific regard to Post-Traumatic Stress Disorder (PTSD), a host of court decisions abound on the critical role that PTSD-evidence has played in informing court decisions over the years. The role of PTSD-evidence, however, remains at its crawling stages in child sexual abuse (CSA) cases despite the potential it bears in effectively prosecuting these cases. This article draws on randomly selected CSA judgments to offer insight on the exact place and role of PTSD-evidence in CSA prosecutions.*

**Keywords:** child sexual abuse; post-traumatic stress disorder; sentencing; protective measures

## INTRODUCTION

Reliance on a diagnosis of Post-Traumatic Stress Disorder (PTSD) has become a common practice in criminal justice. In the specific context of child sexual abuse (CSA) prosecutions, a diagnosis of PTSD bears potential in not only justifying a sentence, but also justifying the application of protective measures with a view to making children's court experiences less traumatic. The jurisprudential record of many criminal justice systems in Africa, however, suggests that the foregoing two roles are often not fully exploited by the prosecution in CSA cases. Notably, PTSD has largely been offered as a basis for criminal defenses, including insanity, self-defense, diminished capacity, and sentencing mitigation. In as far as furthering the prosecution's case is concerned; PTSD is infrequently used, with the result that criminal justice professionals hardly have any guidelines for practice with regard to the application of a PTSD diagnosis in CSA prosecutions. To address the gap of application, this article critically analyses randomly selected court decisions (one from Swaziland and three from South Africa) with a view to bringing to the attention of criminal justice professionals the various opportunities for advancing evidence of PTSD in CSA cases. The article draws the attention of criminal justice professionals to the gaps in application where such gaps are apparent and consequently highlights the role of various criminal justice professionals (including mental health experts, police officers, judicial officers and prosecutors) in effectively advancing evidence of a PTSD diagnosis in CSA prosecutions. However, prior to embarking on the foregoing analysis, the article briefly discusses the concept of PTSD based on the recently published DSM-V.

## POST-TRAUMATIC DISORDER UNDER THE DSM-V

PTSD is one of the disorders recognised by the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-V). "Although PTSD was originally conceived to address the trauma experienced by combat veterans, it was soon recognised that the diagnosis had broad applications to all types of trauma, including 'interpersonal stressors' such as rape, sexual abuse, and physical battering" (Trowbridge, 2003: 459). Because the authors do not have the necessary credentials to comment on the detailed aspects of a PTSD diagnosis and the history/development of the DSM-V, the discussion of PTSD is merely descriptive with the sole purpose of setting the pace for a discussion on the legal application of PTSD in CSA cases.

The DSM is one of the internationally recognised diagnostic systems that classify mental disorders. The DSM is authored by the American Psychiatric Association (DSM-V, 2013). It comprises a classification of mental disorders with associated criteria designed to improve the accuracy of diagnosing mental disorders. With successive editions over the years, it has become a standard reference

for clinical practice. The fifth edition (DSM-V) has been in use since 2013 as the sequel to DSM IV TR of 2000 which classified mental disorders into seventeen diagnostic categories, now expanded to twenty-two under DSM-V.<sup>i</sup>

The DSM-V recognises a number of mental disorders. Among the mental disorders recognised by the DSM-V; PTSD stands out as one of those commonly relied on in the legal context. PTSD is a typical consequence of exposure to catastrophic or aversive events (DSM-V, 2013: 20). The DSM-V provides comprehensive criteria for diagnosing PTSD in adults, adolescents and children.<sup>ii</sup> Prior to the DSM-V, the previous DSMs did not make specific provision for PTSD diagnosis of children under the age of 6 years. The DSM-V, however, introduced a unique position to the discourse by adopting the first developmentally-sensitive diagnosis of PTSD for children aged up to six years (i.e. a preschool subtype of PTSD for children ages 6 years and younger was introduced) (DSM-V, 2013: 272-280). According to the American Psychiatric Association, the current DSM 'is developmentally-sensitive' to children and adolescents (American Psychiatric Association, 2013: 9).

The American Psychiatric Association notes that although the DSM-V is designed for clinical practice, it is expected to be readily adaptable to a variety of contexts for the benefit of all professionals, including those concerned with the forensics of mental health care (DSM-V, 2013: xli). This express pronouncement provides a foundation for the application of the DSM in the legal context, particularly where a diagnosis in question is relevant in informing the decision of the courts. However, in as far as a PTSD diagnosis in CSA cases is concerned, the said application is often not forthcoming and in the countable cases where this diagnosis is applied, the findings suggest that there are still some gaps. It is these aspects that are unpacked in the next section with a view of affording guidelines for all professionals concerned.

## **PTSD DIAGNOSIS IN INFORMING THE DECISION OF THE COURT ON PROTECTION OF CHILDREN FROM TRAUMATIC COURT EXPERIENCES**

Child witnesses are fundamental to the success of a CSA prosecution. Criminal justice systems, therefore, have to ensure that child witnesses are able to give their best evidence during criminal proceedings with minimum distress. At the international level, a number of human rights instruments lend impetus to the cause of protection of children from traumatic court experiences (see generally United Nations Convention on the Rights of the Child, African Charter on the Rights and Welfare of the Child, to mention but a few). More specifically, the United Nations Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime-UN Guidelines (these Guidelines are more specific and detailed in so far as the protection of child victims and witnesses of crime is concerned) have emphasised the foregoing point in very strong terms by amongst others recognising that 'children who are victims and witnesses are particularly vulnerable and need special protection, assistance and support appropriate to their age, level of maturity and unique needs in order to prevent further hardship and trauma that may result from their participation in the criminal justice process' (UN Guidelines: Preamble). Although 'the participation of child victims and witnesses in the criminal justice process is necessary for effective prosecutions, in particular where the child victim may be the only witness' (UN Guidelines: Preamble), criminal justice systems have to equally be mindful of the 'serious physical, psychological and emotional consequences of crime and victimisation for child victims and witnesses, in particular in cases involving sexual exploitation' (UN Guidelines: Preamble). Criminal justice systems are therefore expected to afford child witnesses special protection appropriate to their age, level of maturity and individual special needs.

The best interests of the child is recognised as a guiding principle in all decisions pertaining to children, to which end it is generally accepted that although the rights of accused persons and convicted offenders should be safeguarded, every child has the right to have his or her best interests given primary consideration (UN Guidelines: Preamble). In terms of children's participation in criminal proceedings, all interactions are to be conducted in a child-sensitive manner and in a suitable environment that accommodates the special needs of children, according to their abilities, age, intellectual maturity and evolving capacity (UN Guidelines: paragraph V(14)). One way criminal justice systems can be child-sensitive is by developing and implementing measures 'to make it easier for children to testify or give evidence to improve communication and understanding at the pre-trial and trial stages' (UN Guidelines: paragraph IX(25)). Notable protective measures in the foregoing regard include the use of intermediaries, one-way mirrors, amongst others.

In most child-sensitive criminal justice systems, for child witnesses to benefit from protective measures, evidence of the child's distress is pivotal. Section 170A of South Africa's Criminal Procedure Act, for instance, is to the effect that child witnesses can only benefit from the intermediary mechanism if it appears to the court that the criminal proceedings would expose the child witness in question to undue mental stress or suffering (see Criminal Procedure Act 51 of 1977). By implication, section 170A requires that the child witness be examined by a mental health professional for the court to arrive at an informed decision on whether or not the child is distressed so as to benefit from this protective measure. Where, the child witness is, for instance, diagnosed with PTSD, this diagnosis informs the decision of the court on the protection of the child witness in question. However, although the medical community has generally recognised PTSD as a probable mental disorder among CSA victims (See e.g. studies by Kendall-Tackett, William & Finkelhor, 1993: 164; Paolucci, Genuis & Violato, 2001: 17; Filipas & Ullman, 2006: 652; Briere & Elliot, 2003: 1217; McLeer et al, 1988: 650; Deblinger et al, 1989: 403-408; Koverola, Foy, Heger & Lytle, 1990), evidence that a CSA victim suffers from PTSD is seldom used in the courtroom and more pertinently, legal professionals have not been so keen on advancing this nature of expertise in CSA prosecutions. Thus, evidence based on a PTSD diagnosis in cases of CSA prosecutions still lags behind. In delineating on the exact place and role of PTSD in justifying the application of protective measures for child witnesses, the authors draw on the Swaziland case of *Rex v Themba Magalula*.

### ***Rex v Themba Magalula (Mugalula case) (2009)***

The case of *Magalula* was decided by the High Court of Swaziland in 2009. The facts of the case were as follows:

The Accused was charged with the crime of Rape. The indictment alleged that upon or about the 10 January 2009 and at or near Lobamba area in the Hhohho Region, the accused intentionally had unlawful sexual intercourse with Dudu Shabangu, a female minor aged 7 years, who in law was incapable of consenting to sexual intercourse. The indictment further alleged that the crime was accompanied by aggravating factors as envisaged by section 185 of the Criminal Procedure and Evidence Act 67 of 1938 of Swaziland in the following manner:

- The complainant was very young at the time of the sexual assault as she was 7 years of age.
- The accused exposed the victim to sexually transmitted infections such as HIV/AIDS as he did not use a condom for protection.
- The accused stood in a loco parentis position over the child (para 2)

In a bid to discharge its onus of proof, the prosecution called a total of six witness (including the complainant's mother, neighbour, police constables, medical doctor and mental health expert). For purposes of the current discussion, attention will be devoted to the evidence of the mental health expert.

The mental health professional, a psychiatric doctor, testified that on the 9 May 2011, and on the request of the Lobamba Police force, he conducted a psychiatric evaluation of the complainant and also interviewed the mother for collateral family history. That he found significant evidence of mental illness consistent with PTSD. This expert told the court that PTSD occurs as a memory disturbance following traumatic incidents-which are incidents that are beyond human experience, so that they can cause a disturbance of the mental functioning. That the symptoms and signs of such mental disturbance include anxiety, fear and dread relating to avoiding things that may harm the individual. The expert further told the court that the complainant presented with fear and dread of being left alone because the rape occurred when she was alone. That she exhibited general fear of men who conjured the rapist's image. He further told the court that the complainant also exhibited helplessness syndrome as a result of the agony of the rape incident when she was helpless and that this brings about acute depression. That the depression was evident from the complainant being in a bad mood most of the time. He further told the court that he also found in the complainant a sense of guilt and loss of appetite, leading to weight loss. He also found insomnia or sleep disturbances as well as pain and suffering or sense of terror. That all these factors put together rendered the complainant at a risk of a mental breakdown. He further told the court that after weighing all the factors in the balance in accordance with the relevant standard diagnostic criteria, he found it consistent with the diagnosis of PTSD. It was further the mental health expert's considered opinion that the complainant would be unfit for trial and that she ran the risk of retraumatisation if she was to be subjected to court procedures and interrogations. The report of the mental health expert was admitted in evidence as exhibit A (paras 7-10).

Ruling on the evidence submitted by the psychiatric doctor, Ota, J observed as follows:

The decision not to produce complainant in court as submitted by crown counsel was borne out of the medical advice of PW2..., the psychiatrist who carried out the psychiatric evaluation on complainant and came to the conclusion that complainant was suffering from Post-Traumatic Stress Disorder (PTSD). This diagnosis is confirmed by exhibit A, the report of the psychiatric evaluation. PW2 told the court as I have already demonstrated in this judgment that the complainant was unfit to stand trial as she runs the risk of retraumatisation (para 23).

Having weighed all the evidence on record, the court found that the prosecution had proved its case beyond reasonable doubt and consequently found the accused guilty of rape, accordingly convicting him. This judgment raises a number of issues on the exact role and place of a PTSD diagnosis in informing the decision of court on protection of CSA victims and witnesses from trauma. The salient issues justify comment and are briefly discussed below.

Admittedly, not all CSA cases in which a CSA victim or witness is traumatised should lead to a conclusion that a child is unfit for trial (as it were in the apparent case). In any case, it is settled that children have a right to fully participate in the justice process as it is in their best interest. The crux of the matter in this case, however, is not that all children should be excluded from trial on account of trauma. It is, rather, the exact place and role of evidence of mental health professionals in informing the decision of the court on protection of child witnesses from trauma. It follows then that in some cases, a PTSD diagnosis can inform the decision of the court on application of protective measures such as intermediaries as opposed to declaring a child witness unfit to stand trial.

For expert opinion to be admitted (as it were in the apparent case), the expert has to be of appreciable help to the judicial officer. Hoffman and Zeffert have offered a framework for the admissibility of expert testimony, observing that the expert must:

- Be able to furnish the court with information falling outside the knowledge and expertise of any reasonable court
- Have some qualifications, but not necessarily ‘formal’ or ‘professional’ ones (i.e. a course of study coupled with practical experience)
- Must be able to state his or her opinion either as an inference from facts derived from personal knowledge, or provided by others
- Be able to guide the court to a correct decision on questions falling within the expert’s field (Zeffert & Hoffman, 1989: 100-101).

It can be readily be garnered from the apparent case that the assessment and inferences drawn by the expert on the mental condition of complainant were tasks that fell outside the general expertise of the presiding judge. The psychiatric doctor, by virtue of his qualification, was better qualified (than the legal professionals) to draw inferences pertaining to the mental condition of the child complainant. The expert proceeded to state his opinion based on the psychiatric evaluation of the child complainant. He consequently guided the court on the suitability of the child complainant to stand trial, a conclusion that could only be effectively arrived at upon a proper PTSD diagnosis. The critical role of the mental health professional in advancing evidence based on a PTSD diagnosis in CSA is henceforth clearly demonstrated.

It is not enough for evidence based on a PTSD diagnosis to be admitted. This evidence has to be evaluated and weighed by judicial officers, along with the other evidence on record, with a view to determining the weight to be attached to it (see Bellengere et al, 2013:28 on admissibility and weight of evidence). Where judicial officers are more accommodative and knowledgeable about the interface between psychiatry and law, it is more likely that PTSD evidence will be accorded due weight. It can again be gleaned from the judgment that the judicial officer effectively executed the task of evaluating the mental health professional’s opinion, consequently drawing on the opinion of the expert to arrive at the decision that the child complainant was unfit for trial. The court therefore attached weight to the expert’s opinion and this was effectively reflected in the court’s judgment (see *Magalula* case, 2009: para 23). This is not, however, to suggest that the court should attach weight to all expert opinion on PTSD. The judicial officer reserves the discretion not to accord weight to expert evidence, where, for instance, the expert is not qualified, where the expert’s assessment is fundamentally flawed or where the opinion is not relevant to the issue of contention before the court.

It is also apparent in the foregoing case that the mental health expert could only execute the task of assessing the child complainant following a referral by the police (see *Magalula* case, 2009: para 7). Notably, amidst the general tendency of criminal justice professionals to ignore the critical role of

mental health professionals, this case is a clear demonstration of the need for coordination among criminal justice professionals if evidence based on PTSD diagnosis is to be effectively advanced in CSA cases. The police, who are the ‘gateway’ to all CSA complaints (by virtue of being the first recipients of CSA complaints), therefore play a very critical role. The role of prosecutors in advancing evidence based on a PTSD diagnosis equally goes without saying in light of the fact that they have the mandate to call witnesses.

A snare that criminal justice professionals could, however, fall into is trying to equate evidence based on a PTSD diagnosis to evidence probative of CSA. As can be gleaned from the judgment, as well as the opinion of the mental health professional, the admission of this evidence was limited to executing the role of protecting the child complainant from trauma. The expert did not at any one point opine that a diagnosis of PTSD was proof of the child complainant having been sexually abused. Indeed, it can very well be garnered from judgment that the prosecution called up to six witnesses to testify to the occurrence of the sexual offending (see *Magalula* case, 2009: para 4). One such witness was a medical doctor who testified that he examined the complainant and discovered that her hymen was broken. The medical doctor’s opinion was that penetration had taken place (*Magalula* case, 2009: paras 17 & 18). The doctor’s evidence, along with the evidence of other prosecution witnesses (such as the complainant’s mother) constituted evidence probative of child sexual offending. Thus, in arriving at the conclusion that the prosecution had proved its case beyond reasonable doubt, the court weighed all the evidence on record, with the role of the evidence of the mental health professional being limited to informing the decision of the court on protecting the child complainant from trauma.

## **POST-TRAUMATIC STRESS DISORDER IN INFORMING COURT’S DECISION ON SENTENCING CHILD SEXUAL OFFENDERS**

Child sexual offending often, if not always, has a negative impact on victims’ emotional and psychological wellbeing. It is therefore necessary for criminal justice systems to ensure that at the sentencing stage, the psychological impact that the crime had on the victim is given due consideration. Muller and van der Merwe have observed that ‘[a] sentencing discretion can only be exercised properly if all the facts relevant to a matter are presented to the court’ (Muller & Van der Merwe, 2006: 653). This suggests the need for the prosecution to increasingly draw on the expertise of mental health professionals to back up their arguments at the sentencing stage. The courts have occasionally emphasised the need for legal professionals to provide the court with the relevant expertise in informing the court’s decision at sentencing. In *S v Gerber* (2001) the court pointed out that ‘[a] court does not have the necessary expertise to generalise about the consequences, if any, for the victim in a case...’ (*S v Gerber*, 2001: 624).

Further, when the United Nations Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime emphasise that ‘justice for child victims and witnesses of crime must be assured’ (preamble), it could be generously interpreted to oblige criminal justice systems to amongst others, ensure that punishment for child sexual offenders fits the crime in terms of the psychological harm that CSA victims suffer. In fact, the United Nations Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime take express cognisance of the harm suffered by child victims as a result of crimes committed against them, yet, these Guidelines add that in many instances, the harm suffered by these children is not adequately recognised by criminal justice systems, consequently calling upon justice professionals to change this status quo by developing legislation, procedures, policies or practices for child victims and witnesses (UN Guidelines, 2005: paras 11(7) & XIV). Again despite the general acceptance on the need for mental health expertise in CSA prosecutions, evidence that a child sexual abuse complainant suffers from a mental disorder (including evidence of PTSD) as a result of sexual offending is seldom used at the sentencing stage. The three cases briefly discussed below demonstrate this reality and paint a vivid picture of the opportunities often missed by prosecutors in advancing this nature of evidence.

### ***Edson Ndou v The State (Ndou case) (2012)***

The crux of the matter in the 2012 judgment of *Ndou* case (in the Supreme Court of Appeal of South Africa) was whether the sentence of life imprisonment was appropriate in a case of rape of a girl who was under the age of 16 years. An issue was specifically raised whether there were substantial and compelling circumstances to justify imposition of a lesser sentence (*Ndou* case, 2012: para 2).



The facts of the case on appeal in the Supreme Court of Appeal were as follows:

The appellant was convicted by the regional court in Sebasa (Limpopo) of raping a 15 year-old girl. In terms of section 52 of the Criminal Law Amendment Act 105 of 1997 (the Act), the matter was referred to the Limpopo High Court, Thohoyandou, for the imposition of sentence (Section 52 has since been repealed). The matter came before Hetisani J who sentenced the appellant to life imprisonment in terms of section 51(1) of the Act. The High Court found no substantial and compelling circumstances that warranted the imposition of a lesser sentence. This sentence was appealed in the Supreme Court of Appeal.

On appeal in the Supreme Court of Appeal, the appellant contended that life imprisonment was grossly inappropriate and induces a sense of shock (*Ndou* case, 2012: para 2). The appellant argued that the court should have found substantial and compelling circumstances and therefore that it erred (*Ndou* case, 2012: para 2). It was further argued that there was no evidence of PTSD suffered by the complainant (*Ndou* case, 2012: para 2). The State, on the other hand, argued that sentencing was pre-eminently a matter for the discretion of the sentencing court and that such discretion should not be lightly interfered with by a court of appeal (*Ndou* case, 2012: para 3). The State argued further that it may only interfere if it found that the sentencing court misdirected itself on the law or facts (*Ndou* case 2012: para 3). The State additionally contended that rape of a 15 year-old girl fell within the ambit of Part 1 of Schedule 2 to the Act and therefore a court of appeal may not lightly deviate from a prescribed minimum sentence and for flimsy reasons (*Ndou* case, 2012: para 3). That since the appellant was the stepfather of the complainant and occupied a position of trust and authority over her, the State argued that this was an aggravating factor (*Ndou* case, 2012: para 3). The State also contended that any sentence less than life imprisonment would undermine the objectives of the Act and would make a mockery of justice (*Ndou* case, 2012: para 3).

It is significant to note that at trial, the State did not lead any evidence on the psychological effects of the crime on the child complainant.

In arriving at the decision on appropriate sentence, Shongwe JA ruled as follows:

It is trite that rape is a very serious offence ... In the present case a 15 year-old girl who was the victim regarded the appellant as a father figure from whom she expected protection, but he had abused that position. No evidence was led on the effect the rape had on her. The lack of such evidence should not and cannot be construed as absence of post-traumatic stress at all. It would be unrealistic to think there was none... All these factors must be taken into account in considering whether in this case the ultimate sentence of imprisonment for life is proportionate to the crime committed by the appellant. A balance must be struck on all the factors to avoid an unjust sentence. In my view the sentence imposed is disproportionate to the crime committed and the legitimate interests of society (*Ndou* case, 2012: para 12).

Shongwe JA added as follows:

Sentencing is the most difficult stage of a criminal trial, in my view. Courts should take care to elicit the necessary information to put them in a position to exercise their sentencing discretion properly. In rape cases, for instance, where a minor is a victim, more information on the mental effect of the rape on the victim should be required, perhaps in the form of calling for a report from a social worker. This is especially so in cases where it is clear that life imprisonment is being considered to be an appropriate sentence... I have already mentioned that rape is a very serious offence, especially when perpetrated against a minor. It deserves severe punishment. However, the circumstances under which it took place are relevant in the consideration of an appropriate sentence (*Ndou* case, 2012: para 14).

Again, this judgment raises a number of issues on the exact role and place of a PTSD diagnosis in sentencing child sexual offenders. More specifically, it is a typical demonstration of the missed opportunities for evidence on a PTSD to be advanced to inform the court's sentencing decision.

It is to be noted that the role of a prosecutor is very critical in advancing this nature of evidence at the sentencing stage. What is clear from the submissions of the State on appeal is that the law on sentencing was effectively quoted, with the State submitting that the rape of a 15 year-old girl fell within the ambit of Part 1 of Schedule 2 to the Act and therefore a court of appeal may not lightly deviate from a prescribed minimum sentence and for flimsy reasons. The state also drew the attention of the Supreme Court of Appeal to the fact that the appellant was in a relationship of trust with the complainant. The foregoing arguments are indeed a given. It is, however, apparent that the court needed more evidence to justify the imposition of a sentence of life imprisonment. In fact the need for evidence of PTSD was intimated by both the appellant (*Ndou* case, 2012: para 2) and the court itself (*Ndou* case, 2012: paras 12 & 14), yet the record shows that the prosecution did not lead evidence of PTSD to inform the decision of the court at the sentencing stage. Interestingly, to justify a departure from the prescribed

sentence of life imprisonment, the appellant argued persuasively that there was no evidence that the complainant suffered from PTSD (*Ndou* case, 2012: para 2), a submission that could have been effectively rebutted if the prosecution had led evidence on PTSD (had the complainant had been diagnosed). Moreover, the Court goes ahead to demonstrate its readiness to uphold the sentence of life imprisonment had the prosecution led evidence of PTSD, by keenly observing that ‘no evidence was led on the effect the rape had on her (*Ndou* case, 2012: para 2). The Court added that the lack of such evidence should not and cannot be construed as absence of post-traumatic stress at all. It would be unrealistic to think there was none...’ (*Ndou* case, 2012: para 2). It follows then that the Court could not draw inference as to the psychological impact of the offence on the child complainant because the prosecution failed to lead such evidence. Simply put, the prosecution failed to provide the court with the necessary information so as to put the court in a proper position to exercise its sentencing discretion.

Again, in the 2013 Supreme Court of Appeal decision of *Mudau v The State (Mudau case) (2013)*, the reluctance of the State to advance evidence on the traumatic impact of child sexual offending on the child complainant at the sentencing stage was evident. This case pertained to an appeal by the appellant (Mudau) who was convicted in the Limpopo High Court, Thohoyandou, of the rape of a thirteen year old girl and sentenced to life imprisonment. He appealed his conviction and sentence. In addressing the specific subject of sentence, a task that Majiedt JA described as a ‘vexed question’ particularly ‘in cases where a young child has been raped by a family member’ (*Mudau* case, 2013: para 12), Majiedt JA demonstrated the problematic implication of the failure of the prosecution to advance evidence on the traumatic impact of the child sexual offending in question, by observing as follows: ‘The primary difficulty in the case before us is that no victim impact report was placed before the trial court...’ (*Mudau* case, 2013: para 25). In justifying his decision to have the sentence revised from life imprisonment to 15 years imprisonment, Majiedt JA, amongst others, categorically noted as follows:

It must also be accepted that this was not the most severe form of rape and that the appellant desisted when he realised that the child was crying. There is also no evidence that the child suffered any on-going trauma, over and above the trauma that she would inevitably have experienced as a result of what had happened. In this regard I must mention that it is troubling that the State seems to have made no attempt to place such evidence before the trial court, eg by way of a victim impact report, despite the fact that this court has emphasised its importance (*Mudau* case, 2013: para 25).

The sentence of life imprisonment was consequently substituted with 15 years’ imprisonment (*Mudau* case, 2013: para 29), a decision that can partly be attributable to the failure of the State to present the Court with the relevant mental health expertise (which could have been by way of a PTSD diagnosis).

A similar dilemma was apparent in the CSA case of *Vilakazi v The State (Vilakazi case) (2007)* in which the appeal against the sentence of life imprisonment was upheld, substituting it with fifteen years’ imprisonment. In upholding the appeal, Nugent JA made interesting and memorable observations that warrant being quoted in full and perhaps serve as a cautionary tale to all legal practitioners when addressing the subject of sentencing in child sexual offences. The observations are as follows:

In this case there is very little upon which to measure the emotional impact of the offence upon the complainant. It would not be possible to encapsulate in this judgment the range of emotional responses that rape might evoke as it is described in the considerable literature on the topic and I make no attempt to do so. It is sufficient to say that it is evident from the literature that emotional distress and damage that accompanies rape might be extensive even if it is not manifested overtly and even more is that so in the case of young girls. What also needs to be borne in mind is that the literature shows that emotional responses vary as is demonstrated by a revealing empirical study of the impact of violence (including sexual violence) against women in the metropolitan areas of this country. But while a court must inform itself sufficiently to be alive to the range of possibilities that present themselves in such cases ultimately it must assess the particular individual that is before it and not a statistical sample (*Vilakazi* case, 2007: para 56).

Nugent JA added that:

It is most unfortunate that no attempt was made before the trial to establish the complainant’s intellectual capacity and other aspects of her background in view of the history that she related to the district surgeon for that might have cast further light on the emotional impact of the crime. I have pointed out that the evidence is not sufficient for any meaningful assessment of the complainant’s intellectual capacity and on the evidence it is possible to say no more than that there is some indication that it is limited. What we have before us in assessing the emotional impact of the crime upon the complainant is that after the event the complainant felt herself able to await the appellant’s return and to be in his company once more while he drove her home and became exasperated when he did not return. No doubt she was in tears when being questioned ... but it is difficult to assess the degree to which that was attributable to being questioned persistently by a stranger and

the degree to which it is to be attributed to the crime. When she was examined by the district surgeon a little later he observed no signs of distress. I think it must be accepted that no woman, and least of all a child, would be left unscathed by sexual assault, and that in this case the complainant must indeed have been traumatized, but the evidence does not reveal anything more specific than that (*Vilakazi* case, 2007: para 57).

It can be garnered from the foregoing court decisions that whereas judicial officers are taking general cognizance of the traumatic impact of child sexual offending on victims and also the need for this trauma to be reflected in the sentences handed down, they are reluctant to draw inference where this evidence is not advanced by the prosecution through experts in the field. Moreover, judicial officers seem to be relentless in bringing to the State's attention the critical role of this nature of evidence at the sentencing stage. On balance, it could be reasonably concluded that in addition to quoting sentencing legislation, judicial officers expect more from the prosecution. There is therefore a general call on prosecutors to step up to the plate. Evidence a PTSD diagnosis can be advanced by way of victim impact statement to inform the decision of the court at sentencing.

## CONCLUSION

The authors of the DSM-V envisioned that the DSM-V could be readily adaptable to a variety of contexts, including the criminal justice context. In terms of CSA prosecutions, notable disorders (such as the PTSD), when applied in proper context, could inform the decisions of criminal justice professionals in a number of contexts including decisions on protection of children from secondary trauma and in same token, decisions on sentencing child sexual offenders. Often, however, PTSD is not fully exploited by criminal justice professionals. The *Mugalula* case has demonstrated that evidence of PTSD can inform the decision of the courts on the nature of protection to afford CSA victims. Further, although evidence of PTSD among CSA victims can effectively inform the decision of the court on sentencing, the three cases analysed in the context of South Africa demonstrate a general reluctance on the part of the State to advance this nature of evidence. It is a serious oversight on the part of the State to not have an expert on the psychological impact of child sexual offending at the sentencing stage because so many sentences are substituted with lower sentences because of the absence of expert evidence on the psychological impact of the offence on the child complainant. Judicial officers are prepared to accommodate this nature of evidence at the sentencing stage as evident in their relentless call upon the State to make the best of victim impact statements. It is therefore submitted that the time has come for the State to heed to these calls given that the best interest of the child, a principle that all legal practitioners consider to be paramount in all decisions pertaining to children, brings persuasive momentum to bear on the State to make the best of the DSM-V and specifically, mental disorders such as PTSD which are often cited by mental health practitioners as likely consequences of CSA.

### Endnotes:

- i See DSM-V for details on disorders Neurodevelopmental disorders, schizophrenia spectrum and other psychotic disorders, bi-polar and related disorders, depressive disorders, anxiety disorders, obsessive-compulsive and related disorders, trauma and stress-related disorders, dissociative disorders, somatic symptom and related disorders, feeding and eating disorders, elimination disorders, sleep-wake disorders, sexual dysfunctions, gender dysphoria, disruptive, impulse-control and conduct disorders, substance-related and addictive disorders, neurocognitive disorders, personality disorders, paraphilic disorders, other mental disorders, medical-induced movement disorders and other adverse effects of medication, other conditions which may be a focus of clinical attention.
- ii According to the DSM-V, the essential feature is exposure to actual or threatened death, serious injury or sexual violence in one of the following ways; including, directly experiencing that traumatic event or events, personally witnessing the event as it occurred to others, learning that the traumatic event occurred to a close family member or close friend or experiencing extreme or repeated exposure to aversive details of the traumatic events. The individual must also experience at least one additional symptoms drawn from a list that includes;
  - recurrent, involuntary and intrusive distressing memories of traumatic events. For children older than 6 years, repetitive play may occur in which themes or aspects of the traumatic events are expressed,
  - recurrent distressing dreams in which the content and the effect of the dream are related to the traumatic events. In children older than 6 years, there may be frightening dreams without recognisable content;
  - dissociative reactions in which the individual feels or acts as if the traumatic events were recurring. In children, trauma-specific re-enactment may occur in play;
  - intense or prolonged psychological distress at exposure to internal or external cues that symbolise or resemble an aspect of traumatic events; and
  - marked physiological reactions to internal or external cues that symbolise or resemble an aspect of the traumatic events.

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