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Victim precipitation in the Crime of rape: Does it still feature as an evidentiary tool and barrier to reporting and convictions in South Africa. A case analysis

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the University of Kwa-Zulu Natal in 2018

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FORMAL DECLARATION

I, Enigbokan Omotunde Omotayo, hereby declare that this thesis is my original work, and all my sources of information have been acknowledged. To my knowledge, neither the substance of this dissertation, nor any part thereof, is being submitted for a degree in any other University.

Omotunde O Enigbokan (218017844)

Signature

Date

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CHAPTER ONE

1. INTRODUCTION

The notion of victim precipitating crime that existed ever since the ninety forties, placed victims of crime as precipitators of their own afflictions. Hans Von Hentig, who is described as one of the founding fathers of victimology, paved way by introducing certain traits found in victims which explains the reason victims of crimes are victimized. Hentig opined¹ that

“the accommodating spirit of the victim is the clue to the successful execution of the offence and that looking into the genesis of a situation in a considerable number of cases, we meet a victim who consents tacitly, cooperates, conspires or provokes which also makes the victim one of the causative elements”.

In Hentig’s study of victims of homicide, he expressed how certain victims are victimized based on particular traits, which can be recognized as passive roles played by victims that precipitate crime. Hentig categorises these thirteen roles as the young; old; feeble; depressive; lonesome and heartbroken; mentally defective and deranged; immigrants; minorities; dull; normal; acquisitive; blocked exempted or fighting and the tormentor.²

Hans Von Hentig’s work became the foundation of what is now called the victim precipitation theory. His study was further expanded on by various researchers. This concept was first used and formally introduced by Wolfgang in 1958 on his further study of homicide victims.³ Wolfgang’s analysis in Philadelphia found that a substantial percentage of murders resulted from a victim-offender interaction that actually began with aggressive actions on the part of the eventual victim. Wolfgang implied therefore that the victim’s actions are presumed to provide criminal motivation for the offender. From then onwards, the victim precipitation theory has found its way into individual and societies perceptions of victims of crime.

2. THE DEVELOPMENTS OF THE VICTIM PRECIPITATION THEORY

An overview of the historical development of victimology and the introduction of the victim precipitation theory is significant. Notably, the early notions of victimology were developed by writers and novelists who were regarded as literary victimologists.⁴ The concept of victimology as a formal discipline and the scholar who first coined the word “victimology”, was born in the mind of a

¹ H Von Hentig *The Criminal and His Victim: Studies in the Sociobiological of Crime* (1948) 376-436.

² H Von Hentig *The Criminal and His Victim: Studies in the Sociobiological of Crime* (1948) 404-450 .This study argues that Von Hentig justified the crime of the offender based on certain characteristics beyond the control of the victim by placing a high responsibility of protection from crime on the victim.

³ J PJ Dussich *Victimology-Past Present and Future* available at http://www.unafei.or.jp/english/pdf/RS_No70_12VE_Dussich.pdf accessed on 14 March 2018.

⁴ JPJ Dussich *The challenges of victimology past present and future* available at http://www.unafei.or.jp/english/pdf/RS_No81/No81_09VE_Dussich.pdf accessed on 14 March 2018 43-46.

Romanian defence attorney Benjamin Mendelsohn in 1947, who promoted the concept of “victimity” as the study of all victims. Mendelsohn referred to his concept as “general victimology”, which did not focus on crime victims alone, but was broadened to include all types of victims (which includes among others traffic accident and disasters victims).⁵ His ideas gradually developed, with emphasis on victims and their relationships with offenders. He also placed a great deal of focus on the importance of understanding the victim-offender interaction in order to be able to determine the degree of blame apportioned to offenders and improve his abilities to defend offenders. Mendelsohn was the first person to begin the development of theoretical writing about victimology.

In 1956, Mendelsohn’s theory known as the Culpable Victim in Mendelsohn’s Typology, was based on six categories that centred on the relative guilt of victims which includes the completely innocent victim; the victim with minor guilt; the victim who is as guilty as the offender; the victim who is more guilty than the offender; the most guilty victim and the imaginary victim. These categories were considered to facilitate the degree to which a victim shared the responsibility with the offender.⁶ In 1976, Mendelsohn proposed a different view of victims with his concept of “general victimology” which considered the source of victimization. Based on this notion, he listed five types of victimizers which includes a criminal; one’s self; the social environment; technology and the natural environment. Mendelsohn in further studying victim and offender interaction, later considered the fact that victims were largely ignored, disrespected and even abused by the system and sought ways to help victims by proposing the creation of victim assistance clinics, international organisations and special research institutes.⁷

This theory began to develop through various victimologists like Stephen Schafer,⁸ who extended the work of Von Hentig and also developed a taxonomy on the victim’s functional responsibility for crime in which he classified into the unrelated victims; provocative (victim shared responsibility); precipitative victim (some degree of victim responsibility); biologically weak; socially weak; self-victimizing (total victim responsibility) and politically weak victim. On the other hand, HL Dietrich built on the theory by focusing on the influence of the victim’s lifestyle on the precipitation of crime.⁹

⁵JPJ Dussich *The challenges of victimology past present and future* available at http://www.unafei.or.jp/english/pdf/RS_No81/No81_09VE_Dussich.pdf accessed on 14 March 2018 44.

⁶ JPJ Dussich *The challenges of victimology past present and future* available at http://www.unafei.or.jp/english/pdf/RS_No81/No81_09VE_Dussich.pdf accessed on 14 March 2018 46.

⁷ JPJ Dussich *The challenges of victimology past present and future* available at http://www.unafei.or.jp/english/pdf/RS_No81/No81_09VE_Dussich.pdf accessed on 14 March 2018 46.

⁸ JPJ Dussich *The challenges of victimology past present and future* available at http://www.unafei.or.jp/english/pdf/RS_No81/No81_09VE_Dussich.pdf accessed on 14 March 2018 46.

⁹ HL Dietrich *An Emphasis on Lifestyle-Exposure Theory and Victim Precipitation Theory as it Applies to Violent Crimes* available at <https://www.scribd.com/document/317058293/Victimology-An-Emphasis-on-the-Lifestyle-Exposure-Theory-and-the-Victim-Precipitation-Theory-as-it-Applies-to-Violent-Crime-pdf> accessed on 31 March 2018.

It was this variety of paradigm shifts, scientific advances, and social and political forces between the 1960s and 1970s that provided the foundation from which theories of victimization emerged.¹⁰

This is not to say that this theory has been widely accepted as in the past and in most recent works, the victim precipitation theory has been viewed as a veiled attempt at victim blaming.¹¹ Victimology has been incorporated into the study of law by criminologists. However, this study argues that victim precipitation theory also has the disadvantage of shaping individual or societal notions in light of a victim precipitating the crime of rape.

3. AIM OF STUDY

This study aims to argue that the victim precipitation theory has also found its way into the vein of various cultural beliefs and individual perceptions (discussed in the succeeding chapters of this dissertation) even after there have been developments made by the Criminal Law (Sexual Offences and Related Matters Amendment Act (herein after referred to as SORMA) in South Africa.¹² In determining whether our judiciary follows the letter of the law, this study aims to review South Africa's current case law by drawing discussions from some of the case judgements.¹³ The justification for the selection of the case judgements that will be discussed is based on whether they reflect elements that suggest a factoring of the theory of victim precipitation, which consequently contributes to victim blaming. The thesis will also provide a discussion on how the victim precipitation theory contributes to the under reporting of cases, and how this serves as a bar for the prosecution of rape. Therefore, considering the democracy offered by the Constitution of the Republic of South Africa (hereinafter referred to as the 1996 Constitution) and its objectives that set out to protect the rights of its citizens and all who live in it, there is legal accountability that rises to the fore where the rights to dignity, equality, security and a fair trial, become challenged by the conceptual notion of the victim precipitation theory.

4. BACKGROUND

4.1 South Africa's current statistics on rape

The applicable law for the crime of rape is found in SORMA. Before codification, rape was a common law crime. However, this study argues that public perceptions of rape are still shaped by individual

¹⁰ P Wilcox "Theories of Victimization" in B S Fisher & S.P Lab (eds) *Encyclopaedia of Victimology and Crime Prevention* (2010) 1.

¹¹ DA Timmer & WH Harman "Criminal justice Review: The Ideology of Victim Precipitation" (1984) 1 *SAGES journals* available at <https://doi.org/10.1177/073401688400900209> accessed 18 April 2018.

¹² Act 32 of 2007. The developments made within the Act brought a reformation to the common law definition and outdated principles of the crime of rape.

¹³ *S v Zuma* 2006 (2) SACR 191, *Ndou v State* 2014 (1) SACR 198 (SCA)

perceptions and cultural notions which have existed over the years¹⁴ and appear to persist in the criminal justice system (this is discussed further in this chapter and the succeeding chapters). The South African Police Service (SAPS) seldom forms one of the first points of entry as the enforcement mechanism within the legal system for a rape victim.¹⁵ Often, the first informal encounter of a rape victim is with a friend or family member, someone from the community who either encourages or discourages the reporting of the rape. Rape crisis¹⁶ reveals that “the impact of rape on the circle of families, friends and community could contribute to victim blaming”. Rape crisis¹⁷ states that “this is revealed in instances where the victim was drunk, provocatively dressed or out late at night”. The attitude of this informal circle a victim encounters contributes to victim precipitating rape and could determine if the victim would decide to report to the police.

D Smythe¹⁸ has stated the following:

“More than 1000 women are raped in South Africa every day. Around 150 of those women will report being raped to the police. Fewer than 30 of the cases will be prosecuted and no more than 10 will result in conviction, this translates to an overall conviction of 4-8 percent of reported cases which brings the question of so what happens to all other cases?”

However, D Smythe’s study also presents some of the reasons for the differences in the number of rapes that occur among women *vis-a-vis* the number of SAPS reported cases and also provides reasoning behind their statistical fluctuation.

A recourse to the statistics of reported rape reveals that the police records show a total of 39, 828 rapes in 2016/2017 down from 41,503 in 2015/2016. This report is shown by the Institute for Security Studies (herein after referred to as ISS), that an average of 109.1 incidents of rape were recorded each day, the rate decreased from 75.5 in 2015/2016 to 75.1 per 100, 1000 people in 2016/2017.¹⁹ However, Africa Check²⁰ reports an increase of reported rapes to 40, 035 in 2017/2018. SAPS in 2014²¹ reported that between April and March 2014, 62, 684 sexual offences were reported nationally.

¹⁴ This is discussed in chapter two on the historical background of rape in South Africa

¹⁵ See section 66 of Act 32 of 2007.

¹⁶ Rape Crisis in South Africa- Rape crisis’ available at <https://rapecrisis.org.za/rape-in-south-africa/> accessed 20 August 2018

¹⁷ Rape Crisis in South Africa- Rape crisis’ available at <https://rapecrisis.org.za/rape-in-south-africa/> accessed 20 August 2018

¹⁸ D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) also available at https://books.google.co.za/books/about/Rape_Unresolved.html?id=TLaKrgEACAAJ accessed on 31 August 2018.

¹⁹ See <https://africacheck.org/factsheets/south-africas-crime-statistics-201617/> accessed on 21 March 2018. Although, ISS cautions that rape statistics recorded by the police cannot be taken as an accurate measure either of the extent or trend of this crime and stating that the unfortunate incidence of no recent national representative under reporting rate for South Africa that can be used to estimate the number of rapes committed each year.

²⁰ See <https://africacheck.org/factsheets/factsheet-south-africas-crime-statistics-for-2017-18/> accessed 20 November 2018.

²¹ See *Rape and other Crime Statistics and Propensity per Province* available at https://www.saps.gov.za/resource_centre/publications/statistics/crimestats/2014/crime_stats.php accessed 20 March 2018.

The report on crime statistics also show that the rate of reported cases of sexual offences showed a decrease from 2004 to 2014, with 69 117 reported cases of sexual offence in 2004.

4.2 Factors that contribute to under reporting incidences of rape in line with the above statistics that reveal an impression of the victim precipitation theory

The above statistics poses the question as to the reasons for under reporting. While the rape stigma may make it difficult for a victim to report the crime to the police, the failure to report consequentially affects the victim's dignity- a right which is entrenched in the 1996 Constitution.²² According to Lisa Vetten, the national and international research on factors affecting the reporting of sexual offences include among others reasons of fear of intimidation; humiliation; embarrassment; shame; guilt and lack of confidence that the legal process will result in a conviction.²³ Attritions are also considered as a challenge in the policing system and reveals why some reported cases are not investigated by the police or withdrawn by victims. This is revealed in D Smythe's²⁴ study even during post-apartheid South Africa on policing sexual offences in the Republic which indicates why victims of sexual offences are particularly unlikely to find redress in the criminal justice system.

D Smythe reveals the various attritions and stereotypes in dealing with rape complaints made to the police. It appears that in exercising their discretion in investigating a case of rape, there is evidence reflective of discrimination based on gender and racial, cultural perception and individual perceptions on what is believed real rape should be. D Smythe reveals an instance where the police officer relies on his instinct and experience in determining the truthfulness of a statement made by a victim, D Smythe's studies further shows that when a case is reported it is examined based on who the complainant and who the perpetrator is, on whether the perpetrator is a good and responsible person, and this is reflected in the following instance where a police officer described a suspect as a good and responsible family man.²⁵

Further attritions are highlighted by the extract taken from D Smythe's study provided below:

"In victim blaming and issues of belief and the credibility of the victim,²⁶ an immediate report is necessary to found a credible claim. The status for being a sex worker makes a report of rape untrue, and a police officer is able to predict an untrue statement of a sex worker based on her 'lifestyle. Making statements in the investigation diary that reflect attrition, individual perception on what is believed rape entails, and some victims experiences also reveals that. The police

²² See section 10 of the Constitution.

²³ See *Rape and other Forms of Sexual Violence in South Africa* available at <https://issafrica.s3.amazonaws.com/site/uploads/PolBrief72.pdf> accessed 29 March 2018.

²⁴ D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 4.

²⁵ D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 185-186.

²⁶ The issues of belief and credibility occupy highly contested territory and reflects the tension surrounding women's sexuality and men's violence. See D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 152-160.

stereotypes as to outfit worn by victims seems as a way of asking for it while some officers said that the perpetrators did not look like a rapist".²⁷

D Smythe's studies reveal that "police reports have been linked to their stereotypical view of rape and leave a complainant feeling disbelieved and unsupported; this feeling have thus been associated with the victims decision not to report, and/or withdraw entirely from the criminal justice process".²⁸

However, D Smythe's study reveals how attrition shapes individual and society's perceptions of rape and this contributes to preventing rape victims from reporting their rape. The experience of guilt through victim blaming whereby a victim is said in some instances to precipitate rape in the process of investigation by the police also contributes a great deal to under reporting of rape and can also be said to contribute to reasons for fluctuations in reported rape statistics.²⁹

5. LITERATURE REVIEW

5.1 Developments so far of the laws on rape

The applicable law for the crime of rape is SORMA.³⁰ The provisions of the law brought the substantive reform to the definition of the crime of rape as it existed in the common law. The law has broadened the definition of rape, initially, defined under common law as unlawful and intentional penetration of the vagina without consent.³¹ The common law definition was viewed and rooted in a patriarchal system of violence against women and women sexuality, based on the vulnerability of a woman to be raped. The common law definition of rape restricted the protection of a woman's dignity and bodily integrity to the vagina alone. The provisions of SORMA extends the definition of rape and is gender neutral in its wording. The changes in the law now describe rape as:

"any person "A" who unlawfully and intentionally commit and act of sexual penetration with a complainant "B" without the consent of B is guilty of the offence of rape".³²

Sexual penetration in rape includes³³:

"any act which causes penetration to any extent, of the genital organ of any person into or beyond the genital organ anus or mouth of another, forced anal penetration, any rape including penetration with any object or any part of the body of another including penetration with the genital organs, or any part of the body or the mouth of an animal".

²⁷ D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 165-166.

²⁸ D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 162.

²⁹ This study argues that these reflects the societal and communal beliefs and perceptions of victim precipitation of rape.

³⁰ The regulation under this Act was such that the legislation judicially considered to comprehensively and extensively review and amend all aspects of the laws and the implementation of the laws relating to sexual offences, and to deal with all legal aspects of or relating to sexual offences in a single statute.

³¹ CR Snyman *Criminal Law*' 6ed (2014) 344.

³² See section 3 of Act 32 of 2007.

³³ See section 1 of Act 32 of 2007.

SORMA also provides for the offence of compelled rape.³⁴ The preamble to SORMA recognizes the disadvantageous impact of sexual offences on vulnerable persons, (particularly women and children who are more likely to become victims of sexual offences), the society as a whole and the economy.

SORMA further reinforces in its preamble the protection of the Constitutional rights of every citizen in South Africa including the right to equality, the right to privacy, the right to dignity, the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public or private sources and the rights of children and other vulnerable persons to have their best interests considered to be of paramount importance.³⁵ The age of consent to sexual relations is 16 years. 12 years and above but under 16 years is statutory rape. However, bearing in mind the decriminalisation by the Constitutional Court of consensual sexual conduct between adolescents.³⁶

SORMA prevents drawing inference from length of delay between the alleged offence and the reporting and makes it immaterial in the judgement of a rape.³⁷

SORMA also creates Specialised Sexual Offences Courts to aid procedural issues of rape trial.³⁸

A recourse to the current statistics on rape convictions by the National Prosecuting Authority of South Africa on rape³⁹ from 2011/2012 to 2016/2017, reflect 60.7 percent and an increase of 71.1 percent in 2016/2017. These reflect cases that are finalised at the Thuthuzela Care Centre (TCC) and the conviction percentage rate. These statistics show an increase in the conviction of rape cases, which could be a good sign of effective prosecution. However, this study argues that the above conviction rate only reveals cases reported and eventually considered for prosecution after the procedural screening process considers what ‘real rapes’ entail based on the attritions. Research from 2012 reveals that of 3952 rape cases opened by SAPS,⁴⁰ 1 373 were closed by the police reasons among others based on (victim’s characteristics, victim’s drinking alcohol but not intoxicated). Of the cases closed, 2579 were referred to the prosecutor which declined to prosecute 1 217 cases (67 percent were by victim’s withdrawal, reasons being that the victim decided to go on with their lives). The research

³⁴ See section 4 of Act 32 of 2007.

³⁵ See Act 32 of 2007: The preamble.

³⁶ *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* [2013] ZACC at para 35. The Court held that the criminalisation of consensual sexual conduct between adolescents was unconstitutional.

³⁷ See section 59 of Act 32 of 2007.

³⁸ See section of 55A of Act 32 of 2007.

³⁹ National Prosecuting Authority South Africa *Annual Report National Director of Public Prosecution 2016/2017* available at: <https://www.npa.gov.za/sites/default/files/annual-reports/NDPP-annual%20report-2016-2017.pdf> accessed 31 March 2018. However, the NPA defines a conviction rate as the percentage of cases finalised with a guilty verdict divided by the number of cases finalised with a verdict. Convictions are counted at the date sentencing or “not guilty” verdict, irrespective of when a plea was first entered.

⁴⁰ *Retrospective Study of the Investigation, Prosecution and Adjudication of Reported Rapes from 2012 (RAPSSA)* <https://rapecrisis.org.za/wp-content/uploads/2017/11/RAPSSA-REPORT-FINI-18072017.pdf> 64.

further shows that the same attritions by the police are also considered by prosecutors in deciding whether or not to proceed with or withdraw a case already enrolled.⁴¹ Some of the stereotypes of “real rapes” with “genuine victims” considered by prosecutors to determine the chances of conviction include the victim’s character or behaviour at the time of the incident, the circumstances of the rape (this circumstances include whether or not weapons were used, whether there was threats to the victim, victims had consumed alcohol but not intoxicated and whether no alcohol was mentioned in victim’s statement). These stereotypes play a role in the prosecutor’s determination of the chances of conviction.

Only 1 362 cases of the initial 3952 were assessed by prosecutors as ready and appropriate to go for trial. 631 of the 1 362 cases which were enrolled before trial were withdrawn. 731 cases went for trial, of the 178 cases where trials started 24.4 percent were dismissed once the trial had started and so were finalised as acquittals.⁴² In the 553 full trials, 340 were finalised with a guilty verdict of sexual offences (convictions were 50 percent more common when police had visited the crime scene and twice as common when perpetrator DNA was matched) of which 307(90.3 percent) were for rape convictions, while 206 were acquitted. This study argues that considering reported cases that are not prosecuted based on rape stereotypes considered by prosecutors as revealed by RAPSA’s research above, this would present a challenge if conviction rates were regarded as a true yardstick for determining successful prosecution.

According to Julian Rademeyer’s research on the conviction rate figures routinely cited by South Africa’s National Prosecuting Authority (NPA) and Department of Justice and Constitutional Development, Rademeyer contends that:

“Understandably, the NPA only prosecutes cases it thinks it has a reasonable chance of winning. But for this reason, the version of a conviction rate that it uses is clearly an unreliable test of both its success or lack of it and that of the wider criminal justice system in South Africa. Instead, the only accurate and sensible measure of performance of the criminal justice system would be a comparison of the number of successful convictions and the number of crimes reported to police on an annual basis. And there, the numbers are not so good”.⁴³

L Artz & D Smythe contend that:

“an increase in conviction rate means that the actual justice process is more effective or whether convictions are a good indicator of effective justice for rape complaints bearing in mind the original emphasis of the Sexual Offence Bill to effect

⁴¹ *Retrospective Study of the Investigation, Prosecution and Adjudication of Reported Rapes from 2012 (RAPSSA)* <https://rapecrisis.org.za/wp-content/uploads/2017/11/RAPSSA-REPORT-FIN1-18072017.pdf> 84-90.

⁴² *Retrospective Study of the Investigation, Prosecution and Adjudication of Reported Rapes from 2012 (RAPSSA)* <https://rapecrisis.org.za/wp-content/uploads/2017/11/RAPSSA-REPORT-FIN1-18072017.pdf> 94-96

⁴³ *Conviction Rates an Unreliable Benchmark of NPA Success* 12 April 2013 available at <https://africacheck.org/reports/conviction-rates-an-unreliable-benchmark-of-npa-success/> accessed 31 March 2018.

fair, sensitive and appropriate justice and to protect rape survivors within the courtrooms, the conviction rates question becomes somewhat negligible".⁴⁴

In light of these contentions, this study argues that the fact that there are few acquittal rates does not still reveal the reality in findings of courts and the *ratio decidendi* which in the first instance, are expected to reflect the letter of the law, and not moral sentiments. The justification by courts on substantial and compelling circumstances in mitigating sentences on life imprisonment for rape reveals issues of victim blaming and victim precipitation. This reflects in some decisions of courts in the course of sentencing even after developments by SORMA.⁴⁵

Another challenge is revealed in the findings and decisions of the judge in the case of *S v Zuma*⁴⁶ as regards evidence of past sexual history of a complainant which still gives an impression that the outdated victim precipitating rape notion still shapes societies perceptions on rape. However, this poses the question on the effectiveness of the court's Constitutional duty as an independent body to apply and implement the written law as provided in section 168 of the Constitution impartially without fear, favour or prejudice.

5.2 Preliminary remarks-The individual and societal perceptions of rape reflecting the victim precipitation theory with the developments of the law of rape so far in rape trials and judicial decisions of courts in South Africa.

The state is vested with the onus of proving beyond reasonable doubt that the offence of rape has been committed without consent of the complainant, the definition of consent sets the yardstick for determining rape which the law states must be voluntary and uncoerced agreement. In promoting a fair trial an accused is also entitled to raise evidence of previous sexual experience of a complainant as provided in section 227 (1) – (7) of the Criminal Procedure Act 51 of 1977(CPA).

The statutory enactment of the rape shield laws in the provisions of the CPA has been amended by SORMA in order to bring it in line with the section 35 3(I) of the Constitution which grants an accused the right to adduce and challenge evidence. A court of law has the power to grant leave on application by any of the parties to adduce evidence or put questions on character⁴⁷ and past sexual history.⁴⁸

⁴⁴ L Artz & D Symthe "Losing Ground? Making Sense of Attrition in Rape Cases" (2007) 22 *SA Crime Quarterly* 15.

⁴⁵ *S v Ndou v State* 2014 (1) SACR 198 (SCA).

⁴⁶ *S v Zuma* 2006 (2) SACR 191.

⁴⁷ Section 227 (1) (a) provides that "evidence as to the character of an accused or as to the character of any person against or in connection with whom a sexual offence as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is alleged to have been committed, shall, subject to the provisions of subsection (2), be admissible or inadmissible if such evidence would have been admissible or inadmissible on the 30th day of May, 1961".

⁴⁸ Section 227 (2) (a) provides that "No evidence as to any previous sexual experience or conduct of any person against or in connection with whom a sexual offence is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced and no evidence or question in cross examination regarding such sexual experience or conduct shall be put to such person, the accused or any other witness at

Such application is granted based on relevancy to the proceedings pending before the court.⁴⁹ The court shall not grant an application if such evidence or questioning is sought to support an inference that the complainant is more likely to have consented to the offence being tried or it is less worthy of belief.⁵⁰ These provisions have posed issues, as defence counsels have in some rape trials misused the application of the provisions of the law (this is discussed in chapter three and four as revealed in *Zuma*⁵¹ and *Ndous's case*⁵²). This is done by shifting the onus of proof to the accused to prove consent on some moral considerations or perceptions therefore obviating the definition of rape and this reflects individual sentiments focusing on notions that encourage acts of victim blaming and victim precipitation of rape.

Some of these trials specifically reflect gender bias on female victims of rape by some judges that have applied the notions of victim precipitating rape when dealing with evidence of past sexual history of a complainant. (Discussed in chapter four on the critical analysis of *S v Zuma*).

The misuse of these provisions reflects in instances where a rape complainant's lifestyle is viewed as the reasons for rape, the mode of dressing gives an impression that a rape complainant precipitates rape thereby misunderstanding the element of consent. Aishvarya Singh sates "that the adoption of rape culture which Singh states is defined as the normalization and trivialization of rape by the society, clouds the concept of consent, allowing it to become a sort of puzzle piece - just place it wherever it can fit".⁵³

This study argues that the case of *S v Zuma*⁵⁴ reveals notions of victim precipitating rape in the findings and decisions of the judge (this argument is critically analysed and discussed in chapter four of this dissertation). The accused Jacob Zuma was tried for the alleged offence of rape of the complainant known as Khwzei⁵⁵ (A full detail of the facts and trial of the case is discussed in the chapter three and four of this dissertation). One of the controversial issues in this case was the

the proceedings pending before the court unless- (a) the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such question; or (b) such evidence has been introduced by the prosecution".

⁴⁹ Section 227 (4) -(5) (a)-(g) provides that relevance is determined as follows: "it is in the interests of justice, with due regard to the accused's right to a fair trial; is in the interests of society in encouraging the reporting of sexual offences; relates to a specific instance of sexual activity relevant to a fact in issue; is likely to rebut evidence previously adduced by the prosecution; is fundamental to the accused's defence; is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy or is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue".

⁵⁰ See section 227 (6) a-(b) of Act 51 of 1977.

⁵¹ *S v Zuma* 2006 (2) SACR 191

⁵² *S v Ndou v State* 2014 (1) SACR 198 (SCA)

⁵³ A Singh *We Need to be Educated on Rape Culture and Consent* Huffpost Edition ZA 5 May 2017 available at <https://www.huffingtonpost.co.za/aishvarya-singh/we-need-to-be-educated-on-rape-culture-and-consent-a-22043475/> accessed 21 April 2018.

⁵⁴ *S v Zuma* 2006 (2) SACR 191 (W).

⁵⁵ *S v Zuma* 2006 (2) JDR 0343 (W) page 5. The complainant is referred to as the complainant in this case to protect her dignity.

application and misuse of section 227 of the CPA. The judge seems to have encouraged character evidence of the complainant and allowed various pieces of evidence that brings into question the judge's decision. This study argues that Zuma's trial reveals the various notions and perceptions of rape that presents a female victim as a precipitator of her rape. (Discussed in chapter four on the critical analysis of *S v Zuma*).

Questions as to the clothes the complainant was wearing on the evening of the incident was put before the court to justify consent.⁵⁶ The judge made certain comments as to the lifestyle of the complainant based on her past sexual history from evidence of the witnesses. (A critical analysis of the evidence of the witnesses is discussed in chapter four). The accused was acquitted.⁵⁷ Jake Moloi⁵⁸ states that "when an application in terms of section 227 is granted, the reasons should be based on clear legal determinations with due regard to constitutional imperatives binding on all judicial officers". This study argues that Zuma's case reflects a reverse onus of proving beyond reasonable doubt on the accused of his innocence and the moral credibility of Khwezi is questioned. (Discussed in chapter four in the critical analysis of Zuma's case). Drucilla Cornell⁵⁹ describe this reverse onus of proof of innocence on an accused

"as a situation whereby the plaintiff is turned into the defendant through the use of sexual humiliation. The plaintiff is put to in a position to defend herself against the 'charges' that are made against her, rather than charging the defendant she is the one who becomes charged.' The vitiation of consent on certain moral considerations becomes the order of the day."

5.3 Highlights of previous challenges by judicial officers in enforcing the law of rape which reflects victim precipitating rape

The study of Lisa Vetten & Daniella Motelow⁶⁰ highlight examples of gender bias operating in the administration of law that reflected in the cross examination of witnesses of rape survivors at Boksburg regional court Gauteng in 2002. These factors are considered as factors that contribute to the difficulties of courts getting a guilty verdict in South Africa. The cross examination of an 18 year old complainant by a male defence attorney in a case where the accused who was a stranger to the complaining witness was acquitted of rape is taken into consideration by Vetten & Motelow to highlight this issues.⁶¹

⁵⁶ *S v Zuma* 2006 (2) SACR 191 (W) 218.

⁵⁷ *S v Zuma* 2006 (2) SACR 191(W) at 224

⁵⁸ J Moloi "The Case of *S v Zuma*: Implications of Allowing Evidence of Sexual History in Rape Trials" (2006) 18 *South African Crime Quarterly* 29.

⁵⁹ D Cornell "Civil Disobedience and Deconstruction" (1991) 13 *Cardozo LR* 1309& 1311.

⁶⁰ L Vetten & D Motelow "Creating State Accountability to Rape Survivors: A case study of Boksburg Regional Court" (2004) 2(1) *Sexuality in Africa* 45- 52.

⁶¹ L Vetten & D Motelow "Creating State Accountability to Rape Survivors: A case study of Boksburg Regional Court" (2004) 2(1) *Sexuality in Africa* 49.

The issues in Vetten & Motelow's study of the above cross examination includes the misuse of the provisions of section 227 of the CPA on the evidence of the sexual history of a complainant. These issues revealed by Vetten & Motelow further includes: "the failure of defence counsel to make an application to ask questions in line with the sexual history of the complainant and failure by the magistrate to ask that an application be made, given the protracted nature of the questions inquired as to their relevance".⁶² Vetten & Motelow⁶³ observed the issue of gender bias as revealed in their study on the cross-examination of the complainant. This bias is revealed in some questions put by the defence counsel which aimed at portraying the victim as a "bad" girl, one of which includes a question as to the complainant's status of her virginity (this however, reflect issues of victim precipitation of rape). Vetten & Motelow states "that the failure of the prosecution to object to the questioning and the willingness of the court to hear the testimony illustrated another impediment to women's access to justice in their sexual offence claims and also constituted a form of secondary victimisation."⁶⁴

Vetten & Motelow concluded that "in promoting a fair trial, a defence counsels' right in challenging witness evidence is protected by the law. Allowing this right to continue unchecked by judges without advancing any objective of justice makes an already traumatic process more harrowing for the witness, and the failure of judges to intervene and follow procedure further compounds the victimisation of rape survivors."⁶⁵

Vetten & Motelow⁶⁶ further concluded that "the consequences of maladministration of justice contribute to a rapist's belief that they are above the law and encourage a culture of impunity and that policies and laws intended to advance women's gender interests are nothing but paper promises if public officials cannot be held accountable for ineffectual implementation".

The above study was carried out before the coming into effect of SORMA. However, these challenges reveal the issue of victim blaming and victim precipitation of rape and was seen by Vetten & Motelow as a challenge to getting a guilty verdict in the rape case. However, this study argues that these challenges still reflect in decisions of courts even after reformation of the law by SORMA.⁶⁷

⁶² L Vetten & D Motelow "Creating State Accountability to Rape Survivors: A case study of Boksburg Regional Court" (2004) 2(1) *Sexuality in Africa* 49.

⁶³ L Vetten & D Motelow "Creating State Accountability to Rape Survivors: A case study of Boksburg Regional Court" (2004) 2(1) *Sexuality in Africa* 49.

⁶⁴ L Vetten & D Motelow "Creating State Accountability to Rape Survivors: A case study of Boksburg Regional Court" (2004) 2(1) *Sexuality in Africa* 50.

⁶⁵ L Vetten & D Motelow "Creating State Accountability to Rape Survivors: A case study of Boksburg Regional Court" (2004) 2(1) *Sexuality in Africa* 51.

⁶⁶ L Vetten & D Motelow "Creating State Accountability to Rape Survivors: A case study of Boksburg Regional Court" (2004) 2(1) *Sexuality in Africa* 51.

⁶⁷ *Ndou v State* 2014 (1) SACR 198 (SCA).

5.4 Victim precipitation under the veil of victim blaming in the discretionary powers of courts on substantial and compelling circumstances in mitigation of rape sentence.

The punishment for rape as provided for in the Criminal Law Amendment Act (CLAA) 105 of 1997 is life imprisonment⁶⁸ excluding an accused under the age of 18 years.⁶⁹ Section 51 (3) (a) of the CLAA provides for the discretion of a court to impose a lesser sentence for the offence of rape. This will be so only if the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence.⁷⁰ The CLAA states that provided that if a regional court imposes a lesser term of imprisonment for rape, it shall not exceed a period of 30 years.⁷¹ The law however states that the substantial and compelling circumstance in respect of the offence of rape justifying the imposition of a lesser sentence shall not include: the complainant's sexual history, an apparent lack of physical injury to the complainant, and an accused person's cultural or religious belief about rape or any relationship between the accused person and the complainant prior to the offence being committed.⁷²

The circumstance for discretions of a court create an opportunity for some courts which hide under the veil of the provision of compelling and substantial circumstance in sentencing by blaming a victim for the precipitation of rape even though an accused has been found guilty and convicted for rape. This justification gives a notion that an accused found guilty and convicted for rape is 'excused'⁷³ when passing a sentence even after a guilty verdict has been delivered. The provisions of the law is misused in certain delivered judgement of courts (see below the case referred to) and have reflected situations of individual stereotype notions and perceptions of victim blaming based on moral consideration which the law do not accommodate. The focus of punishment shifts from the criminal act of the convicted accused to the precipitating characteristics of the victim under the notion of victim blaming when passing a sentence for rape.

The case of *Ndou v State*⁷⁴ the case is an appeal to the Supreme Court of Appeal against the imposition of a sentence of a life imprisonment by the appellant Mr Edon Ndou who was found guilty by a regional court in Limpopo and convicted of raping his 15 year old year old step-daughter.⁷⁵ (The fact

⁶⁸ See section 51 schedule 2 part 1 of Act 105 of 1997.

⁶⁹ See section 51(6) of Act 105 of 1997.

⁷⁰ See section 51(3) (a) of Act 105 of 1997.

⁷¹ See section 51 schedule 2 part 1(a) - (c) of Act 105 of 1997.

⁷² See section 51(3) (a) (Aa) (i)-(iv) of Act 105 of 1997.

⁷³ This study argues that this gives an impression of – saying to a convicted accused your crime of rape is not wholly your fault, you cannot be fully liable for the protection of a victim's right to dignity. A victim led you into it and should also be blamed for precipitating the rape based on certain moral consideration, even though you as a rapist is guilty for rape, you ought to have controlled yourself.

⁷⁴ *Ndou v State* 2014 (1) SACR 198 (SCA).

⁷⁵ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 1.

and decisions of *Ndou v State* is discussed in chapter three). This study argues that the judge in *Ndou*'s case obviates from the law and misused the provisions of the law. (A critical analysis of this case is discussed in chapter four). The judge in considering the substantial and compelling circumstance justified its discretion for a lesser imprisonment punishment.⁷⁶ This study argues that the reasoning of the judge reflects moral blameworthiness' and the principle of the victim precipitating her rape by playing a role in the submission to the sexual intercourse; the judge not considering her vulnerability that she is a child.⁷⁷

The judge considered the appellants' argument that the child submitted to the sexual intercourse without any threat of violence and no serious physical injury,⁷⁸ which resistance according to Artz and D Smythe are among others a list of factors relevant to attrition in rape.⁷⁹ Resistance and standards of physical force are often still used when interpreting whether or not sexual intercourse is consensual, where there is no threat of force, a victim is said to have submitted to rape on a mistaken belief of consent and is used as one of the yardsticks in blaming a victim for rape. Rebecca Chennells⁸⁰ states "that the application of the minimum life sentence is against a backdrop of rape stereotypes and assumptions". The complainant's acceptance of a monetary gift is said by the judge to have played a role in her submitting to the sexual intercourse, the judge gives an impression of the victim precipitating her rape through her acceptance of gifts.⁸¹ This presents an impression of consent for rape and led to victim blaming. This according to Marvin B Scott & Stanford M. Lyman reveals a situation that:

"is a justification in denial of injury whereby an actor acknowledges that he did an act but was permissible to do it since no one was injured by it and a denial in victim justifying the act on the basis that the victim deserves such injury".⁸²

6. RATIONALE

This study will serve to contribute to the awareness of judicial decisions that still reflect individual notions and societal perceptions of rape and how it shapes a society's collective understanding thereby leading to victim blaming and shaming in addition to the stigma a rape victim experiences which calls for legal accountability. Burt⁸³ states that these perceptions 'are myths which can be defined as prejudicial, stereotype or false belief about rape, rape victim and rapist in creating a climate hostile

⁷⁶ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 11.

⁷⁷ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 13.

⁷⁸ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 13.

⁷⁹ L Artz & D Symthe "Losing Ground? Making Sense of Attrition in Rape Cases" (2007) 22 *SA Crime Quarterly* 19.

⁸⁰ R Chennells "Sentencing the 'Real Rape' Myth: Empowering Women for Gender Equity" (2009) 82 *Gender and the Legal System* 34.

⁸¹ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 13.

⁸² S M Lyman & MB Scot *A Sociology of the Absurd* 2ed (1989) 118.

⁸³ M Burt "Cultural Myths and Supports for Rape" (1980) 38 (2) *Journal of Personality and Social Psychology* 217.

to rape victim.’⁸⁴ The perceptions of victim precipitating rape is revealed in myths and notions about rape.

The Bill of Right which serves as the cornerstone of South Africa as a democratic society as provided in the 1996 Constitution that protects the rights of every citizen is not seen as being enforced by the courts. The provisions of the Bill of right which includes the right to dignity(section 10) , right to equality before the law(section 9 (1)-(5), right to a fair trial(section 35)and right to security in and control over the body(section 12 (2) b is not seen as being upheld and are infringed. This study highlights these particular rights as they are violated rights that would be considered in this dissertation. The Constitutional courts in South Africa recognizes the importance of protecting these rights. The Constitutional court in *Carmichele v Minister of Safety and Security*⁸⁵ held that the state must employ positive action to protect individual rights. The Supreme Court of Appeal in *S v Chapman*⁸⁶ held that rape in general constitutes humiliating, degrading as well as brutal invasion of the privacy and dignity of the victim. The court further states that rape infringes women’s fundamental human rights and courts are therefore determined to protect the equality, dignity and freedom of all women and thus no mercy will be shown when these rights are invaded.

Helen Moffett⁸⁷ states that the State fails to respect feminine rights to bodily autonomy and integrity which Moffett reveals in Zuma’s case that:

‘South African women are frequently reminded that equality in public domain does not translate into equality in private domain an arena that remains highly stratified and hierarchically structured and Zuma’s trial reflects a situation of gender inequality, the bias statements of the judge, on the past sexual history of Khwezi was uncovered and used to discredit her testimony.’⁸⁸

This study argues that the dignity of a rape victim is **likely seen** as a serious issue. Courts tend to forsake the stigma of being a rape victim instead, while men are seen as highly respected in a democratic society of equal rights.⁸⁹ Gender equality within the justice system as provided for in the Constitution is not upheld. A rape script is based on what is normally expected as a way of judging a victim of rape which reflects stereotypes that shape a society's understanding. According to Estrich,⁹⁰

⁸⁴ M Burt “Cultural Myths and Supports for Rape” (1980) 38 (2) *Journal of Personality and Social Psychology* 217. These examples of rape myths among others stated are “only bad girls get raped” and “women ask for it”.

⁸⁵ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at para 62.

⁸⁶ *S v Chapman* 1997 (3) SA 341(SCA) 344J-345B.

⁸⁷ H Moffet “Sexual Violence, Civil Society and the New Constitution” in H Britton, J Fish & S Meintjes *Women’s Activism in South Africa: Working across Divides* (2008) 178.

⁸⁸ H Moffet “Sexual Violence, Civil Society and the New Constitution” in H Britton, J Fish & S Meintjes *Women’s Activism in South Africa: Working across Divides* (2008) 172 & 177.

⁸⁹ See 1996 Constitution section 9 (1)- (5)

⁹⁰ S Estrich “Real Rape. How the Legal System Victimized Women Who Say No” (1987) 95 (6) *Yale Law Journal* 1087.

“what the criminal justice takes into consideration as ‘real rapes’ are those involving the use of weapons, resulting to injury committed by strangers and taking place outdoors in a neutral place”.

N Naffine in her study on traditional views that still pervade the law of rape in Australia, states that:

“the law of rape is not merely a piece of legislation a string of words in an Act which can be taken on their own always. It is the judicial interpretation of that legislation and in that interpretation, traditional assumptions about the possessive and coercive nature of heterosexuality can be and have been imported into the law”.⁹¹

Naffine’s observation reflects the individual perception and notions that shapes a society's understanding of rape and is being imputed in the interpretation of the law by the courts.

7. RESEARCH DESIGN

This dissertation will be based on discourse analysis of the legal principles considering arguments of various proponents and scholars.

8. RESEARCH METHODOLOGY

This dissertation will embark on a theoretical study approach alone. Focusing on desktop study only, there is no consideration for empirical study and thus no interviews or questionnaires. This study will consider theoretical assumptions and the applicable legal principles of rape and will not empirically access the extent to which the law is implemented in practice. The laws, regulations and policies this study will examine include (but are not limited to) the following: Constitution of the Republic of South Africa 1996, Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 Of 2007, Criminal Law (Sexual Offences and Related Matters) Regulations, National Instruction on Sexual Offences 2008, The Minimum Standard of Service for Victims of Crime, NPA’s Strategic Plan of 2013 to 2018 and Service Charter for Victims of Crime in South Africa.

STRUCTURE OF DISSERTATION

Chapter 1: Introduction

Chapter 2: Historical background and case review analysis (pre -1994)

Chapter 3: Descriptive case analysis post 1994 and post SORMA

Chapter 4: Critical analysis of cases post 1994 and post SORMA

Chapter 5: Recommendations and conclusions

⁹¹ N Naffine “Possession: Erotic Love in the Law of Rape” (1994) 57(1) *Modern Law Review* 35.

CHAPTER TWO

1. INTRODUCTION

Lisa Vetten⁹² states “that no understanding of sexual violence is complete without reference to South Africa’s apartheid history”. This chapter will focus on the historical background and case review analysis in South Africa from pre 1994(before and during apartheid), post 1994(after the apartheid system) and post SORMA on the challenges with enforcing the laws on rape and the society’s perceptions to rape.

2. THE EARLY HISTORICAL DEVELOPMENTS OF THE CRIME OF RAPE

The history of the South African law of rape developed from the Roman-Dutch law and the English law.⁹³ The Roman- Dutch law was imported in the seventh century to South Africa. Roman-Dutch ruled the Cape Colony from 1652 until the last decade of the eighteenth century. The British took over in 1806.⁹⁴ The English Law retained some laws of the Roman-Dutch in part because it was deeply entrenched at the Cape. The reception of the English criminal law into the South African Common law was much aided by the Transkeian Code Act 24 of 1886.⁹⁵ Some of the definitions came to be adopted by the South African courts and in other cases, it strongly influenced the evolution of the general principles of criminal liability.

Roman Dutch writers confined rape cases to forcible sexual intercourse with a woman without her consent.⁹⁶ The essence of the crime was the employment of force to overcome the woman’s resistance, the complainant was expected to cry out to indicate her lack of consent and to lay complaint immediately. The purpose of this was an added advantage of credibility to the woman’s allegation that the rape was without consent.⁹⁷ There was no rape when the woman submitted through fear or duress. Consent to intercourse obtained by fraud or where the woman was unconscious or mentally ill was not rape, though punished as *Stuprum Violentum*.⁹⁸ Under English law, conduct was deemed to be rape only in instances where there was a forceful resistance by the victim.⁹⁹ Rape became defined in England in 1842 as unlawful sexual intercourse with a woman without her

⁹²L. Vetten *Roots of a Rape Crisis in Crime and Conflict* No 8 Summer available at <http://www.csvr.org.za/publications/1626-roots-of-a-rape-crisis> accessed 18 June 2018.

⁹³ J Burchell *Principles of Criminal Law* 2(eds) 1997 32.

⁹⁴ J Burchell *Principles of Criminal Law* 2(eds) 1997 32.

⁹⁵ J Burchell *Principles of Criminal Law* 2(eds) 1997 34.

⁹⁶ J Burchell *Principles of Criminal Law* 2(eds) 1997 702.

⁹⁷ J Burchell *Principles of Criminal Law* 2(eds) 1997 702.

⁹⁸ *S v Ncanywa* 1992 (2) SA 182 (CK) 185. The court states the positions of the offence as one that was regarded as seduction that includes coition with women of certain classes but apparently married women and prostitutes were excluded and Punished as a lesser offence.

⁹⁹ J Burchell *Principles of Criminal Law* 2(eds) 1997 702.

consent.¹⁰⁰ An irrefutable presumption that boys below the age of 14 years could not be liable for rape also existed under the English law. Marital rape was not regarded as a crime under the English law however, a husband was held liable for indecent assault.¹⁰¹ Courts recognised that the youth of the victim may vitiate consent but English courts did not see fit to impose a fixed age limit.¹⁰²

The South African common law adopted the English approach to the crime of rape and the definition however, focusing on the consent element as the essence of the crime. The Roman-Dutch position as to the distinction between rape and punishable *stuprum* was not adopted.¹⁰³ In adopting the same approach of English law as to the youth of the victim initiating consent, the South African position in addition provides for an irrefutable presumption that girls younger than the age of 12 years of age could not consent.¹⁰⁴ 12 years and older with consent was not a crime of rape at common law.¹⁰⁵ However, the position in the nineteenth century influenced by the prevalence of child prostitution, encouraged the perception that sexual intercourse with young pubescent girls was undesirable.¹⁰⁶

South African courts inculcated the cautionary rule which applied to evidence of a complainant in sexual offence cases. This was to warn a jury that certain witnesses, complainants, young children and accomplices could not safely be relied upon without some other indication of trustworthiness.¹⁰⁷ There were no precise criteria that had to be set before a court could be convinced of a witness' trustworthiness.¹⁰⁸ Lillian Artz & D Smythe¹⁰⁹ state that:

“Some scholars argued that the problem with this cautionary rule was that it appeared to have no rational basis, demeaned women and contributed to secondary victimisation and the non-reporting of cases.”

This study argues that the cautionary rule also contributed to the individual and society's notions that shapes the perceptions of women who are rape victims. However, this approach to evidence continued to be applicable by courts during the period of the 1990s.¹¹⁰

South Africa also inculcated the English approach rule on the admission of evidence that the complainant in a sexual offence case lay a complaint soon after the alleged offence.¹¹¹ The import is to show consistency of conduct, although it could not prove the truth of the accused's allegation.

¹⁰⁰ *R v Camplin* 1845 1 Den.

¹⁰¹ *R v Gumedde* 1946 (1) PH H68 N.

¹⁰² *R v Harling* 1938 (1) All ER 307.

¹⁰³ PMA Hunt “Common law crimes” Vol 11 in JRL Milton (ed) *South African Criminal Law and Procedure* (1970) 433.

¹⁰⁴ Gerhard Kemp...*et al Commentary on Criminal Law in South Africa* (2012) 314

¹⁰⁵ J Burchell *Principles of Criminal Law* 2(eds) 1997 729.

¹⁰⁶ G Parker “The Legal Regulation of Sexual Activity and Protection of Females” (1983) 21 *Osgoode Hall LJ* 187.

¹⁰⁷ DT Zeffertt & AP Paizes *The South African Law of Evidence* 2 ed (2009) 961.

¹⁰⁸ *S v Artman* 1968 (3) SA 339 (A).

¹⁰⁹ L Artz & D Smythe *Should we consent?: Rape Law Reform in South Africa* (2008) 74.

¹¹⁰ *S v Jackson* 1998 (1) SACR 471. The courts held that Cautionary rule in based on an irrational and out-dated perception.

¹¹¹ *R v M* 1959 (1) SA 352A 356E 357C.

However, it could be used to strengthen the accused's defence and to cast doubt on the complainant's credibility.¹¹² A notion from old English law of "hue and cry" in the thirteenth century by Bracton which required the victim to go at once while the deed is newly done with hue and cry, to the neighbouring townships and show the injury done to her to men of good repute the blood and torn garment.¹¹³

3. RAPE IN SOUTH AFRICA DURING THE ERA OF THE BRITISH COLONY (1860s- 1890s)

This thesis intends to highlight the positions of women generally in South Africa and how the laws to protect women developed so far, there is no specific focus on the racial class of women. A brief recourse to the era of the British colonial rule reveals stereotypes and notions of rape that somewhat shapes rape trials and judgements in South Africa today. Rape was characterised as racial, only white women were capable of being raped, the society was patriarchal as women were regarded as part of property.¹¹⁴ This situation is revealed in the Natal black rape scare which was characterised by fear of black invasion which never came to pass.¹¹⁵

Jeremy Martens states that "these panics increased in 1886 which prompted the coming into effect of Law 21 of 1888(to facilitate the registration of native servants and servants belonging to uncivilized Races within the Boroughs of Pietermaritzburg and Durban, this amended the rape legislation of the 1887)¹¹⁶ imposing capital punishment for rape".¹¹⁷ However, Martens further states that this did not amount to cases of actual commission of the extreme crime.¹¹⁸ Features of this era reveals that protection from rape was afforded to only white women by white males as the concern of rape was characterised by fear of the male colonial white minority losing dominance. E Norman states that:

"this substratum of anxiety rose to the surface in the form of a moral panic whenever disturbances in the economy or the body politic were severe enough to unsettle the mask of composure worn by the face of public authority".¹¹⁹

However, Norman states also that "the panics was not attributed to any marked increase in reports of rape and generated few prosecutions".¹²⁰

¹¹²R v M 1959 (1) SA 352A 356E 357C.

¹¹³ H De Bracton *On the Laws and Customs in England* (1968) 415.

¹¹⁴ E Norman "Natal's Black Rape Scare of the 1870s" (1988) 15(1) *Journal of South African Studies* 36.

¹¹⁵ E Norman "Natal's Black Rape Scare of the 1870s" (1988) 15(1) *Journal of South African Studies* 36.

¹¹⁶ J Martens "Settler Homes Manhood and Houseboys: An Analysis of Natal's Rape Scare of 1886" (2002) 28 (2) *Journal of South African Studies* 385.

¹¹⁷ J Martens "Settler Homes Manhood and Houseboys: An Analysis of Natal's Rape Scare of 1886" (2002) 28 (2) *Journal of South African Studies* 381.

¹¹⁸ J Martens "Settler Homes Manhood and Houseboys: An Analysis of Natal's Rape Scare of 1886" (2002) 28 (2) *Journal of South African Studies* 38.

¹¹⁹ E Norman "Natal's Black Rape Scare of the 1870s" (1988) 15(1) *Journal of South African Studies* 36.

¹²⁰ E Norman "Natal's Black Rape Scare of the 1870s" (1988) 15(1) *Journal of South African Studies* 37.

There were no rights afforded to women to speak as testimony about rape comes from white men who claimed to speak on behalf of white women whom they alleged were unable to speak for themselves.¹²¹ A feature of these panics reveal that most cases comprised of accusations of attempted rape as supporting evidence was scanty and attempted rape came before the court as charges of vagrancy, attempted housebreaking or breaking and entering.¹²² The rape scare is seen by colonial settlers as a means of control of what is regarded as their rightful control of women's bodies.¹²³

European men were not prosecuted for rape or immoral conduct with African women.¹²⁴ Pumla Dineo Golqa¹²⁵ states that “salvocratic society created the stereotype of African ‘hyper sexuality’, and this was unique in the Cape which sought to both authorise and justify the institutionalised rape of slaves, as women were seen as excessively sexual and impossible to satiate”. Golqa further states that “the rape of black women by white men was seen as a way of punishing black women who defied their society’s prescriptions on appropriate feminine behaviour”.¹²⁶ This era generated less attention to regular policing which was unknown in the countryside as no one took special notice of the crimes perpetrated by non-Europeans against other non- Europeans.¹²⁷ The Union of South Africa's 1913 Report of the Commission appointed to enquire into Assaults on Women similarly pointed to the threat of sexual assault as something previously unknown.¹²⁸

4. RAPE IN SOUTH AFRICA FROM 1920s to 1970s

This era generated a wake in the women’s rights movement. White women who were members of the National suffrage body, the Women’s Enfranchisement Association of the Union (WEAU) were enfranchised in 1930.¹²⁹ Although, Cheryl Walker contends that:

“Formal recognition was not the same as practical application and the enfranchisement of women did not signal a radical restructuring of power relationships between men and women”.¹³⁰

White males in tightening their dominance over the blacks introduced the Immorality Act No 5 of 1927. A brief recourse to the essence of the Act reveals that it prohibited intercourse between white

¹²¹ E Norman “Natal’s Black Rape Scare of the 1870s” (1988) 15(1) *Journal of South African Studies* 37.

¹²² E Norman “Natal’s Black Rape Scare of the 1870s” (1988) 15(1) *Journal of South African Studies* 38.

¹²³ E Norman “Natal’s Black Rape Scare of the 1870s” (1988) 15(1) *Journal of South African Studies* 47.

¹²⁴ E Norman “Natal’s Black Rape Scare of the 1870s” (1988) 15(1) *Journal of South African Studies* 49.

¹²⁵ PD Gqola *Rape: A South African Nightmare* (2015) 44.

¹²⁶ PD Gqola *Rape: A South African Nightmare* (2015) 23.

¹²⁷ E Norman “Natal’s Black Rape Scare of the 1870s” (1988) 15(1) *Journal of South African Studies* 42.

¹²⁸ E Norman “Natal’s Black Rape Scare of the 1870s” (1988) 15(1) *Journal of South African Studies* 52.

¹²⁹ C Walker “Women Suffrage the Politics of Gender Race and Class” in C Walker (ed) *Women and Gender in Southern Africa to 1945* (1990) 313: However, in 1930, women’s suffrage became an established principle in South African political thought and as such was incorporated into subsequent campaigns for political rights among the black majority as well.

¹³⁰ C Walker “Women Suffrage the Politics of Gender Race and Class” in C Walker (ed) *Women and Gender in Southern Africa to 1945* (1990) 344.

men and native women with penalties of up to five years imprisonment for men and four years imprisonment for women ¹³¹until amended in 1950 by the Immorality (Amendment) Act which extended the prohibition to intercourse out of wedlock between whites and non- whites (removed the restrictions to blacks only).¹³² The second Immorality Act No 23 of 1957 continued this prohibition. Section 1 of the Act provided that “unlawful carnal intercourse means carnal intercourse otherwise than between husband and wife”. The effect of this provision was that sexual intercourse between husband and wife was lawful and a woman could not be raped by her husband.

Age for consent of a female child under the Sexual Offences Act No 23 of 1957 was fixed to 16 years. Section 14(1) (a) provided that “it is an offence for any male or female to have unlawful carnal intercourse with a girl under the age of 16 years”. However, the Act provided also that rape was not committed when parties are married, the accused was deceived as to the girl’s age,¹³³ the girl was a prostitute (the notion that a girl who was a prostitute could not be raped was evident in the provisions of this Act as the lifestyle of a victim was considered as a precipitation for rape and justified consent), the accused was under the age of 21 years and it is the first occasion on which he had been charged with this offence.¹³⁴

During the 1920s to the 1950s, South Africa experienced a period of recession after the Second World War. These according to PL Borner¹³⁵ “had an effect on the economy”. Borner¹³⁶ reveals that this period resulted in a gradual move to an industrial era which brought about outstrip of mining and contributed to the damage on the rural society as those working in the mine had to move to towns. Due to this challenge, a significant proportion of men and women (some women went to join their husbands) migrated to towns.¹³⁷ Prior to 1937, Borner further states “that there were no effective restrictions on women entering towns and (even after the amendment of the Urban Areas Act of that year, a man was entitled to bring his wife and family to urban areas once he had worked continuously for two years”).¹³⁸

¹³¹ J Martens “Citizenship Civilization and the Creation of South Africa’s Immorality Act 192” (2007) 59 *South African Historical Journal* 223.

¹³² J Martens “Citizenship Civilization and the Creation of South Africa’s Immorality Act 192” (2007) 59 *South African Historical Journal* 215.

¹³³ See section 14 (2) c of Act 23 of 1957.

¹³⁴ S Hoor, JRL Milton & M Cowling *South African Criminal Law and Procedure Volume III: Statutory Offences* 2ed (1989) 3-8.

¹³⁵ PL Borner ‘Family crime and political consciousness on the East rand 1939-1955’(1980) 14 (3) *Journal of Southern African Studies*.393

¹³⁶ PL Borner ‘Family crime and political consciousness on the East rand 1939-1955’(1980) 14 (3) *Journal of Southern African Studies*.393

¹³⁷ PL Borner ‘Family crime and political consciousness on the East rand 1939-1955’ (1980) 14 (3) *Journal of Southern African Studies*.394.

¹³⁸ PL Borner ‘Family crime and political consciousness on the East rand 1939-1955’(1980) 14 (3) *Journal of Southern African Studies*.394

Apartheid was introduced in 1948 when the National Party (NP) came into power. Meaghan E Campbell¹³⁹ states that “during this era, the emergence of apartheid government concerned itself with the institutionalisation of racial laws to control the influx of African migrants as African men and women who migrated to urban areas were seen as corrupted once exposed to a urban lifestyle”. These laws include: the Group Areas Act of 1950(that provides for the separation of various residential areas for various races), the Abolition of Pass Laws and the Coordination of Documents Act of 1952 (it regulated the movement of African men and women and required that African men carry passes at all times and that each month, it is to be signed by their employer).The apartheid government was concerned about the migration of African women to the urban areas. This was so as according to Sophile¹⁴⁰ “they were stereotyped as loose women which was considered as probably the main factor in the disintegration in towns flirting about from job to job here are women for the asking” which Louis Franklin¹⁴¹ asserts “were also characterised as sexually promiscuous among native women”. Migrant women in the city engaged in illegal jobs of prostitution, liquor brewing and selling and also including menial jobs such as nursemaid and domestic servants.¹⁴²

Although, noted developments as a result of migration of women to townships according to Cherryl Walker “allowed women access a greater range of political, social and cultural organisations and encouraged them in independence”.¹⁴³ This is reflected in the 1954 establishment of the Federation of South African Women (FSAW)-an emergence of a new women’s movement against the pass laws in rural and urban areas.¹⁴⁴

Longmore¹⁴⁵ states that “women were qualified as highly sexed as a woman’s attractive ways were seen as her great advantage and inviting”. This according to Campbell is said to have encouraged the perceptions that African and coloured men lost control of their morals when confronted with sexual lasciviousness.¹⁴⁶ Campbell’s research reveals¹⁴⁷ “that during mid-1960s to 1980s rape in townships was of little interest to the State as it was merely seen as reflecting the moral corruptibility of the African and coloured male and his inability to adapt to urban life as high rate of rape was seen as a logical result of urban decay”. Campbell further noted “that the apartheid Government devoted the first two decades of rule to considering African and coloured roles in urban centres as long standing

¹³⁹ M E Campbell *Discourse analysis in South Africa 1948-1994: A Case for “Policing the Penis”* Dalhousie University (2000).

¹⁴⁰ DWT Sophile *Primitive marriage and European Law: A South African Investigation* (1970) 11.

¹⁴¹ LF Freed *Crime in South Africa: An Integralist Approach* (1963) 145.

¹⁴² DWT Sophile *Primitive marriage and European Law: A South African Investigation* (1970)11.

¹⁴³ C Walker *Women and Resistance in South Africa* (1991)3.

¹⁴⁴ C Murray *Gender and the New South African Legal Order* (1994) 43.

¹⁴⁵ L Longmore *The Dispossessed a Study of Sex-Life of Bantu Women In and Around Johannesburg* (1959) 23.

¹⁴⁶ L Longmore *The Dispossessed a Study of Sex-Life of Bantu Women In and Around Johannesburg* (1959) 11.

¹⁴⁷ M E Campbell *Discourse analysis in South Africa 1948-1994: A Case for “Policing the Penis”* Dalhousie University (2000) 38.

historical issues characterized by industrialisation and urbanisation aggravated this concern.¹⁴⁸ Sexual violence was of minimal concern to the Government”.¹⁴⁹

During the end of the 1970s the concern for rape was developing. Law journals began to publish articles of rape as issues of concern to women.¹⁵⁰ Campbell highlights the strengths and weaknesses of this era as follows: government paid attention to township rape during this period,¹⁵¹ developments around this era reflects in the Annual Report from the Commissioner of Police on rape statistics regarding rapists but on victims’ racial identification.¹⁵² However, until 1982 racial identification was excluded from the Annual Report of the Commissioner of police.¹⁵³ Demands were made to the Minister of Statistics and Law and Order that rape statistics be announced in the House of Assembly. The statistics states as follows that from 1974 to 1975, 14 058 “non-white females” reported rape by a “non-white male,” 14 596 of these kinds of intra racial rape were reported in 1975 to 1976 and 15 232 in 1979.¹⁵⁴ Only 125 white females reported rape by an African male in 1974 to 1975 and 113 in 1975 to 1976. However, men who raped white women were severely punished despite the prevalence of black women’s rape.¹⁵⁵

In a newspaper report in 1978 Colonel Tony Visser¹⁵⁶ Soweto's Criminal Investigation Department Chief, states that:

“95% of rape cases in Soweto remained unsolved and this was not the fault of police, rather that ‘women and girls who were raped often had themselves to blame’ and that ‘some women use rape as a cover when they were in difficulties with their husbands or parent’. It was the responsibility of township parents and women to prevent possible violation. Where reports of township rape were taken seriously in cases where ‘women coming from work are attacked’ and victims were found to be ‘decent people who need protection they might expect judiciary action though certainly not of the same quality white women received”.

The above statement reveals the individual and societal notions of rape in the criminal justice system. This study argues that this era reveals notions that shaped the society about women. The victim

¹⁴⁸ M E Campbell *Discourse analysis in South Africa 1948-1994: A Case for “Policing the Penis”* Dalhousie University (2000) 26.

¹⁴⁹ M E Campbell *Discourse analysis in South Africa 1948-1994: A Case for “Policing the Penis”* Dalhousie University (2000) 48.

¹⁵⁰ C Murray *Gender and the New South African Legal Order* (1994) 43.

¹⁵¹ M E Campbell *Discourse analysis in South Africa 1948-1994: A Case for “Policing the Penis”* Dalhousie University (2000) 46.

¹⁵² M E Campbell *Discourse analysis in South Africa 1948-1994: A Case for “Policing the Penis”* Dalhousie University (2000) 46.

¹⁵³ G Super *Governing Through Crime in South Africa: The Politics of Race and Class in Neoliberalizing Regimes* (2013) 21.

¹⁵⁴ M E Campbell *Discourse analysis in South Africa 1948-1994: A Case for “Policing the Penis”* Dalhousie University (2000) 46.

¹⁵⁵ MCJ Olmesdahi & NC Steytler *Criminal Justice in South Africa* (1983) 162-173

¹⁵⁶ M E Campbell *Discourse analysis in South Africa 1948-1994: A Case for “Policing the Penis”* Dalhousie University (2000) 94.

precipitation theory reflects in notions about women as weaker vessels in the society and notions that characterised black women as “hyper sexual”. This presents an impression that rape was as a result of a woman's lifestyle in township cities which precipitated rape by black and coloured men and also justified the rape by white men which according to Campbell “seemed not as an issue to be considered”.¹⁵⁷

5. SOUTH AFRICA’S POSITION ON RAPE FROM 1979-1985

5.1 Rape statistics 1979- 1983

The statistics below reflect reported rape cases, prosecution and convictions rates around these periods as collected by the South African police as processed by the central statistical services of the Department of Constitutional Development and Planning.¹⁵⁸

Years	Reported cases	Prosecutions rates for rape or attempted rape	Conviction rates
1978/1979	14 095	8480	0
1979/1980	14 938	9365	4500
1980/1981	15318	9974	4848
1981/1982	15535	8993	5179
1982/1983	15342	0	4744

The South African Law Commission (SALRC)¹⁵⁹ however noted that:

“the conviction rates and prosecution rates differs radically from those reported which brings to light the fact that there are rape cases that go unreported and the need for the law and process of the law might be modified to make the idea of reporting rape more acceptable by the complainants. The commission further states that if the above statistics on reported cases were accepted unreservedly as a true reflection of the rape situation in South Africa, it would however place the problem of rape out of perspective a picture which is unfortunately presented to the public”.

Campbell states that “the above statistics still gave more attention to white women’s rape, as racial discrimination was still the order of the South African justice system, the safety of white women was

¹⁵⁷ M E Campbell *Discourse analysis in South Africa 1948-1994: A Case for “Policing the Penis”* Dalhousie University (2000) 35

¹⁵⁸ South African Law Commission *Project 45 Women and Sexual Offences in South Africa* published paper (1985) 7.

¹⁵⁹ South African Law Commission *Project 45 Women and Sexual Offences in South Africa* published paper (1985) 1.8.

still of priority”.¹⁶⁰ However, Campbell further notes the increased interest in intra-racial rape during this period,¹⁶¹ as interracial rape was the focus of early discourse on rape.¹⁶²

Violence by Frustrated male youths, known as the “Jack Rollers” were popular among the Diepkloof area of Soweto. This group comprised of male youths that were too old to go to school (having passed the age limit of 21 set by the NPA.) The “Jack rollers” were unable to find jobs, this led to abducting and raping females. The gangs were resentful to their state and began targeting young women at schools. The reasons for the crime of rape was centred on destroying women’s opportunities and potential as such women were regarded as snobs that seemed to enjoy better circumstances. The impression this portrays is that they aimed to put women in the same position as these they were. This however reveals how the society viewed women’s rights and place in the late 1980s¹⁶³

During the mid-1980s, the South African State inquired into the viability of oppressive laws governing the majority oppressed groups under white rule. In 1982 a request was made to the SALRC to institute an investigation into the procedure for laying of rape charges and the medico -forensic aspect of rape, this was made pursuant to the questions put to the House of Assembly in Parliament on 5 May 1982.¹⁶⁴ This entailed the various press reports about the trauma experienced by rape victims, the stigma that somehow attaches to them and the humiliation of giving evidence in the public.¹⁶⁵

5.2 The genesis towards the considerations for reformation of the Common law positions of rape in South Africa 1985

The SALRC was to investigate the issue of women and sexual offences in South Africa in 1985.¹⁶⁶ The common law position on rape was re-evaluated. A summary of the Commission’s recommendations in regards to the focus of this thesis as regards substantive law, law of evidence and treatment of offenders by the police is as follows:¹⁶⁷

¹⁶⁰ M E Campbell *Discourse analysis in South Africa 1948-1994: A Case for “Policing the Penis”* Dalhousie University (2000) 47

¹⁶¹ M E Campbell *Discourse analysis in South Africa 1948-1994: A Case for “Policing the Penis”* Dalhousie University (2000) 48.

¹⁶² M E Campbell *Discourse analysis in South Africa 1948-1994: A Case for “Policing the Penis”* Dalhousie University (2000) 45.

¹⁶³ Y Jung... et al *Commentary on Reclaiming Women’s Spaces: new perspectives on violence against Women and Sheltering in South Africa* (2000) 71.

¹⁶⁴ South African Law Commission *Project 45 Women and Sexual Offences in South Africa* published paper (1985) 1.1.

¹⁶⁵ South African Law Commission *Project 45 Women and Sexual Offences in South Africa* published paper (1985) 1.1.

¹⁶⁶ C Murray *Gender and the New South African Legal Order* (1994) 43.

¹⁶⁷ South African Law Commission *Project 45 Women and Sexual Offences in South Africa* published paper (1985) 8.

- “There is no redefinition of the common law crime of rape. The commission still maintained the gender focus on female as male assault could be charged under existing crimes such as indecent assault”.¹⁶⁸
- “Presumption that a boy under the age of 14 is incapable of having sexual intercourse be abolished by legislature”.¹⁶⁹
- “No change is recommended regarding the application of the cautionary rule in rape cases”.¹⁷⁰
- “Continued in-service training should be considered by South African Police”.¹⁷¹
- “Recommendation that rape within marriage be laid down clearly in legislation that a husband may be prosecuted for rape of his wife provided a prosecution is not instituted without the consent of the Attorney General”.¹⁷²
- “Cross Examination of the complaint concerning previous sexual experience with the accused will always be relevant and should therefore be admissible. Legislation should prohibit questions concerning previous sexual experience with persons other than the accused unless grounds for the relevance thereof are advanced by the accused or his legal representative in an application made in camera to the presiding judge or judicial officer”.¹⁷³
- “No change is made with regards to the rules rendering the complaint made in sexual crime inadmissible¹⁷⁴ the correct application of the rule, in no way prejudices a rape victim. Where she did complain to someone, this could only benefit the state’s case”.¹⁷⁵

The Minister of Justice introduced a proposed Bill to these effects.

These recommendations also illustrates the effort made by the apartheid Government to incorporate issues of gender into its agenda in recognition of the changing political climate regarding women's rights.¹⁷⁶ Colleen Hall ¹⁷⁷ contends the Commission’s report of 1985 on the definition of rape and states “that the positions of the definition still maintained a gender based patriarchal ideology”. However, attempts to address the specific needs of African and Coloured women were not addressed at this period. The consideration of white women’s rape was still a priority to the police.¹⁷⁸

¹⁶⁸ South African Law Commission *Project 45 Women and Sexual Offences in South Africa* published paper (1985) 2.19-2.20.

¹⁶⁹ South African Law Commission *Project 45 Women and Sexual Offences in South Africa* published paper (1985) 2.52.

¹⁷⁰ South African Law Commission *Project 45 Women and Sexual Offences in South Africa* published paper (1985) 3.50.

¹⁷¹ South African Law Commission *Project 45 Women and Sexual Offences in South Africa* published paper (1985) 5.36

¹⁷² South African Law Commission *Project 45 Women and Sexual Offences in South Africa* published paper (1985) 2.43.

¹⁷³ South African Law Commission *Project 45 Women and Sexual Offences in South Africa* published paper (1985) 3.24-3.31.

¹⁷⁴ South African Law Commission *Project 45 Women and Sexual Offences in South Africa* published paper (1985) 3.50.

¹⁷⁵ South African Law Commission *Project 45 Women and Sexual Offences in South Africa* published paper (1985) 3.50.

¹⁷⁶ M E Campbell *Discourse analysis in South Africa 1948-1994: A Case for “Policing the Penis”* Dalhousie University (2000) 55.

¹⁷⁷ C Hall “Rape: The Politics of Definition” (1988) 105(1) *South African Law Journal* 67-72.

¹⁷⁸ M E Campbell *Discourse analysis in South Africa 1948-1994: A Case for “Policing the Penis”* Dalhousie University (2000) 55.

5.3 Notable progress after SALRC's recommendation of 1985 on rape

A shift from the position of the Law on the presumption that males younger than the age of 14 years could not be liable for rape was eventually repealed by Section 1 of the Criminal Procedure Amendment Act 103 of 1987.

A move for change occurred in relation to the positions of the past sexual history of a rape victim. Prior to the move for development there was no rape shield law to protect complainants of sexual offences and evidentiary rules were governed by the common law, where this reflects in the provisions of the Act 51 of CPA 1977. Section 227(1) states that the admissibility of character evidence of the accused is determined by the rules in force on 30 May 1961, which signifies the rules of the English law.¹⁷⁹ In South Africa, these evidentiary rules were adopted from the English law of evidence into the South African common law.

The common law position was criticised. The common law rule applied did not provide precise and clear circumstances under which prior history could be adduced and the purpose for which such evidence was allowed as this was used to discredit the evidence of a rape victim. DT Zeffertt & AP Paizes¹⁸⁰ on the common law evidentiary rules states that “on the issue of consent evidence as to the character of the complainant was often adduced for no reason other than to show bad reputation for lack of chastity”.(As to whether she was a virgin or not).

This study argues that the Common law character evidence reflected the victim precipitation theory by courts. The lifestyle of a rape victim was used as a yardstick for determining consent to rape. On the issue of consent, the complainant at common law could be examined on other sexual acts with the accused¹⁸¹ this was relevant to the case and could be contradicted by evidence.¹⁸² Although, the rule allows evidence of the complainant's sexual conduct with other men other than the accused only where sufficiently relevant under the similar fact rule to warrant their reception.¹⁸³

The accused may cross-examine the complainant as to her bad character due to lack of chastity in a case involving rape or indecent assault, as this line of questioning was considered relevant to credibility.¹⁸⁴ Prior to amendment of the common law position, section 227 of CPA 1977 provided that the admissibility of character evidence of a complainant in a sexual offence case would be determined according to the common law rules. It was also recognised that the general reputation on

¹⁷⁹ PJ Schwikkard & SE Van Der Merwe *Principles of Evidence* 3ed (2009) 60.

¹⁸⁰ DT Zeffertt & AP Paizes *The South African Law of Evidence* 2 ed (2009) 263.

¹⁸¹ *R v Riley* 1887 18 QBD 481.

¹⁸² *R v Riley* 1887 18 QBD 481.

¹⁸³ *R v Adamstein* 1937 CPD 331.

¹⁸⁴ *R v Cockcroft* 1870 11 Cox CC 410.

the complainant could be relevant to the issue of whether consent was given.¹⁸⁵ M Anderson¹⁸⁶ states that:

“consent was in effect transferable a woman if consented to sexual intercourse with men to whom she was not married was deemed indiscriminate in her sexual life and that once a woman had engaged in other sexual behaviour with the defendant, courts became sympathetic with the argument that he had every reason to believe that she consented to sexual intercourse with him”.

The recommendation by SALRC in 1985¹⁸⁷ on the application of the common law evidentiary rules, recognized the criticism that the rule appears to be a relic from the days when it was generally accepted code of conduct that no decent woman had sexual intercourse outside marriage which is no longer the position today. In considering legislations in other jurisdictions,¹⁸⁸ the Commission recognized the situations of cases in practice where the present law is still considered as being misused and the complainant is consequently not protected from unnecessary cross examination. As regards to questions concerning sexual intercourse with the accused, the Commission recommended that the status quo of the common law be maintained¹⁸⁹ as the questions will always be relevant and their limitation by the legislature may be a very real danger of prejudicing the accused.¹⁹⁰

Considering the evidence of character and cross examination concerning previous sexual experience with persons other than the accused, the Commission recognized the negative impact this has on a woman and accepts by noting that the disclosure must certainly be one of a traumatic aspects of the rape trial for a complainant and is also one of the strongest deterrents from reporting rape. The Commission recommended that a limitation be placed by legislation on cross examination and that such questions be prohibited unless an application is made in camera to the presiding judge or judicial officer by giving grounds for their admissibility.¹⁹¹ The Commission noted the advantages of the developments, as questions to be considered will be on relevance, a prosecutor would be required to address the court on the issue with the inclusion of proper instruction and training of those involved in the administration of justice concerning the purpose and contemplated operation of such statutory provisions.¹⁹²

¹⁸⁵ DT Zeffertt & AP Paizes *The South African Law of Evidence* 2 ed (2009) 264.

¹⁸⁶ MJ Anderson “From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law” (2002) 70(51) *Washington Law Review* 54.

¹⁸⁷ South African Law Commission *Project 45 Women and Sexual Offences in South Africa* published paper (1985) 3.9.

¹⁸⁸ South African Law Commission *Project 45 Women and Sexual Offences in South Africa* published paper (1985) 3.10.

¹⁸⁹ South African Law Commission *Project 45 Women and Sexual Offences in South Africa* published paper (1985) 3.25.

¹⁹⁰ South African Law Commission *Project 45 Women and Sexual Offences in South Africa* published paper (1985) 3.25.

¹⁹¹ South African Law Commission *Project 45 Women and Sexual Offences in South Africa* published paper (1985) 3.28.

¹⁹² South African Law Commission *Project 45 Women and Sexual Offences in South Africa* published paper (1985) 3.31.

The Criminal Law and Criminal Procedure Act 39 of 1989 amended the former positions of the Common law and substituted section 227 (2) of Act 51 of 1977 CPA¹⁹³ this provides that:

“(2) Evidence as to sexual intercourse by, or any sexual experience of any female against or in connection with whom any offence of a sexual nature is alleged to have been committed, shall not be adduced, and such female shall not be questioned regarding such sexual intercourse or sexual experience, except with the leave of the Court such leave shall not be granted unless the Court is satisfied that such evidence or questioning is relevant: provided that such evidence may be adduced and such female may be so questioned in respect of the offence which is being tried.

(3) Before an application for leave contemplated in subsection (2) is heard, the Court shall direct that any person whose presence is not necessary may not be present at the proceedings, and the Court may direct that a female referred to in subsection (2) may not be present”.

Judges were still left with the discretion as to relevance of questions. However, can what stems from the above developments be regarded as a true reflection of the latter positions of the courts? L Artz & D Smythe¹⁹⁴ state “that the same judicial officers who in the past failed to exclude irrelevant previous sexual history evidence were then required to exercise the very same discretion albeit to be proceeded by an application held in camera”. However, this study reveals that there were notable developments after these amendments.

The case of *S v M*¹⁹⁵ reveals these developments after the change in the positions of the law on the evidence of past sexual history on rape. An appeal before the Supreme Court of Appeal (SCA) Heher AJA [Harms JA and Brand JA concurred].¹⁹⁶ The appellant was tried before a regional magistrate court with raping his six-year-old daughter during 1989.¹⁹⁷ The appellant was convicted and sentenced to ten years imprisonment. An appeal for the remittal of the case was made to a Natal Provincial Division of the High court¹⁹⁸ for hearing of evidence of two further witnesses (Siphamandla Ngema and Eli Khumbuza). The SCA judge decided whether adequate considerations of the law was taken before the lower court judge considered the remittal application.¹⁹⁹ One evidence was on the past sexual history of complainant.²⁰⁰ Witness Siphamandla Ngema was to testify that he had had a sexual relationship with the complainant.²⁰¹ The judge held that the proposed evidence of Ngema that he and the complainant had engaged in a sexual relationship in the years 1993 to 1996

¹⁹³ DT Zeffertt & AP Paizes *The South African Law of Evidence* 2 ed (2009) 264.

¹⁹⁴ L Artz & D Smythe *Should we consent?: Rape Law Reform in South Africa* (2008) 95.

¹⁹⁵ *S v M* 2003 (1) SA 341 (SCA)

¹⁹⁶ *S v M* 2003 (1) SA 341 (SCA) at para 4, 39.

¹⁹⁷ *S v M* 2003 (1) SA 341 (SCA) at para 1

¹⁹⁸ *S v M* 2003 (1) SA 341 (SCA) at para 1- 3. The matter was referred back to the magistrate to hear the further evidence where the appellant was again convicted after the regional court heard the further evidence. His appeal to the provincial Division failed.

¹⁹⁹ *S v M* 2003 (1) SA 341 (SCA) at para 14-17

²⁰⁰ *S v M* 2003 (1) SA 341 (SCA) at para 13

²⁰¹ *S v M* 2003 (1) SA 341 (SCA) at para 13

had no bearing on whether the appellant raped the complainant in 1989 and the purpose of adducing the evidence could only have been to attack the credibility or character of the complainant.²⁰² The court considered the provisions of section 227 of the 1989 provisions which it states intends to militate against offensive, hostile and irrelevant questioning of complainants.²⁰³ The judge noted various positions of other jurisdictions in this respect considering what appears to be the common background of such enactments which appears to take into consideration difficulties whether evidence or cross examination is relevant to the issues or credibility.²⁰⁴ After considering comparative sources (Canada, United Kingdom, New Zealand and Australia).²⁰⁵

The judge considered the proposed (South African Law Commission published Discussion Paper A 102 relating to Project 107 “Sexual Offences: Process and Procedure” in December 2001) that list aspects that would be proper for a court to consider when an application to adduce evidence or put questions about previous sexual experience or conduct of a complainant is in issue.²⁰⁶ These aspects includes: that if a court is satisfied that such evidence or questioning relates to a specific instance of sexual activity relevant to a fact in issue; is likely to rebut evidence previously adduced by the prosecution; is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant where it is relevant to a fact in issue; is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy or is fundamental to the accused's defence.²⁰⁷

The judge further states “that the matters identified must, even in the present state of the law, be regarded as considerations of great importance in arriving at a properly considered judgment on admissibility in terms of s 227(2)”.²⁰⁸ These reveals the developments in case law as to the proper use of discretion by judges in the application of the provisions of section 227 of 1989.

²⁰² *S v M* 2003 (1) SA 341 (SCA) 353 at para 17.

²⁰³ *S v M* 2003 (1) SA 341 (SCA) 353 at para 17.

²⁰⁴ *S v M* 2003 (1) SA 341 (SCA) 353 at para 17.

²⁰⁵ *S v M* 2003 (1) SA 341 (SCA) 353 at para 17.

²⁰⁶ *S v M* 2003 (1) SA 341 (SCA) 353 at para 17.

²⁰⁷ *S v M* 2003 (1) SA 341 (SCA) 353 at para 17. The court also considers aspects from the Canadian position to take into account in determining admissibility of evidence relating to sexual activity of a complainant. This is also provided in same para 17 and these includes: (a) the interests of justice, including the right of the accused to make a full answer and defence; (b)society's interest in encouraging the reporting of sexual assault offences;(c)whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case; (d)the need to remove from the fact-finding process any discriminatory belief or bias; (e)the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury (f)the potential prejudice to the complainant's personal dignity and right of privacy; (g)the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; (h)any other factor that the Judge, provincial court Judge or justice considers relevant.

²⁰⁸ *S v M* 2003 (1) SA 341 (SCA) 353 at para 17.

6. HISTORICAL POSITIONS ON SENTENCING IN RAPE

Character evidence of a rape victim served as a part of the considerations among other factors relevant to assessment of punishment for rape.²⁰⁹ Evidence of character for sentencing in rape was maintained as a relevant factor by SALRC of 1985.²¹⁰

The common law traditionally vested full discretion to determine sentences to be imposed for particular offences with no laid down rules guiding discretion.²¹¹ Traditionally, the death sentence could have been in the past, be imposed in a crime of rape.²¹² However, De Villiers CJ states that “few judges failed to give a sentence of death unless there were exceptional circumstances of such great atrocity as to leave no choice”.²¹³ In Natal, the death penalty was compulsory for rape.²¹⁴ This position was changed as death sentence in Natal was made discretionary.²¹⁵ The Criminal Procedure and Evidence Act 31 of 1917²¹⁶ provided for a discretionary death penalty for rape, this was also similar to the provisions of the Criminal Procedure Act 51 of 1977 section 227(1) (b)²¹⁷ this provision was substituted by section 4 the Criminal Procedure Act 107 of 1990,²¹⁸ which maintained the position on discretionary death penalty for rape. This reflects the position of the law till 1990. The character evidence of a rape victim among other factors served as a relevant factor in sentencing of rape. This study argues that this factor encouraged rape myths about female victims and this was presented in the way judges exercised their discretion. Victim precipitating rape shaped the discretion of judges in sentencing as character evidence was a way for victim blaming for rape.

The case of *S v N*²¹⁹ is considered to illustrate the positions of the law. The case was an appeal from a decision dismissing an appeal in the Natal Provincial Division to the Appellate Division. Corbett JA delivered the judgement with (Viljoen JA and Nestadt JA concurring).²²⁰ The case was an appeal on the conviction and sentencing for rape of the complainant by the regional magistrate which

²⁰⁹PMA Hunt “Common law crimes” Vol 11 in JRL Milton (ed) *South African Criminal Law and Procedure* (1970) 451.

²¹⁰South African Law Commission *Project 45 Women and Sexual Offences in South Africa* published paper (1985).

²¹¹ L Artz & D Smythe *Should we consent?: Rape Law Reform in South Africa* (2008) 228

²¹² *R v Nonosi* 1882 1 BAC 154 155-156.

²¹³ *R v Nonosi* 1882 1 BAC 154 155-156.

²¹⁴ See section 1 of Act 27 of 1887.

²¹⁵ See section 2 of Act 22 of 1898.

²¹⁶ See section 338 of Act 31 of 1917.

²¹⁷ PMA Hunt “Common law crimes” Vol 11 in JRL Milton (ed) *South African Criminal Law and Procedure* (1970) in Du Toit *Straf* 226-230.

²¹⁸ See section 4 of Act 107 of 1990.

²¹⁹ *S v N* 1988 (3) SA 450 (A).

²²⁰ *S v N* 1988 (3) SA 450 (A) 452. This study only presents a summary of the relevant positions in the case on the sentence without full details due to the fact that character evidence was an established factor relevant in sentencing which is the position of plethora of cases during this era. See also *M v N* 1981 (1) SA 136 (Tks) *R v S* 1958 (3) SA 102 (AD) 105 *R v Sibande* 1958 (3) SA 1 (AD) 6, where Per Schreiner stated that rape upon a prostitute for example, though it is the crime of rape, would not ordinarily call for a penalty of equal severity to that imposed for rape upon a woman of refinement and good character.

occurred next to the appellant's van alongside a freeway. The appellant requested for leave on appeal for further evidence not led which the appellant states was due to the said alleged incompetence of appellant's attorney on the following: evidence of plaintiff's character and a relationship between the parties, evidence relating to the spermatozoa test and evidence of post-trial conduct of plaintiff.²²¹

In considering the issue on further evidence on character, the judge was not persuaded that the evidence would be materially relevant to the outcome of the trial due to the fact as the judge stated that the "evidence would have been of more relevance and cogency had appellant's case been that intercourse had taken place with the complainant's consent as his case was that intercourse took place due to this reason as well the application for remittal to lead such evidence was refused".²²² The judge in addressing the sentence, points to the concluding portion of the magistrate's judgement on sentence where the magistrate states that:

"This is not the usual or ordinary type of case where the rapist grabs H an unknown person and rapes her. In this case you knew the complainant well and you had often associated with her".²²³

The appellate judge in reviewing the above statement of the magistrate on factors relevant for mitigation of the sentence of rape considered by the magistrate in sentencing the appellant to five years imprisonment noted that it was not clear whether the magistrate regarded it as a mitigating or an aggravating factor.²²⁴ However, the judge considered it as a mitigating factor. These factors are as follows:

"The shock and affront to dignity suffered by the rape victim would ordinarily be less in the case where the rapist is a person well-known to the victim and someone moving in the same social milieu as the victim. Bearing in mind the appellant's personal situation, the fact that he had no previous convictions, the lack of any serious injury to the complainant' and the fact that she was evidently a woman of experience from the sexual point of view".

This study argues that the judge in stating that the complainant was a "woman of experience from the sexual point of view" gives an impression that she was not a virgin and had a lot of sexual experiences thereby undermining the dignity of the complainant and blaming her for her rape. The judge also undermined the dignity of the rape victim by stating that the shock and affront to dignity would be less if a rapist is a person well known to the victim.²²⁵ This gives an impression that a victim precipitates or encourages rape if the offender is well known to the victim and someone moving in the same social milieu with the offender will also share a part of the responsibility for rape.

²²¹ *S v N* 1988 (3) SA 450 (A) at 452.

²²² *S v N* 1988 (3) SA 450 (A) at 463.

²²³ *S v N* 1988 (3) SA 450 (A) at 466.

²²⁴ *S v N* 1988 (3) SA 450 (A) at 466.

²²⁵ *S v N* 1988 (3) SA 450 (A) at 466.

The appellate judge allowed the appeal for sentencing and substituted the sentence imposed by the magistrate to five years imprisonment, suspending two-and-a-half years for a period of five years on conditions stated in paragraph[c].²²⁶ The appeal against the conviction was dismissed. The application for remittal for setting aside the conviction and sentencing was refused.²²⁷ D Smythe notes that much of the problem of sexual violence prior to the democratic era was either ignored or embodied under the broader imperative of ending apartheid.²²⁸ D Smythe further states that this challenge reflects the paucity of research into criminal justice response to rape in South Africa.²²⁹

7. THE DEVELOPMENTS TOWARDS SOUTH AFRICA AS A DEMOCRATIC STATE AND THE POSITIONS OF THE LAW IN RELATION TO RAPE

7.1 Rape statistics 1990-1994 and the women's liberation movement

This era was a move to a democratic system and a gradual development to the end of apartheid. The African National Congress (ANC) was unbanned in February 1990, this encouraged the national liberation movement for equality and women's and feminist activist discourse on violence against women in South Africa.²³⁰ "In mid 1990s, the South African Government responded to pressing problems of sexual violence by making violence against women and children a strategic crime prevention and policing priority".²³¹ According to Pelser A & De Kock C²³² on statistics for rapes reported to the police from the Crime information analysis centre records 20 321 in 1990 reflecting an increase to 42 429 in 1994.

According to a research by Penelope Andrews²³³

"on a series ran by the weekly Mail & Guardian newspaper in 1991 about violence against women, specifically the incidences of rape though focussing on Johannesburg and Soweto reveals that multiplying the number of reported rapes by 20, sociologist Diana Russell has estimated that in South Africa, 1038 women are raped every day, 111 of them in Soweto. 750 000 are raped every year".

D Smythe states "that as South Africa began its transition to democracy in the 1990s it saw a rapid increase in reported rapes and other violent crimes. D Smythe notes the development of a better record

²²⁶ S v N 1988 (3) SA 450 (A) at 466.

²²⁷ S v N 1988 (3) SA 450 (A) at 466.

²²⁸ D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 18.

²²⁹ D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 18.

²³⁰ C Murray *Gender and the New South African Legal Order* (1994) 49-50. The Women's Charter Campaign of 1992 had an impact on the national political process of writing a constitution.

²³¹ D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 18.

²³² A Pelser & C De Kock "Violence in South Africa: A Note on Some Trends in the 1990s" (2000)13(1) *Acta Criminologica* 83.

²³³ PE Andrews "Violence Against Women in South Africa: The Role of Culture and the Limitations of the Law in Redefining Violence Against Women" (1999) 8 *Temple and Political Civil Rights Law Review* 433.

keeping”.²³⁴ In comparison with the above statistics,²³⁵ and prior to these eras, D Smythe highlights the previous challenges with the policing system prior to South Africa’s democratic transition as follows: “South Africa had 11 different police forces with widely varying competencies in the collection of crime statistics,²³⁶ crimes reported in the “independent homelands” were not included in national figures,²³⁷ police resources were concentrated in white areas,²³⁸ with policing in black areas being predominantly targeted towards political control, apartheid crimes are biased by under reporting because majority of South Africans had little faith in the same justice system that was at the same time used to oppress.”²³⁹

D Smythe further “states that poor record keeping therefore makes it impossible to estimate pre- 1994 levels of rape in those areas”.²⁴⁰ It is to be noted that before 1993, marital rape was not a crime, none of this could have been included in any statistics.

However, it is still questionable if the new transition reflects a change in attitude and effectiveness of the policing system. A Kreigler “states that increase in reporting could have been as a result of the introduction of a democratic State”.²⁴¹

7.2 Developments towards the interim Constitution of South Africa

In the move for liberation towards the process of the Constitutional enactment, the most claims made by all women organizations was geared to all women being able to claim equality through the Bill of rights.²⁴² In 1993, the South African parliament ended white political domination by enacting an interim Constitution. The Constitution of the Republic of South Africa Act 200 of 1993 established in addition to other notable developments an independent judiciary, a justiciable Bill of Rights and a new era of a non-racial Government and principles of equality.²⁴³

The world conference on Human Rights held in Vienna in 1993²⁴⁴ introduced the application of human rights guarantees to both private and public domain and declared violence against women a human right violation. The 1994 United Nations Declaration on the Elimination of Violence against Women that set obligations to address the urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human

²³⁴ D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 17.

²³⁵ South African Law Commission *Project 45 Women and Sexual Offences in South Africa* published paper (1985).

²³⁶ D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 17.

²³⁷ D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 17.

²³⁸ D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 16.

²³⁹ D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 16.

²⁴⁰ D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 17.

²⁴¹ A Kreigler & M Shaw *A Citizen’s Guide to Crime Trends in South Africa* (2016) 146.

²⁴² C Murray *Gender and the New South African Legal Order* (1994) 58-61.

²⁴³ C Murray *Gender and the New South African Legal Order* (1994) 4339.

²⁴⁴ D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 25.

person.²⁴⁵ The apartheid government signed the Convention on the Elimination of All Forms of Discrimination against women (CEDAW) in 1993.²⁴⁶

Marital rape exemption was abolished in all aspects in the Prevention of Family Violence Act 133 of 1993, which reflected the “legitimisation of rape in marriage.” The first sexual offences court was established in 1993 in Cape Town.²⁴⁷ Rape kits were introduced in 1993. However, they were used only by district surgeon the majority of whom were male and white and reflective of the prejudices and preconceptions of the apartheid state.²⁴⁸

The interim Constitution was promulgated on 28 January 1994 and took effect on 27 April 1994.²⁴⁹ However, even after the election of a democratic Government in South Africa in 1994 the report of the South Africa Violence against Women and the Medico-Legal System²⁵⁰ reveals that:

“due to the racist and sexist culture that typified South Africa, magistrates and judges often had discriminatory and sexist assumptions about women that prejudice those cases that [did] reach court. A high percentage of cases are dropped before they reach trial or result in acquittal. Prosecutors may subscribe to stereotypes dropping cases where the woman involved is not a “good victim. “The police also contributes to the issues of women who have been seriously assaulted to the extent of needing medical attention may find their cases dismissed as unimportant given the levels of ‘real crime’ needing attention”.

8. SOUTH AFRICA’S POSITION ON RAPE FROM 1995-1999 (POST 1994)

According to Pelsers & De Kock’s²⁵¹ research on statistics for rapes reported to the police from the Crime Information Analysis Centre (CIAC) records 47 506 in 1995 and an increase to 50 481 in 1996 and a slight decrease to 49 280 in 1998.²⁵² According to R Jewkes & N Abrahams’s²⁵³ “research from CIAC on rape and attempted rape reported in 1999 reveals 23 900 for attempted rape, while reported rapes only reveal 20768. Although, Jewkes & Abrahams notes that data for rapes reported in 1999 are only available for the first six months (January to June). Jewkes & Abrahams states that

²⁴⁵ United Nations Declaration on the Elimination of Violence Against Women 85th Plenary Meeting held on 20 December 1993. See also United Nations Document A/RES/48/104(1993)

²⁴⁶ D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 25. See also United Nations Document A/RES/34/180(1980). It was ratified by first democratic parliament on 15 December 1995. The Convention was adopted for signature and ratification and accession by the UN General assembly on 18 December 1979 and entered into force on 3 September 1981.

²⁴⁷ Wynberg Regional Magistrate’s Court, Cape Town 2 March 1993.

²⁴⁸ Human Rights Watch *South African: Violence Against Women Medico-Legal System* (1997) 3.

²⁴⁹ I M Rautenbach & E F J Malherbe *Constitutional Law* 4eds (2004) 18.

²⁵⁰ Human Rights Watch *South African: Violence Against Women Medico-Legal System* (1997) 3.

²⁵¹ A Pelsers & C De Kock “Violence in South Africa: A Note on Some Trends in the 1990s” (2000)13(1) *Acta Criminologica* 83.

²⁵² This study argues that this statistics as opposed to the 1990 to 1994 periods reveals an increase in reported cases.

²⁵³ R Jewkes & N Abrahams “The Epidemiology of Rape and Sexual Coercion in South Africa: An Overview” (2002) 55(7) *Social Science & Medicine* 1233- 1234.

‘however, this still suggests a further decline in reported rape’.²⁵⁴ Earliest South African research conducted on rape victims in 1996 and 1997 by Stanton, Lochrenberg and Mukasa according to D Smythe’s study²⁵⁵ reveals the challenges in form of attritions that shape the attitudes of the police, leading to concerns about secondary victimisation and quality of evidence collected. D Smythe further reveals that the challenges reflects among other factors “in attitudes of refusal in allowing women lay charges, formulating charges of rape as indecent assault and not allowing complainant give statement in private”.²⁵⁶

However, the noted measures brought a change that contributed to an increase in reported rape cases.²⁵⁷

9. RAPE STATISTICS IN SOUTH AFRICA FROM 2000-2003 (POST 1994)

In 2000, the police developed a National Crime Combating strategy (NCCS). D Smythe states that this added more details and specificity to the National Crime Prevention Strategy (NCPS) strategic priority.²⁵⁸ However, D Smythe²⁵⁹ further notes that the NCCS still “did not address the issue of investigation and that no reference was made to improving investigations or how a ‘proper investigation’ was to be achieved”.²⁶⁰

Statistics by Ted Leggett²⁶¹ from ISS records reported rapes from 2000/2001 of 52 875, 2001/2002 54 293 and in 2002/2003 52 425. These statistics reflect an increase in 2001/2002 and a decrease in 2002/2003. Africa Check²⁶² states the following:

²⁵⁴ R Jewkes & N Abrahams “The Epidemiology of Rape and Sexual Coercion in South Africa: An Overview” (2002) 55(7) *Social Science & Medicine* 1233.

²⁵⁵ D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 11.

²⁵⁶ D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 11.

²⁵⁷ D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 33, 35 and 36. This is revealed in the establishment of the National Crime Prevention Strategy (NCPS) 1996 wherein it was stated that this identified gender based violence and crimes against children as one of seven policing strategy. Though, D Smythe further states that the strategy recognized that “violence against women exact a high human cost” and suggesting the need for victim empowerment as the central response. D Smythe contends that the above vague concept with a poor articulated goal of “crime prevention” set the tone for a policy that although well intentioned, de-emphasised the investigative power of the police and provides no directive to them as to how to respond to sexual offences. D Smythe notes further development which reflects in the National Instruction 22/1998: sexual offences support to victims and crucial aspect of the investigation. These provides detailed guidelines for investigating rape cases and treatment of rape victims. Among other guidelines, these provides for the taking of in depth information about incidence from a victim where she is told that anything that she may have done might put her in a “bad light when cross examined” should be declared. However, the guide further provides that this did not mean permission was given for sexual offences to be committed and emphasising that the fact that the victim states everything in his or her statement even information that will reflect negatively on the victim, will enhance credibility of victim.

²⁵⁸ D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 33.

²⁵⁹ D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 34.

²⁶⁰ D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 34.

²⁶¹ T Leggett “The Facts Behind the Figures: Crime Statistics 2002/2003” 2003(6) *SA Crime Quarterly* 4.

²⁶² *Guide: understanding crime statistics in South Africa--what you need to know* available at <https://africacheck.org/factsheets/a-guide-to-crime-statistics-in-south-africa-what-you-need-to-know/> accessed 7 July

“Prior to 2000 crime statistics were released for the periods of January to September each year. However, in July 2000 publication was suspended by the Minister of police and lifted in 2001. The Minister stated that statistics will be published quarterly. Though, Africa Check states that SAPS have only released crime statistics on an annual basis and actual reporting have differed over time”.

10. RAPE STATISTICS FROM 2004-2008(POST 1994 AND POST SORMA)

SAPS²⁶³ report’s rape statistics from 2004 to 2007(April to December) as follows: 2003/2004 39 007, 2004/2005 41 006, 2005/2006 41 343, 2006/2007 39 304 and in 2007/2008 36 190. In January 2004, Government instructed that contact crimes should be reduced by 7%-10% per annum starting with the 2004/2005 financial year.²⁶⁴ However, the challenge this presents is that reported rape statistics from this year upwards cannot be relied on, reasons being that it does not capture all reported rape cases.

11. THE DEVELOPMENT OF THE 1996 CONSTITUTION AND IMPACT OF THE BILL OF RIGHTS

On 4 February 1997, the South African Constitution Act 108 of 1996 took effect.²⁶⁵ The Constitution guarantees the rights of all people and affirms the democratic values of human dignity, equality and freedom.²⁶⁶ Chapter two provides for the Bill of Rights. (For the purpose of this dissertation the writer focuses on section 10 on the right to dignity,²⁶⁷ section 12 (2) right to bodily and psychological integrity these includes 12 (2) (b) right to security in and control over their body, section 9 (1) - (5) on the right to equal protection and benefit of the law.

The right to fair trial in section 35 provides for the rights of an accused in trial. However, the State is mandated to ensure that these rights are respected, promoted, protected and fulfilled.²⁶⁸ The right to dignity has been regarded as the foundation of many other Constitutional rights²⁶⁹ and this

2018. Africa Check states that Crime statistics are now released each September this cover crimes reported to SAPS in the previous financial year starting from 1 April of the previous year to 31 March of the current year. However, these signifies that at time of release, official crime statistics are already at best six months out of date and do not reflect current crime patterns and trends.

²⁶³ *Crime situation in South Africa* available at: https://www.saps.gov.za/about/stratframework/annual_report/2007_2008/2_crime_situation_sa.pdf accessed 8 July 2018 27.

²⁶⁴ *Crime situation in South Africa* available at: https://www.saps.gov.za/about/stratframework/annual_report/2007_2008/2_crime_situation_sa.pdf accessed 8 July 2018 3. The police reports that the reason is attributed to the high rate of contact crimes in South Africa in the late nineties compared to other INTERPOL countries and this had to be done over a ten year period in order to meet the “accepted” standard recorded by majority of INTERPOL member countries.

²⁶⁵ I M Rautenbach & E F J Malherbe *Constitutional Law* 4eds (2004)32.

²⁶⁶ See section 7 of the Constitution.

²⁶⁷ It states that everyone has inherent dignity and the right to have their dignity respected and protected.

²⁶⁸ See section 7(2) of the Constitution.

²⁶⁹ *S v Makwanyane* 1995 (3) SA 391 (CC) 328.

Ackermann J²⁷⁰ recognized that the violation of the right to freedom and security of the person also relates to the infringement of the right to dignity.²⁷¹

With the welcoming of the Constitution and the Bill of rights, statistics reveal an increase from 1996 to 2003 but with slight fluctuations thereafter. The challenges with the policing system during post-apartheid and post SORMA has been revealed in chapter one of this dissertation. However, this study highlights the notable developments in post-apartheid periods below. In the case of *S v Chapman*,²⁷² the crime of rape was for the first time upheld by the Supreme Court of Appeal in accordance with the Constitutional rights as guaranteed in the Bill of rights.

Further development is revealed in SALRC's report on investigation of sexual offences which was restricted to children only in 1996²⁷³ and 1997.²⁷⁴ However, in May 1998 the Minister of Justice approved the extension of the project to all aspects of sexual offences committed against both children and adults.²⁷⁵ This is revealed in the 1999 report of SALRC that provides for the expanded investigation to include adults, the reasons being that during the investigation it was observed that any proposed change in the law will have an overarching effect on the positions of not only children but also adults.²⁷⁶

The investigation was renamed sexual offences.²⁷⁷ The Committee's report of 1998 provides for an analysis of the existing laws relating to rape and suggested recommendations for changes in the laws based on the constitutional provisions which provides for the balancing of rights of both victim and accused (in terms of the right to equality freedom from violence and dignity of rape victims), government's commitments to the Gender Policy Statement published by the Department of Justice, international instruments on the nature and extent of state duties, redefinition of the Common law definition of rape, abolition of the cautionary rule, admissibility of previous consistent, evidence

²⁷⁰ *S v Dodo* 2001 (3) SA 382 (CC) 614.

²⁷¹ S Hoor "Dignity, Criminal Law and the Bill of Rights" (2004) 121 (2) *South African Law Journal* 306. It also points to note the significance of dignity as a foundational value of the criminal law.

²⁷² *S v Chapman* 1997 (3) SA 341(SCA) 344J - 355B

²⁷³ South African Law Reform Commission Discussion Paper Project 106 *Juvenile Justice* (1996) 79.

²⁷⁴ South African Law Reform Commission Issue Paper Project 107 *Sexual Offences Against Children* (1997) 10.

²⁷⁵ South African Law Reform Commission *Annual Report* (1998) 80. See also B Pithey.... et al *Commentary on Discussion Document on the Legal Aspects of Rape in South Africa* (1999) available at http://www.gjru.uct.ac.za/sites/default/files/image_tool/images/242/parliamentary/Legal-Aspects.pdf accessed 11 July 2018. This team was commissioned by then the Deputy Minister (Tshabalala-Msimang) as regards a research report on the legal aspect of rape. The discussion paper presents commitments of the state in respect to the legal and substantive definition of rape.

²⁷⁶ South African Law Reform Commission Discussion Paper Project 107 *Sexual Offences the Substantive Law* (1999) 85. The three (IV) separate discussion paper is to be published in an attempt to: (among others) 'codify the substantive law relating to sexual offences in an easily accessible and workable act and develop efficient and effective legal provisions for reporting, management, investigation prosecution of sexual offences which will protect the rights of victims as well as ensure the fair management and trials of persons (including children) suspected, accused and convicted of committing a sexual offence. '

²⁷⁷ South African Law Reform Discussion Paper Project 107 *Sexual Offences the Substantive Law* (1999) 85.

of previous sexual history.²⁷⁸ SALRC's 1999²⁷⁹ discussion report also reinstates the recommendations of the 1998 report but broadens the discussion. In 2002 the final report on sexual offences was released.²⁸⁰ A revised bill was introduced in 2003²⁸¹ and also on 16 June 2006.²⁸² *S v Masiya*²⁸³ was also a case law development on the extension of the definition of rape to include anal penetration. The 2007 bill was passed in September 2007 and SORMA 2007²⁸⁴ was enacted and commenced on 16 December 2007.²⁸⁵

12. CONVICTION RAPE RATES FROM 2002-2017(POST 1994 AND POST SORMA)

Conviction rates for sexual offences during 2002/2003 by the NPA²⁸⁶ were at 64%, while during 2004/2005 they sat at 63%.²⁸⁷ The 2005/2006 and 2009/2010 periods²⁸⁸ reveals 70% and 67.7% respectively. Between 2005/2006 and 2009/2010, there was a leap in the percentage increase, as compared to the yearly +1.5% increases.²⁸⁹ The statistics is however, a combination of other sexual offences and this is difficult to know the exact rape convictions. Although, in 2011/2012 to 2016/2017 NPA presented a separate statistics for conviction rates of rape (discussed in chapter one).

²⁷⁸ South African Law Reform Discussion Paper Project 107 *Sexual Offences the Substantive Law* (1999) chapter 1-9.

²⁷⁹ South African Law Reform Commission Discussion Paper Project 107 *Sexual Offences the Substantive Law* (1999) 85 at para 9.4.7.8. These widened the scope of the discussion document and later introduced the SALRC Discussion Paper 102 Project 107 *Sexual Offences the Substantive Law* December 1999 Volumes I and II.

²⁸⁰ South African Law Reform Commission Project 107 *Sexual Offences Report* December 2002 at para 1.2. The report stated that the intention of rape law reform is to encourage victims of sexual violence to approach the system for assistance and to improve the experiences of those victims who choose to enter the criminal justice system, whilst at the same time giving due regard to the rights accorded to alleged perpetrators of sexual offences.

²⁸¹ Criminal Law (Sexual Offences) Amendment Bill 50–2003.

²⁸² Redrafted Criminal Law (Sexual Offences) Amendment Bill B50–2003.

²⁸³ *S v Masiya* 2006 (2) SACR 357 (T).

²⁸⁴ See Act 32 of 2007

²⁸⁵ See Act 32 of 2007

²⁸⁶ The National Prosecuting Authority was established by Act 32 of 1998.

²⁸⁷ *Annual Report National Prosecuting Authority 2005 -2006* available at https://www.npa.gov.za/sites/default/files/annualreports/NPA%20Annual%20Report%202005_2006.pdf accessed 10 July 2018 42- 43. This reveals the Sexual Offences and Community Affairs Service (SOCA) delivery performance indicators. This body was established by the NPA in 1999 among other among other of functions of this body is to foster improvements of conviction rates in cases of violence against women and children

²⁸⁸ *Sub- Programme 1:Public Prosecution* available at https://www.npa.gov.za/sites/default/files/annual-reports/Sub-Programme1%20Public%20Prosecutions_2010.pdf accessed July 9 2018 at 27.

²⁸⁹ *Sub- Programme 1:Public Prosecution* available at https://www.npa.gov.za/sites/default/files/annual-reports/Sub-Programme1%20Public%20Prosecutions_2010.pdf accessed July 9 2018 at 27. The report further shows an increase due to enhanced screening process and a focussed approach by dedicated personnel.

13. RAPE STATISTICS FROM 2008-2018(POST SORMA)

Africa Check²⁹⁰ reports rape statistics as follows: 2008/2009 46 647, 2009/2010 48 259, 2010/2011 48158, 2011/2012 47 069, 2012/2013 48 408 2013/2014 45 349 and 2014/2015 43 195. ISS²⁹¹ reveals reported rapes from 41 903 in 2015/2016 to 39 828 in 2016/2017 with an increase in 2017/2018²⁹² to 40 035. It is to be noted that from 2004, the police statistics reflects a combination of all sexual offences without separating the various offences. The reports presented are gotten from SAPS on request.

D Smythe²⁹³ however states the challenges with initiatives developed by the Police during 2008(post SORMA). These initiatives include: the National Instruction 3/2008 Sexual Offences and the Standing order (G) 325: Closing of Case Dockets. D Smythe states ‘that these developments still revealed attritions in the investigation diary and case dockets that still shapes the policing system in respect of the attitudes and perceptions to rape victims.’²⁹⁴ D Smythe argues that

“even the 2010 to 2014 strategic plan that asserts to “revamping the criminal justice system” which was aimed at intensifying efforts to combat crime against women and children does not still reflect in the attitudes of the police towards victims as the police still tends in practice to shift responsibilities on the complainants”.²⁹⁵

Attritions still continues to shape police attitudes.

14. SENTENCING IN RAPE FROM 1996-2007(POST 1994 AND POST SORMA)

The broad discretion in sentencing by judges in early sentencing posed issues and this introduced the 1996 Committee of the law Commission on sentencing. These issues include among others: a perceived lack of uniformity of sentences and leniency of sentences with respect to certain serious

²⁹⁰K Wilkinson *Guide: Rape Statistics in South Africa* available at <https://africacheck.org/factsheets/guide-rape-statistics-in-south-africa/> accessed 7 July 2018. These statistics reflect reported rapes from the South African police service analysis of 2014/2015 national crime statistics. Africa Check states that statistics of rapes reported to the police are included in the broad array of sexual offences, However rape makes up the majority of cases. Africa Check further states that this category cannot be used in place of disaggregated rape statistics.

²⁹¹ See <https://africacheck.org/factsheets/south-africas-crime-statistics-201617/> accessed on 21 March 2018. Although, ISS cautions that rape statistics recorded by the police cannot be taken as an accurate measure either of the extent or trend of this crime and stating that the unfortunate incidence of no recent national representative under reporting rate for South Africa that can be used to estimate the number of rapes committed each year.

²⁹² See <https://africacheck.org/factsheets/factsheet-south-africas-crime-statistics-for-2017-18/> accessed 20 November 2018.

²⁹³D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 35 39: this was also a notable development that came after the National Instruction 22/1998. Amongst other guidelines, the standing order reflects a normative commitment to ensuring cases are well, prosecuted where possible and closed only when there are sufficient grounds for believing that the case cannot or should not proceed. The categories provided for closing of dockets includes: withdrawn, undetected, and unfounded and responsibility.

²⁹⁴ D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 152-153 and 185-186.

²⁹⁵ D Smythe *Rape Unresolved Policing Sexual Offences in South Africa* (2015) 34.

offences including sexual offences.²⁹⁶ The 1996 Committee was opposed to the enactment of mandatory minimum sentences as a temporary measure (as was clearly intended by Government) but investigated this option as a possible aspect of sentencing reform.²⁹⁷ However, the 1996 Committee ended its term without submitting any specific proposals. Prior to the appointment of the Committee in 1998 (the Sentencing Committee) section 51 of the CLAA was enacted²⁹⁸ and amended by SORMA in 2007.²⁹⁹ The CLAA provides for a discretionary minimum sentence for rape. Courts can impose a lesser sentence in instances of substantial and compelling circumstances. This remains the positions of the law to date.

15. CONCLUSION

The perceptions that characterized the pre 1994 era reveal notions that shaped societies view about women, their place in the society and perceptions as victims of rape. This perceptions is revealed in the Common law positions on rape that reflects the victim precipitating rape theory. Although, there are noted developments. However, the perceptions prompted the fight for liberation by women which contributed to the move for an interim Constitution.

In the year 1994 South Africa welcomed a new era, this served as a stepping stone to the developments of the Constitution and the Bill of rights in 1996. A shift from archaic laws is evident and a gradual change with developments so far is revealed in the reformations of the legal framework on rape by SORMA. Notwithstanding this developments, the challenges with this era reveals that individual and societies perceptions of victim precipitating rape still continues to contribute to underreporting of rape.

²⁹⁶ South African Law Reform Commission *Project 82 Sentencing A New Sentencing Framework: Sentencing the Report* (2000) 1.8.

²⁹⁷ South African Law Reform Commission *Project 82 Sentencing A New Sentencing Framework: Sentencing the Report* (2000) 1.8 *Project 45 Women and Sexual Offences in South Africa* published paper (1985) 1.12.

²⁹⁸ South African Law Reform Commission *Project 82 Sentencing A New Sentencing Framework: Sentencing the Report* (2000) 1.8 *Project 45 Women and Sexual Offences in South Africa* published paper (1985) 1.16.

²⁹⁹ See sections 51(3a) (a)-(Aa) (iv) of Act 105 of 2007.

CHAPTER THREE

1. INTRODUCTION

This chapter focuses on the descriptive analysis of case law in South Africa that reflect elements suggesting a factoring of victim precipitation.

2. DESCRIPTIVE ANALYSIS OF *S v ZUMA*³⁰⁰

Jacob Zuma, then the Deputy President of South Africa was charged on 6 December 2005 and tried for the alleged rape of Ms K³⁰¹ before Van de Merwe J at Witwatersrand Local Division.³⁰² Van de Merwe J³⁰³ delivered the judgement on 8 May 2006.³⁰⁴ The complainant had visited and spent the night at the accused home on 2 November 2005 and sexual intercourse took place between them.³⁰⁵ The accused pleaded not guilty of rape.³⁰⁶ The issue before the judge was whether the complainant had consented to intercourse.³⁰⁷ The complainant denied consenting to the intercourse and claimed that it occurred in the guest bedroom and testified that she was frozen and unable to move during the intercourse.³⁰⁸ The accused's evidence was that he had discussions with the complainant at his bedroom later that night and sexual intercourse took place without the complainant asserting verbally and physically resisting as she was not the submissive type of person.³⁰⁹

According to the accused, prior to the alleged rape and in the preceding two months, the complainant had sent 54 SMS messages to the accused which ended off with "love, hugs and kisses" which the judge emphasised as a way by "the complainant in seeking to make regular contact with the accused".³¹⁰ The accused further contended that the complainant was not wearing underwear beneath her kanga while in the home.³¹¹ The judge emphasised on the evidence of the accused and one of the accused witnesses known by the name Duduzile Zuma who also testified that the complainant walked around in a kanga with no underwear in the accused's house, which the judge stated "prompted Duduzile Zuma to say that the complainant was inappropriately dressed".³¹² The judge considered as

³⁰⁰ *S v Zuma* 2006 (2) SACR 191.

³⁰¹ *S v Zuma* 2006 (2) JDR 0343 (W) page 5. The complainant is referred to as the complainant in this case to protect her dignity.

³⁰² *S v Zuma* 2006 (2) SACR 191 at 191.

³⁰³ This dissertation makes use of Van de Merwe J and the word 'judge' interchangeably.

³⁰⁴ *S v Zuma* 2006 (2) SACR 191 at 191.

³⁰⁵ *S v Zuma* 2006 (2) JDR 0343 (W) at 5.

³⁰⁶ *S v Zuma* 2006 (2) SACR 191 at 191.

³⁰⁷ *S v Zuma* 2006 (2) SACR 191 at 192.

³⁰⁸ *S v Zuma* 2006 (2) SACR 191 at 192.

³⁰⁹ *S v Zuma* 2006 (2) SACR 191 at 192.

³¹⁰ *S v Zuma* 2006 (2) SACR 191 at 217.

³¹¹ *S v Zuma* 2006 (2) SACR 191 at 217.

³¹² *S v Zuma* 2006 (2) SACR 191 at 217.

an “odd feature” of the alleged rape³¹³ the fact that the “complainant was at least a reasonably fair match physically for the accused, being 31 years old herself and weighing 85 kg, compared with the accused who was at the time 63 years old and weighing 90 kg”.³¹⁴ (This study considers these finding of the judge as suggesting a factoring of victim precipitating rape which is discussed in chapter four).

The complainant testified that she could not have consented to unprotected sexual intercourse without condoms based on her HIV status.³¹⁵ Leave was granted to the State to ask the complainant a question concerning the last time the complainant had sexual intercourse with a man prior to 2 November 2005.³¹⁶ On the question put to the complainant by the State, the complainant stated to have had sexual intercourse last during July 2004.³¹⁷ The defence contended that the complainant knowing her status as HIV positive since April 1999 would not willingly have sex without a condom and could only be tested by going into her sexual history from the date at which she had become aware of her status and applied for leave to ask similar question as provided in section 227(2) of the CPA on the complainant’s past sexual history.³¹⁸

The defence also sought leave to question the complainant about various other instances of alleged rape which it had information at its disposal that some of these allegations were false.³¹⁹ The application was heard in *camera* in the absence of the complainant.³²⁰ In granting leave on the relevance of the past sexual history of the complainant as regards section 227 (2) of the CPA, the judge made reference to the case of *R v Matthews and Others*³²¹ where Schreiner J stated “Relevancy is based on a blend of logic and experience lying outside the law”. The judge further made an important remark on the relevance of evidence of past sexual history of a complainant by stating that “the question of relevance can never be divorced from the facts of a particular matter before court.”³²² (Discussed in chapter four)

Reference was made by the judge to a judgement reported in the Canadian Rights Reporter vol 6 1992 in the case of *R v Seaboyer*³²³ and the judge referred to two quotes referred to by McLachlin J from other judgments.³²⁴ The second of the two quotes which is relevant for the purpose of this study states

³¹³ *S v Zuma* 2006 (2) SACR 191 at 217.

³¹⁴ *S v Zuma* 2006 (2) SACR 191 at 218.

³¹⁵ *S v Zuma* 2006 (2) SACR 191 at 199.

³¹⁶ *S v Zuma* 2006 (2) SACR 191 at 198.

³¹⁷ *S v Zuma* 2006 (2) SACR 191 at 198.

³¹⁸ *S v Zuma* 2006 (2) SACR 191 at 200.

³¹⁹ *S v Zuma* 2006 (2) SACR 191 at 200.

³²⁰ *S v Zuma* 2006 (2) SACR 191 at 198

³²¹ *S v Zuma* 2006 (2) SACR 191 at 199 in *R v Matthews and Others* 1960 (1) SA 752 (A). The dictum at 758A - B applied.

³²² *S v Zuma* 2006 (2) SACR 191 at 199.

³²³ *S v Zuma* 2006 (2) SACR 191 at 204 in *R v Seaboyer* 1992 6 CRR (2d) 35.

³²⁴ *S v Zuma* 2006 (2) SACR 191 at 204.

that “every possible procedural step should be taken to minimise the encroachment on the witness's privacy, but in the end if evidence has sufficient cogency the witness must endure a degree of embarrassment and perhaps psychological trauma. This harsh reality must be accepted as part of the price to be paid to ensure that only the guilty are convicted”.³²⁵

The judge made reference to the SALRC’s proposed amendments to s 227 of the Act,³²⁶ the judgment in *S v M*³²⁷ the Law Commission's final report³²⁸ and the Criminal Law (Sexual Offences) Amendment Bill 50- 2003³²⁹ (these developments are discussed in chapter two of this dissertation). This reveals that the judge was abreast with the developments so far on evidence of past sexual history. The judge also made an important statement on the purpose of cross-examination and evidence the defence wanted to lead concerning the behaviour of the complainant which the judge stated “was relevant to the issue of consent, the question of motive and credibility and was not aimed at showing that the complainant was a woman of questionable morals but it was aimed at the investigation of the real issues in this matter and was fundamental to the accused's defence.”³³⁰

After considering the above positions, the judge gave a short judgement and granted leave to the defence to cross-examine the complainant about her past sexual history.³³¹ Eight witnesses³³² were adduced by the defence and gave evidence about allegations of rape or attempted rape made by the complainant on previous occasions some of which the complainant could not remember.³³³ Relevant to this study is the statement made by the judge on the complainant’s lifestyle from the testimony of one of the eight witnesses known by the name Manzi who met the complainant in 1998³³⁴ and which testimony the judge considered relevant.³³⁵ Manzi testified that “while he was having a bath, the complainant came into the bathroom, undressed and got into the bath with him”.³³⁶ On this evidence, the judge regarded the complainant’s lifestyle as “not strange to her to be naked with a man whom she had met only a week before”.³³⁷

The judge further referred to the statement made by the complainant about one of the witnesses known by name Mpontshani (whom the complainant met in 1996) to Manzi. The statement made by the

³²⁵ *S v Zuma* 2006 (2) SACR 191 at 204.

³²⁶ *S v Zuma* 2006 (2) SACR 191 at 204.

³²⁷ *S v Zuma* 2006 (2) SACR 191 at 204 in *S v M* 2003 (1) SA 341 para 17(6) at 422c-g.

³²⁸ *S v Zuma* 2006 (2) SACR 191 at 204.

³²⁹ *S v Zuma* 2006 (2) SACR 191 at 204.

³³⁰ *S v Zuma* 2006 (2) SACR 191 at 205.

³³¹ *S v Zuma* 2006 (2) SACR 191 at 198.

³³² *S v Zuma* 2006 (2) SACR 191 at 220-221. These witnesses include Mashaya, Sithole, Matsoko, Modise, Mahlabe , Mbambo, Manzi and Mpontshani

³³³ *S v Zuma* 2006 (2) SACR 191 at 221.

³³⁴ *S v Zuma* 2006 (2) SACR 191 at 221.

³³⁵ *S v Zuma* 2006 (2) SACR 191 at 220.

³³⁶ *S v Zuma* 2006 (2) SACR 191 at 221.

³³⁷ *S v Zuma* 2006 (2) SACR 191 at 221.

complainant to Manzi was that the complainant “told Mpontshani in no uncertain terms that she wanted to have sexual intercourse and that she wanted it immediately”.³³⁸ The judge also inferred the complainant’s attitude from this “that she was a woman who is not scared to tell men of her sexual needs”.³³⁹

The judge held that the accused's evidence was clear and convincing and the accused’s version should be believed and accepted, the accused was not found guilty and was discharged and acquitted.³⁴⁰

3. DESCRIPTIVE ANALYSIS OF *NDOU v STATE*³⁴¹

Section 51 of the CLAA was amended by SORMA in 2007³⁴². The CLAA provides for a discretionary minimum sentence for rape. Courts can impose a lesser sentence in instances of substantial and compelling circumstances.³⁴³

The case of *Ndou v State*³⁴⁴ is a case after the enactment of SORMA. The case was an appeal from the Limpopo High court before Hetisani J who sentenced the appellant to life imprisonment in terms of section 51(1) of CLAA to the Supreme Court of Appeal before Shongwe JA (with Mpati P, Lewis JA, Van Heerden JA and Erasmus AJA concurring). The appellant Edson Ndou was found guilty and convicted for raping his 15 year old step-daughter.³⁴⁵ The appellant contended that the High court erred in law in not finding substantial and compelling circumstances that warranted the imposition of a lesser sentence and further contends there was no use of any violence or weapon to force the complainant to submit to having sexual intercourse with him and that the complainant accepted money and gifts from the appellant. The appellant further argued that there was no evidence of “post-traumatic stress suffered by the complainant”.³⁴⁶

Whereas, the State argued that sentencing is 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 and that the court of appeal may only interfere if the court finds that the sentencing court misdirected itself on the law or facts.³⁴⁷ The State contended that rape of a 15-year-old girl falls within the ambit of Part 1 of Schedule 2 of the Act and therefore a court of appeal may not lightly deviate from a prescribed minimum sentence and for flimsy reasons.³⁴⁸ The State further argued that since the

³³⁸ *S v Zuma* 2006 (2) SACR 191 at 220.

³³⁹ *S v Zuma* 2006 (2) SACR 191 at 220.

³⁴⁰ *S v Zuma* 2006 (2) SACR 191 at 224.

³⁴¹ *Ndou v State* 2014 (1) SACR 198 (SCA).

³⁴² See section 51(3a) (a)-(Aa) (iv) of Act 105 of 2007.

³⁴³ See chapter two on Historical Developments.

³⁴⁴ *Ndou v State* 2014 (1) SACR 198 (SCA).

³⁴⁵ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 1.

³⁴⁶ *Ndou v State* 2014 (1) SACR 198 (SCA) at paras 2 and 3.

³⁴⁷ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 3.

³⁴⁸ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 3.

appellant is the stepfather of the complainant and occupied a position of trust and authority over her, then it is an aggravating factor.³⁴⁹ The State concluded by stating that any sentence less than life imprisonment would undermine the objectives of the Act and would make a mockery of justice.³⁵⁰

The judge in considering the question whether life imprisonment was appropriate in accordance with section 51(3) (a) of CLAA made reference to *S v Siebert*³⁵¹ where Olivier JA stated the following:

“Sentencing is a judicial function *sui generis*. It should not be governed by considerations based on notions akin to onus of proof. In this field of law, public interest requires the court to play a more active, inquisitorial role. The accused should not be sentenced unless and until all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court”.

The judge made certain remarks which this study regards as crucial in considering substantial and compelling circumstances for mitigation of a lesser sentence. The following remarks stated by the judge which is considered for the purpose of this study is as follows: The judge stated that “it is trite that rape is a very serious offence” and made reference to the case of *S v Chapman*³⁵² on the seriousness of the crime of rape and the humiliating, degrading and brutal invasion the crime has on the privacy and dignity of a victim.³⁵³ The judge further stated that “the 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.”³⁵⁴ The judge made reference to the case of *S v Dodo*³⁵⁵ where the Constitutional court referred to *S v Malgas*³⁵⁶ case with approval (which upholds the offender's right not to be treated, punished in a cruel, inhuman or degrading way guaranteed by s 12(1)(e) of the Constitution.) and the constitutional court stated that:

“the whole approach enunciated in *Malgas*, and in particular the determinative test articulated in paragraph 1 of the summary, namely if the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.”

After establishing the rights of both parties, the judge based his findings on the following submissions which includes some of the contentions raised by the appellant and which (this study argues suggest a factoring of the victim precipitating rape theory (which is discussed in chapter four of this dissertation).

³⁴⁹ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 3.

³⁵⁰ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 3.

³⁵¹ *Ndou v State* 2014 (1) SACR 198 (SCA) para 14 in *S v Siebert* 1998 (1) SACR 544 at 558i – 559a.

³⁵² *Ndou v State* 2014 (1) SACR 198 (SCA) at para 12 in *S v Chapman* 1997 (3) SA 341(SCA) at para 344I-J.

³⁵³ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 12.

³⁵⁴ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 12.

³⁵⁵ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 14 in *S v Dodo* 2001 1 SACR 594 at para 40.

³⁵⁶ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 14 in *S v Malgas* 2001 1 SACR 469 at para 12.

“The complainant did not suffer any serious physical injuries;³⁵⁷ she submitted to the sexual intercourse on the occasion in question without any threat of violence;³⁵⁸ the fact she had accepted gifts and money from the appellant must have played a role in her submitting to the sexual intercourse.³⁵⁹ When she was asked whether she had screamed for help, she said that she had not resisted or screamed but simply waited for the appellant to finish what he was doing.³⁶⁰ Thus the degree of the trauma suffered by her cannot be quantified. 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.³⁶¹ A balance must be struck on all the factors to avoid an unjust sentence.³⁶² In my view, the sentence imposed is disproportionate to the crime committed and the legitimate interests of society”.³⁶³

The judge set aside the judgement of the lower court and replaced the accused sentence to 15 years imprisonment.³⁶⁴ (A critical analysis of *Ndou v State* is discussed in chapter four of this dissertation).

4. CONCLUSION

A descriptive analysis of the cases of *S v Zuma*³⁶⁵ and *Ndou v State*³⁶⁶ reveals how the judges applied and interpreted the positions of the laws on past sexual history evidence and mitigation of punishment in sentencing of rape which are crucial factors needed to be considered by the judges and which reflects in the findings and decisions of both judges. However, this study reveals that there are elements that suggest a factoring of victim precipitating rape in the findings and decisions of the judges which is considered in the succeeding chapter.

³⁵⁷ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 13.

³⁵⁸ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 13.

³⁵⁹ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 13.

³⁶⁰ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 13.

³⁶¹ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 13.

³⁶² *Ndou v State* 2014 (1) SACR 198 (SCA) at para 13.

³⁶³ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 13.

³⁶⁴ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 18.

³⁶⁵ *S v Zuma* 2006 (2) SACR 191.

³⁶⁶ *Ndou v State* 2014 (1) SACR 198 (SCA).

CHAPTER FOUR

1. INTRODUCTION

This chapter focuses on a critical analysis of the cases of *S v Zuma*³⁶⁷ and *Ndou v State*³⁶⁸ by revealing elements that suggest a factoring of victims precipitating rape, which contributes to victim blaming in the trial and decisions of the presiding judges.

2. CRITICAL ANALYSIS OF *S v ZUMA*³⁶⁹

The case of *S v Zuma*³⁷⁰ was decided during the periods of the move for developments of the legal framework for rape as noted in the case of *S v M*³⁷¹ and the recommendations by SALRC on the positions of the substantive and procedural law of rape which came before the enactment of SORMA (these developments is discussed in chapter two). This study argues that the expectation from the various recommendations should have had an impact on the decisions of the court. However, this study reveals that Zuma's case was a setback in the progress of the law as revealed in the findings that led to the decisions of the learned judge Van de Merwe J which this study will argue presents an impression of victim precipitating rape.

The judgement was delivered on certain findings. However, this study argues that the findings of the judge reveals normal stereotype expectations based on individual and societies' perceptions (some of these stereotype perceptions are also revealed in the preceding chapters of this dissertation, some of which are similar to that revealed in the police attitudes towards rape victims) of rape which reveals the victim precipitating rape. The considered findings for the purpose of this dissertation are discussed under the heading below.

3. VICTIM PRECIPITATING RAPE VERSUS VITIATORS OF CONSENT

3.1 High responsibilities for resistance

The judge considered as an odd feature that the complainant was at least a reasonably fair match physically for the accused, being 31 years old herself and weighing 85 kg, compared with the accused who was at the time 63 years old and weighing 90 kg.³⁷² This study argues that this finding of the judge gives an impression that resistance by force was a "normal" expectation of any victim and a yardstick for determining consent. The impression this presents was that the normal response was for

³⁶⁷ *S v Zuma* 2006 (2) SACR 191.

³⁶⁸ *Ndou v State* 2014 (1) SACR 198 (SCA).

³⁶⁹ *S v Zuma* 2006 (2) SACR 191.

³⁷⁰ *S v Zuma* 2006 (2) SACR 191.

³⁷¹ *S v Zuma* 2006 (2) SACR 191 at 204 in *S v M* 2003 (1) SA 341 at para 17(6) at 422c-g.

³⁷² *S v Zuma* 2006 (2) SACR 191 at 218

the complainant to have resisted with force even though she claimed she was frozen at that instance due to her intimate father relationship with Zuma.³⁷³

Steven Robins contends that the judge's perceptions are based on universalist assumptions about women's agency and "voice".³⁷⁴ This is according to Raymond Suttner³⁷⁵ "a stereotypical pattern of behaviour which is attributed to those who experience rape". However, this reveals a stereotype responsibility (which is also revealed in the police attitudes towards rape victims as revealed in chapter one of this dissertation) from victims on what to do and what not to which assumes the precipitation of rape.

3.2 Dressing

The fact the complainant walked around in a kanga with no underwear, reveals that the complainant's dressing was a justification for consent to the accused.³⁷⁶ The judge emphasised on the evidence that followed the successful application of the defence in terms of s 227 of the CPA³⁷⁷ and made reference to the evidence of the accused that the complainant walked around the house dressed in a kanga with no underwear which the judge stated prompted Duduzile Zuma (the accused's daughter who was present at the night of the visit by the complaint and testified as one of the defence witnesses) to say that "the complainant was inappropriately dressed".³⁷⁸

The judge also emphasised on the evidence of the accused which was that two months preceding the incident the complainant had sent a large number of SMS messages to the accused and the tone of the messages changed, in that they had ended off with "love, hugs and kisses"³⁷⁹ as a form of sexual advances.

This study argues that the judge's emphasis on the dressing of the complainant from the evidence of the defence and defence witness, gives an impression that the dressing of the complainant was a way of making sexual advances and encouraged an assumption of consent of the complainant. However, this reveals that the dignity and pride of a lady can be infringed as regards to certain notions and perceptions that assume what consent is. This notion according to Burt's³⁸⁰ study is revealed as one

³⁷³ *S v Zuma* 2006 (2) SACR 191 at 192

³⁷⁴ S Robins "Sexual Politics and the Zuma Trial" (2008) 34 (2) *Journal of Southern African Studies* 424. He further contends that the judgement presents an impression that the fact that the victim did not exhibit the "normal" rape victim's response of resistance and self-assertion meant that she could not possibly be telling the truth.

³⁷⁵ R Stunner "The Jacob Zuma Trial: Power and African National Congress (ANC) Masculinities"(2009) 17 (3) *Nordic Journal of Feminist and Gender Research* 229.

³⁷⁶ *S v Zuma* 2006 (2) SACR 191 at 217.

³⁷⁷ *S v Zuma* 2006 (2) SACR 191 at 217.

³⁷⁸ *S v Zuma* 2006 (2) SACR 191 at 217.

³⁷⁹ *S v Zuma* 2006 (2) SACR 191 at 217.

³⁸⁰ M Burt "Cultural Myths and Supports for Rape" (1980) 38 (2) *Journal of Personality and Social Psychology* 217. Burt's investigation tested some of the perceptions of feminist analysis to rape and also drew on social psychological research on reactions to victims.

which falls in the item of accepted rape myths. Burt's study reveals a correlation with the dressing of women as a precipitation for rape that "when women go around bare less or wearing short skirts and tights, they are just asking for trouble".³⁸¹

This study further argues that these perceptions are revealed in myths and notions about rape in South Africa which shapes the societies understanding of how a female is expected to dress and determines if she exhibits a good moral value. This is revealed in a survey³⁸² of a group of men in South Africa who were to comment on questions that probed their involvement in cases of non-sexual intercourse with women, the survey revealed that the dressing women wore encouraged unstoppable urges and caused their rape. This gives an impression that the way a woman dresses determines her consent **which prioritises a man's sexual appetite** and encourages notions of rape precipitation and infringes the right of the complainant to security in and control over her body.

This study argues that the judge, in placing emphasis on the accused's defence of the complainant's dressing gives an impression that the evidence of the accused was considered as justifying the consent of the complainant.³⁸³ This study further argues that the judge inferred from the text messages sent to the accused as a justification for consent by implying sexual advances from this. An instance of remarks made by Judge Mabel Jansen in 2015³⁸⁴ from a Facebook comment were the judge stated that "in black culture, a woman is there to pleasure men and that women tell their children that it is their father's birth right to be first and gang rapes or baby, mother and daughter were a pleasurable pass time." Although, these statements were made out of court and the judge was to face a disciplinary panel. It was said that "Jansen's statements suggest that she may harbour certain preconceived biases and potentially at least not be able to bring an open and impartial mind to bear when determining matters that come before her involving a particular sector of our society".³⁸⁵ These statements were made out of court and the judge was to face a disciplinary panel. This study argues that this remarks reveals the judge's sentiments on consent that a black woman cannot be raped as consent is not required for intercourse and that black women are precipitators of their rape by teaching their children

³⁸¹ M Burt "Cultural Myths and Supports for Rape" (1980) 38 (2) *Journal of Personality and Social Psychology* 217.

³⁸² Y Sikweyiya, R Jekwes, R Morell "Talking about Rape: South African Man's Responses to Questions about Rape" (2007) 74 *Empowering Women for Gender Equity Rape: Gender Based Violence Trilogy* 50-51.

³⁸³ *S v Zuma* 2006 (2) SACR 191 at 199.

³⁸⁴ "Judge Mabel Jansen to face imprisonment tribunal over Facebook comment" *Mail & Guardian* 7 April 2007 available at <https://mg.co.za/article/2017-04-07-judge-mabel-jansen-to-face-impeachment-tribunal-over-facebook-comments> accessed 23 September 2018

³⁸⁵ "Judge Mabel Jansen to face imprisonment tribunal over Facebook comment" *Mail & Guardian* 7 April 2007 available at <https://mg.co.za/article/2017-04-07-judge-mabel-jansen-to-face-impeachment-tribunal-over-facebook-comments> accessed 23 September 2018

about perceptions that encourage male dominance. Glynnis Breytenbach³⁸⁶ argued that “Jansen violated Article 7 of the Code of Judicial Conduct”.³⁸⁷ According to Article 7, “a judge must at all times personally avoid and dissociate him or herself from comments or conduct by persons subject to his or her control that are racist, sexist or otherwise manifest discrimination in violation of the equality guaranteed by the Constitution”. This study further argues that such remarks from a judge could shape the societies perceptions about rape victims as precipitators of rape.

3.3 Moral sentiments

Stereotypes can be said to shape societies’ perceptions on what should be good or bad. In determining relevance, the judge referred to Schreiner J A³⁸⁸ that “relevance is based on a blend of logic and experience lying outside the law”. However in *S v M*³⁸⁹ Heher AJA states that “relevance can never be reduced to hard and fast rules and some allowance must be made for unforeseen and extraordinary cases”. In light of *S v M* and Schreiner JA’s positions, this study argues that a challenge with this is that it could encourage moral sentiments that lead to victim precipitating rape perceptions. If such positions are to be considered, then perceptions that would uphold the right to dignity of rape victims is to be encouraged. Steven J Rogers³⁹⁰ states that “collateral issues may become the central focus of the trial which may lead to misuse of the evidence”. A balance of both parties’ rights should be struck to encourage a fair trial.³⁹¹

This study reveals that the judge in Zuma’s case inculcated moral sentiments into the law based on the previous sexual history of the complainant from the evidence of one witness known as Manzi. It is interesting to note that the judge established that “the question of relevance can never be divorced from the facts of a particular matter before court”.³⁹² However, this study argues that the testimony of Manzi does not reveal a consideration of the statement made by the judge. Manzi testified that, while he was having a bath, the complainant came into the bathroom, undressed and got into the bath with him. This study reveals that the judge made comments on the lifestyle of the complainant from

³⁸⁶ “Complaints gather against Judge’s rape comments” *News 24* 9 May 2016 available at <https://www.news24.com/SouthAfrica/News/complaints-gather-against-judges-rape-comments-20160509> accessed 6 November 2018

³⁸⁷ See <http://www.justice.gov.za/legislation/notices/2012/20121018-gg35802-nor865-judicial-conduct.pdf> accessed 20 November 2018.

³⁸⁸ *R v Matthews and Another* 1960 1 SA 752 (A) 758A-B.

³⁸⁹ *S v M* 2003 (1) SA 341 at para 17(6) at 422c-g.

³⁹⁰ S J Rogers “Evidence of Sexual History in Sexual Offence Trials” (1986) 11 *Sydney Law Review* 76.

³⁹¹ F Cassim “The Treatment of Female Complainants who are Victims of Sex Crimes in the Criminal Justice System: Evaluating Prejudice with a View towards Achieving a Balancing of Interest” (2009) 24 (1) *South African Public Law* 18.

³⁹² *S v Zuma* 2006 (2) SACR 191 at 199.

these testimony by stating that “it was not strange to her to be naked with a man whom she had met only a week before”.³⁹³

The judge also inferred the complainant’s attitude from the statement made by the complainant to Manzi which was that the complainant “told Mpontshani in no uncertain terms that she wanted to have sexual intercourse and that she wanted it immediately”,³⁹⁴ the judge stated that “she was a woman who is not scared to tell men of her sexual needs”.³⁹⁵ However, the remarks made by the judge gives an impression on the way the judge viewed the complaint’s lifestyle, which this study argues reveals that the complainant was of loose morals and unchaste thereby undermining her dignity by the judge and characterises her as a precipitator of her rape.

The reference made by the judge from the second quotation referred to by McLachlin J from other judgements (discussed in chapter three)³⁹⁶ reveals that the balance the judge intended to strike in ensuring that only the guilty are convicted. The degree of embarrassment a complainant is to endure raises a question as to what balance is struck when the right to fair trial and the dignity of the complainant is infringed, from the above judge’s perceptions of the judge.

4. POST SORMA CHALLENGES ON PAST SEXUAL HISTORY EVIDENCE

With the enactment of SORMA, the provisions on the past sexual history received legislative approval in principle³⁹⁷ (discussed in chapter two). Section 227 (1) - (7) of the CPA reflects these changes.³⁹⁸ Research reveals³⁹⁹ that even after SORMA’s developments, same challenges with the application of section 227 (1)-(6) still reflects in findings of courts which encourages victim precipitation. The research presents an example of the case of a 13 year old rape victim and reveals that the fact that the complainant had written her own surname as “condom” and her mother as “HIV”, was considered as proof that the complainant was not an innocent 13-year-old girl.⁴⁰⁰ The research further presents an argument that the magistrate wrongly inferred relevance from this that the complainant was “sexually active” and stated that “but as she portrays the picture of being the innocent, one can really ask why she refers to her surname as a condom and her mother as HIV”.⁴⁰¹ The research reveals that this

³⁹³ *S v Zuma* 2006 (2) SACR 191 at 221.

³⁹⁴ *S v Zuma* 2006 (2) SACR 191 at 220.

³⁹⁵ *S v Zuma* 2006 (2) SACR 191 at 220.

³⁹⁶ *S v Zuma* 2006 (2) SACR 191 at 204. See also Chapter 3 of the thesis.

³⁹⁷ The developments in *S v M* and recommendations of SARLC.

³⁹⁸ See section 51(3a) (a)-(Aa) (iv) of Act 105 of 2007.

³⁹⁹ *Retrospective Study of the Investigation, Prosecution and Adjudication of Reported Rapes from 2012 (RAPSSA)* <https://rapecrisis.org.za/wp-content/uploads/2017/11/RAPSSA-REPORT-FIN1-18072017.pdf> 105.

⁴⁰⁰ *Retrospective Study of the Investigation, Prosecution and Adjudication of Reported Rapes from 2012 (RAPSSA)* <https://rapecrisis.org.za/wp-content/uploads/2017/11/RAPSSA-REPORT-FIN1-18072017.pdf> 105.

⁴⁰¹ *Retrospective Study of the Investigation, Prosecution and Adjudication of Reported Rapes from 2012 (RAPSSA)* <https://rapecrisis.org.za/wp-content/uploads/2017/11/RAPSSA-REPORT-FIN1-18072017.pdf> 105.

branding of the child by the court as a Lolita-like character reverses the role of the child as a victim of adult sexual violence and instead positions her as the accused.⁴⁰²

5. CRITICAL ANALYSIS OF *NDOU v STATE*⁴⁰³

Section 51 of the CLAA was enacted⁴⁰⁴ and amended by SORMA in 2007.⁴⁰⁵ The CLAA provides for a discretionary minimum sentence for rape. Courts can impose a lesser sentence in instances of substantial and compelling circumstances. This remains the position of the law to date. Although, with these developments this study argues that judges still blame victims for precipitating rape even when an offender is found guilty of rape by hiding under the veil of substantial and compelling circumstances and justifying these circumstances on moral considerations which the law does not accommodate. NJ Kubista⁴⁰⁶ states that “this approach perpetuates ‘mythical rape paradigms’ suggesting that ‘mere’ rape is not violent”. Chennells⁴⁰⁷ additionally states that:

“The trivialisation of the crime and its effects, consistent with masculinist ideas about female sexuality, is made more explicit where the woman in question was not a virgin or does not meet the ‘victim respectability’ required of a real rape”.

The case of *Ndou v State*⁴⁰⁸ was decided after the coming into effect of SORMA. This case obviates from the positions of the law, as the decision of the judge reveals that rape myths are revealed in the justifications for substantial and compelling circumstances in imposing a lesser sentence even after developments by SORMA. The court in considering the question whether life imprisonment was appropriate in accordance with section 51(3)(a) of the CLAA after noting the seriousness of the crime of rape and the humiliating, degrading and brutal invasion the crime has on the privacy and dignity of a victim⁴⁰⁹ made the following remarks:

“The complainant did not suffer any serious physical injuries. She submitted to the sexual intercourse on the occasion in question without any threat of violence. The fact that she had accepted gifts and money from the appellant must have played a role in her submitting to the sexual intercourse. When she was asked whether she had screamed for help, she said that she had not resisted or screamed but simply waited for the appellant to finish what he was doing. Thus the degree of the trauma suffered by her cannot be quantified. 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

⁴⁰² *Retrospective Study of the Investigation, Prosecution and Adjudication of Reported Rapes from 2012 (RAPSSA)* <https://rapecrisis.org.za/wp-content/uploads/2017/11/RAPSSA-REPORT-FIN1-18072017.pdf> 105.

⁴⁰³ See section 51(3a) (a)-(Aa) (iv) of Act 105 of 2007.

⁴⁰⁴ South African Law Reform Commission *Project 82 Sentencing A New Sentencing Framework: Sentencing the Report* (2000) 1.16.

⁴⁰⁵ See section 51(3a) (a)-(Aa) (iv) of Act 105 of 2007.

⁴⁰⁶ NJ Kubista “Substantial and Compelling Circumstances: Sentencing of Rapists under the Mandatory Minimum Sentencing Scheme” (2005)18 (1) *South African Journal of Criminal Justice* 85.

⁴⁰⁷ R Chennells “Sentencing the ‘Real Rape’ Myth: Empowering Women for Gender Equity” (2009) 82 *Gender and the Legal System* 31.

⁴⁰⁸ *Ndou v State* 2014 (1) SACR 198 (SCA).

⁴⁰⁹ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 12 in *S v Chapman* 1997 (3) SA 341(SCA) at para 344I-J.

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”.⁴¹⁰

This study argues that the above findings of the judge gives an impression of victim blaming and the complainant precipitating her rape. Chennells classifies the submissions “on serious physical injury” considered by judges in mitigation of sentencing as a perception considered by judges “as worse rape injuries”.⁴¹¹ Chennells classifies this perception as a form of a “real-rape template which excludes the experiences of victims who do not present to the court particular forms of injuries”.⁴¹² This study argues that rape would be considered as rape where there are serious injuries inflicted on a victim, further giving an impression that the right to dignity of a rape victim is lightly seen as serious and **such right would only be protected where serious injuries are inflicted.**

This study reveals further that the judge hid under the veil of substantial and compelling circumstances in blaming the victim as a precipitator for her rape by stating the issue of the acceptance of gifts.⁴¹³ From this justification, this study further argues that the judge gives an impression that a convicted accused is not wholly at fault and cannot be fully liable for the protection of the victim’s right to dignity. This in a way justifies the act of the accused and gives an impression that even though the appellant is guilty of rape, a victim precipitated the rape and should also be blamed as a precipitator. This raises a question as to what balance the judge intended to strike after a consideration of the above factors to avoid an unjust sentence.

Should it have been a balance that undermines the right to dignity of the respondent by blaming the respondent under the veil of substantial and compelling circumstances as a precipitator of her rape?

This study argues that the justification by the judge contradicts the consideration to strike a balance. If notions of victim precipitating rape justifies mitigation of sentence in rape then the offender's right to equality not to be treated, punished in a cruel inhuman or degrading way guaranteed by s 12(1) (e) of the Constitution which the judge intended to uphold from the dictum of the constitutional court in *S v Dodo*⁴¹⁴ is not a balance with the right to dignity of the respondent.

⁴¹⁰ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 13.

⁴¹¹ R Chennells “Sentencing the ‘Real Rape’ Myth: Empowering Women for Gender Equity” (2009) 82 *Gender and the Legal System* 27.

⁴¹² R Chennells “Sentencing the ‘Real Rape’ Myth: Empowering Women for Gender Equity” (2009) 82 *Gender and the Legal System* 27.

⁴¹³ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 13.

⁴¹⁴ *Ndou v State* 2014 (1) SACR 198 (SCA) at para 14 in *S v Dodo* 2001 1 SACR 594 at para 40.

6. CONCLUSION

This study argues that the case of *S v Zuma*⁴¹⁵ reveals a setback from the preceding case of *S v M*⁴¹⁶ and the recommendations of the SALRC (this developments is discussed in chapter two) in the progress for developments in the substantive and procedural law of rape on past sexual history evidence. Even after the enactment of SORMA with its developments on the substantive and procedural law of rape(this developments is revealed in chapter one) some judges to date as revealed in this study in the case of *Ndou v State*⁴¹⁷ and the research presented by RAPSA⁴¹⁸ hold archaic perceptions of victim precipitating rape.

⁴¹⁵ *S v Zuma* 2006 (2) SACR 191.

⁴¹⁶ *S v M* 2003 (1) SA 341 at para 17(6) at 422c-g.

⁴¹⁷ *Ndou v State* 2014 (1) SACR 198 (SCA).

⁴¹⁸ *Retrospective Study of the Investigation, Prosecution and Adjudication of Reported Rapes from 2012 (RAPSSA)*
<https://rapecrisis.org.za/wp-content/uploads/2017/11/RAPSSA-REPORT-FIN1-18072017.pdf> 105.

CHAPTER FIVE

1. INTRODUCTION

This chapter would recommend and conclude on how there can be better and effective performance of police officers, prosecutors, magistrates and judges in the criminal justice system. This will call for legal accountability where archaic perceptions of victim precipitation of rape is upheld in order to reflect the intent of the Constitution and the Bill of Rights.

2. RECOMMENDATIONS

Philip NS Rummney & Charnelle van der Bijl's research⁴¹⁹ reflects in a survey on a small number of criminal law students at the University of South Africa on their state of knowledge about specific issues regarding rape behaviour. The research reveals that there were no significant differences about rape perceptions between law students who studied criminal law and those who had not.⁴²⁰ Among others, the study shows that nearly two thirds of the participants expected victims to physically resist their attackers. Philip & Charnelle further state that if these perceptions in the survey are more widely held among law students generally, it may create particular problems when they perform professional roles as lawyers, judge or police officers.

Philip & Charnelle conclude that there is clearly a need for public education on the nature and impact of rape.⁴²¹ This reveals that the educational system still has a strong important role to play on rape perceptions in South Africa. In addition to Philip & Charnelle's recommendations, a useful practical approach beyond lecture teachings and students studying from text books could be to maximize moot trials of law schools where the various rules of law are made practical. This will shed light and give better understanding to students' perceptions about rape victims and rape. The difference between rules of evidence in a rape trial with samples of rape myths can be adopted for better explanations.

However, surveys of rape myths will remain as surveys without educating the society about what consent in rape is. If the society is not consistently educated about rape and what consent in rape is, there will continue to be an infringement on the right to dignity of a rape victim. Although, efforts are being made by campaigns to tackle rape myths. The Cape Town red lipstick⁴²² campaign was achieved by a call to women and men wearing red lipstick which was aimed to support victims of

⁴¹⁹ N Philips, S Rummney, C van der Biil "Rape Attitudes and Law Enforcement in South Africa" (Fall 2010) 13(4) *New Criminal Law Review: An International and Interdisciplinary* 835.

⁴²⁰ They suggest that caution is to be given due to the small number of participants and further suggest that notwithstanding this, the statistics could also provide a basis for further research regarding larger samples.

⁴²¹ N Philips, S Rummney, C van der Biil "Rape Attitudes and Law Enforcement in South Africa" (Fall 2010) 13(4) *New Criminal Law Review: An International and Interdisciplinary* 839.

⁴²² R Henney *Call to Bust a Lot of Rape Myths with a Little Red Lipstick* IOL News 5 April 2016 available at <https://www.iol.co.za/news/call-to-bust-a-lot-of-rape-myths-with-a-little-red-lipstick-2005233> accessed 25 August 2016.

sexual assault and combat rape myths by educating on the distinction between women making themselves ‘sexy’ by wearing provocative dressing(rape myths) and giving consent.

The campaign was revealed successful, since it was said to have reached the society and most people online where most of the horrible shaming and silencing of victims takes place. This encouraging campaign however should be intensified and consistent to create awareness of victim’s rights and enlighten the society’s perceptions about rape.

Research reveals⁴²³ that rape myths are considered as a result of prosecutors wanting to meet performance targets contained in the Annual Performance Plans issued by the Department of Justice and Constitutional Development which they are committed to achieving. The research further reveals that “these targets shift the focus of prosecutors from achieving justice and effective performance to emphasis on numbers” which the research reveals that interviews conducted with some prosecutors highlight that the emphasis on numbers diminishes recognition of prosecutors’ capabilities as litigators. To meet these targets, rape myths become a way to determine the likelihood of convictions which causes distinguishing “real rapes” with “rape” (rapes that are violent and resulting in injuries being regarded as the real rapes).⁴²⁴

The research suggests that “the approach for measuring performance in determining justice should instead be substantive dimensions of justice that emphasise on time spent consulting with complainants and preparing them for trial than on number of cases finalised in a month, as well as rates of withdrawals to trials and that lower conviction rates may also be acceptable if they result in more difficult cases being tried. It is only by bringing such “difficult” cases in greater numbers to the magistrates’ attention and by testing and developing their prosecution, that notions of “real” rape will be shifted”.⁴²⁵

However, this study suggests that if the NPA’s Strategic Plan of 2013 to 2018⁴²⁶ intends to achieve a more effective criminal justice system and a well- managed and improved perception of crime among the population, then effective trainings directed to prosecutors should focus more on encouraging justice and upholding the intent of the Constitution since the practice of prosecutors presents images which could shape societies perceptions of rape and attitudes to rape victims.

⁴²³ *Retrospective Study of the Investigation, Prosecution and Adjudication of Reported Rapes from 2012 (RAPSSA)* <https://rapecrisis.org.za/wp-content/uploads/2017/11/RAPSSA-REPORT-FIN1-18072017.pdf> 109.

⁴²⁴ *Retrospective Study of the Investigation, Prosecution and Adjudication of Reported Rapes from 2012 (RAPSSA)* <https://rapecrisis.org.za/wp-content/uploads/2017/11/RAPSSA-REPORT-FIN1-18072017.pdf> 112.

⁴²⁵ *Retrospective Study of the Investigation, Prosecution and Adjudication of Reported Rapes from 2012 (RAPSSA)* <https://rapecrisis.org.za/wp-content/uploads/2017/11/RAPSSA-REPORT-FIN1-18072017.pdf> 112.

⁴²⁶ *National Prosecuting Authority Strategic Plan* available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/130423stratplan_0.pdf accessed 27 August 2018.

Research⁴²⁷ suggests that all detectives working on rape cases must be thoroughly trained to deal with cases including those with special needs victims with empathy and reduce secondary victimisation. However, the issue of trainings cannot be exhausted; this will constantly put the police in check. The investigating officers who encourage rape myths should be held accountable for their attitudes towards victims of rape.

Focusing on the officers in the criminal justice system without empowering rape victims to understanding their rights as provided in the Constitution so as to encourage victims' cooperation in fighting victim precipitation of rape would yield limited results. Measures in place among others like the National Policy Guidelines for Victim Empowerment,⁴²⁸ Minimum Standards on Services for Victims of Crime⁴²⁹ and The Victim Charter⁴³⁰ which was developed to further explain a victim's right as contained in the Service Charter for Victims of Crime in South Africa and assist victims to hold everyone involved in the criminal justice system accountable to ensure that victims of crime receive appropriate assistance and services. This is in compliance with South Africa's obligations under the various international and human rights movements and to protect and empower victims regarding their rights. However, victims still need to be encouraged to respond to the measures provided in the legislations positively.

Efforts to discipline judges as reflected in judge Mabel Jansen's Facebook remarks made out of court in 2015 which encouraged perceptions of victim precipitating rape (discussed in chapter four of this dissertation) is an encouraging attempt to fight these perceptions. However, this study recommends that further trainings be consistently done to presiding officers to remind them of their constitutional duties (these duties are stipulated in chapter one of the thesis). The Judicial Service Commission Amended Act (hereinafter referred to as JSC Amended Act)⁴³¹ provides for the establishment of the Judicial Conduct Committee, which is to receive and deal with the complaints about judges and to provide for a Code of Judicial Conduct, which judges must adhere to.⁴³² Section 14(4) of the JSC Act provides an opportunity for "lodging of complaints on any wilful or grossly negligent conduct that is incompatible with or unbecoming the holding of judicial office including any conduct that is

⁴²⁷ *Retrospective Study of the Investigation, Prosecution and Adjudication of Reported Rapes from 2012 (RAPSSA)* <https://rapecrisis.org.za/wp-content/uploads/2017/11/RAPSSA-REPORT-FIN1-18072017.pdf> 116.

⁴²⁸ *National Policy Guidelines for Victim Empowerment* https://www.gov.za/sites/default/files/National_policy_guidelines_for_victim_empowerment.pdf 1 accessed 19 September 2018. This serves as a guide for sector specific victim empowerment policies, capacity development and a greater emphasis on the implementation of victim empowerment programmes by all relevant partners.

⁴²⁹ *Minimum Standard on Services for victims of Crime* available at <http://www.justice.gov.za/VC/docs/vcms/vcms-eng.pdf> 1 accessed 19 September 2018.

⁴³⁰ *Service Charter for Victims of crime in South Africa* available at <http://www.justice.gov.za/VC/docs/vc/vc-eng.pdf> accessed 21 September 2018.

⁴³¹ See Act 20 of 2008.

⁴³² See Act 20 of 2008: Regulations under this Act- Legislation Judicially considered.

prejudicial to the independence, impartiality, dignity, accessibility, efficiency or effectiveness of the courts.” Section 17 (8) (a) – (g) of the JSC Act further provides for remedial steps in response to a complaint that may be imposed in respect of a judge which includes: apologising to the complainant in a manner specified, a reprimand, a written warning, any form of compensation, attendance of specific training course and any other appropriate corrective measures.

This study recommends that judges that hold archaic notions of victim precipitating rape in the course of the judge’s findings that obviates from the element of consent in rape as revealed in Zuma’s case and RAPSAs’ research (this is discussed in chapter 4 of this dissertation) **should be reprimanded**.

3. CONCLUSION

The archaic notions of victim precipitating rape theory is still a factor that reflects in decisions of the police, prosecutors and judges on victims of rape even after the development of SORMA. This however should call for legal accountability in order to uphold the spirit and purpose of the constitutional right to dignity, equal protection before the law, right to security in and control of the body and the right to a fair trial of a victim of rape.

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