



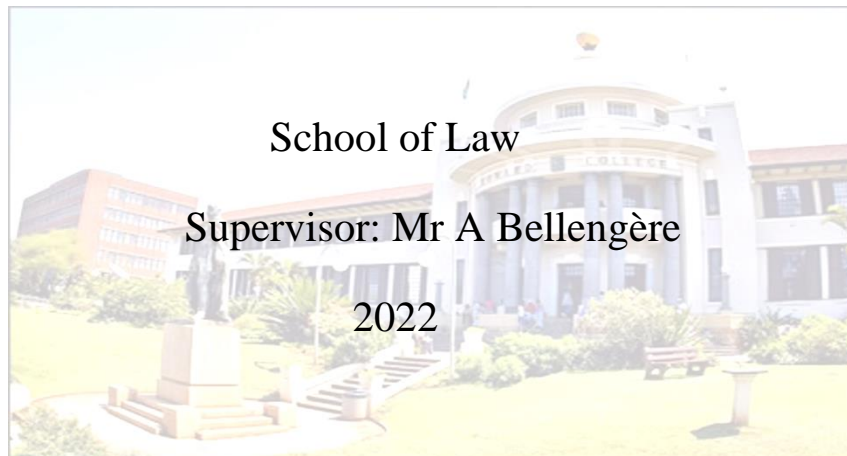
UNIVERSITY OF KWAZULU-NATAL  
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**False rape accusations: Reputational damage and statutory  
redress for the legally exonerated in South Africa**

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This mini dissertation is submitted in pursuance requirements for the  
degree of Master of Laws in Criminal Justice



**Declaration regarding originality**

I, Siyabonga Blessed Maseko (222069685), declare that:

The research reported in this dissertation, except where otherwise indicated, is my original research.

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**Declaration by supervisor**

This dissertation, which I have supervised, is being submitted with my approval.



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Adrian Bellengère

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February 2023

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## **Abstract**

*In this dissertation, the author explores what remedies, if any, South African law offers to those wrongfully convicted as the result of false accusations in rape cases if they can prove liability on the part of the State for the wrongful conviction. South Africans who are wrongfully convicted in rape cases but lack financial resources to claim compensation under the common law delict are deprived of their right to restitution in the absence of any State provided remedies. This dissertation will identify this gap by examining case law, existing compensation statutes, international law, academic literature, and statutory compensation of foreign jurisdictions. Through a comparative analysis of foreign jurisdictions, the dissertation also examines whether a compensation statute is an alternative remedy for South Africa. There is a hope that this dissertation will inform the legislature regarding creating a statutory law and a body that can assist wrongly convicted individuals.*

*Keywords:* false accusation, reputational damage, statute, compensation, wrongful conviction.

## **Abbreviations**

<i>Abbreviation</i>	<i>Definition</i>
CAIDWY	Canadian Association for the Defence of Wrongfully Convicted
CA	Canada
CCRC	Canadian Criminal Case Review Commission
CCRF	Civil Code of the Russian Federation
CPA	Criminal Procedure Act
CPHRFF	Convention for the Protection of Human Rights and Fundamental Freedoms
DCS	Department of Correctional Services
ECHR	European Convention on Human Rights
ICCPR	International Covenant on Civil and Political Rights
IHRC	International Human Rights Commission
IP	Innocence Project
NPA	National Prosecuting Authority
RAF	Road Accident Fund
SA	South Africa
SAPS	South African Police Service
SCA	Supreme Court of Appeal
UCT	University of Cape Town
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UKZN	University of KwaZulu-Natal
UN	United Nations
US	United States of America
WJP	Wits Justice Project

## **Table of contents**

<b>Contents</b>	<b>Page</b>
<b>Declaration regarding originality</b> .....	
<b>Declaration by supervisor</b> .....	<b>i</b>
<b>Acknowledgements</b> .....	<b>ii</b>
<b>Abstract</b> .....	<b>iii</b>
<b>Abbreviations</b> .....	<b>iv</b>
<b>Table of contents</b> .....	<b>v</b>
<b>CHAPTER 1: INTRODUCING THE TOPIC</b> .....	<b>1</b>
1.1 Introduction .....	1
1.2 Problem Statement .....	<b>3</b>
1.3 The rationale for the dissertation.....	5
1.4 The objective of the dissertation .....	<b>6</b>
1.5 Research questions .....	<b>6</b>
1.6 Literature review .....	<b>7</b>
1.7 Research Methodology.....	<b>9</b>
1.8 Overview of the dissertation .....	<b>9</b>
1.9 Conclusion .....	10
<b>CHAPTER 2: MOTIVES FOR FALSE ACCUSATIONS</b> .....	<b>11</b>
2.1 Introduction .....	11
2.2 False statements: Intentionally making a false statement .....	14
2.3 Motives for falsely accusing someone of rape .....	15
2.3.1 Revenge.....	16
2.3.2 Regret and shame .....	18
2.3.3 An alleged victim is used as a tool by another.....	19
2.3.4 Need for an alibi.....	20
2.3.5 Blackmail and Extortion .....	20
2.4 Conclusion .....	22

<b>CHAPTER 3: EFFECTS OF FALSE ACCUSATIONS</b> .....	23
3.1 Introduction .....	23
3.2 Social effects of being falsely accused.....	24
3.2.1 Humiliation of the profession .....	25
3.2.2 Social status is negatively impacted.....	26
3.2.3 Relationships are adversely affected.....	26
3.2.4 Isolation from family and friends.....	27
3.3 Psychological effects.....	28
3.4 Material effects.....	29
3.5 Conclusion .....	29
<b>CHAPTER 4: EXPLORING MISCARRIAGES OF JUSTICE</b> .....	31
4.1 Introduction .....	31
4.2 Miscarriage of justice .....	32
4.2.1 Malicious investigations by the SAPS .....	33
4.2.2 Malicious prosecutions.....	35
4.2.3 Judicial misconduct.....	38
4.3 Court of public opinion .....	40
4.4 Evidence reliability, concealment, and fabrication .....	41
4.5 Conclusion .....	41
<b>CHAPTER 5: COMPENSATION – A COMPARATIVE ANALYSIS</b> .....	43
5.1 Introduction .....	43
5.2 International Covenant on Civil and Political Rights .....	44
5.3 Compensation statutes enacted by foreign jurisdictions .....	46
5.3.1 The United States of America (US) .....	46
5.3.2 The United Kingdom.....	48
5.3.3 The Russian Federation.....	49
5.3.4 Canada.....	51

5.3.5	Romania .....	51
5.3.6	Conclusion .....	53
<b>CHAPTER 6: DISCUSSION AND CONCLUSION .....</b>		<b>54</b>
6.1	Discussion .....	54
6.2	Conclusion and recommendations .....	56
7.	<b>BIBLIOGRAPHY .....</b>	<b>59</b>
7.1	<b>PRIMARY SOURCES .....</b>	<b>59</b>
	Domestic Case Law .....	59
	Foreign Case Law .....	60
	Domestic Statutes.....	60
	Foreign Statutes .....	60
	International Statutes .....	61
	Domestic Government Publications .....	61
	Domestic Reports.....	61
	Foreign Government Publications .....	61
	Foreign Reports.....	62
7.2	<b>SECONDARY SOURCES .....</b>	<b>62</b>
	<b>Books .....</b>	<b>62</b>
	<b>Journal Articles.....</b>	<b>63</b>
	<b>Online Articles.....</b>	<b>66</b>
	<b>Online Websites.....</b>	<b>71</b>
	<b>Theses.....</b>	<b>72</b>
	Video Documentation .....	73
8.	<b>APPENDICES .....</b>	<b>74</b>
8.1	<b>APPENDIX A: Ethical clearance certificate .....</b>	<b>74</b>
8.2	<b>APPENDIX B: Understanding Plagiarism Certificate.....</b>	<b>75</b>

## **CHAPTER 1: INTRODUCING THE TOPIC**

### *1.1 Introduction*

In South Africa, rape occurs at an alarming rate. Statistics provided by the South African Police Service ('SAPS') show that 42,289 rape cases were reported to the SAPS in 2019/2020.<sup>1</sup> Moreover, South Africa ('SA') is listed as number 3 in the top 10 countries with high rape rates worldwide.<sup>2</sup> This high number of reported cases is compounded by the fact that not all cases are reported. Victims of sexual abuse may be afraid of reporting rape because of its trauma. Survivors might experience trauma in reliving the experience of being raped, and sometimes the fear is that they will not be believed. In addition, rape may be challenging to prove, including the fact that it often happens in a private setting.

Under section 208 of the Criminal Procedure Act ('CPA'), South African courts can convict anyone based on the evidence of a single witness.<sup>3</sup> It is possible for a single witness to be a complainant, eyewitness, section 204 witness, or an expert witness under section 208.<sup>4</sup> Moreover, as it stands, the law has no limitation period as required by section 18 of the CPA of when to report rape or any other sexual offences, as confirmed in the case of *L v Frankel*<sup>5</sup> in 2018. Thus, South African legislators have put legislation in place to protect rape victims from the fear of not being believed because the rape took place long ago, and no one witnessed it.

However, allegations of sexual crime are not always true. There is no statutory requirement in the South African legal system that corroborating evidence is produced in rape cases. Although s208 might seem adequate, it is questionable whether it protects innocent people since convictions can be based on a 'he said, she said' argument.<sup>6</sup> A presiding officer might be misled if the facts of rape are carefully fabricated and aligned with the circumstances,

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<sup>1</sup> South African Government available at <https://www.gov.za/speeches/speaking-notes-delivered-police-minister-general%2%A0bheki-cele-mp-occasion-release-%2%A0quarterterm>, accessed on 15 April 2022.

<sup>2</sup> World Population Review 'Rape Statistics by Country 2022' available at <https://worldpopulationreview.com/country-rankings/rape-statistics-by-country>, accessed on 15 April 2022.

<sup>3</sup> Act 51 of 1977. States that

'An accused may be convicted of any offence on the single evidence of any competent witness'.

<sup>4</sup> Ibid.

<sup>5</sup> *L v Frankel* [2018] (2) SACR 283 (CC).

<sup>6</sup> See some of the cases that were upheld and conviction set aside by an Appeal Court: *Sphanda v S* [2021] ZAGPPHC 186; *Monyepao v S* [2017] ZAGPPHC 594.

leading to a wrongful conviction.<sup>7</sup> For example, Sifiso Shezi was wrongly convicted of rape in 2003, in a case where a presiding officer used carefully fabricated false evidence of the alleged victim to convict the accused wrongly.<sup>8</sup>

How many false accusations or wrongful convictions occur in rape cases in South Africa is unknown. Domestic initiatives like Wits Justice Project ('WJP'),<sup>9</sup> False Rape SA and False Rape SA Press,<sup>10</sup> and the media publication tell the stories of those falsely accused and wrongfully convicted people. In addition, Forejustice<sup>11</sup> and the Innocence Project<sup>12</sup> provide records on the deficiencies in Criminal Justice Systems that lead to wrongful convictions worldwide.

This dissertation examines the motives behind false accusations of rape, reputational damage, and state liability compensation following a wrongful conviction. In the context of state liability, unfair trial proceedings, misconduct, and malicious prosecution are considered. The definition of a false rape accusation adopted by Nicole Okeke-Oraeki and taken from Philip Rumney's study 'Purported False Allegations of Rape'<sup>13</sup> used is taken to be 'describing an event the complainant knows didn't happen.'<sup>14</sup> Adopted by this dissertation, Okeke-Oraeki proposes that the accuser must be motivated by malice or intention when making the accusation.<sup>15</sup>

The internet has given life to false accusations of sexual assault, which can result in the wrongful conviction and incarceration of innocent people. The prevailing basis for this dissertation is the non-existent statutory compensation for those wrongfully convicted after the fact of a false accusation and question of State liability for wrongful convictions in South Africa.

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<sup>7</sup> E Lubaale 'Taking the incidence of false child sexual abuse allegations more seriously' 2016 *De Jure* 80.

<sup>8</sup> Ibid 'Unreported judgment on the case. Also, as far as newly-discovered evidence is concerned, the findings of the court have not been reported pursuant to section 327(3)(b) of the Criminal Procedure Act 105 of 1977 of South Africa, which prohibits a court from disclosing its findings'.

<sup>9</sup> Wits Justice Project available at <https://www.witsjusticeproject.co.za/>, accessed on 21 April 2022.

<sup>10</sup> Twitter <https://twitter.com/Falserapesa>; [https://twitter.com/FRSA\\_Press](https://twitter.com/FRSA_Press), accessed 15 March 2022.

<sup>11</sup> Forejustice available at <http://forejustice.org/>, accessed on 25 July 2022.

<sup>12</sup> Innocence Project available at <https://innocenceproject.org/>, accessed on 21 April 2022.

<sup>13</sup> P Rumney and K McCartan 'Purported False Allegations of Rape, Child Abuse and Non-Sexual Violence: Nature, Characteristics and Implications' (2017) 81 (6) *Journal of Crim. L* 497–520.

<sup>14</sup> Okeke-Oraeki, N 'The Liability of Liar: Rape, Lies, and Destroyed Lives' (2020) 11 *Journal of Race, Gender, and Poverty* 94.

<sup>15</sup> Ibid 94.

The International Covenant on Civil and Political Rights ('ICCPR')<sup>16</sup> guides how to address the consequences of a miscarriage of justice. South Africa is among the countries that are signatories to the ICCPR. Signatory states must implement a statutory compensation mechanism to comply with the treaty.<sup>17</sup> For example, the United Kingdom ('UK') is one signatory to the ICCPR that has adopted Article 14(6) as its statutory framework on the basis that 'individuals who have been exonerated require support networks, food, shelter, employment, as well as mental and physical health treatment, but do not often have access to these facilities.'<sup>18</sup> Studies have shown that exonerees may carry a serious risk of committing crimes after they have been released from prison, and there is ample reason to hope that compensating these victims will result in a positive outcome.<sup>19</sup>

## *1.2 Problem Statement*

A problem statement is 'a challenge based on the limitations, which a Researcher identifies in the context of a practical or theoretical situation and wants to find a solution for the same.'<sup>20</sup> In South Africa, gender-based violence ('GBV') has led to men and women becoming less sensitive to one another, as the hashtags #MenAreTrash and #WomenAreTrash have dominated social media.<sup>21</sup> The #MenAreTrash campaign was launched by women in South Africa in 2016, responding to the violence and problematic masculinity the country suffers from.<sup>22</sup> Similarly, in 2016, the hashtag #WomenAreTrash was launched in response to #MenAreTrash.<sup>23</sup> The response suggested that women are also capable of physically abusing men.

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<sup>16</sup> United Nations General Assembly, 1966.

<sup>17</sup> Article 14(6) states 'When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him'.

<sup>18</sup> E J Mandery, et al. 'Compensation Statutes and Post-Exoneration Offending' (2013) 103(2) *Journal of Criminal Law and Criminology* 555.

<sup>19</sup> Ibid.

<sup>20</sup> V Bairagi & V M Munot *Research Methodology: A Practical and Scientific Approach* 7 ed (2019) 57.

<sup>21</sup> R P Aguera *From #MenAreTrash to #MensConference: Networked masculinities in South African* (unpublished Masters Dissertation, University of Cape Town, 2021). The men's response to the #MenAreTrash movement, a digital feminist campaign against gender-based violence, using the hashtag #WomenAreTrash.

<sup>22</sup> R Samanga 'The Real Story Behind #menaretrash, South Africa's Response to Domestic Violence' *Okayafrica*, 2017 available at <https://www.okayafrica.com/real-story-behindmenaretrash-south-africas-viral-hashtag/>, accessed on 15 April 2022.

<sup>23</sup> J Fenton 'Why 'Women Are Trash' trended on a day celebrating girls' *BBC News*, 11 October 2016 available: <https://www.bbc.com/news/blogs-trending-37621269>, accessed on 15 April 2022.

The use of social media platforms like Twitter and Facebook has dramatically altered the way people gain access to information and news in a much more effective way.<sup>24</sup> Social media's emergence has transformed how we discuss and report social issues, making it easier to find engagement and help in matters of social significance.<sup>25</sup> For example, the Twitter hashtags #Metoo<sup>26</sup> and #EndRapeCulture [with the slogan 'We believe them']<sup>27</sup> emerged in social media debates regarding prominent male public figures accused of sexual misconduct.

A list of prominent men in South Africa accused of rape by anonymous victims was posted on the Twitter account @weBatataa in 2019.<sup>28</sup> A cancel culture called for cancelling those on the list. Merriam-Webster defines cancel culture as 'the practice or tendency of engaging in mass cancelling as a way of expressing disapproval and exerting social pressure.'<sup>29</sup> The American term emerged in 2016, becoming more popular in 2021 as the internet became more widespread and prominent worldwide.<sup>30</sup> Consequences of cancel culture include the loss of employment, harassment, malicious prosecutions, and the violation of various fundamental rights that South Africans enjoy.<sup>31</sup>

The Criminal Justice System has failed to address the issue of sexual abuse effectively in South Africa.<sup>32</sup> When it comes to rape, the Criminal Justice System faces a dilemma since both victims, and the accused must be protected at all times.<sup>33</sup> The Criminal Justice System

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<sup>24</sup> M Boukes 'Social Network Sites and Acquiring Current Affairs Knowledge: The Impact of Twitter and Facebook Usage on Learning About the News' (2019) 16 *Journal of Information Technology & Politics* 36.

<sup>25</sup> S Beukes 'An Exploration of the Role of Twitter in the Discourse Around Race in South Africa: Using the #Feesmustfall Movement as a Pivot for Discussion' 2017 *JSTOR* 200.

<sup>26</sup> R Alaggia & S Wang 'I never told anyone until the #metoo movement: What can we learn from sexual abuse and sexual assault disclosures made through social media?' (2020) *Child abuse & neglect* 103.

<sup>27</sup> Z Orth Rape culture and social media: Exploring how social media influences students' opinions and perceptions of rape culture (unpublished Master' thesis, University of the Western Cape, 2018). See also Gouws, A *#EndRapeCulture campaign in South Africa: Resisting sexual violence through protest and the politics of experience* 45 (1) *Politikon*, (2018) 3–15.

<sup>28</sup> Available at

[https://twitter.com/weBatataa/status/1168781603277070337?s=20&t=c\\_vrkYfPTAciOKIs3mDSlQ](https://twitter.com/weBatataa/status/1168781603277070337?s=20&t=c_vrkYfPTAciOKIs3mDSlQ), accessed on 16 April 2022.

<sup>29</sup> 'cancel culture,' Merriam-Webster.com Dictionary, available at <https://www.merriam-webster.com/dictionary/cancel%20culture>, accessed on 15 March 2022.

<sup>30</sup> S Arrigg Koh 'Cancel Culture' and Criminal Justice' (2023) 74(1) *Hastings Law Journal* 85.

<sup>31</sup> Ibid at 86. See also The South African Constitution, 1996 (The SA Constitution) sections 9, 10, 12 and 35.

<sup>32</sup> Rumney, P N S, and Van Der Bijl, C 'Rape, Attitudes, and Law Enforcement in South Africa' (2010) 13(4) *New Criminal Law Review*, 827.

<sup>33</sup> Lubaale (see note 7 above) 81.

lacks adequate tools to carry out this function due to the lack of conclusive evidence needed in many rape cases to determine whether a rape occurred.<sup>34</sup>

The consequences of the accusation will inevitably haunt the individual accused for the rest of their life, regardless of its truthfulness.<sup>35</sup> In 2021, some falsely accused and wrongfully convicted rape individuals were also made public through social media.<sup>36</sup> The convictions in these cases took place before the rise of social media. For instance, Njabulo Ndlovu was falsely accused of rape, wrongfully convicted, sentenced to life in prison, and spent 13 years in prison before being exonerated on appeal in 2017.<sup>37</sup> He has never received compensation for being wrongfully convicted but was exonerated due to state liability of misconduct.<sup>38</sup>

The only way to recover compensation for a wrongful conviction or false accusation in South Africa is through a civil claim which is an expensive and lengthy process. The financial implications make claims inaccessible for an ordinary citizen post-exoneration in SA. Therefore, a viable alternative that can accommodate everyone regardless of class, race, or gender is needed in SA.

### *1.3 The rationale for the dissertation*

The SA Constitution guarantees human dignity, equality, and freedom to every South African citizen.<sup>39</sup> Moreover, it protects citizens against unfair discrimination based on gender or sexual orientation.<sup>40</sup> False rape accusations indeed happen, and wrongful convictions and innocent people are incarcerated.<sup>41</sup> It is also true that exonerations sometimes happen for those wrongly

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<sup>34</sup> Ibid 82.

<sup>35</sup> Ibid 80.

<sup>36</sup> Available at

[https://twitter.com/Madlala\\_TM/status/1467833729104154638?s=20&t=celJnV4MnawVFJstnVF2AA](https://twitter.com/Madlala_TM/status/1467833729104154638?s=20&t=celJnV4MnawVFJstnVF2AA), accessed 16 March 2022.

<sup>37</sup> In SA, a minimum sentence of 15 years to a life sentence is prescribed under section 51(1) of the Criminal Law Amendment Act ('CLAA'),<sup>37</sup> read with section 3 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) Act 32 of 2007. As a result, those accused of rape may face lengthy prison sentences if found guilty.

<sup>38</sup> *Ndlovu v S* 2019 (1) SACR 686 (KZP). See also an article by South African Lawyer 'Wrongfully convicted would-be lawyer can't get a job' *Daily News*, 15 April 2019 available at <https://www.southafricanlawyer.co.za/article/2019/04/wrongfully-convicted-would-be-lawyer-cant-get-a-job/>, accessed on 16 March 2022.

<sup>39</sup> Note 31 above at s1, s7, s8, s9, s10, s11 and s12.

<sup>40</sup> Ibid section 9.

<sup>41</sup> K Hail-Jares et al. 'False Rape Allegations: Do they Lead to a Wrongful Conviction Following the Indictment of an Innocent Defendant?' (2020) 37(2) *Justice Quarterly* 295.

convicted, but there is no statutory mechanism in SA for compensation post-exoneration on the basis of the state's liability for the wrongful conviction. Upon the conclusion of this dissertation, statutory compensation will be proposed as an alternative redress method for the fundamental rights violated by the State. Moreover, legislators, academics, lawyers, and researchers will find this dissertation valuable as a source of reference literature in developing statutory compensation for the wrongfully convicted due to state liability.

#### *1.4 The objective of the dissertation*

An objective outlines a research project's focus, direction, and evaluation criteria.<sup>42</sup> This dissertation focuses on false rape cases, their consequences, and wrongful convictions due to intentional violations of the accused, for which the state should be held liable. In South Africa, civil litigation is the only remedy to obtain compensation for false accusations and wrongful convictions. This dissertation proposes an alternative compensation model to facilitate a rapid and effective process for compensating those wrongly convicted in circumstances where the state is held liable. Therefore, International legal standards outlined in Article 14(6) of the ICCPR provide support for evaluating the objective of this dissertation.<sup>43</sup>

#### *1.5 Research questions*

Based on the problem description and the objectives, the following questions guided this dissertation:

1. What causes or motivates a person to make false accusations of rape?
2. How are individuals affected when falsely accused of rape?
3. As a result of a false accusation, what factors contribute to a wrongful conviction?
4. If wrongful convictions occur in foreign jurisdictions, how are the exonerated compensated, and can SA achieve a similar outcome?

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<sup>42</sup> M Denscombe *Ground rules for good research* (2002).

<sup>43</sup> The International Covenant on Civil and Political Rights (ICCPR), adopted in 1966, states 'When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him'.

## 1.6 *Literature review*

Neither false rape accusations nor wrongful convictions have been studied in depth in South Africa. Shumba examines the remedies available under Section 327 of the CPA and demonstrates that they do not apply to victims of wrongful convictions, who are left with no recourse other than the appeals process.<sup>44</sup> Shumba compares the procedures of various foreign jurisdictions for setting up independent commissions to investigate and probe cases where persons who have exhausted all options to appeal still maintain their innocence.<sup>45</sup> Taking Shumba's study as a starting point, Chapter 5 of this dissertation examines international law and the provisions made in foreign jurisdictions for compensating persons exonerated after wrongful convictions.

In a United States ('US') study on false rape accusations that result in wrongful convictions, Katie Hail-Jares et al. indicate that other studies on false rape have existed for some time. Still, the #MeToo social media campaign gave it a new life starting in 2016 and becoming more prevalent by 2021.<sup>46</sup> The authors noted that most studies had not examined the supposition that false rape allegations lead to wrongful convictions. Additionally, the study revealed that false allegations were used to taint the public image of an accused and to convict an innocent person wrongfully.<sup>47</sup> The study refers to a website called 'accused.me.uk' that documents real-life stories of people falsely accused of sexual assault.<sup>48</sup> In most studies, false allegations were not examined for the likelihood of leading to wrongful convictions but rather for how frequently they occurred.<sup>49</sup> As part of this study, the dissertation goes beyond noting

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<sup>44</sup> T Shumba *Litigating Innocence: The Problem of Wrongful Convictions and Absence of Effective Post-Conviction Remedies in South Africa*; (2017) 2 SACJ 179.

<sup>45</sup> *Ibid* 184.

<sup>46</sup> Hail-Jares (see note 41 above) 282.

<sup>47</sup> *Ibid*.

<sup>48</sup> *Ibid*.

<sup>49</sup> *Ibid*.

that false allegations can lead to wrongful convictions and proposes a statutory fund to compensate after exoneration in South Africa.

Recent psychological studies by Brooks and Greenberg on the effects of being wrongly convicted assert that falsely accused and wrongly convicted people suffer permanent harm.<sup>50</sup> Some effects could be an

impact on health, particularly mental health, often leaving participants unable to continue their normal work and social activities. Generally, such symptoms occurred in people without previous psychiatric histories, inferring such health problems are likely directly attributable to the wrongful arrest, conviction, or imprisonment. Social-psychological effects could include anger, sense of powerlessness, suicidal thoughts, divorce/separation, malnutrition, illnesses acquired in jail, substance addiction, risk of being killed, forms of trauma, cyberbullying, unemployment, deprivation of freedom of movement, association, and reproduction.<sup>51</sup>

Therefore, this dissertation envisions that a statutory fund would provide compensation for those who have suffered, or who are at risk of suffering, potential lifelong harm due to false accusations and wrongful convictions.

The dissertation also refers to cases in which false accusations have led to wrongful convictions. The case of *Ndlovu*<sup>52</sup> is a primary example that will be used frequently in all chapters of this dissertation. In this dissertation, Ndlovu is viewed as embodying all the objectives discussed since he was falsely accused by someone who knew his identity, limiting the chance of mistaken identity. His trial was marred by malice by the state and the magistrate; he was wrongfully convicted and, after 13 years in prison, was exonerated on appeal. He was a 2nd-year law student before the accusation and conviction. However, following his exoneration, his conviction was not expunged. Ndlovu could not find employment and received no compensation for time lost, health, or social problems.<sup>53</sup>

State liability compensation for wrongfully convicted people in SA is evaluated in the dissertation. Compensation in SA can only be obtained by filing a common-law delictual claim

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<sup>50</sup> S K Brooks & N Greenberg 'Psychological Impact of Being Wrongfully Accused of Criminal Offences: A Systematic Literature Review' (2021) 61 *Medicine, Science and the Law* 47.

<sup>51</sup> *Ibid* 47, 50.

<sup>52</sup> *Ndlovu* (see note 38 above).

<sup>53</sup> Note 38 above.

against the perpetrator. In light of sections 297(1)(a)(i) and 300 of the CPA, where a court may award compensation following a criminal trial, the judgment for compensation must be civil; thus, delict is also a factor.<sup>54</sup> The dissertation suggests that though common law provisions exist and are available to institute claims, a development by enacting a statutory provision that will align with the needs of wrongly convicted individuals is needed.

### *1.7 Research Methodology*

A qualitative approach was taken in this dissertation, which describes the ‘use of language, text, and visual data.’<sup>55</sup> The library’s online portal was used to conduct desk-top research and identify reputable sources. Materials were accessed from academic websites such as Juta, Lexis Nexis, Sabinet, Hein Online, Westlaw, UKZN eBook and Journals Collection,<sup>56</sup> and Google Scholar. Other online sources, such as social media and publications, were also used to gather data. In addition, a comparative method was employed to demonstrate how international law and foreign jurisdictions have enacted statutory mechanisms intended to assist wrongfully convicted individuals.

### *1.8 Overview of the dissertation*

*Chapter 1* provides background information regarding the subject matter of the dissertation. This chapter includes the problem statement, rationale, research questions and a literature review.

*Chapter 2* discusses the literature related to reasons for individuals making false accusations of rape and the impact of these false accusations on the accused’s psychosocial and material well-being.

*Chapter 3* discusses the effects of false rape accusations that can permanently impact an innocent person.

*Chapter 4*, case studies illustrate how false accusations can result in wrongful convictions.

*Chapter 5* presents a comparative analysis of provisions in international law and foreign law to

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<sup>54</sup> Note 3 above.

<sup>55</sup> Kraska et al. ‘Criminal Justice and Criminology Research Methods’ (2020) 12.

<sup>56</sup> University of KwaZulu-Natal Library available at <https://library.ukzn.ac.za/>, accessed 16 March 2022.

rehabilitate those falsely convicted of rape, with a view to South Africa drafting similar legislation.

*Chapter 6* analyses the findings of the study and presents conclusions.

### *1.9 Conclusion*

In this chapter, the author has successfully laid the groundwork for an in-depth examination of the challenging and urgent issue of false rape cases and wrongful convictions in South Africa. With the help of these shocking facts and tales, this dissertation offers insight into the urgent need for a reform of the existing legal and social processes that deal with sexual crimes. The dissertation highlights the dilemma of both protecting the victims and ensuring justice for those who are wrongly accused, which gives an indication of a considerable gap in the South African Criminal Justice System. Besides, the dissertation draws attention to the injustice of no compensation for the wrongly convicted and thus questioning the adequacy of existing legal systems to balance between justice and victim support. The dissertation is prepared by establishing a clear research problem, rational objectives, and research questions that will lead to a comprehensive analysis of different solutions, for instance, statutory compensation, to tackle these key concerns. This dissertation not only provides a unique perspective on legal reform, and human rights in South Africa but also arms researchers, legislators, academicians, and legal practitioners with a scholarly lens to review and realign policies and legal practices.

## **CHAPTER 2: MOTIVES FOR FALSE ACCUSATIONS**

### *2.1 Introduction*

As with any human behaviour, there are many reasons why someone might lie about being raped.<sup>57</sup> *The Secret of Bryn Estyn* is a fascinating study by Richard Webster that sheds light on the cultural environment and beliefs that support false accusations being made and accepted as facts.<sup>58</sup> Hoyle *et al.* write that since the stigma associated with rape is so severe and it is difficult to demonstrate one's innocence in a contested rape case, 'accusations of serious criminality, especially alleged sexual wrongdoing, are often their convictions in the high court of public opinion.'<sup>59</sup>

A case study involving the acquittal of an African American college athlete found that he was still perceived as a potential rapist on campus.<sup>60</sup> Hale<sup>61</sup> writes that

actual rape is a most detestable crime and, therefore, ought severely and impartially to be punished with death. Still, it must be remembered that it is an accusation easy to make, hard to prove, and harder to defend by the party accused, though never so innocent.<sup>62</sup>

The discourse around false accusations is often muted or non-existent, perhaps because false accusations can reinforce cultural stereotypes of women as being dishonest or vicious.<sup>63</sup> Giving attention to false accusations might lead to stereotypes and negatively affect how society treats rape victims.<sup>64</sup> Discussions of false rape have been characterized as a dangerous argument that promotes the idea that women are liars.<sup>65</sup> In this dangerous argument, falsely

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<sup>57</sup> B Gross 'False rape allegations: An assault on justice' (2009) 18(1) *Forensic Examiner* 68.

<sup>58</sup> R Webster *The Secret of Bryn Estyn: The Making of a Modern Witch Hunt* (2005).

<sup>59</sup> C Hoyle, N Speechley & R Burnett 'The Impact of Being Wrongly Accused of Abuse in Occupations of Trust: Victims' Voices' (2016) *University of Oxford: Centre for Criminology* at 3, available at [https://www.law.ox.ac.uk/sites/files/oxlaw/the\\_impact\\_of\\_being\\_wrongly\\_accused\\_of\\_abuse\\_hoyle\\_speechley\\_burnett\\_final\\_26\\_may.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/the_impact_of_being_wrongly_accused_of_abuse_hoyle_speechley_burnett_final_26_may.pdf), accessed on 25 March 2022.

<sup>60</sup> Okeke-Oraeki (see note 14 above) 92. 'Athlete Michael, an 18-year-old African American boy, had just finished playing in one of the most important football games of his life. After the game, Michael and his friends made the decision to attend an off-campus party to celebrate their impressive victory, where he met Stacy Wash, another college student. Stacy brought Michael to her dorm room for a nightcap after the party, where they had consensual intercourse... Stacy went to the campus police station and reported Michael for rape there' 93.

<sup>61</sup> Chief Justice of the Court of the King's Bench of England.

<sup>62</sup> M Hale *The history of the pleas of the crown* 1 ed (1847) Vol 1: 634.

<sup>63</sup> Rumney (see note 13 above) 501.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

accused individuals' rights to equality, among other rights, are entirely ignored.<sup>66</sup> In effect, the dangerous argument gives the impression that false accusations are not significant issues that need to be investigated and discussed by society. In his autobiography, Jones differs from the notion of the dangerous argument, noting that:

History is full of innocent men and women who have been sent to jail for crimes they did not commit. I am not too naïve to realise that it could easily have happened to me. Before my trial began, relatively few people could understand how a former care worker could be facing more than 20 counts of physical and sexual abuse from four separate accusers and claim he was innocent and that all the allegations were false. By the time the trial had collapsed, practically everyone knew the explanation.<sup>67</sup>

False accusations can be made for different reasons, and the accuser may not always know the accusation is false. According to Lonsway's concept of false allegations, untrue statements are sometimes made without intending to do so, for example, when a person has a mental illness and cannot tell the truth about their current state of affairs.<sup>68</sup> False accusations can sometimes arise when someone has just had a severely traumatic event.<sup>69</sup> The accusations are based on statements that contradict the sequence of events compared to other available information. It is conceivable that the individual who complained misidentified the accused.

The dissertation concentrates on deliberate and purposeful false accusations, which may emerge from revenge, guilt, the need for an excuse or an alibi, or an economic motive or financial payoff. Illustrated by a video recording made during data collection for this dissertation, when individuals face extreme emotional tension, it is easy to imagine accusing someone of rape casually.<sup>70</sup> For instance, a female unidentified in the video describes an argument with a male person with whom she had consensual sexual relations. In a conversation with the friend of the male she had sex with, she explains that she is hurt by what the male called her: someone who sleeps around and has sex with multiple people. It appears that both parties engaged in sexual activity whilst intoxicated, and the woman suggests that she can open

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<sup>66</sup> Ibid 502.

<sup>67</sup> D Jones *No Smoke, No Fire: The Autobiography of Dave Jones* (2011) 141.

<sup>68</sup> K A Lonsway 'Trying to move the elephant in the living room: Responding to the challenge of false rape reports' (2010) 16(12) *Violence Against Women* 1362, 1367.

<sup>69</sup> Ibid 1363.

<sup>70</sup> 'Pay me or I will scream Rape, Another Slay Queen Caught On Camera' *Mzansi Entertainment*, 14 December 2022 available at <https://www.youtube.com/watch?v=O2SaK4CEzPE>, accessed on 5 May 2022.

a rape case, but the friend of the male advises against it. In the video, she specifically states the following:

His sperm is still inside my vagina, and he has no idea I have control over him. If I want, I can cry rape right now. I have authority over him, and I'm going to the cops now.<sup>71</sup>

The video is a perfect example of how false accusations can arise in a spring of a heated argument and emotions. A false accusation could be thrown casually at this time without considering the current crisis that the world is facing.

People claiming to have been raped who have not are likely to have experienced some injustice, rejection, or betrayal from the false rapist, which is why the false accusation is perpetrated to exact revenge,<sup>72</sup> and this will be deliberated more below reflecting on the case of *Canelli v Canelli*.<sup>73</sup> Alternatively, the accuser may feel guilty or regretful for having sex with the accused because they were unfaithful to their partner in another relationship. False rape accusations allow the accuser to evade accountability by altering the story of what happened.

The objective of creating an alibi, or finding another excuse to protect oneself from harm, is to defend oneself in difficult situations, not to harm the accused.<sup>74</sup> False accusations of rape have also been made for extortion, where the accused is asked to pay or face prison for the offence.<sup>75</sup> However, some have dared to take the situation to court with the assistance of their lawyers.<sup>76</sup>

According to Rumney,<sup>77</sup> false accusations may cause the actual victims of rape to isolate themselves for fear of not being believed.<sup>78</sup> It is argued in this dissertation that giving falsely

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<sup>71</sup> Ibid.

<sup>72</sup> Gross (see note 57 above).

<sup>73</sup> *Canelli v Canelli and Others* (205 of 2019) [2021] ZASCA 12 (3 February 2021).

<sup>74</sup> Ibid.

<sup>75</sup> Z Khumalo 'Free State cop on bail for allegedly accusing man of rape, then extorting money to drop case' *News24*, 18 August 2022, available at <https://www.news24.com/news24/southafrica/news/free-state-cop-on-bail-for-allegedly-accusing-man-of-rape-then-extorting-money-to-drop-case-20220818>, accessed on 30 September 2022.

<sup>76</sup> Law Office of Jeffrey Lichtman available at <https://jeffreylightman.com/blog/falsely-accused-crime-extorted-harassed-lunatic-fight-back/>, accessed on 27 July 2022.

<sup>77</sup> Rumney (see note 13 above) 501.

<sup>78</sup> Ibid.

accused people a voice does not negate the lessons that real victims may be able to impart to society.<sup>79</sup>

## 2.2 *False statements: Intentionally making a false statement*

Section 9 of the Justice of Peace and Commissioners of Oaths Act describes the context of when a false statement is made to mean that,

Any person who, in an affidavit, affirmation or solemn or attested declaration made before a person competent to administer an oath of affirmation or take the declaration in question, has made a false statement knowing it to be false, shall be guilty of an offence and liable upon conviction to the penalties prescribed by law for the offence of perjury.<sup>80</sup>

Lonsway's finding is that, while a false statement is a term used to refer to the statement made by a witness who mistakenly thinks a set of facts is real,<sup>81</sup> on the other hand, the meaning of the Legislative definition above seems to imply that the said person deliberately makes the false statement with the express purpose of misleading, and this is one of the concepts that form the centre of this dissertation. If the witness believes the statement is true, they cannot be held accountable for making a false statement and cannot be charged with perjury due to a lack of intent. It is also possible that a false statement could be made due to mistaken identity, in which instance, the person also lacks intent.<sup>82</sup>

According to section 9 of the Justice of Peace and Commissioners of Oaths Act,<sup>83</sup> making a false statement in the presence of police is treated as making a statement under oath. Anyone proven to have made such false statements can be charged with perjury. In the case of *Malinga v Minister of Police*,<sup>84</sup> the court held that

it is trite law that both statutory and common law perjury are serious crimes, and experience shows the disturbing frequency with which the state witnesses materially

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<sup>79</sup> Hoyle (see note 59 above) at 5.

<sup>80</sup> Justice of Peace and Commissioners of Oaths Act 16 of 1963.

<sup>81</sup> Lonsway op cit note 68 1367.

<sup>82</sup> Perjury in South African law requires that the statement be false. This implies that if a person accidentally states the truth but believes he is lying (his aim is to deceive), he is not guilty of perjury. They may, however, be charged with attempted perjury.

<sup>83</sup> Act 16 of 1993.

<sup>84</sup> [2021] ZAGPJHC 858.

depart from their police statements, thus potentially frustrating the proper administration of justice.<sup>85</sup>

Perjury is also treated differently under section 319 of the Criminal Procedure Act,<sup>86</sup> which states that it can only be committed by making contradictory claims – and not false statements, as is the case under common law. The act of making a false statement under oath is considered to be perjury. This dissertation examines the primary motives for making a false statement. Gross claims, ‘there is ample evidence that people lie about nearly everything, including significant issues with damaging consequences for others.’<sup>87</sup>

In May 2022, a university professor from the University of Cape Town (‘UCT’) in SA was accused of sexually assaulting and raping a student.<sup>88</sup> Using the Twitter handle @RAPEDUCT1, the student claimed that UCT deliberately obstructed her case.<sup>89</sup> UCT issued a statement acknowledging receipt of the accusation and their immediate cooperation to investigate the matter internally.<sup>90</sup> UCT also affirmed that, although an internal investigation was underway, a rape charge had also been opened with the South African Police Service (SAPS) to enable them to undertake their investigation to the advantage and for the support of the victim. The internal investigation found no evidence that the professor was guilty. According to the investigating officer’s report, interviews with witnesses verified that the evidence had been fabricated and the claims of rape and sexual harassment were fraudulent.<sup>91</sup>

### 2.3 *Motives for falsely accusing someone of rape*

Sometimes false accusations of rape are made by someone seeking compassion, attention, or sympathy.<sup>92</sup> The study by Zutter et al. explored the motives behind false accusations of rape,

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<sup>85</sup> Ibid at para 22.

<sup>86</sup> Act 56 of 1955.

<sup>87</sup> Gross (see note 57 above) 46.

<sup>88</sup> M Charles ‘Rape, sexual harassment claims ‘fabricated’ against UCT professor - Western Cape health department’ *News24*, 16 June 2022 available at <https://www.news24.com/news24/southafrica/news/rape-sexual-harassment-claims-fabricated-against-uct-professor-western-cape-health-dept-20220616>, accessed on 22 June 2022.

<sup>89</sup> @RAPEDUCT1 ‘I’m a UCT student raped by a UCT professor on UCT premises. I reported thus to UCT & for months they failed to act/suspend rapist. UCT has instructed me to not report the matter & keep it ‘internal’. I received threats from rapist. I’m in witness protection.’ available at <https://mobile.twitter.com/RAPEDUCT1/status/1526859124897636352>, accessed on 22 June 2022.

<sup>90</sup> @UCT\_news available at [https://mobile.twitter.com/UCT\\_news/status/1526960873331359744](https://mobile.twitter.com/UCT_news/status/1526960873331359744), accessed on 22 June 2022.

<sup>91</sup> Ibid.

<sup>92</sup> Rumney (see note 13 above) 500.

which found that both men and women make false accusations to gain attention and sympathy from others.<sup>93</sup>

### *2.3.1 Revenge*

In Merriam-Webster's dictionary, revenge is defined as 'retribution; an act or instance of retaliation designed to cause harm; a satisfaction sought through revenge or punishment.'<sup>94</sup> According to Walton, 'vengeance is portrayed as a failed attempt to implement justice; only in the absence of justice does the revenger follow a course of action that is inherently wrong.'<sup>95</sup> As an expression of retribution, revenge may be utilised by those who wish to retaliate. A failed marriage or relationship may explain why revenge might be used. Several factors may contribute to a desire for revenge against an ex-partner in such a situation. One partner may need to appear superior in light of the circumstances, such as hostility, anger, or jealousy towards their ex-partner's new relationship or the need to have power over the relationship moving forward.<sup>96</sup> The spouse who has been retaliated against may need to appear superior in response to the retaliation.<sup>97</sup>

In the civil case of *Canelli v Canelli*, an action for damages against a woman who falsely accused her husband of rape and assault was recently heard by the Supreme Court of Appeal ('SCA').<sup>98</sup> In this case, the couple resided on a farm in Cape Town from 2004 until 2009, thereafter, the husband moved to a property in town.<sup>99</sup> They filed for divorce, and it was finalised on 24 July 2012.

On 17 September 2012, the ex-husband visited a local casino and spent the night at a hotel associated with the casino.<sup>100</sup> That night, someone broke into the ex-wife's home, raped her, and tied her up with wire on the kitchen table.<sup>101</sup>

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<sup>93</sup> D E Zutter et al. 'Motives for Filing a False Allegation of Rape' (2018) 47 *Archives of Sexual Behavior* 462.

<sup>94</sup> 'Revenge' available at <https://www.merriam-webster.com/dictionary/revenge>, accessed on 26 April 2022.

<sup>95</sup> S Walton 'Madness and Vengeance: Gendered False Consciousness in the Golden Age Crime Novel' (2011) 13 *University of Edinburgh Postgraduate Journal of Culture and the Arts* 2.

<sup>96</sup> I Grattagliano et al. 'False accusations of sexual abuse as a mean of revenge in couple disputes' (2014) 165(2) *La Clinica terapeutica* e122.

<sup>97</sup> Ibid.

<sup>98</sup> [2021] ZASCA 12.

<sup>99</sup> Ibid full details are given in para 5-21.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

The following day, 18 September, she was untied by her six-year-old child; later, a friend came to help her.<sup>102</sup> She alleged that her ex-husband had raped and brutally assaulted her.<sup>103</sup> She filed a rape case against her former husband the same day.<sup>104</sup>

A warrant was issued for the ex-husband, who was arrested. He insisted that he was innocent, claiming that he was physically elsewhere on the day in question and had an alibi. While he presented evidence to the police in the form of invoices, and the police went to the casino and hotel to corroborate his alibi, he was still charged and detained for 18 days before he was released on bail pending prosecution.<sup>105</sup>

The ex-husband sought damages for malicious prosecution against the National Prosecuting Authority ('NPA'), defamation against his ex-wife, and unlawful arrest and detention against the Minister of Police.<sup>106</sup> The SCA held that

there is no dispute that the parties had a destructive marriage, ultimately leading to their separation and divorce. The plaintiff's evidence was that he had never physically or sexually abused the defendant and that the charges against him regarding the violent sexual assault were false.<sup>107</sup>

Regarding the claims of malicious prosecution and defamation, the SCA found that 'the defendant's unwillingness to testify should have led to a negative inference against her, rather than giving her the possibility to evade responsibility for falsely accusing the plaintiff of a very horrific crime.'<sup>108</sup> Additionally, the court held that 'if the defendant was hesitant to testify, she must have understood that she would not be able to refute the false accusations made against her husband.'<sup>109</sup>

The South African media reported a case in 2012 in which a magistrate court found an 18-year-old girl living in Durban guilty of committing perjury when she falsely reported to the police that her boyfriend had raped her. A consensual sexual encounter with the accused led to

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<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid para 46.

<sup>108</sup> Ibid para 72. See also the court's conclusions were supported by the following case law: *S v De Oliveira* 1993 (2) SACR 59 (A) at 65A-C, with reference to the cautionary words of Schreiner JA in *R v Mohr* 1944 TPD 105 at 108.

<sup>109</sup> Ibid para 72.

the false accusation, and the victim was upset that the accused had cheated on her. After being convicted, she was sentenced to 50 days in prison or pay a fine of R1000.<sup>110</sup> The presiding magistrate made the following statements in court:

It was the third case in his court in which a woman applied for charges to be withdrawn after making a false statement that she had been raped. You can't charge someone for something they didn't do. This is disconcerting and does not bode well for women who have been raped.<sup>111</sup>

### 2.3.2 *Regret and shame*

The shame or regret that occurs after having sexual relations with another person may lead that person to accuse that individual of rape falsely. Some factors may contribute to regret after a random sexual encounter. These include guilt of being unfaithful to your partner, an unwanted pregnancy, abortion access, or an individual's values, opinions, and beliefs.<sup>112</sup> There is a possibility that this pattern could be a contributing factor to the rise in false rape accusations, which result from regretful consensual sex with another individual out of concern about being branded as promiscuous or out of concern for harming existing relationships.<sup>113</sup>

The putative complainant may regret having sexual intercourse because it was unsatisfactory or because they have been criticised for their sexual behaviour. It may seem easier to claim rape than to admit having been engaged in sexual activity without protection or experience regret having had sexual intercourse with the person. Alleging rape may, in some cases, seem the easiest way to reclaim one's dignity and moral position.<sup>114</sup>

In 2014, former University of Tennessee football players A J Johnson and Michael Williams were charged with aggravated rape after a female athlete said she was raped after a

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<sup>110</sup> R S Umar 'Woman fined for false rape claim' *Iol News*, 22 October 2012 available at <https://www.iol.co.za/news/south-africa/kwazulu-natal/woman-fined-for-false-rape-claim-1408341>, accessed on 29 April 2022.

<sup>111</sup> *Ibid.*

<sup>112</sup> S Demarchi, F Tomas & L Fanton 'False Rape Allegation and Regret: A Theoretical Model Based on Cognitive Dissonance' (2021) 50 (5) *Archives of sexual behavior* 2068.

<sup>113</sup> Okeke-Oraeki (see note 14 above) 95.

<sup>114</sup> K Geldenhuys 'False allegations - the forgotten victims' *Servamus Community-based Safety and Security Magazine* 28 February 2018 at 1, available at <https://journals-co-za.ukzn.idm.oclc.org/doi/epdf/10.10520/EJC-c4c691397>, accessed on 29 June 2022. The article states 'there are also instances where a woman has cried rape after being caught cheating, regretting a poor decision, or in an attempt to cover up a pregnancy'.

game celebration.<sup>115</sup> According to the defence attorney, Michael and the alleged victim were friends with benefits. The accusation of rape was made only ‘after rumours spread among family members, party guests, and boyfriend that she had consensual sexual relations with both men.’<sup>116</sup>

The defence had to prove to the jury that regret did not constitute rape.<sup>117</sup> The defendants were never accepted back onto their university’s football team despite being acquitted. Shame may have motivated the accuser to file charges of rape. In another case involving a man having sex with another man in the UK, ‘he claimed that it was rape since he felt guilt, shame, and depression due to his sexual orientation.’<sup>118</sup>

### *2.3.3 An alleged victim is used as a tool by another*

When a person believes that another person has been sexually abused, they may, in good faith, falsely accuse the alleged perpetrator.<sup>119</sup> It is also possible for a rape case to be brought about by a person who uses another person as a tool to intentionally manufacture rape accusations for their malic motives. For example, Shezi was sentenced to life in prison after a court found that the state’s evidence was sufficient and beyond a reasonable doubt that he raped his 8-year-old daughter. The sentencing drew a positive reaction from the public and seemed to restore some faith in the criminal justice system.<sup>120</sup>

However, years later, his daughter confessed that her deceased mother had encouraged her to make the false accusation. The alleged victim was a child, and the mother had to represent the false accusation. The alleged victim confessed to the false allegations only after the mother had died and she had grown older. As she explains in her confession, her mother’s misconduct led to false accusations, and her father never raped her. Her mother’s violent temper and fear

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<sup>115</sup> Eldridge & Blakney ‘Regret Isn’t Rape’ *Distinguished Knoxville Attorneys*, 8 April 2019 available at <https://www.eblaw.us/blog/2019/april/regret-isn-t-rape/>, accessed on 27 April 2022.

<sup>116</sup> ‘Jury in A.J. Johnson, Michael Williams rape case largely female, largely white’ *Knox News*, 20 July 2018 available at <https://www.knoxnews.com/story/news/crime/2018/07/20/aj-johnson-tennessee-football-michael-williams-rape-jury/805730002/>, accessed on 27 April 2022.

<sup>117</sup> *Ibid.*

<sup>118</sup> L Wall & C Tarczon ‘True or false? The contested terrain of false allegations’ (2013) *Australian Centre for the Study of Sexual Assault* 7.

<sup>119</sup> Rumney (see note 13 above) 500.

<sup>120</sup> Lubaale (see note 7 above) 79-81.

made her abide by her instructions. After serving 10 years of life, Shezi was finally exonerated.<sup>121</sup>

#### *2.3.4 Need for an alibi*

This occurs when a false rape allegation is made because an alibi is needed to cover up other behaviour.<sup>122</sup> Zutter et al. note that, in some cases, people manufacture an incident that they think will cause outrage in others as it creates an alibi to cover up their behaviour.<sup>123</sup>

An incident occurred in the Netherlands where a woman was caught having an affair; she claimed she had been raped to conceal her infidelity.<sup>124</sup> A similar case occurred in the Netherlands when a 17-year-old girl was late for her internship, and the only way for her to escape the consequences of her lateness was to claim that she had been raped.<sup>125</sup>

In South Africa, a woman falsely accused her boyfriend of rape in 2020 was prosecuted, convicted of perjury, and sentenced to pay a fine of R500. Her rape claim was motivated by the medical need for morning-after pills to prevent pregnancy because she had had unprotected sex with her boyfriend.<sup>126</sup>

#### *2.3.5 Blackmail and Extortion*

Extortion is a common law criminal offence in South Africa. According to Synman, extortion is the ‘unlawful and intentional acquisition of a benefit from some other person by applying pressure to that person which induces her to part with the benefit.’<sup>127</sup> There is also a direct relationship between extortion and blackmail. Merriam-Webster defines blackmail as ‘extortion or coercion by often written threats, especially of public exposure, physical harm, or criminal prosecution.’<sup>128</sup> Threats of this nature can gravely damage a person’s personal, professional, and social relationships if they do not comply with the demands.

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<sup>121</sup> Ibid.

<sup>122</sup> Zutter et al. (see note 92 above) 458.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

<sup>126</sup> B Mosalankwe ‘R500 fine for woman who lied about being raped to get free morning after pills from hospital’ *Iol News*, 3 July 2020 available at <https://www.iol.co.za/news/r500-fine-for-woman-who-lied-about-being-raped-to-get-free-morning-after-pills-from-hospital-50345110>, accessed on 27 April 2022.

<sup>127</sup> C R Synman *Criminal Law* 6th ed (2014).

<sup>128</sup> ‘Blackmail’ available at <https://www.merriam-webster.com/dictionary/blackmail>, accessed 30 June 2022.

False accusations of rape may be levied against a person with the offer to drop the charges if financial demands are met. Blackmail and extortion of this type have been reported in domestic and foreign media jurisdictions.

The SAPS has released statements on its websites about police officials who were part of a scam in extorting money for rape charges to be dropped. According to the statement made in August 2022, a police officer approached a male, falsely accused him of raping a woman, threatened to arrest him, and sent him to prison for 25 years unless he paid R100 000. A case of extortion was reported after the accused paid the required amount, and the police officer was arrested, charged, and appeared in court.<sup>129</sup>

As reported in an August 2022 statement, the SAPS stated that prison inmates with cell phones could create profiles of police officers using social media profiles and call logs from an online escort agency to contact clients who paid them to avoid prosecution. Although there is no accusation of rape in this case, blackmail and extortion have been used to extort all individuals accused of sexual affairs.<sup>130</sup>

In March 2022, the SAPS reported that a female police officer and a female accomplice agreed to fabricate rape charges against a male unless he paid them R15 000. It was the girlfriend of a married boyfriend who made the accusation. Initially, the female demanded R4000 from her boyfriend, but he refused to give it to her, so she left. A police station phoned the boyfriend later to say that a rape case had been filed against him. A case of extortion was reported, and the female police officer and the alleged complainant were arrested.<sup>131</sup> The involvement of police officers in false accusations of rape for extortion represents serious corruption in the police force, in addition to the cultural phenomenon of making accusations of rape for financial gain.

It was reported in media in 2013 that South African politician Zwelinzima Vavi filed a case of extortion alleging that his rape accuser had sent him a letter requesting R2 million to

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<sup>129</sup> S Thakeng 'Police Constable bust for extortion and granted bail of R1 000-00' *SAPS*, 18 August 2022 available at <https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=41625>, accessed on 5 September 2022.

<sup>130</sup> P Nkwalase 'Convicted inmates charged for running an extortion scam from prison cells' *SAPS*, 12 August 2022 available at <https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=41487>, accessed on 5 September 2022.

<sup>131</sup> S Thakeng 'A police Constable and Meloding woman are facing extortion after a man was falsely accused of rape' *SAPS*, 3 March available at <https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=38771>, accessed on 5 September 2022.

drop the case. When the alleged incident occurred, the accuser and the accused were both engaged in an office romance and married to their spouses. According to the complaint, Mr Vavi confined the complainant to her office and had sexual relations with her without her consent during work hours.<sup>132</sup>

India media reported that in 2021 a woman was arrested for extortion after she threatened to file a rape charge against a man unless he married her or paid her a sum of money.<sup>133</sup> Another woman was arrested in India in 2021 for attempting to extort money from the boyfriend of one of her friends. As part of the conspiracy, she conspired with her friend, who was dating the accused, to extort money from him in exchange for not opening a rape case against him.<sup>134</sup>

## 2.4 Conclusion

The chapter has taken an in-depth look at the mindset behind making a false accusation exemplifying circumstances where people could be prone to doing that – as a result of being too emotional, a quest for circle of friends or in revenge purposes. This has demonstrated the dark aspects of human life and hints that betrayal can happen anytime and in any relationship. Moreover, the consequences of using false evidence and perjury in relation to false rape accusations are discussed to provide an all-inclusive understanding of the seriousness and implications of testifying falsely under oath.

Another vital message carried by this chapter is the aspect of wider social and legal consequences of false accusations. Reports such as aforementioned do not only erode the credibility of real victims and the judicial system, but also foster a culture of distrust and dread which in turn render the already difficult pursuit of justice for true victims of rape an almost impossible task.

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<sup>132</sup> ‘Vavi opens case of extortion after blackmail allegations’ *Mail and Guardian*, 27 July 2013 available at <https://mg.co.za/article/2013-07-27-vavi-opens-case-of-extortion-after-blackmail-allegations/>, accessed on 22 June 2022.

<sup>133</sup> ‘Woman who filed 8 rape cases against 8 men arrested for extortion by Gurgaon police’ *The Indian Express*, 30 December 2021 available at <https://indianexpress.com/article/cities/delhi/woman-rape-cases-arrested-extortion-gurgaon-police-7697302/>, accessed on 30 June 2022.

<sup>134</sup> ‘33-year-old trying to extort money from man’ *Times of India*, 19 June 2021 available at [http://timesofindia.indiatimes.com/articleshow/83665926.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](http://timesofindia.indiatimes.com/articleshow/83665926.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst), accessed on 29 April 2022.

## **CHAPTER 3: EFFECTS OF FALSE ACCUSATIONS**

### 3.1 *Introduction*

When a person is falsely accused of rape, the consequences can impact their lives significantly, and even after the court has ruled in their favour, it can be difficult for them to move on with their lives.<sup>135</sup> As tragically illustrated by the South African cases of Bafana Sithole in November 2022. One of the South African media publication reported that a 17-year-old boy named Bafana Sithole committed suicide after being accused of rape by a fellow student.<sup>136</sup> The accuser revealed that she was joking about being raped after the accused committed suicide.<sup>137</sup> In addition, a letter written by the boy to his mother before he committed suicide was published. In a suicide letter posted on social media, he claimed that he was innocent of the rape accusation and that no one believed him.<sup>138</sup> The following is an extract from his letter:

Mama, I hope this letter finds you. By the time you are reading this, I will be already gone. Let me love you and leave you. Sengihambike maye [I am gone]. I have suffered in this world all alone. I was accused by those who were better than me. My heart of gold has stopped beating. What was my fault? No one knew this day would come. I am leaving her in the darkest world, and her sky will turn Grey. May my tears will be a golden memory in her life. I am not a rapist. What did I do for her to hate me this much? I have opened and closed my grave. I have fought a good fight and have finished my race. My time to be on this earth has come to an end.<sup>139</sup>

Moreover, the story also trended on social media where people expressed distress over the false accusations used to hurt people with malicious intent.<sup>140</sup> On Twitter, the hashtag

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<sup>135</sup> Okeke-Oraeki (see note 14 above) 97.

<sup>136</sup> Z Khumalo 'Probes launched after Mpumalanga pupil, 17, dies in classroom' *News24*, 21 November 2022 available at <https://www.news24.com/news24/southafrica/news/probes-launched-after-mpumalanga-pupil-17-dies-in-classroom-20221121>, accessed on 21 November 2022.

<sup>137</sup> Available at <https://twitter.com/AdvoBarryRoux/status/1594209233318207490>, accessed on 21 November 2022.

<sup>138</sup> S Sithole 'Teenager's suicide note details pain and suffering over untrue rape allegations' *Iol News*, 21 November 2022 available at <https://www.iol.co.za/the-star/news/teenagers-suicide-note-details-pain-and-suffering-over-untrue-rape-allegations-f64c82d8-a10c-44fb-9f0c-fbb1423ca0b2>, accessed on 21 November 2022.

<sup>139</sup> *Ibid.*

<sup>140</sup> Available at <https://twitter.com/SirMichaelEther/status/1594253071412068353>, accessed on 21 November 2022.

#justiceforbafanasithole became the number one trend in SA, where people expressed concern about the escalating number of false accusations of rape, which is becoming increasingly common in the context of rising numbers of real rape cases in South Africa.<sup>141</sup>

In a psychological study by Brooks and Greenberg, people who are falsely accused and wrongly convicted experience profound trauma that is either irreversible or difficult to overcome.<sup>142</sup> Moreover, Okeke-Oraeki found in her study that,

the falsely accused and family members may suffer a range of serious consequences, including social stigma, stress, anxiety, threats, violence, harassment, criminal investigation, social service intervention, court proceedings, and imprisonment.<sup>143</sup>

An examination of the social, psychological, and material consequences of falsely accusing someone of rape is discussed in this chapter.

### *3.2 Social effects of being falsely accused*

There is no denying that persons accused or convicted of sexual offenses face social stigma.<sup>144</sup> For falsely accused and wrongly convicted people who must continue to live in society, the effects of the stigma can damage their lives on several levels. Rumney, referring to Harrison's book, *Managing High-risk Sexual Offenders in the Community*, illustrates the stigma associated with being classified as a rapist.<sup>145</sup> In Rumney's view, if actual rapists are highly stigmatised by their society, more damage is being done to those falsely accused. The stigma theory proposes that public and private activities contribute to the social stigma experienced by sexual offenders, making them outcasts in society.<sup>146</sup>

Individuals connected to sex offenders may also be stigmatised. Tewksbury states, 'families and loved ones may be harmed by applying courtesy stigmas - the basic principle of guilt by association.'<sup>147</sup> The humiliation, reputational loss, and isolation from family and

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<sup>141</sup> Available at [https://twitter.com/hashtag/JusticeForBafanaSithole?src=hashtag\\_click](https://twitter.com/hashtag/JusticeForBafanaSithole?src=hashtag_click), accessed on 21 November 2022.

<sup>142</sup> Brooks (see note 50 above) 47.

<sup>143</sup> Okeke-Oraeki (see note 14 above) 97.

<sup>144</sup> Rumney (see note 32 above) 126.

<sup>145</sup> Ibid. the book used by Rumney is by Harrison, K (ed) *Managing High-Risk Sex Offenders in the Community* Cullompton: Willan, (2010) 137.

<sup>146</sup> Rumney (see note 32 above) 126.

<sup>147</sup> R Tewksbury 'Collateral Consequences of Sex Offender Registration' (2005) 21 *Journal of Contemporary Criminal Justice* 67, 79.

friends that may result from the stigma of being viewed as a rapist can severely damage an innocent person who has been wrongly accused.

### *3.2.1 Humiliation of the profession*

Humiliation involves ‘reducing someone to a lower position in their own or others eyes and making them feel ashamed or embarrassed.’<sup>148</sup> An individual accused of rape can suffer immense humiliation among colleagues and peers to the extent that their personal and professional identity is destroyed.

Hoyle et al. studied those wrongly convicted for crimes they did not do and how it impacted their careers. The case study included educators who were immediately suspended, instructed to leave the building, and barred from interacting with peers and acquaintances after being falsely accused of rape or sexual assault.<sup>149</sup>

A South African teacher named Johnny Baartman, a father of two was arrested in 2011 after a 14-year-old pupil alleged that he had sexually assaulted her.<sup>150</sup> Baartman was fired from his job. He was acquitted of all charges in 2014 after an expert medical witness who examined the complainant testified that there was no sign of sexual assault. In court, the complainant’s witness testimony and police statement contradicted each other, and the defence attorney requested a discharge under section 174 of the CPA.<sup>151</sup> A court may discharge an accused under Section 174 if it becomes apparent that there is no evidence to support a conviction at the conclusion of the state’s case.<sup>152</sup>

After being acquitted, Baartman gave his first public statement, stating that he had been teaching for 22 years and was involved in the school’s day-to-day operations, so he had made teaching his life before being accused. In addition, he stated that his family and friends provided him with financial support during the two-year unemployment period. This case demonstrates how, following a false accusation, the afflicted individual might become dependent on friends

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<sup>148</sup> ‘humiliation’ available at <https://www.merriam-webster.com/dictionary/humiliation>, accessed on 3 May 2022.

<sup>149</sup> Hoyle (see note 59 above) 16.

<sup>150</sup> ‘Fired teacher acquitted after rape allegation proved false’ *Herald Live*, 5 August 2014 available at <https://www.heraldive.co.za/news/2014-08-05-fired-teacher-acquitted-after-rape-allegation-proved-false/>, accessed on 5 July 2022.

<sup>151</sup> *Ibid.*

<sup>152</sup> Note 3 above.

and family. Furthermore, Baartman said that being humiliated by rape charges had destroyed his reputation as a teacher and member of the community.<sup>153</sup>

### *3.2.2 Social status is negatively impacted*

Merriam-Webster defines social standing as having the esteem or regard of others and having a good or honourable, name.<sup>154</sup> The stigma of rape accusations affects a person's social position, personal and public reputation, and their good standing. Unless there is absolute evidence to refute the accusation, false allegations of rape are likely to be considered credible by many. Even if accusations do not result in prosecution, the consequences for those falsely accused may be catastrophic. An accusation insufficient to sustain a charge at a police station may, nevertheless, be sufficient in the court of public opinion to have an immediate negative impact on a person's professional position and reputation.

According to Baartman, having his image in the media damaged his reputation in the community where he lived in Port Elizabeth and put his two children under severe strain.<sup>155</sup> It is a commonplace for professionals in professions of care and trust to be immediately suspended when they are accused of sexual abuse, which can result in reputational damage in society and financial hardship.<sup>156</sup>

### *3.2.3 Relationships are adversely affected*

Hoyle provides practical examples of people whose intimate relationships have suffered a great deal of strain due to false accusations or wrongful convictions of rape, which can have a permanent negative impact.<sup>157</sup> As a result of witnessing their lovers being wrongly convicted or accused of rape, some partners experience depression, weight loss, high blood pressure, substance abuse, heart attacks, and death, which harms [or ends] the relationship.<sup>158</sup> Much media and social platform coverage focus on the accused's family background, often casting the whole family in a negative light.

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<sup>153</sup> Note 149 above.

<sup>154</sup> 'Reputation' available at <https://www.merriam-webster.com/dictionary/reputation>, accessed on 3 May 2022.

<sup>155</sup> Note 149 above.

<sup>156</sup> Hoyle (see note 59 above) 26.

<sup>157</sup> Ibid at 39.

<sup>158</sup> Ibid.

### 3.2.4 *Isolation from family and friends*

A person accused of rape may also experience a loss of contact, closeness, or trust with family and friends. Friends may avoid them because they do not know what to believe and do not want to be associated with them.

Hoyle et al. found that the allegations adversely affect the family members of falsely accused individuals. A person facing charges of rape may be prevented from spending time with their children. Children of accused individuals may be ridiculed at school; spouses and children of individuals accused of rape have also been found to experience long-term severe psychiatric problems later in their lives.<sup>159</sup>

In a case study, Hoyle presented the following comments from people who had been accused of rape and how it harmed their families:

*David*, my family had to maintain a low profile since people now referred to me as a paedophile. Arjun's daughter was bullied at school, despite no arrest in his case, and both *Rhys* and *Jenny* described the detrimental effects on their mothers' mental health. *Rick* said, My family was, naturally, devastated. They were put through the emotional wringer as well. *Jack* described that, in addition to mental health problems experienced by his mother and parents-in-law as a direct result of his arrest: One son has been suffering from stress and depression during and since the arrest and eventual trial. All three sons were very distressed by the whole process. They are still very angry that their Dad had to go through this.<sup>160</sup>

The experience of being accused and convicted may also cause families to become estranged. Furthermore, Grounds asserts that children with incarcerated parents experience trauma, thinking their parents don't want them.<sup>161</sup> The parent-child relationship suffers permanent estrangement when a parent spends a long time in prison. A case study by Grounds talks about a father who tried to rebuild his relationship with his children after he was released from prison. The father,

in his attempts to rebuild ties with his children—who were seven and eight years old when he was arrested—said that his son's responses were a little half-hearted and that

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<sup>159</sup> A Grounds 'Understanding the effects of wrongful imprisonment' (2005) 32 *Crime and Justice* 38.

<sup>160</sup> Hoyle Hoyle (see note 59 above) 43.

<sup>161</sup> Grounds (see note 158 above) 39.

there was an emotional distance. He has never said anything like, I love you, or Dad, I'm so glad you're back.<sup>162</sup>

Ultimately, the social consequences of being falsely accused of rape can lead to humiliation and reputational harm, exclusion from social activities, divorce or separation, and isolation or alienation from family and friends.<sup>163</sup>

### *3.3 Psychological effects*

Brooks and Greenberg report that a victim of false allegations of rape can experience intense emotions and suffer multiple psychological effects.<sup>164</sup> These include suicidal thoughts, substance addiction or abuse [drugs and alcohol], a sense of powerlessness and giving up on life, trauma from imprisonment, and disturbed sleeping patterns.<sup>165</sup> According to Okeke-Oraeki, those falsely accused of rape often face life experiences beyond the accusation and 'are left to live with the stink of that accusation for the rest of their lives, and it frequently seems impossible to get rid of the offensive smell no matter how hard one tries.'<sup>166</sup>

The accused may experience stress, anxiety, and depression, with high levels of psychological distress, mental health may be impacted, and the person may develop depressive and anxiety disorders.<sup>167</sup> If false allegations disrupt a person's psychological narrative, they lose much of their ability to live. Consequently, Hoyle et al. mention that those who participated in the case study have been burdened by loneliness and suicidal thoughts that may lead to severe mental illness.<sup>168</sup> Loneliness may increase as a support system, and social networks withdraw or collapse.<sup>169</sup>

A person falsely accused of rape may experience intense feelings of shame and disgust related to the hardships they endure during the investigation and the suffering brought on their families, with an awareness that the false accusation will affect them for the rest of their lives.<sup>170</sup>

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<sup>162</sup> Grounds (see note 158 above) 40.

<sup>163</sup> Ibid.

<sup>164</sup> Brooks (see note 50 above) 19, 20.

<sup>165</sup> Ibid

<sup>166</sup> Okeke-Oraeki (see note 14 above) 97.

<sup>167</sup> Ibid.

<sup>168</sup> Hoyle Hoyle (see note 59 above) 37-38.

<sup>169</sup> R S Weiss *Loneliness: the experience of emotional and social isolation* (1973).

<sup>170</sup> Hoyle Hoyle (see note 59 above) 5.

### 3.4 *Material effects*

The psychosocial effects of being falsely accused of rape are also likely to have material consequences.<sup>171</sup> Rape allegations can have serious economic consequences even if they do not proceed to trial, and they can endanger a person's career, resulting in suspension or termination of employment.<sup>172</sup>

In a 2021 case, a woman used social media to publicly accuse two well-known public personalities of drugging and raping her in 2010.<sup>173</sup> In a statement released afterward, the two denied the allegations.<sup>174</sup> Shortly after, the co-accused released a joint statement on social media announcing they would take a sabbatical leave from their employment. However, their employer issued a statement announcing that the individuals' employment had ended amicably as this was in the company's best interests.<sup>175</sup>

When a person lacks a reliable source of income, they may be unable to meet their financial obligations, including school fees, automobile expenses, bond payments, and municipal accounts. As a result, they may lose their homes and other possessions. They may rely on their spouse or others to cover considerable legal costs.<sup>176</sup> They may lose their career, which represents years they invested in building.<sup>177</sup>

### 3.5 *Conclusion*

The chapter has discussed the harmful effects of false accusations of rape on the accused and their families and friends, which takes away access to a normal life. In normal life, one would have been able to enjoy life apart from the false accusation and its consequences, which can result in mental health issues that can lead to severe problems such as mental health disorders and suicide attempts. Therefore, false accusations of rape are dangerous because they damage

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<sup>171</sup> Gross (see note 57 above) 48.

<sup>172</sup> Hoyle Hoyle (see note 59 above) 26.

<sup>173</sup> 'Primedia fires rape accused DJ Fresh and Euphonik' *Iol News*, 10 February 2021 available at <https://www.iol.co.za/entertainment/celebrity-news/local/primedia-fires-rape-accused-dj-fresh-and-euphonik-dea649ed-76a7-48b8-afdc-9322395234a0>, accessed on 4 July 2022.

<sup>174</sup> 'DJ Fresh breaks silence over rape allegation storm' *Sunday World*, 5 October 2021 available at <https://sundayworld.co.za/news/dj-fresh-breaks-silence-over-rape-allegation-storm/>, accessed on 4 July 2022.

<sup>175</sup> 'Primedia fires rape accused DJ Fresh and Euphonik' *Daily Voice*, 11 February 2021 available at <https://www.dailyvoice.co.za/lifestyle-entertainment/lifestyle/primedia-fires-rape-accused-dj-fresh-and-euphonik-6dcc17ae-9722-4b4b-a90c-5271c5580a30>, accessed on 4 July 2022.

<sup>176</sup> Gross (see note 57 above) 57.

<sup>177</sup> Hoyle (see note 59 above) 27.

a person's morality, family bonds, career, and reputation; they may also lead to wrongful conviction and a lengthy prison term.<sup>178</sup>

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<sup>178</sup> Okeke-Oraeki (see note 14 above) 107.

## **CHAPTER 4: EXPLORING MISCARRIAGES OF JUSTICE**

### *4.1 Introduction*

The results of a study conducted by Hail-Jares et al. have shown that false accusations have the potential to lead to wrongful convictions.<sup>179</sup> Furthermore, the study points out why wrongful convictions may occur, including ‘false confessions, interracial identifications, and police misconduct.’<sup>180</sup> This chapter provides further insight into why wrongful convictions can occur, including malicious conduct by prosecutors or presiding officers, pressure from public opinion, and mainstream media on prosecutions to obtain high conviction rates.

In South Africa and worldwide, innocent individuals continue to be imprisoned for crimes they did not commit.<sup>181</sup> The study by Savage et al. shows that criminal justice systems worldwide make mistakes, attesting to the errors that happen and continue to happen.<sup>182</sup>

A study by Mujuzi on the wrongful convictions that occur within the BRICS countries noted the following;

Courts in some of the BRICS nations, for example, China, have identified some of the factors that lead to wrongful convictions or miscarriages of justice. The BRICS nations have put in place measures to prevent or minimise wrongful convictions. These have included the constitutional protection of the right to a fair trial, the establishment of a system to review convictions after the appeals process has been exhausted, should the offender exercise his or her right of appeal and compensation for wrongful conviction in some countries.<sup>183</sup>

Furthermore, Mujuzi goes on to state that ‘International human rights law has recognised the threat of wrongful convictions and injustices for many years. In light of this, actions have been taken to discourage or challenge wrongful convictions.’<sup>184</sup> Therefore, the

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<sup>179</sup> Hail-Jares (see note 41 above) 282.

<sup>180</sup> Ibid 287.

<sup>181</sup> M E Savage et al. ‘After Exoneration: Attributions of Responsibility Impact Perceptions’ (2018) 33(1) *Canadian Journal of Law & Society* 86.

<sup>182</sup> Ibid.

<sup>183</sup> J Mujuzi ‘Addressing wrongful convictions or miscarriages of justice in the BRICS nations’ (2022) 9(1) *BRICS Law Journal* 63. The international Federation known as BRICS comprises Brazil, Russia, India, China, and South Africa.

<sup>184</sup> Ibid at 62.

problem is not limited to BRICS nations alone. For example, Mujuzi notes that scholars have documented that there have been more than 2 000 wrongful convictions in the United States, all of which are due to persistent flaws in the criminal justice system, particularly concerning the handling of rape cases.<sup>185</sup> As the South African criminal justice system does not keep a database of wrongful convictions, it is impossible to estimate the frequency with which rape convictions are overturned.

In South Africa, the Criminal Justice System determines the requirements and procedures by which the state may prosecute individuals for illegal activity. The Criminal Justice System comprises different essential components.<sup>186</sup> The South African Police Service ('SAPS') investigates criminal offenses. The National Prosecuting Authority ('NPA') decides whether or not to prosecute, depending on the investigation and evidence presented, and then prosecutes alleged crimes. The role of the Department of Justice ('DOJ') is to ensure that all individuals have access to equal justice. The Department of Correctional Services ('DCS') oversees the prison system, ensures that sentences are carried out, and rehabilitates the convicted persons under their care.

This chapter examines the causes of wrongful convictions based on factual evidence. The stages of the investigation, prosecution, trial procedures, the influence of public opinion, and the evidence presented in court are explored as potential sources of wrongful convictions resulting from false accusations in rape cases.

#### 4.2 *Miscarriage of justice*

In the *United States v Olano*,<sup>187</sup> the Supreme Court held that 'miscarriage of justice occurs when the accused is not guilty'<sup>188</sup> yet is convicted. This dissertation draws on Eady's definition of miscarriages of justice, which 'refers to the wrongful conviction of an innocent person.'<sup>189</sup>

Brian Forst in his book on Errors of Justice contends that

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<sup>185</sup> Ibid.

<sup>186</sup> 'How does the criminal justice system work?' available at <https://www.gov.za/faq/justice-and-crime-prevention/how-does-criminal-justice-system-work>, accessed on 7 July 2022.

<sup>187</sup> 507 US 725 (1993).

<sup>188</sup> Ibid at para 736.

<sup>189</sup> D Eady *The Uncertainty Principle* (PhD thesis, Cardiff University, UK 2009) at 10.

failures of constitutional protections (including unwarranted convictions of the innocent) and failures of impunity are two types of miscarriages of justice (involving lapses of justice which permit criminals to escape).<sup>190</sup>

Miscarriages are, without a doubt, as much about faulty procedures as they are about wrong outputs.<sup>191</sup>

This section explores failures at different stages in the legal process that can result in wrongful convictions, including malicious investigations, malicious prosecutions, and improper conduct of criminal proceedings – including the conduct of the presiding officer.

#### *4.2.1 Malicious investigations by the SAPS*

Any member of the SAPS, as described in section 5 of the South African Police Service Act ('SAPS Act'),<sup>192</sup> is considered a police officer under section 1 of the CPA.<sup>193</sup> Section 205 (3) of the SA Constitution outlines the objectives of the police service as being 'to prevent, combat and investigate crime, maintain public order, protect and secure the inhabitants of the Republic and their property, and uphold and enforce the law.'<sup>194</sup> According to section 16 of the SAPS Act, the police can look into situations that would be considered criminal conduct or an attempt to commit criminal conduct. These situations would be regarded as organised crime, crimes that need to be addressed or investigated nationally, or crimes that require specialised investigative skills.<sup>195</sup>

The SAPS has a specialised unit that is equipped to investigate offences of a sexual nature and GBV crimes against women and children. The Family Violence, Child Protection, and Sexual Offences Unit ('FCS') was established by the SAPS in March 1996.<sup>196</sup> Most officers in the FCS have completed their basic police training at one of the SAPS colleges and

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<sup>190</sup> B Forst *Errors of Justice* (2003) 17.

<sup>191</sup> *Ibid.*

<sup>192</sup> Act No.58 of 1958.

<sup>193</sup> Note 3 above.

<sup>194</sup> Note 31 above.

<sup>195</sup> Note 191 above.

<sup>196</sup> J Van Graan 'The quality of service of the family violence, child protection and sexual offences unit of the South African police service, post-2010' *Department of Police Practice: University of South Africa* 2012 at 35, available at

[https://www.researchgate.net/publication/308795710\\_The\\_quality\\_of\\_service\\_of\\_the\\_Family\\_Violence\\_Child\\_Protection\\_and\\_Sexual\\_Offences\\_Unit\\_of\\_the\\_South\\_African\\_Police\\_Service\\_post-2010](https://www.researchgate.net/publication/308795710_The_quality_of_service_of_the_Family_Violence_Child_Protection_and_Sexual_Offences_Unit_of_the_South_African_Police_Service_post-2010), accessed on 30 May 2022.

had some degree of experience investigating sexual offences.<sup>197</sup> Malicious intent prevails when investigators place more emphasis on winning convictions than pursuing justice.<sup>198</sup> According to the SAPS annual report, civil claims for unlawful arrests, detentions, and other unlawful police operations have cost the SAPS billions of Rands, with a total of R59 812 179 327, 28 for the financial year 2020/2021.<sup>199</sup>

The successful investigation of sexual offences is plagued not only by a lack of resources and competent police officers committed to delivering justice without fear, prejudice, or bias but also by incompetent public officers. Investigators risk being tempted to secure convictions when they concentrate on securing confessions rather than obtaining reliable sources and accounts of what occurred.<sup>200</sup> Therefore, it may lead to ‘pressures associated with the difficulties associated with looking for and compiling evidence as well as preparing a case for conviction.’<sup>201</sup>

In 2022, a police officer in South Africa extorted money from someone accused of rape.<sup>202</sup> The police officer was suspected of conspiring with the complainant to falsely accuse the accused of rape to demand payment in exchange for the case being withdrawn.

It is more likely for a police officer to commit a crime caused by malicious conduct or corruption in South Africa than the average citizen.<sup>203</sup> It is more likely that police officials are corrupt when they are involved in gang-related criminal activities because ‘they decide which individuals to arrest or when to arrest them when money has been exchanged for protection by criminal groups.’<sup>204</sup>

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<sup>197</sup> Ibid 35.

<sup>198</sup> D D Broughton ‘The South African Prosecutor in the Face of Adverse Pre-Trial Publicity’ (2020) 23 *Potchefstroom Electronic Law Journal* 14.

<sup>199</sup> ‘South African Police Service Annual Report 2020/2021’ available at [https://www.gov.za/sites/default/files/gcis\\_document/202201/saps-annual-report-202021.pdf](https://www.gov.za/sites/default/files/gcis_document/202201/saps-annual-report-202021.pdf), accessed on 24 December 2022.

<sup>200</sup> S Poyser & R Milne ‘The time in between a case of ‘wrongful’ and ‘rightful’ conviction in the UK: Miscarriages of justice and the contribution of psychology to reforming the police investigative process’ (2021) 23(1) *International Journal of Police Science & Management* 10.

<sup>201</sup> Ibid 7.

<sup>202</sup> O Mnisi ‘Cop and ‘rape victim’ behind bars’ *Daily Sun*, 2 May 2022 available at <https://www.dailysun.co.za/dailysun/news/cop-and-rape-victim-behind-bars-20220502>, accessed on 6 June 2022.

<sup>203</sup> Y Shaka ‘Police Corruption in South Africa’ (2013) 9(1) *Journal of Commonwealth Law and Legal Education* 8.

<sup>204</sup> Ibid.

#### 4.2.2 *Malicious prosecutions*

Prosecutors are required by section 179(2) of the Constitution to prosecute all criminal cases brought before them by investigating officers.<sup>205</sup> The prosecutor will choose how to deal with the matter in the pre-trial phase. The State may decide, for instance, whether or not to prosecute a suspect, what charges to prosecute them for, which jurisdictional court to bring them before, when to withdraw all or some charges, and other similar considerations.<sup>206</sup> The SCA adopted the following position in *Van Breda v Media 24 Ltd*<sup>207</sup>

Citizens can bring their issues before a court, confident that the rule of law will be upheld there. It is regulated by rules governing the admissibility of evidence and procedures intended to find the truth—not in a generic sense but in the context of the particular case at hand and the administration of justice. These regulations also make an effort to guarantee trial process fairness. Additionally, a criminal trial follows a well-established procedure, with the prosecutor attempting to prove the accused’s guilt beyond a reasonable doubt by submitting evidence.<sup>208</sup>

The prosecutor’s responsibility is to ‘bring to a court what the prosecution deems to be credible evidence on what is supposed to be a crime.’<sup>209</sup> Along with actively arguing the case before the court and acting as a representative of society throughout the processes, the prosecutor evaluates the conduct of the police and the strength of the State’s case.<sup>210</sup> Moreover, the prosecutor determines whether there is sufficient evidence to prove the guilt of the accused beyond a reasonable doubt at trial. Any allegations against an accused person must be supported by evidence offered by the prosecution, not the accused.<sup>211</sup>

A prosecutor’s choice to prosecute or not ‘affects accused people and their families, victims, witnesses, law enforcement agencies, and the public.’<sup>212</sup> Prosecutors have the power

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<sup>205</sup> (2) ‘The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings’. See also *S v Basson* (2004) 1 SACR 285 (CC) paragraphs 32–33 and *S v Basson* (2007) 1 SACR 566 (CC) paragraph 144.

<sup>206</sup> *S v Sehoole* 2015 2 SACR 196 (SCA) para 10.

<sup>207</sup> [2017] 2 SACR 491 (SCA).

<sup>208</sup> *Ibid* para 50. The *Van Breda* case extracted this position from paragraph 156 of *R v Pilarinos and Clark* 2001 BCSC 1332.

<sup>209</sup> *Ibid*.

<sup>210</sup> *S v Sithole* 2012 1 SACR 586 (KZD) para 7.

<sup>211</sup> N Steytler ‘Making South African criminal procedure more inquisitorial’ (2001) *Community Law Centre: University of the Western Cape* 1-30.

<sup>212</sup> P du Toit ‘Criminal Procedure’ 2015 *SACJ* 85.

to initiate and discontinue prosecutions, which gives them a distinct advantage in influencing the freedom and reputation of an accused.<sup>213</sup>

Justice is pursued, due process is implemented, and offenses are prosecuted through the NPA as part of the Criminal Justice System.<sup>214</sup> Prosecutors must disclose all evidence that will benefit the accused; that is, they cannot suppress evidence leading to the accused's acquittal.<sup>215</sup> In *S v Yengeni*, the court confirmed the integrity that the office of the NPA should uphold and held that,

the National Director of Public Prosecutions ('NDPP') and every competent member of his or her staff are guaranteed professional independence by the Constitution, with the obvious intention of preventing any interference in their duties by the powerful, the well-connected, the wealthy, and the purveyors of political influence.<sup>216</sup>

Consequently, an accused has a constitutional right to a prosecutor independent of political pressure.<sup>217</sup> The prosecution's evidence must be reliable and not be seen as taking chances to secure a conviction because of the stress of insufficient convictions. In *S v Tshotshoza*, the court held that 'prosecutions must be fair and must not violate the accused's right to a fair trial.'<sup>218</sup>

A prosecution should only be initiated or pursued if there is a good chance of a conviction.<sup>219</sup> The court in *Minister of Police v Du Plessis*<sup>220</sup> warned that 'prosecutors are required to carefully review police dockets before making their decision to prosecute, and to act objectively in this regard.'<sup>221</sup> Studies demonstrate that as the crime rate increases daily,<sup>222</sup> prosecutors are under increasing pressure to put the perpetrators of sexual offences behind bars.<sup>223</sup> As a result of pressure on the prosecution to convict, they may conceal evidence at trial

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<sup>213</sup> Broughton (see note 197 above) 6.

<sup>214</sup> W P de Villiers 'Is the Prosecuting Authority under South African Law Politically Independent? An Investigation into the South African and Analogous Models' 2011 *THRHR* 256.

<sup>215</sup> Broughton (see note 197 above) 15.

<sup>216</sup> [2006] 1 SACR 405 (T) at Para 51.

<sup>217</sup> De Villiers (see note 228 above) 248.

<sup>218</sup> [2010] 2 SACR 274.

<sup>219</sup> P du Toit 'Criminal Procedure' 2017 *SACJ* 84.

<sup>220</sup> [2014] 1 SACR 217 (SCA).

<sup>221</sup> *Ibid* para 34.

<sup>222</sup> Crime Statistics *Crime situation in Republic of South Africa twelve (12) months (April to march 2019\_20)* available at [https://www.saps.gov.za/services/april\\_to\\_march\\_2019\\_20\\_presentation.pdf](https://www.saps.gov.za/services/april_to_march_2019_20_presentation.pdf), accessed on 25 June 2022.

<sup>223</sup> Broughton (see note 197 above) 12.

maliciously.<sup>224</sup> Prosecutors' malicious conduct violates both their work ethic and the right of the accused to a fair trial guaranteed by the constitution.<sup>225</sup>

The prosecutors must not allow themselves to be swayed by increased media attention in a well-known case that has attracted negative or vehement attention to obtain a conviction, for example, by suppressing exonerating evidence to the detriment of the accused.<sup>226</sup> Ndlovu suffered from a wrongful conviction and the prosecution contributed to the problem by deliberately withholding exonerating DNA evidence. The NPA policy states that prosecutors 'should disclose information favourable to the defence (even though it may be adverse to the prosecution case) and, where necessary, assist in putting the version of an unrepresented accused before the court.'<sup>227</sup> There was an emphasis on this in *S v Masoka*,<sup>228</sup> in which the court held that:

The purpose of a criminal trial is not to obtain a conviction at all costs. A prosecutor has to gather all relevant information and evidence and then decide whether such evidence is sufficient to result in a conviction. If not, the decision must be made not to prosecute. If the evidence is sufficient, his/her duty is to place all such evidence before the Court. In cases where the accused is represented by counsel or an attorney, the evidence that the prosecutor does not intend to place before the Court must be made available to the accused's legal representative before the trial commences. In cases where an accused is unrepresented, all such evidence, even evidence pointing to the innocence of the accused, must be placed before the Court. By the above remarks, I do not intend to convey that a prosecutor's role is to prosecute the State case and defend the accused. A conviction must be sought and argued for firmly and without fear or favour. However, it must be done in an even-handed, open, and honest manner, always recognising an accused's right to a fair trial.<sup>229</sup>

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<sup>224</sup> D S Kahn 'Presumed guilty until proven innocent: the burden of proof in wrongful conviction claims under state compensation statutes' (2010) 44(1) *University of Michigan Journal of Law Reform* 153.

<sup>225</sup> Section 35 of the SA Constitution.

<sup>226</sup> P R Wallace 'Prosecuting in the Limelight' 2005 *Delaware Lawyer* 21.

<sup>227</sup> Section 7 of the Department of Justice and Constitutional Development *NPA Policy* available at <https://static.pmg.org.za/docs/1999/990301policy.htm#:~:text=They%20should%20disclose%20information%20ofavourable,also%20applies%20to%20bail%20proceedings>, accessed on 7 December 2022.

<sup>228</sup> [2014] ZAECPHC 54.

<sup>229</sup> *Ibid* para 12-13.

As soon as the state learned of the DNA result that exonerated Ndlovu and didn't immediately withdraw the charges, it became complicit in his eventual wrongful conviction. The prosecutor violated his obligation to provide any evidence that might facilitate an acquittal of the accused in this case. In the event of such injustices, the justice system should be held accountable and be prepared to correct any miscarriages of justice. Therefore, in light of the *Ndlovu* case, there were serious violations of the Constitution<sup>230</sup> and NPA policy – including the NPA Code of Ethics<sup>231</sup> and the NPA prosecution policy.<sup>232</sup>

#### 4.2.3 *Judicial misconduct*

The judiciary has a duty to 'always promote the spirit, purport, and objects of the Bills of Rights<sup>233</sup> and 'promote the values that underlie an open and democratic society based on human dignity, equality, and freedom.'<sup>234</sup> Justice for all South Africans should be a fundamental concern of the post-apartheid judiciary system due to historical injustices, some of which, Dugard argues, 'were related to a conservative legal system and a large majority of people's inability to access justice.'<sup>235</sup> More than just having physical access to the legal system, judicial independence also refers to the accused person's right to an appropriate and constitutional proceeding.<sup>236</sup>

In *R v S*<sup>237</sup> Cory J states, 'Courts had already correctly acknowledged that there is a presumption that judges will uphold their oath of office.'<sup>238</sup> Furthermore, the international Bangalore Principle states that the judiciary must be 'free of any extraneous influences, inducements, pressures, threats, or interference'<sup>239</sup> when exercising its judicial function. It is necessary to safeguard the institution from dishonest presiding officers because a violation of

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<sup>230</sup> Sections 7, 8 9 10, 11, 12 and 35.

<sup>231</sup> Department of Justice and Constitutional Development *Revised NPA Code of Ethics* available at <https://www.npa.gov.za/sites/default/files/resources/Revised%20NPA%20Code%20of%20Ethics%20Booklet.pdf>, accessed 7 December 2022.

<sup>232</sup> Note 226 above.

<sup>233</sup> Section 39(2) of the SA Constitution.

<sup>234</sup> *Ibid* s7 and s39(a).

<sup>235</sup> J Dugard 'Courts and the poor in South Africa: critique of systemic judicial failures to advance transformative justice' (2008) 24(2) *South African Journal on Human Rights* 217.

<sup>236</sup> *Ibid* 216.

<sup>237</sup> [1997] 3 SCR.

<sup>238</sup> *Ibid* para 48.

<sup>239</sup> Council of Europe *Measures For The Effective Implementation Of The Bangalore Principles Of Judicial Conduct* Lusaka, Zambia (2010) at page 4 available at <https://www.icj.org/wp-content/uploads/2015/08/JIG-Measures-effective-implementation-Bangalore-Principles-2010.pdf>, accessed on 1 August 2022.

the judicial code does not just harm the individual judicial officer. Instead, it brings the entire judicial system into question.

In reference to the provisional suspension of magistrate Desmond Nair on two counts of misconduct for his alleged connections to Bosasa corruption that were revealed in the Zondo State Capture Commission Inquiry ('Zondo Commission'), Minister of Justice and Correctional Services Ronald Lamola indicated that the judicial 'conduct must at all times be beyond reproach, and conduct befitting their office.'<sup>240</sup>

In *Ndlovu*,<sup>241</sup> the appeal court made adverse findings against the magistrate who presided over the case, resulting in the wrongful conviction. The appeal court found that the magistrate had suppressed a DNA evidence report that would have exonerated the accused of rape and also found that the magistrate asked leading questions of the complainant.<sup>242</sup> The trial transcript shows that the magistrate was aware of the DNA results but still convicted the accused, resulting in the accused being sentenced to life. Accordingly,

Ndlovu was released in 2018 after the Pietermaritzburg High Court unanimously reversed his conviction. The appeals court found that there was no forensic evidence linking Ndlovu to the crime, and Magistrate Mike Lasich's conduct raised questions about the impartiality of his judgment.<sup>243</sup>

Instances of wrongful conviction, such as the Ndlovu case, bring to light incompetence in the legal system. Ackermann J, referring to the Canadian Supreme Court in *Canada v Bearegard*,<sup>244</sup> said the following in *De Lange v Smuts NO*<sup>245</sup> about the independence and impartiality of the courts:

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider, be it government, pressure group, individual, or even another

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<sup>240</sup> 'Why pay a lawyer when you can buy the judge? Corruption in our legal system is a threat to democracy' Available at <https://www.dailymaverick.co.za/opinionista/2020-03-01-why-pay-a-lawyer-when-you-can-buy-the-judge-corruption-in-our-legal-system-is-a-threat-to-democracy/>, accessed on 1 August 2022.

<sup>241</sup> *Ndlovu* (see note 38 above).

<sup>242</sup> *Ibid* para 6.

<sup>243</sup> Wrongly Convicted Database Record available at <http://forejustice.org/db/location/Ndlovu--Njabulo-.html>, accessed on 1 august 2022.

<sup>244</sup> *Canada v Bearegard* (1986) 30 DLR (4th) 481, 491.

<sup>245</sup> *De Lange v Smuts* 1998 (3) SA 785 (CC).

judge C should interfere in fact, or attempt to interfere, with how a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.<sup>246</sup>

#### 4.3 *Court of public opinion*

Justice must be served in respect of both the accused and the victim by following the justice system and not justice from public opinion. As the Cc held in *S v Makwanyane* that, despite a ‘widely held belief that a majority of the population favours retaining the death penalty, the court reaffirmed its commitment to its duties as an independent arbiter of the Constitution, as opposed to acting merely as a proxy for public opinion.’<sup>247</sup>

Public opinion’s potential impact must be understood because it can cause reputational damage regardless of the legal verdict and result in effects long after the trial is completed.<sup>248</sup> As prosecutors and presiding officers are prohibited from yielding under the pressure of the media or the public as it is represented in the media, the court of public opinion should never be perceived as dictating to the court and NPA to prosecute, convict, sentence, or acquit an accused person.<sup>249</sup>

When a case is being tried in the court of public opinion, online media, and social networks are frequently used to influence public perceptions of the case’s merits and the Criminal Justice System’s expectations of the outcome.<sup>250</sup> As a result, those outside the legal system, or those not presiding officers, may choose to support one side or the other in a case involving rape. Even if an individual wins in court or after an appeal, their reputation, physical health, psychological condition, and financial situation may still be severely negatively impacted, and the court of public opinion’s decision is not as easily [if ever] overturned on appeal, and the original public judgment often remains uncontroverted and is never withdrawn.

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<sup>246</sup> Ibid para 70.

<sup>247</sup> [1995] ZACC 3 para 89.

<sup>248</sup> G Resta ‘Trying cases in the media: comparative overview’ (2008) 71(4) *Law and Contemporary Problems* 53.

<sup>249</sup> Broughton (see note 197 above) 11.

<sup>250</sup> Ibid at 2.

#### 4.4 *Evidence reliability, concealment, and fabrication*

Evidence may be fabricated or concealed by criminal justice professionals in rape cases. Police, prosecutors, or even the judiciary may be responsible for this. In *Luthuli v S*,<sup>251</sup> because the victim was believed to have been raped more than once, Luthuli was sentenced to a life term for rape and a 3-year prison sentence for breaking into a residence to commit rape.<sup>252</sup>

The prosecutor presented a DNA report linking the defendant to the crime. On appeal, the court concluded that there was ‘no specific evidence linking the appellant to this crime. The DNA evidence the State gathered was the primary component that gave foundation to an allegation against him.’<sup>253</sup> The appeal court, examining the testimony of the doctors who concluded the DNA reports, observed many inaccuracies regarding the numerous DNA samples introduced as evidence, specifically that state witnesses referenced the forensic evidence seal numbers differently.<sup>254</sup> The court found that the DNA evidence, which formed the foundation of the state’s case, was inaccurate since it exhibited significant inconsistencies.

In *Ndlovu*, a judicial officer withheld DNA evidence that exonerated Ndlovu of the alleged rape. On appeal, the court found impropriety because the presiding officer had concealed this evidence.<sup>255</sup>

#### 4.5 *Conclusion*

While every false accusation does not result in a wrongful conviction [many are acquitted], every conviction following a false accusation is automatically a wrongful one. There is, thus, a significant overlap between wrongful conviction and false accusations. This chapter discussed several ways in which false accusations are linked to wrongful convictions and looked at various factors that could facilitate wrongful convictions following false accusations. This chapter outlined negligent and malicious events in the justice system pre-and-during trials that contribute to wrongful convictions. Evidence suppression and unfair trial procedures are often examples of malice. Following this, a proposal is presented for reforming the common law of

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<sup>251</sup> [2021] ZAKZPHC.

<sup>252</sup> *Ibid* para 1.

<sup>253</sup> *Ibid* para 15.

<sup>254</sup> *Ibid* para 20-34.

<sup>255</sup> *Ndlovu* (see note 38 above) 77.

delict with the possibility of enacting a statutory fund to compensate wrongly convicted individuals.

## **CHAPTER 5: COMPENSATION – A COMPARATIVE ANALYSIS**

### *5.1 Introduction*

Why is compensation for wrongful conviction necessary? In the case of *Mahlangu v Minister of Police (Mahlangu)*,<sup>256</sup> Tshiqi J provides an answer, holding that

It is trite that damages are awarded to deter and prevent future infringements of fundamental rights by state organs. They are a goodwill gesture to the aggrieved and do not rectify the wrong.<sup>257</sup>

The Court in *Mahlangu* further expresses that it is difficult to undo the humiliation and violations of human rights that are sustained by a person who has been falsely accused of rape, even if compensation is provided for the harm caused.<sup>258</sup>

*Mahlangu* expresses that the fundamental values and principles embodied in the Bill of Rights underpin the foundations of the South African constitutional system.<sup>259</sup> Everyone should be protected by the ideals and principles of the Constitution as a matter of national and international interest. In line with sections 231<sup>260</sup> and 232<sup>261</sup> of the Constitution, norms, and guidance emanating from international law is applicable in South Africa. While sections 39,<sup>262</sup>

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<sup>256</sup> [2021] ZACC 10.

<sup>257</sup> Ibid at para 50.

<sup>258</sup> Ibid at 56.

<sup>259</sup> According to section 1(a) of the Constitution ‘the Republic of South Africa is one, sovereign state founded on the following values’ comprising, ‘human dignity, the achievement of equality and the advancement of human rights and freedoms’.

<sup>260</sup> States that ‘(1) The negotiating and signing of all international agreements is the responsibility of the national executive. (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3). (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time. (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect’.

<sup>261</sup> States that ‘Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament’.

<sup>262</sup> States that ‘(1) When interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. (2) When interpreting any legislation, and when developing

232, and 233 recognize international law as an interpretive instrument. Section 231 addresses the link between the provisions of the South African Constitution and international law as substantive law.

The International Human Rights Commission ('IHRC') is particularly pertinent to this dissertation because of its emphasis on commitments to protect human rights. Moreover, Article 3 of the Universal Declaration of Human Rights ('UDHR') addresses the right to life and the rights to freedom and security of all humans.<sup>263</sup> These rights are also upheld in the South African Constitution. The dissertation will now turn its attention to another international instrument essential to the topic at hand, the ICCPR.<sup>264</sup>

## 5.2 *International Covenant on Civil and Political Rights*

The ICCPR promotes human rights by recognizing the possibility of wrongfully convicted individuals seeking restitution after being exonerated.<sup>265</sup> This implies that the state should establish a statutory compensation system for wrongfully convicted individuals.<sup>266</sup> The South African government does not provide meaningful assistance – such as employment, housing, or other necessities post-exoneration.<sup>267</sup>

Taking into account the principles of international law,<sup>268</sup> Article 14(6) of the ICCPR states:

When a person has, by a final decision, been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall

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the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill'.

<sup>263</sup> (United Nations 1948).

<sup>264</sup> See note 16 above.

<sup>265</sup> See note 16 above.

<sup>266</sup> B L Garrett 'Towards an International Right to Claim Innocence' 2017 *California Law Review* 1180.

<sup>267</sup> K A Clow et al. 'Public Perception of Wrongful Conviction: Support for Compensation and Apologies' (2012) 75(3) *Albany Law Review* 1417.

<sup>268</sup> Also, Article 3 of the Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms has the same wording that is outlined in Article 14(6). See also Article 10 of the American Convention on Human Rights which states 'every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice'.

be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.<sup>269</sup>

The United States, the United Kingdom, the Russian Federation, Canada, Australia, and South Africa are among the countries that are signatories to the ICCPR, making them subject to its provisions, including Article 14(6), which is unquestionably the central component of the right to compensation for wrongfully convicted individuals.<sup>270</sup> Article 14(6) contains the crucial clause for the exoneree's entitlement to compensation under international law.<sup>271</sup>

Costa points out that, to swiftly and effectively implement the right to claim compensation under Article 14(6), 'a country must explicitly incorporate the provision into its domestic legislation.'<sup>272</sup> This not only allows any person to seek restitution for an infringement of their human rights within the framework of domestic law, but it also ensures that the ICCPR's provisions are implemented.<sup>273</sup> Costa argues for the application of international law to domestic law as follows:

Article 14(6) must be complied with in one or more of the following ways: the provision must be incorporated directly into domestic law to create a statutory right to compensation; administrative or judicial bodies must be given the power to determine whether compensation awards should be paid, or ex gratia payments must be made using general domestic government authority. In addition, victims of wrongful convictions may submit individual complaints to the UN Human Rights Committee in nations that have joined the First Optional Protocol to the ICCPR, where their right to compensation under Article 14 of the ICCPR is infringed.<sup>274</sup>

Even though they have to wait, exonerees who apply for compensation under state statute can receive compensation sooner than they would if they had filed a lawsuit.<sup>275</sup> Additionally, as statutes usually accord equal treatment to all qualifying applicants, the amount

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<sup>269</sup> See note 16 above.

<sup>270</sup> J Costa 'Alone in the world: the United States' failure to observe the international human right to compensation for wrongful conviction' (2005) 19(3) *Emory International Law Review* 1620.

<sup>271</sup> *Ibid.*

<sup>272</sup> *Ibid.*

<sup>273</sup> *Ibid* at 1622.

<sup>274</sup> 'Innocence and Wrongful Convictions' *Cornell Law School*, 14 March 2013 available at <https://deathpenaltyworldwide.org/publication/innocence-and-wrongful-convictions/?version=html>, accessed on 7 September 2022.

<sup>275</sup> B N Cardozo *Making Up For Lost Time: What The Wrongfully Convicted Endure And How To Provide Fair Compensation, An Innocence Project Report* School of Law, Yeshiva University (2009) at 13-14.

of support cannot differ based on factors such as personality disorders, race, educational attainment, political ties, or other factors.<sup>276</sup> In the case of exonerees, compensation statutes represent a clear expectation that will assist them in their future planning.<sup>277</sup> However, individuals are not only eligible for compensation if they don't share the liability for the wrongful decision; the state must be fully liable for fault.<sup>278</sup>

The following section discusses the enactment of statutes per Article 14(6) of the ICCPR by five signatories: the United States of America, the United Kingdom, The Russian Federation, Canada, and Romania.

### *5.3 Compensation statutes enacted by foreign jurisdictions*

The United States is where most of the research on innocence and exoneration has been done. This section begins by studying statutes in US law that comply with Article 14(6) of the ICCPR before examining a wider variety of approaches used by other countries that are signatories to the ICCPR.

#### *5.3.1 The United States of America (US)*

The US signed the ICCPR in 1977 and thus came under obligation to comply with Article 14(6).<sup>279</sup> However, the United States has a federal government with fifty states,<sup>280</sup> each with its own jurisdictional laws.<sup>281</sup> Some states have developed statutory guidelines for compensation for exonerees. Although the US does not recognize compensation as a fundamental right, it has encouraged those who have experienced injustice to use the appeals process to get compensation.<sup>282</sup>

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<sup>276</sup> Ibid.

<sup>277</sup> Ibid.

<sup>278</sup> ICCPR.

<sup>279</sup> B I Morel *Wrongful Conviction Compensation in the United States* (unpublished Honours Thesis, Georgia Southern University, 2022) 9 available at <https://digitalcommons.georgiasouthern.edu/cgi/viewcontent.cgi?article=1839&context=honors-theses>, accessed on 13 October 2022.

<sup>280</sup> An overview of the compensation statutes that are available for each American state is available at [https://www.law.umich.edu/special/exoneration/Documents/CompensationByState\\_InnocenceProject.pdf](https://www.law.umich.edu/special/exoneration/Documents/CompensationByState_InnocenceProject.pdf), accessed 8 September 2022.

<sup>281</sup> M J Ryan 'Compensation for Wrongful Conviction and Incarceration in the United States' *Dedman School of Law Legal Studies Research* 6 January 2022 at 2, available at <https://dx.doi.org/10.2139/ssrn.4002746>, accessed on 12 September 2022.

<sup>282</sup> Morel (see note 293 above) 1.

Since the National Registry of Exonerations began systematic documentation in 1989, it has recorded close to 3 000 exonerations in the US for various offences.<sup>283</sup> Causes for wrongful convictions include faulty eyewitness identification, coerced confessions, and unreliable forensic evidence.<sup>284</sup> There are several ways to seek compensation: tort and civil rights litigation, bills of moral obligation,<sup>285</sup> and statutes.<sup>286</sup> Various avenues are provided, as some may not be eligible for a particular route due to the associated restrictions.<sup>287</sup> However, since there

is no federally regulated right to compensation, individual states are allowed to resolve the issues as they see appropriate, and exonerates international human rights extend only as far as the borders of the state that wrongfully convicted them.<sup>288</sup>

The executive pardon or judicial determination are the two methods available to wrongfully convicted people in the US to prove their innocence, after which they are eligible to apply for compensation. Recent scholarly findings report that,<sup>289</sup>

there are nine jurisdictions where both methods are acceptable<sup>290</sup> and six states where only a pardon will do. There is no uniform method for a judicial finding of factual innocence. In twenty-four jurisdictions, the compensation statutes have a qualifying criterion of a finding of ‘innocence,’ ‘innocent,’ ‘factual innocence,’ or ‘actual

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<sup>283</sup> M J Ryan ‘Cultivating Judgment on the Tools of Wrongful Conviction’ (2015) 68(4) *SMU Law Review* 1076.

<sup>284</sup> *Ibid.*

<sup>285</sup> This ‘is a general principle of international law that a State responsible for an internationally wrongful act must make full reparation for the injury caused’ available at <https://jusmundi.com/en/document/wiki/en-damages-restituo-in-integrum>, accessed on 12 September 2022.

<sup>286</sup> Ryan (see note 280 above) 7.

<sup>287</sup> *Ibid.*

<sup>288</sup> Costa (see note 269 above) 1638. Also see M F McLellan ‘Innocence Compensation: A Comparative Look at the American and Canadian Approaches’ (2013) 49(2) *Criminal Law Bulletin* 218.

<sup>289</sup> M F McLellan ‘Innocence Compensation: An International Comparative Analysis on Compensation for Wrongful Convictions and Miscarriages of Justice’ *Osgoode Hall Law School* 2019 at 1-33, available at [https://www.researchgate.net/profile/Myles-Frederick-McLellan/publication/334794105\\_Innocence\\_Compensation\\_An\\_International\\_Comparative\\_Analysis\\_on\\_Compensation\\_for\\_Wrongful\\_Convictions\\_and\\_Miscarriages\\_of\\_Justice/links/5d5160344585153e594ef24b/Innocence-Compensation-An-International-Comparative-Analysis-on-Compensation-for-Wrongful-Convictions-and-Miscarriages-of-Justice.pdf](https://www.researchgate.net/profile/Myles-Frederick-McLellan/publication/334794105_Innocence_Compensation_An_International_Comparative_Analysis_on_Compensation_for_Wrongful_Convictions_and_Miscarriages_of_Justice/links/5d5160344585153e594ef24b/Innocence-Compensation-An-International-Comparative-Analysis-on-Compensation-for-Wrongful-Convictions-and-Miscarriages-of-Justice.pdf), accessed on 12 September 2022.

<sup>290</sup> *Ibid.* 25. [see footnote 159-162]: ‘Alabama, Massachusetts, New Jersey, New York, Oklahoma, Texas, West Virginia, Washington, D.C., the federal government, Illinois, Maine, Maryland, North Carolina, and Tennessee are just a few of the states that fall under this category’.

innocence’<sup>291</sup> Seven states<sup>292</sup> refer the wrongfully convicted applicant to have not committed the predicate offence or words to that effect. In Montana,<sup>293</sup> a conviction may only be overturned with the help of DNA evidence. Only fifteen states<sup>294</sup> still lack compensation statutes.<sup>295</sup>

As aforementioned, certain states in the USA have different conditions for filing a claim to be eligible for compensation for people who have suffered from wrongful convictions. For example, in jurisdictions where compensation statutes have been implemented, there is a chance for reparation based on impartial guidelines, which arguably gives a more straightforward approach than sympathy. More specifically:<sup>296</sup>

These statutes do not require claimants to determine who committed errors that ‘caused’ the investigation to go wrong, why the prosecution was incorrect, or even what those errors may have been. Without regard to fault or blame, compensation legislation offers funds and resources to those exonerated of crimes. In most cases, claimants merely need to demonstrate their innocence and the fact that they spent time behind bars due to the wrongful conviction.<sup>297</sup>

### 5.3.2 *The United Kingdom*

The UK passed legislation in 1988 to directly meet its obligations in terms of Article 14(6). Section 133 of the UK Criminal Justice Act states:<sup>298</sup>

When a person has been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of

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<sup>291</sup> Ibid: The following states and the federal government are included in this list: ‘Alabama, California, Colorado, Connecticut, District of Columbia, Florida, Illinois, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New York, Ohio, Oklahoma, Texas, Utah, Vermont, Virginia, and Washington’.

<sup>292</sup> Ibid. ‘Wisconsin, Maryland, New Jersey, Ohio, Tennessee, and Iowa’ are among the states in this group.

<sup>293</sup> Ibid ‘Mont. Code Ann. S.53-1-214’.

<sup>294</sup> Ibid ‘Alaska, Arizona, Arkansas, Delaware, Georgia, Kentucky, Idaho, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Wyoming’ are among the states that fall under this category.

<sup>295</sup> Ibid 25.

<sup>296</sup> McLellan (see note 288 above) 25.

<sup>297</sup> A Bernhard ‘Short Overview of the Statutory Remedies for the Wrongly Convicted: What Works, What Doesn’t and Why, A Symposium’ (2008) 18 *Pace Law Faculty Publications School of Law* 409.

<sup>298</sup> Costa (see note 269 above) 1638.

justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result...<sup>299</sup>

The provision in Section 133 is the same as Article 14(6) of the ICCPR. In the UK, compensation must be awarded based solely on the standards outlined in Section 133, but only after a preliminary finding that the law covers the case.<sup>300</sup> It should be highlighted that the UK does not offer compensation to those who contributed to the injustice they experienced, including those who made confessions, unless there is evidence that the confession was forced.<sup>301</sup>

### *5.3.3 The Russian Federation*

Aside from ratifying and participating in the ICCPR, Russia has also reaffirmed its commitments to the European Convention on Human Rights ('ECHR')<sup>302</sup> and the Convention for the Protection of Human Rights and Fundamental Freedoms ('CPHRFF').<sup>303</sup> Article 3 of the CPHRFF provides that

[w]hen a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned unless it is proved that the nondisclosure of the unknown fact in time is wholly or partly attributable to him.<sup>304</sup>

The Constitution of the Russian Federation serves as the legal foundation for the Russian Federation. Article 53 of the Russian Constitution provides that 'everyone shall have the right to a state compensation for damages caused by unlawful actions (inaction) of bodies of state

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<sup>299</sup> United Kingdom's Criminal Justice Act of 1988. Also available at [https://www.legislation.gov.uk/ukpga/1988/33/section/133#:~:text=133%20Compensation%20for%20miscarriages%20of%20justice,-S&text=\(b\)circumstances%20in%20respect%20of,or%20to%20discontinue%20proceedings\).%5D](https://www.legislation.gov.uk/ukpga/1988/33/section/133#:~:text=133%20Compensation%20for%20miscarriages%20of%20justice,-S&text=(b)circumstances%20in%20respect%20of,or%20to%20discontinue%20proceedings).%5D), accessed on 8 September 2022.

<sup>300</sup> See note 16 above.

<sup>301</sup> Ibid.

<sup>302</sup> European Convention on Human Rights as amended by Protocols Nos. 11, 14 and 15 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16.

<sup>303</sup> Protocol No. 7.

<sup>304</sup> Article 3 of the CPHRFF.

authority and their officials.<sup>305</sup> The domestic and international provisions are intertwined to the extent that,

Article 3 of Protocol No. 7 and Article 14(6) of the ICCPR provide that a person is eligible for compensation for a miscarriage of justice after the appeals procedure is through, the conviction has been upheld, or the individual has been found not guilty.<sup>306</sup>

In addition to the remedies described above, further civil remedies are available to challenge unlawful detention or incarceration due to a conviction under the Civil Code of the Russian Federation ('CCRF').<sup>307</sup> Several articles in the CCRF deal with compensation, but Article 1070<sup>308</sup> addresses 'liability for the injury inflicted by the illegal actions of the bodies of an inquest, preliminary investigation, the procurator's office and the court of law.'<sup>309</sup> Compensation is warranted under domestic statutes as long as a person was wrongfully convicted. Additionally, the two international laws qualify a person for compensation as long as it is not proven that the failure to disclose the unknown fact was exclusively or partially their fault. Since there is no mention of contribution under domestic law, 'this suggests that a person may qualify for compensation for an unlawful conviction even if he or she contributed to his or her guilt.'<sup>310</sup>

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<sup>305</sup> Article 53 of Russian Federation's Constitution of 1993 with Amendments through 2014.

<sup>306</sup> Mujuzi (see note 182 above) 79, 80.

<sup>307</sup> It consists of five components, which are as follows: Civil Code of the Russian Federation Part One No.51-FZ of 30 November 1994, Part Two No. 14-FZ of 26 January 1996, Part Three No. 146-FZ of 26 November 2001 and Part Four No. 230-FZ of 18 December 2006.

<sup>308</sup> Article 1070 further provides that '1. The injury inflicted on an individual as a result of illegal conviction, illegal institution of proceedings on criminal charges, illegal application of remand in custody as a measure of suppression or of a written understanding not to leave one's place of residence, of illegally taking to administrative responsibility in the form of administrative arrest, as well as the damage inflicted upon a legal entity as a result of illegally taking to administrative responsibility in the form of an administrative suspension of the activity shall be redressed in full at the expense of the state treasury of the Russian Federation and in cases, stipulated by law, at the expense of the state treasury of the respective subject of the Russian Federation or of the respective municipal body, regardless of the fault of the officials of bodies of inquest, preliminary investigation, procurator's offices or courts of law in the procedure established by law. 2. Injury inflicted on an individual or a legal entity as a result of the illegal activity of bodies of inquest, preliminary investigation, procurator's offices, which has not entailed the consequences, specified by Item 1 of this Article, shall be redressed on the grounds and in the procedure, provided for by Article 1069 of this Code. Injury inflicted during the administration of justice shall be redressed in cases, if the fault of a judge has been established by the court's judgement that has entered into legal force'.

<sup>309</sup> Ibid.

<sup>310</sup> Mujuzi (see note 182 above) 81.

#### 5.3.4 Canada

In 1985, Canada demonstrated its commitment to upholding its obligations under international law to protect human rights by forming a task force composed of the justice ministers of the federal and provincial governments to look into the issue of wrongful convictions and suggest criteria for compensation.<sup>311</sup> Subsequently, in 1988, Canada's federal, provincial, and territory governments passed the Federal, Provincial, and Territory Guidelines for Compensation of the Wrongfully Convicted. A compensation program for wrongful convictions was established in Canada on a non-statutory basis to demonstrate its commitment to remedying injustices.<sup>312</sup>

In addition, the Canadian Association for the Defence of Wrongfully Convicted Persons ('CIDWY')<sup>313</sup> has positively impacted the exoneration of wrongfully convicted people in that country.<sup>314</sup> The Canadian legal system has properly and successfully compensated people in various cases who have been the subject of a miscarriage of justice.<sup>315</sup>

The Canadian government has recently committed taken steps to address wrongful convictions.<sup>316</sup> In 2019, the government, through the Minister of Justice and Attorney General has, proposed an independent Canadian Criminal Case Review Commission ('CCCRC') to address the problem of wrongful convictions. There is a likelihood that the CCCRC will be asked to determine which cases to investigate, based upon the evidence of factual innocence and procedural injustice in each case.<sup>317</sup>

#### 5.3.5 Romania

The 1936 Romanian Criminal Procedure Code first codified the right of a wrongfully convicted person to compensation.<sup>318</sup> In 1991, Romania's new constitution enshrined the right to state

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<sup>311</sup> Ibid 19.

<sup>312</sup> Ibid 20.

<sup>313</sup> 'The Association in Defence of the Wrongly Convicted is a Canadian, non-profit organization' available at <https://prezi.com/z4eptnvj8p9e/the-association-in-defence-of-the-wrongly-convicted/>, accessed on 9 September 2022.

<sup>314</sup> Clow et al. (see note 266 above) 1416.

<sup>315</sup> Costa (see note 269 above) 1624.

<sup>316</sup> C Leonetti 'Conviction Integrity: The Canadian Miscarriages of Justice Commission' (2022) 3(2) *The Wrongful Conviction Law Review* 99.

<sup>317</sup> Ibid 111.

<sup>318</sup> M Damaschin 'Legislative Evolution in Romanian Criminal Proceedings: The Special Procedure for Compensation of Material or Moral Damages in Cases of Judicial Error' (2010) 35 *Review of Central and East European Law* 371.

compensation for losses resulting from ‘judicial error.’<sup>319</sup> As a constitutional concept, state responsibility creates the legal basis for the legislature to regulate state liability through constitutional provisions instead of statutes.<sup>320</sup> According to the Constitution, the state is only accountable for cases resulting from criminal proceedings, and the Constitution is obligated to safeguard individuals’ rights against any judicial error through compensation.

However, a 2003 amendment to the Constitution states that these ‘rights may be exercised by interested individuals irrespective of the nature of the proceedings.’<sup>321</sup> This implies that whenever public officials [police, prosecutors, or even the judicial officer] are accused of violating the law or acting with extreme carelessness during a criminal procedure/process, a claim for damages may be filed for violating human rights.<sup>322</sup>

Regarding Romania’s subsequent developments in human rights, the international qualification of Article 14(6) of the ICCPR has significantly impacted Romanian legal principles.<sup>323</sup> Furthermore, the Romanian Parliament amended the regulations governing Article 504 of the 1969 Criminal Procedure Code in 2003; it reads:

(1) A person convicted under a final judgment shall have the right to compensation by the state for the damages incurred if, after a re-trial of the case, a final decision of acquittal has been rendered. (2) Also, the person who, during the criminal trial, was unlawfully deprived of freedom or whose freedom was limited shall be entitled to compensation for the damages.<sup>324</sup>

When a person has been convicted for the first time, and a new and conclusive judgment has been delivered showing that they are innocent, that individual has the right to file a claim against the state to obtain reimbursement for losses incurred as a result of that conviction.<sup>325</sup>

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<sup>319</sup> Ibid 373.

<sup>320</sup> Damaschin (see note 317 above) 373.

<sup>321</sup> Ibid.

<sup>322</sup> Ibid.

<sup>323</sup> Ibid.

<sup>324</sup> Ibid 379.

<sup>325</sup> Ibid

### 5.3.6 Conclusion

The overall aim of this chapter is to scrutinise the essentiality of compensation for wrongful conviction using a comparative analysis of international and domestic law. The opening part provided a background to the underlying principle of monetary compensation serving as a discouragement to future infractions of fundamental rights. It also pointed out to some of the difficulties in recovering from the damage inflicted on wrongly convicted people. The South African case of *Mahlangu v Minister of Police*<sup>326</sup> was an illustrative example which aimed to emphasise the alignment of South African domestic law with that of human rights principles such as Article 14(6) of the ICCPR.

The chapter then advanced onto a discussion of ICCPR's Article 14(6), which is one of the pivotal international law instruments which aims to encourage States to compensate wrongly convicted individuals within the parameters of domestic law. The evaluation identified that international legal obligations regarding the communication must be unambiguously contained in domestic law. Costa stated that providing compensation for victims of breaches of human rights, which could be statutory rights, the creation of an administrative or judicial body to determine the awards or paying ex gratia payments under general domestic authority, should be considered.<sup>327</sup> The mandate of the IHRC and the UDHR principles are meant to highlight global effort to support human rights. Moreover, through the analysis of compensation statutes in foreign countries, such as those of the United States, United Kingdom, Russia, Canada, and Romania, this dissertation illustrates that diverse resolution tactics exist.

Therefore, the comparative compensation schemes discussed in this chapter explain the importance of domestic law being on the same footing as international legal systems, both in terms of offering genuine opportunities for the exonerated to claim reparations, and in terms of considering state involvement or complicity in wrongful convictions. Through this analysis, the main argument of the thesis becomes more evident since the different compensation models reveal important qualities of an ideal approach to compensation for wrongful conviction.

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<sup>326</sup> *Mahlangu* (seen note 255).

<sup>327</sup> *Costa* (see note 269 above) 43.

## **CHAPTER 6: DISCUSSION AND CONCLUSION**

### *6.1 Discussion*

The dissertation does not disagree that false accusations do not account for all wrongful convictions. However, there has been a link established between false rape accusations and wrongful convictions in the dissertation, namely that no (or extremely few) wrongful convictions occur without a false accusation. As outlined in chapter 1, an accused could receive a lengthy sentence once found guilty in court.<sup>328</sup> Additionally, the dissertation provided examples of how carefully manufactured evidence can persuade a court to find in favour of the prosecution and convict and sentence an accused to life imprisonment based on the evidence provided by a single witness.<sup>329</sup> Suppose the single witness is the complainant, as is invariably the case, and the complainant has made a false accusation. In that case, the link between false accusations and wrongful convictions is difficult to deny. Additionally, chapter 1 discusses whether section 208 of the CPA protects innocent people in instances where the state is found to have proven an accused's guilt beyond a reasonable doubt in light of the evidence of a single witness, which does not require any other corroborating evidence except that the presiding officer must act with caution and be satisfied that the witness is competent.<sup>330</sup>

This dissertation discusses the case of Sifiso Shezi, where the child was used as a tool to fabricate a false rape by the mother. By relying on section 208, the State presented evidence to the court, and the accused was found guilty and sentenced to life in prison. It is never the State's fault that it performs its constitutional duties without fear or favour. Still, Shezi serves as an example of how a carefully fabricated false rape accusation can lead to a wrongful conviction.

Shezi's innocence did not rest with the findings of the court. The truth finally emerged only after the death of the mother who masterminded the false accusation, through a confession made by the alleged victim that she had never been raped by her father and that her mother orchestrated and taught her how to handle the false accusation. Since Shezi had already served

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<sup>328</sup> See note 37 above.

<sup>329</sup> See notes 7, 8 above.

<sup>330</sup> *Ibid.*

10 years of the life sentence before his exoneration, he would still be in prison if the confession had not been made.

The dissertation has not argued against section 208, although it is an area of research that would be of interest in the future. However, it explicitly outlines how false accusations can lead to wrongful convictions and lengthy prison sentences through the law. The South African government has developed laws designed to serve the public's interest. Still, Chapter 2 demonstrates how some people take advantage of the fact that the law favours them to fight personal battles. It is illustrated in Chapters 1 to 5 how easy it is to destroy someone's reputation and cause significant social and health harm, even to the point of suicide for the individual accused.

Chapter 4 discusses other factors that contribute to wrongful conviction, for example, the suppression of evidence that could have acquitted Ndlovu at trial by the magistrate and prosecution.<sup>331</sup> In the *Ndlovu* case, the State was entirely responsible for the wrongful conviction.<sup>332</sup> As a 2<sup>nd</sup>-year law student at the University of Kwa-Zulu Natal, Ndlovu was unlawfully deprived of his past and future opportunities by the State. His hardships continued even after being exonerated, since exonerated individuals in South Africa are left on their own without assistance from the State. In addition, his criminal record wasn't immediately expunged, which hindered his ability to find work.

Some other cases were not discussed in this dissertation but still have relevance. For example, Andile Mthimkhulu tells the media about his experience of being falsely accused and wrongly convicted of rape.<sup>333</sup> After serving 10 years of his life sentence, he was exonerated on appeal. As he recalls, when he appeared in court, the victim's word was always preferred over his, leading to his conviction.<sup>334</sup> The State has not assisted him in rebuilding and regaining his lost time and life since his exoneration.

False allegations of rape pose a severe threat to an individual's fundamental constitutional right to dignity, equality, freedom, and security. False allegations can result in

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<sup>331</sup> See 4.2.2 and 4.3.3 above.

<sup>332</sup> *Ndlovu* (see note 38 above).

<sup>333</sup> 'An Ulundi man in Northern KwaZulu-Natal is free after being falsely accused of rape' *SABC News*, 4 June 2020 available at <https://www.youtube.com/watch?v=nRibIaSuMVw>, accessed 3 February 2023.

<sup>334</sup> *Ibid* (see video from 1:40 minute).

harmful psychological, social, and material consequences to the person who has been accused and to their families and friends. A wrongful conviction based on false accusations undermines a person's faith in the justice system as the principle of being innocent until proven guilty before the law is violated. Under psychological distress and facing ostracism, humiliation, and isolation – and perhaps having lost their jobs- many people falsely accused of rape have committed suicide.<sup>335</sup>

## 6.2 Conclusion and recommendations

Chapter 1 has highlighted that in South Africa, the only means to obtain compensation for wrongful conviction is through the courts using the common law of delict by filing a civil claim for damages.<sup>336</sup> As a result of the high cost of initiating civil proceedings, very few who have been falsely accused claim damages once proven innocent.

The cases of Ndlovu,<sup>337</sup> Shezi,<sup>338</sup> the UCT Professor,<sup>339</sup> and others examined in this dissertation provide insight into the causes and effects of the false accusations and possible wrong convictions that do and can occur. Only a few of those falsely accused of rape have succeeded in being awarded damages, and only after a long civil court process. For example, in *Buthelezi v Minister of Police*,<sup>340</sup> Buthelezi received R1.6 million from the criminal justice system ten years after being falsely accused, arrested, detained, and acquitted.<sup>341</sup>

However, the *Nohour v Minister of Justice and Constitutional Development*<sup>342</sup> ruling is a stark illustration of the predicament in which South Africa finds itself with the common law of delict in that and it does not always guarantee awards of damages for wrongful convictions. In this case, the SCA observed that even though the applicant had been exonerated, they could

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<sup>335</sup> See note 137 above.

<sup>336</sup> Mujuzi (see note 182 and 1.3 above) 85-86.

<sup>337</sup> *Ndlovu* (see note 38 above).

<sup>338</sup> Lubaale (see note 7 above).

<sup>339</sup> See note 89 above.

<sup>340</sup> [2019] ZAKZPHC 49.

<sup>341</sup> 'Umlazi deputy principal detained over false rape accusation awarded R1.6m' IOL News 8 August 2021 available at <https://www.iol.co.za/sunday-tribune/news/umlazi-deputy-principal-detained-over-false-rape-accusation-awarded-r16m-2bb60acb-e65e-4487-bf67-073fa51f968a>, accessed 28 March 2022.

<sup>342</sup> [2020] ZA (SCA)

not succeed in a civil claim since they did not satisfy the prerequisites set out by the law of delict.<sup>343</sup>

There is a large gap between South Africa and other signatories to the ICCPR that have introduced statutory compensation mechanisms which enshrine the protection of international human rights standards. To comply with the ICCPR and align itself with international human rights frameworks and best practices, South Africa must reform its laws to provide statutory compensation for wrongful convictions caused by the State. This dissertation demonstrates that the common law of delict does not provide restitution for a miscarriage of justice for most South Africans. A viable alternative means must be enacted to protect South Africans from discrimination based on race, gender, or class. The alternative must be easy to access for everyone. This dissertation recommends establishing a statutory compensation mechanism for wrongful convictions in South Africa.

Is the recommendation of a compensation statute in South Africa feasible? The Road Accident Fund Act ('RAF Act'),<sup>344</sup> amended by the Road Accident Fund Amendment ('RAFA Act'),<sup>345</sup> is an example of a statutory compensation provision in SA. RAF victims are given general damages for pain and suffering and special damages for hospital and medical expenses, future and past income loss, and loss of earnings. Based on similar harm suffered by the RAF victims and those falsely accused and wrongly convicted due to state liability, this dissertation recommends that a similar statutory fund and body be enacted to remedy the injustices of wrongful convictions. International and foreign law has shown that enacting domestic compensation laws for wrongful convictions can close a gap because statutory laws can be effective, unlike civil means.

Moreover, the dissertation recommends that the justice system provides its employees with sufficient basic training and skills development to understand what justice entails. Compensation for damages caused as a result of wrongful conviction is a victim-centred approach to restoring some hope and dignity to those falsely convicted. Although not the subject of this dissertation, it goes without saying that steps, mechanisms, reforms, and policies are urgently required to reduce the incidence of wrongful convictions (and false accusations).

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<sup>343</sup> Ibid para 27.

<sup>344</sup> Act 56 of 1996.

<sup>345</sup> Act 15 of 2005.

For example, the existence of an exoneration record is another form of justice that documents injustices that have occurred. As we see mistakes that other people make, we learn from them as well.

7.

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8.

## APPENDICES

### 8.1 APPENDIX A: Ethical clearance certificate



**UNIVERSITY OF  
KWAZULU-NATAL**  
INYUVESI  
YAKWAZULU-NATALI

Mr Siyabonga Blessed Maseko (222069685)  
School Of Law  
Pietermaritzburg

Dear Mr Siyabonga Blessed Maseko,

**Original application number:** 00017661  
**Project title:** False rape accusations: Reputational damage and statutory redress for the legally exonerated in South Africa

**Exemption from Ethics Review**

In response to your application received on 27 July 2022, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW**.

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

**PLEASE NOTE:**  
Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

-----  
**Mr Matthew Blain Kimble**  
obo Academic Leader Research  
School Of Law

**UKZN Research Ethics Office**  
Westville Campus, Govan Mbeki Building  
Postal Address: Private Bag X54001, Durban 4000  
Website: <http://research.ukzn.ac.za/Research-Ethics/>

Founding Campuses: ■ Edgewood ■ Howard College ■ Medical School ■ Pietermaritzburg ■ Westville

**INSPIRING GREATNESS**

8.2 APPENDIX B: Understanding Plagiarism Certificate



## CERTIFICATE OF COMPLETION

This is to certify that

**Siyabonga MASEKO**

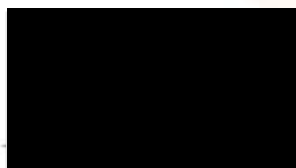
Has successfully completed the

**UNDERSTANDING PLAGIARISM  
ONLINE SHORT COURSE**

Administered by

The University Teaching and Learning Office (UTLO)

Issued date 25 November 2022



**Professor Rubby Dhunpath**  
Director: Teaching and Learning



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