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A critical analysis of the offence of rape in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007: Identifying challenges and providing solutions thereto

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Abstract

This study examines the reformation of rape laws in South Africa and challenges two inadequacies which are the result of the statutory definition of the offence created by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The first inadequacy being challenged is the retention of consent as an element of the offence. The second inadequacy is the bundling together of all acts of sexual penetration under the label of rape, which arguably infringes the principle of fair labelling. In the course of raising the above mentioned challenges, the present study also offers possible solutions to the impugned aspects of the offence.

TABLE OF CONTENTS

CHAPTER ONE

INTRODUCTION

1.1 PURPOSE OF THE STUDY

The common-law offence of rape was at common law defined as the unlawful intentional sexual intercourse with a woman without her consent.[1] However, as will be shown in the background to the offence of rape under heading 1.5 below, the offence has undergone drastic changes. These changes (which are discussed in detail under heading 1.5.1 below) were brought about by the introduction of the Criminal Law (Sexual Offences and Related Matters) Amendment Act,[2] (hereinafter referred to as the Sexual Offences Act) which replaced the common-law offence of rape with a widened statutory offence.

In this study, the writer intends to argue two points with regard to the statutory offence of rape. The first point is that the significant shortfall of the statutory offence is its retention of consent as an element of rape. This argument will be based on the comparison of the element of consent to that of 'coercive circumstances' and that the latter term would have been more apt. The second point is that the definition is not consistent with the principle of legality, in particular the principle of fair labelling. This argument will be justified on the basis that the extension of the definition of rape to acts of oral sex, digital rape[3] and rape with an object does not align with the principle of fair labelling and that so doing has negatively affected the adjudication of rape cases and the sentencing of rape offenders.

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[1] J Burchell & Milton JRL *Principles of Criminal Law* (1997) 490

[2] 32 of 2007

[3] For purposes of this study digital rape is unlawful sexual penetration of genital organs with a finger.

1.2 RESEARCH METHODOLOGY

The research methodology to be used for the study will be literature study. The writer will analyse the literature and case law on the topic of rape law reformation.

1.3 RESEARCH QUESTIONS

Ultimately, this study intends to answer the following questions:

1. Should consent be removed from the definition of rape and replaced with coercive circumstances?
2. Is the offence of rape in keeping with the principle of fair labelling?
3. What is the effect of the definition's non-compliance with the fair labelling principle insofar as the adjudication of rape cases and sentencing of rape offenders is concerned?

1.4 THE STRUCTURE OF THE STUDY

The following is the layout of the study

Chapter one: Introduction
Chapter one is titled 'Introduction', and is the present chapter. It is aimed at introducing this study and explains its purpose and relevance.

Chapter two: Consent versus coercive circumstances
Chapter two is titled 'Consent versus coercive circumstances' and will examine the correctness of maintaining consent as an element of rape. This will be done by comparing the term consent to the term coercive circumstances as was suggested by the Law Commission.[4]

Chapter three: Fair Labelling
Chapter three is titled 'Fair Labelling' and will analyse the jurisprudence of the principle of fair labelling in relation to criminal-law offences, particularly the offence of rape.

[4] South African Law Commission Discussion Paper 85 (Project 107) *Sexual Offences – The Substantive Law* (1999)

Chapter four: Labelling and Sentencing

Chapter four is titled 'Labelling and Sentencing' and will evaluate what effect the labelling of certain unlawful sexual acts as rape, has on the adjudication of rape cases and on the sentencing of rape offenders. Sentences handed down by courts in rape cases will be analysed to show disparities in how courts view and punish the different forms of unlawful sexual penetration which are labelled by law as the same offence (i.e. that of rape).

Chapter five: Conclusion

This chapter is titled 'Conclusion' and will provide an ending to the study by revealing the recommendations of the writer on the issues raised.

1.5 THE BACKGROUND TO THE STUDY

1.5.1 *The evolution of rape*

Rape is one of the most complex offences in the history of the law. It is said to be easy to allege and hard to disprove[5] which is why allegations of rape are viewed with caution and scrutiny. The history of the Romans tells of the rape of a noble woman called Lucretia[6] which is alleged to have occurred in 510 BC. Many writers and painters such as William Shakespeare and Sandro Botticelli were influenced by this story in their paintings and stories.[7] The famous painting of Lucretia's violation done by Titian[8] depicts a vulnerable woman being attacked by a man at knife point. The circumstances under which Lucretia was raped are not specified, but it is noteworthy that in every painting depicting the violation the perpetrator is shown enforcing violence on the female and in some even using a knife to subdue the victim. The paintings further show the female physically resisting the attack.[9]

Such paintings highlight the manner in which societies viewed the offence of rape, as a physically violent act by a male upon a female with the use of power or force to overcome the

[5]Geis G 'Lord Hale, witches, and Rape' (1978) 5 *British Journal of Law and Society* at 26

[6] 'The story as told by Livy' available at *http://www.novaroma.org/nr/Rape-of-Lucretia*, accessed on 31 March 2019

[7] W Shakespeare *The Rape of Lucrece* (1594)

[8] Titian, *Tarquin and Lucratia* (1571) The Fitzwilliam Museum, Cambridge

[9] Ibid

female's resistance to the unwanted penile-vaginal sexual intercourse.[10] These views of the offence of rape remain of relevance today as societies still view the offence under such light.[11]

Though the commission of rape can be traced back thousands of years ago, the act itself was not considered an offence.[12] Rape was once a crime against property[13] since a woman was considered as a man's property. If she was unmarried, she belonged to her father, and, if married, to her husband. The sexual violation of a virgin was viewed as the devaluing of her father's property; likewise, the raping of a married woman was seen as an attack on her husband's property.[14] Different countries and cultures had differing views of the act of rape. Some cultures allowed the kidnapping and raping of women as a means to force them into agreeing to marry the perpetrator, this was practiced in Kyrgyz Republic in the form of *ala kuchuu*.[15] This tradition allowed a male to kidnap his female victim and force her into marriage.

The rising of feminist movements and the demand for change brought about change in the status of women, which then resulted in the transformation of rape laws.[16] Thus rape was finally recognised as an offence. The law recognised rape as a crime against a person, not against property. That it is the female and her bodily integrity that is affected, harmed and degraded.[17]

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[10] Ibid.

[11] South African Law Commission op cit note 4 at 120

[12] J F Gardner *Women in Roman Law and Society* (1986) 117

[13] Hall C 'Rape: The politics of Definition' (1988) 105 *SALJ* at 79

[14] Ibid at 79

[15] S Amsler and R Kleinbach 'Bride Kidnapping in the Kyrgyz Republic' (1999) 4 *International Journal of Central Asian Studies* 1226
The Nguni tribes of South Africa had a similar tradition referred to as *ukuthwala* which involved the abduction and deflowering of a woman to force her family to allow the perpetrator to marry the victim. In the case of *Mvumeleni Jezile v S and Others* 2015 (2) ZAWCHC 31, the Western Cape High Court held that the abuse of the cultural practice of *ukuthwala* is unconstitutional and the accused was found guilty on three counts of rape and human trafficking.

[16] S Brownmiller *Against our will: Men, women and rape* (1975) at 896

[17] *Masiya v Director of public Prosecutions Pretoria and Another* 2007 (5) SA 30 (CC) 2007 (8) BCLR 827 (CC) at para 28

The English law on rape is one of the oldest recorded modern day laws that dates as far back as the early 1800s.[18] The law at that time required that a woman alleging rape had to show that she physically resisted the sexual intercourse and that immediately after the rape she made a full report to the nearest man of good reputation.[19] Her demeanour at the time of reporting was very important.[20] She had to appear as one who had just been raped; both emotionally distraught and physically able to show the results of her having tried to resist the sexual intercourse.[21] By the eighteenth century, English law defined rape as 'carnal knowledge of a woman forcibly and against her will'.[22] Meaning that only a male person could commit rape and only a female could be a victim of rape. The offence was committed by the perpetrator engaging in sexual intercourse with her by force. South African common law was largely influenced by the English law definition and defined rape as the unlawful, intentional sexual intercourse with a woman without her consent.[23]

It was argued that the definition was unconstitutional[24] as it did not regard as rape the other degrading acts of sexual penetration on women and men that did not include vaginal-penile penetration. The exclusion did not afford the victims of such acts the same protection from the law and effectively did not regarded their violation as equally serious and degrading.[25] The offence was further criticised for not being gender neutral, thus not allowing for the proper punishment of female sexual offenders, and not affording male victims equal protection.[26] The biggest criticism of the common-law offence of rape was that it was not in line with the right

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[18] Stephen J. Schulhofer 'Reforming the Law of Rape' (2017) 2 *Minnesota Journal of Law and Equality* at 336

[19] Ibid at 336

[20] Ibid at 336

[21] S Brownmiller op cit note 16 at 52

[22] Schulhofer op cit note 18 at 336

[23] C R Snyman *Criminal Law* 3 ed (1995) 424 (Later editions of the book do not have extensive discussions on common law rape)

[24] K Phelps 'A dangerous precedent indeed – A response to C R Snyman's note on Masiya (2008) 4 SALJ at 655

[25]Supra note 17 at para 39

[26] P Rumney, T Morgan 'Recognising the Male Victim: Gender Neutrality and the Law of Rape: Part One (1997) 26 *Anglo-American Law Review* 198 at 211

to equality as enshrined in the South African Constitution.[27] This of course was highly problematic as the Constitution is sovereign to all other laws.

This form of rape definition places the element of consent at the very centre of the offence.[28] Thus highlighting the sexual nature of the act, and not the violence inflicted on the victim.[29] The element of consent in the offence was negatively looked upon.[30] It was seen as shifting the burden of proof to the victim as she would have to convince the court that she did not consent to the sexual act. The female victim always had to show that her conduct could not have been viewed by the perpetrator as a way of consenting to the act.

Such criticism of the common law definition lead to the South African Law Commission[31] recommending that a statutory offence be enacted to replace the common-law offence. Its recommended definition was as follows;

(1) any person who intentionally and unlawfully commits an act of sexual penetration with another person, or who intentionally and unlawfully causes another person to commit such an act, is guilty of an offence
(2) For the purpose of this Act', an act of sexual penetration is prima facie unlawful if it takes place in any coercive circumstances.

The Commission described coercive circumstances as circumstances where;

- There is any application of force, whether explicit or implicit, direct or indirect, physical or psychological against any person or animal;
- There is any threat, whether verbal or through conduct, direct or indirect, to cause any form of harm to any person or animal;
- The complainant is under the age of twelve years

[27] Constitution of the Republic of South Africa, 1996*;* Supra note 17 at para 32

[28] South African Law Commission op cit note 4 at 72; Rape under common law was defined as unlawful intentional sexual intercourse with a woman without her consent.

[29] Louise du Toit 'From Consent to Coercive circumstances: Rape law reform on trial' (2012) 28 *South African Journal on Human Rights* at 389

[30] L Artz, D Smythe *Should we consent? Rape Law reform in South Africa* (2008) at 27

[31] South African Law Commission op cit note 4 at 116

- There is an abuse of power or authority, whether explicit or implicit, direct or indirect, to the extent that one person is inhibited from communicating his or her resistance to an act of sexual penetration, or his or her unwillingness to participate in such an act;
- A person's mental capacity is affected by-
- Sleep;
- any drug, intoxicating liquor or other substance;
- mental or physical disability, whether temporary or permanent,
- or
- any other condition, whether temporary or permanent
- to the extent that he or she is unable to appreciate the nature of an act of sexual penetration, or is unable to resist the commission of such an act, or is unable to indicate his or her unwillingness to participate in such an act;
- a person is unlawfully detained;
- a person believes that he or she is committing an act of sexual penetration with another person, or
- a person mistakes an act of sexual penetration which is being committed with him or her for something other than an act of sexual penetration.'[32]

The Commission's Report[33] and recommendations gave birth to the Criminal Law (Sexual Offences) Amendment Bill of 2003,[34] which detailed the intended amendments to rape law in South Africa. The Bill gave rape the following definition:

> 'Rape (1) A person who unlawfully and intentionally commits an act which causes penetration to any extent whatsoever by the genital organs of that person into or beyond the anus or genital organs of another person, or any act which causes penetration to any extent whatsoever by the genital organs of another person into or beyond the anus or genital organs of the person committing the act, is guilty of the offence of rape.
>
> (2) An act which causes penetration is prima facie unlawful if it is committed—
>
> (a) in any coercive circumstance;

[32] Ibid at 115

[33] South African Law Commission (Project 107) *Sexual Offences Report* (2002)

[34] Criminal Law (Sexual Offenses) Amendment Bill of 2003

(b) under false pretences or by fraudulent means; or

(c) in respect of a person who is incapable in law of appreciating the nature of an act which causes penetration.'[35]

This above definition was not used in the final Act. The definition was further amended with the intention of formulating a statutory offence that is in keeping with the constitutional right to be equal before the law. This then lead to the new expanded statutory offence of rape which is applicable to all forms of sexual penetration without consent, irrespective of gender. The Criminal Law (Sexual Offences and Related Matters) Amendment Act [36] came into effect on 16 December 2007. Section 3 of the Act defines rape as:

'Any person (A) who unlawfully and intentionally commits an act of sexual penetration with a complainant (B) without the consent of B is guilty of the crime of rape.'

This new broader definition is in keeping with the Constitution in so far as it relates to equal protection of all individuals, and enables the prosecution of all persons for the crime of rape. It is in harmony with other jurisdictions[37] and the definition given by the International Criminal Tribunal of Rwanda in *Akayesu's* case.[38] The definition has however widened the offence of rape to include many of the offences which were previously regarded as indecent assault.

Tough undeniable positive changes have resulted from the enactment of the Sexual Offences Act, such as the gravity of seriousness now applicable to male-on-male rape; the Act has also negatively affected rape statistics and attrition rate of rape trials.[39] Perhaps the most significant negative effect of the statutory offence is its wide definition of sexual penetration.[40] This broad

[35] Ibid

[36] Act 32 of 2007

[37] English rape law is now governed by the Sexual Offences Act of 2003 which defines rape as (1) A person (A) commits an offence if; (a) he intentionally penetrates the vagina, anus or mouth of another person(B) with his penis, (b) B does not consent to the penetration, and (c) A does not reasonably believe that B consents.

[38] *Prosecutor v Jean Paul Akayesu* Chamber 1, Case No ICTR 96 4 T, Decision of 2 September 1998 at 597

[39] 'From Reporting to Trial – how rape cases fall through the cracks' *http://www.rapecrisis.org.za* accessed on 10 June 2019

[40] Act 32 of 2007 defines sexual penetration as 'any act which causes penetration to any extent whatsoever by- (a)the genital organ of one person into or beyond the genital organ, anus, or mouth of another person(b) any

definition envelops different acts of sexual penetration under the same offence and forces presiding officers to view such different conducts as being the same. Though the intention of the legislator was noble, the writer argues that the end results is an unjustly broad offence which often leads to inconsistent sentences being given for the same offence as will be shown in detail in the following chapters, and still retains the contentious element of consent at the centre of the rape. This contention of consent as an element of rape is not only a complex issue in terms of domestic South African law but was equally problematic for the International Criminal Court when it had to give a definition of rape in different cases.

1.5.2 *International criminal law on rape*

Rape is not specifically mentioned in the definition of genocide but the International Criminal Court has prosecuted perpetrators of rape. In the case of *The Prosecutor v Jean Paul Akayesu*[41] the Trial Chamber held that, because rape can cause serious bodily and mental harm, it forms part of the acts of genocide and prosecuted *Akayesu* for same. Similarly in the case of *Prosecutor vs Tadic,*[42] the International Criminal Tribunal for the former Yugoslavia (ICTY) prosecuted Tadic for rape as a crime against humanity and war crimes. Today, the offence of rape is recognised under international criminal law[43] as a crime against humanity and an act of genocide.[44] This indicates the change of attitude of society and the courts towards the offence of rape. However, with such changes can come confusion and inconsistencies in how the laws governing rape are to be interpreted and applied. The International Criminal Court is not immune to such confusion as the Court has repeatedly contradicted itself when faced with the dilemma of defining rape. In *Akayesu's* case the ICTR stated that;

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other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person, or (c) the genital organs of an animal into or beyond the mouth of another person'

[41] Supra note 38

[42] Case No IT-94-1-AR72, OXIO 62, (1996) 32, 2 October 1995 UNSC ICTY

[43] In 1998 during the case of *The Prosecutor v Jean Paul Akayesu* Case No ICTR 96 4 T at para 688, the International Criminal Tribunal of Rwanda defined rape as a physical invasion of a sexual nature, committed on a person under circumstances that are coercive.

[44] M Ellis 'Breaking the Silence: Rape as an International Crime' (2007) 38 *Cape Western Reserve Journal of International Law* at 226

> ‘rape is a form of aggression and the element of the crime of rape cannot be captured in a mechanical description of objects and body parts. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity.’[45]

Based on this the ICTR defined rape as a physical invasion of a sexual nature, committed on a person under circumstances that are coercive.[46] The Tribunal used the term coercive circumstances and not consent. It further stated that coercive circumstances need not be evidenced by a show of physical force.[47] This was a clear indication of the Tribunal’s view that rape is not merely a sexual crime but a violent act which is intended to harm its victim.

In December 1998 the ICTY delivered its judgment in the case of *Furundzija*[48] and defined rape as “the sexual penetration, however slight: of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or of the mouth of the victim by the penis of the perpetrator; by coercion or force or threat of force against the victim or a third person.”[49] Both the above definitions did not have consent as an element of the offence. They differed in that the *Furundzija* definition specified certain body parts and included force as an element of the offence. However the Tribunal amended the above definition in *Kunarac’s* case[50] to include consent. The Tribunal defined rape as;

> ‘The *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the

[45] Supra note 38 at 597

[46] Ibid at 598

[47] Ibid at 598

[48] *Prosecutor v Anton Furundzija*, ICTY, IT-95-17/1-T, Decision of 10 December 1998

[49] Ibid at 185

[50] *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* IT-96-23-T & IT 96-23/1-T, Decision of 22 February 2001

> context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim'[51]

The last noteworthy change to the definition was given in the case of *Jean-Pierre Bemba Gombo*[52] where the International Criminal Court Trial Chamber aligned its definition with that given in *Akayesu's* case by removing consent from the definition and highlighting that;

> 'the victim's lack of consent is not a legal element for the crime of rape under the Statute. The preparatory works of the Statute demonstrate that the drafters chose not to require that the Prosecution prove the non-consent if the victim beyond reasonable doubt, on the basis that such a requirement would, in most cases, undermine efforts to bring perpetrators to justice'[53]

1.6 CONCLUSION

This chapter traces rape from its evolution from a crime against property to an internationally recognised offence that is both punishable under domestic laws and in terms of international criminal law. The chapter concentrates on rape reformation in South Africa and indicates that the reformation process has not been without fault as the definition of the offence has been broadened to include acts which were previously not regarded as rape. The chapter also mentions the complexities of the element of consent both at a domestic level and at an international level as per the different definitions of the offence provided by the different International Criminal Tribunals in their judgments. In the next chapter the writer analyses in more detail why the retention of consent as an element of the offence is problematic and suggests the alternative term of coercive circumstances instead.

[51] Ibid at 460

[52] *Prosecutor v Jean-Pierre Bemba Gombo* ICC 01/05-01/08 Decision of 21 March 2016

[53] Ibid at 105

CHAPTER TWO

CONSENT VERSUS COERCIVE CIRCUMSTANCES

2.1 INTRODUCTION

In the 17th century, Sir Hale stated that;

'it is true that rape is a detestable crime, and therefore ought severely and impartially to be punished with death, but it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused though ever so innocent.'[54]

This is because sexual intercourse is not in itself an offence; it only becomes an offence when there is no consensus between the participants. Consent is therefore at the centre of the offence and is its most contentious element. Consent in the context of sexual relations can simply be defined as an agreement between two parties to engage in a sexual activity. Consent to sexual conduct is not ordinarily verbally expressed; it is deduced from the participant's actions and the court's decision on whether or not consent was expressed is based on the conduct of the victim.[55] According to Burchell,[56] the following factors negate consent:

Mental defect: A mental defect renders a person incapable of consenting to sexual intercourse. In a court of law such evidence is adduced by a qualified witness who has assessed the victim. The expert witness provides a professional estimated mental age of the victim who is below the age of consent.[57]

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[54] Sir Matthew Hale *The History of the pleas of the Crown* (1736) Volume 1 at 634

[55] *R v M* 1953 (4) SA 393 (AD). In this case, the victim alleged that she had been raped by the accused, but the court acquitted the accused as it found that the victim, through her actions of engaging in sexual acts with the accused, had expressed her consent to the sexual intercourse. The court found that, although consent had not been verbally expressed, the complainant had voluntarily engaged in sexual conduct with the accused. This then lead to her being overcome by the sexual stimulation thus permitting full copulation and only realising the full extent of her actions after the fact.

[56] JM Burchell *Principles of Criminal Law* 4ed (2013) 608 (Later editions of the book do not have extensive discussions on common-law rape)

[57] Faadiela Jogee, Jerome Singh 'Age of Consent: Legal, Ethical, Cultural and Social Review –South Africa Country Report' *https://www.researchgate.net/publication/341541607* accessed on 16 May 2019

Intoxication: A highly inebriated individual is incapable of making an informed decision. Thus, engaging in sexual intercourse with an intoxicated person, even with their consent, amounts to rape as the inebriation negates the consent. The level of intemperance is decided on a case-to-case basis.

Age: The age of legal consent to sex in South Africa is 16 years.[58] Consensual sexual intercourse with a person under the age of 16 years is a criminal offence. In the case of *R v Z*,[59] the Appellant Division held that a girl of under 12 years in incapable of consenting to sex. Though such a girl can both verbally and through her conduct confirm that she is a willing participant in the conduct; her age negates her consent as she is regarded by law as being too young to appreciate her actions. Engaging in sexual intercourse with a person older than 12 years but younger than 16 years amounts to an offence of statutory rape.[60]

Sleep: A person who is asleep or unconscious at the time of sexual penetration does not have the opportunity to consent to the act. Though she does not resist the sexual intercourse, the mere fact that she has not verbally or through conduct communicated her consent due to her unconsciousness makes the act with her unlawful.[61]

Fraud: Rape by fraud can be committed in two ways; the perpetrator misrepresents the act being committed or the misrepresentation maybe in terms of the perpetrator's identity.[62]

Duress: Where a person is so intimidated that he/she submits to the sexual penetration this vitiates her consent and amounts to rape. It goes without saying that where force of violence is used to compel the woman into having sexual intercourse consent is not possible, unless prior to the penetration the woman is so overcome by her own sexual arousal that she consents to the act.[63]

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[58] Ibid

[59] *R v Z* 1960 (1) SA 739

[60] Act 32 of 2007 s15(1)

[61] Burchell op cit note 54 at 608

[62] The court confirmed this in *R v M* 1953 (4) SA 393 (AD) where Van den Heever J said it is essential that the victim's resistance be overcome by fear, force or fraud.

[63]Burchell op cit note 54 at 608

Change of mind: Rape is a continuing offence; therefore, where the victim withdraws their consent amid the sexual penetration and the perpetrator does not cease the sexual penetration becomes unlawful and amounts to rape.[64]

The trouble with the element of consent is that it equates rape to an act of a sexual nature rather than an act of violence, and also focuses on the victim's behaviour. It shifts the emphasis from the behaviour of the perpetrator to that of the victim. The victim (represented by the state) bears the onus of proving that she did not consent to the sexual penetration and that the lack of consent was properly communicated to the perpetrator. This has the effect of putting the victim on trial and not the offender. It is the victim's state of mind at the time of the rape that the law is concerned with and not that of the offender. Consent further accentuates rape as sexual offence instead of the violent act that it is. The Law Commission[65] recommended that consent be removed from the statutory offence. It recommended that the term coercive circumstances be utilised instead.[66] This recommendation was not adopted into the Sexual Offences Act[67]and consent was retained in the definition. The Act defines consent as voluntary and un-coerced agreement,[68] it recognises that consent given under the following situations is not legally valid, that is:

> 'Where there has been use of force, intimidation or a threat of harm. Where the perpetrator was in a place of authority and abused such authority to obtain consent. Where the consent is obtained by fraudulent means. Where the victim is asleep, unconscious, under the influence of any medicine, drug, alcohol, below the age of 12 or a person who is mentally disabled.'[69]

This is not an exhaustive list as the Act stipulates that there may be other scenarios that can negate consent given for a sexual act.

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[64] Burchell op cit note 54 at 608

[65] South African Law Commission op cit note 4 at 114

[66] South African Law Commission op cit note 4 at 122
The Commission provided a detailed definition of the term coercive circumstances, the writer summarises the terms as meaning any circumstances that prohibit the victim from expressing their non-consent to a sexual act or that force them to participate in a sexual act in order to placate a situation they are in.

[67] Act 32 of 2007

[68] Act 32 of 2007 s1(2)

[69] Act 32 of 2007 s1(3)

2.2 THE PROBLEM WITH CONSENT

By retaining consent as an element of the offence of rape, the law makers hindered rape law reformation by continuing to sexualise the offence instead of considering it as an offence of violence. Rape is not a sexual act driven by sexual desire; rather it is a violent and hostile act which is aimed at dominating, humiliating and terrorising the victim. The retention of consent furthers old stereotypes of rape and rape myths which work against the victims of rape.[70] In an argument for the reformation of rape, Peter Rush[71] states that if rape is viewed as an act of violence then consent has no role to play. This argument is cemented by Louise du Toit who argues that 'rape is consistently pushed back within the ambit of sexual crimes rather than violence.'[72] Consent is a non-factor in offences such as robbery, it is understood that the robbery occurred without the victim consenting to it, the same principle should be applied to the offence of rape.[73] This would have the effect of desexualising the offence and shifting the focus from sex to assault. It would unburden the victim with having to prove that she was not a willing participant in the sexual act, that she was not overpowered by her own sexual desires and entertained the sexual advances of the perpetrators only to regret it later and cry rape.[74]

Due to its engrossment with the sexual behaviour of the victim at the time of the rape, the element of consent demands that the victim's response to the sexual advances of the offender be scrutinised and not the actions of the offender. This is regardless of whether or not violence was inflicted as some adults consensually engage in sexual intercourse. During the adjudication of the offence, the victim is tasked with proving beyond a reasonable doubt that she communicated her unwillingness to engage in the sexual act and that such unwillingness could not have been misinterpreted by the offender. Though South Africa does not expressly have the defence of mistaken consent as part of rape laws, the defence is generally accepted due to

[70] P Rush 'Jurisdictions of Sexual Assault: Reforming the Text and Testimonies of Rape in Australia' (2011) 19 *Feminist Legal Studies* at 65

[71] Ibid at 65

[72] Louise du Toit 'From Consent to Coercive circumstances: Rape law reform on trial' (2012) 28 *South African Journal on Human Rights* at 389

[73] Ibid at 389

[74] Hale op cit note 52 at 631

consent being an element of the offence.[75] James Hopper[76] in his article explains that during a traumatic event the human body is primed for fight or flight, but at times the body may react by freezing and not taking any action until the traumatic event has ceased. The rape victims who react in the latter would fail at trial in proving that they properly communicated their lack of consent. This approach to rape law further perpetuates the appalling rape statistics faced by South Africa, as perpetrators of rape rarely get convicted and victims are rarely believed. The 2017 rape statistics indicate that less than 20% of rapes cases reported go to trial and of those only 8.6% result in a conviction.[77]

A study done by L Finkelson and R Oswalt[78] showed that the majority of victims of rape do not report incidents of rape because they are unlikely to be believed by the courts, and they are likely to be further victimised during cross examination based on their relationship with the accused and the possibility of consent being present due to prior knowledge of the accused. The concern with consent is more delicate when the victim was intoxicated at the time of the incident but is not well known to the accused person, and he raises the defence that he was not aware that she was so intoxicated that she could no longer appreciate her conduct and act in accordance with such appreciation. Even harder to adjudicate are cases where the victim consents to parts of the sexual penetration but not to others. An apt example would be where a female consents to penile vaginal sexual intercourse but does not consent to anal intercourse, and is thereafter forced to engage in anal sex. Since consent is central to the offence, it becomes a mountain for the victim to prove that there was no consent for the particular act and that such a lack of consent was clearly communicated to the penetrator. The writer argues that such situations exist because consent is an element of the offence instead of coercive circumstances.

The writer contends that the element of consent largely plays a role in rape incidents going unreported and also contributes to the low conviction rates in those that are prosecuted. This is

[75] T Illsey 'The defence of mistaken belief in consent' (2008) 1 *SACJ* at 66

[76] JW Hopper 'Why many rape victims don't fight or yell' available at *http://www.washingtonpost.com/news/grade-point/wp/2015/06/23/why-many-rape-victims-dont-fight-or-yell* accessed on 10 June 2019

[77] Rape Crisis Cape Town Trust 'From reporting to trial – how cases fall through the cracks' available at *http://rapecrisis.org.za/from-reporting-to-trial-how-rape-cases-fall-through-the-cracks*/accessed on 22 June 2021

[78] L Finkelson, R Oswalt 'College Date Rape: Incidence and Reporting' (1995) 2 *Psychological Reports* at 526

also the reason why it is general practice for the state to not oppose bail applications in rape cases where the parties had been drinking together or where they have a romantic relationship. Such cases are viewed as being less likely to result in a conviction. This is simply because at the trial stage, the victim, in her testimony, must convince the presiding officer that she was of sound mind but was not a willing participant. Du Toit explains that:

> 'the complainant convinces the judge or jury that her body and her mind were in a real sense working against one another, that she was split or divided in herself, that her body passively underwent sexual intercourse while her mind, spirit, soul or will was actively resisting it, that she lost her mind-body integrity for the duration of the intercourse. Given these contradictory requirements, it is then small wonder that rape courts often find the complainants to be deeply paradoxical, contradictory or enigmatic." "She is required to prove the absence of something essentially invisible, the absence of consent, rather than the unlikelihood of active desire on her own part.'[79]

2.3 COERCIVE CIRCUMSTANCES

The term 'coercive circumstances' was first introduced to South African rape law by the Law Commission in their discussion paper mentioned above.[80] The term implies that consent to a sexual act could not have been possible because of the prevailing circumstances at the time of the commission of the rape. The use of the coercive circumstances was discussed throughout the law reformation discussions but the term never made into the Sexual Offences Act. Instead in the definition of consent provided by the Sexual Offences Act, the term 'coercive agreement' is included.[81] This definition merely serves to explain circumstances under which sexual penetration can be regarded as rape, but does not change the narrative that consent still plays the central role in the offence. The use of the term 'coercive circumstances' shifts the focus of the offence from the victim's intentions and behaviour to the prevailing circumstances as it takes into account the prevailing factors that could have hindered the victim's ability to express her non-consent. It further desexualises the offence by shifting the focus from sex to assault. If rape is seen as the infliction of sexual violence on a person, then their unwillingness to

[79] Du Toit op cit note 72 at 402

[80] South African Law Commission op cit note 4 at 116

[81] Act 32 of 2007 s1(2)

participate is unquestionable and need not even be discussed at trial. There are presently many situations where the prevailing circumstances negate any consent given, but such situations go unpunished because of the element of consent as it presently stands in the law. For instance, rape is very prevalent amongst hitchhikers. The person is typically destitute and in desperate need of assistance while having no financial means to pay for the transportation that they require. The drivers who are perpetrators of such sexual violations normally demand to be compensated with sexual intercourse in return for the free ride. The desperate and destitute victims are coerced into agreement.

The situation is the same in job interview situations. Here, the interviewer demands sexual intercourse in exchange for employment. In a country riddled by unemployment, the desperate and needy applicant agrees due to the prevailing coercive circumstances. Even though the two circumstances are prevalent and well known, there are no reported rape cases on either one of them. The writer argues that this is due to both parties supposing that there was consent in the form of an agreement between them. However, when one considers the circumstance under which this consent was given, it is clear that it was not freely and voluntarily provided.

Similarly, coercive circumstances and consent differ greatly in a situation dealing with Stockholm syndrome, a condition where a hostage develops a trauma bond with her captor due to the prevailing coercive circumstances. In such a situation, the hostage would engage in sexual intercourse with the captor and it would in all other aspects appear normal apart from the fact that the circumstances are coercive and have altered her normal state of mind. This is clarified by Du Toit[82]where she argues that,

> 'Rape law should take for granted that sexual penetration under coercive or fraudulent circumstances constitutes an injury to the whole, embodied person, and it is doubtful whether the consent approach with its emphasis on rational choice, will and agreement on the side of the victim can deliver this. After coercion or coercive circumstances have been proven, there should be no further need to prove sexual injury in order to prove that rape took place, whatever we understand under the term sexual injury.'[83]

[82] Du Toit op cit note 72 at 392

[83] Ibid at 392

2.2 CONCLUSION

The replacement of the word consent with coercive circumstances was discussed by the Law Commission in their above-mentioned discussion paper but it never made it onto the final legal draft of the Act. This was an error as it has held the offence stagnant in its evolution. By the mere fact that consent is still an element in the definition means complainants of rape must be questioned on it and on their sexuality. Centuries after the abolition of the legal requirement that women must show that they physically resisted the sexual act, the law makers still insist on retaining the preposterous element of consent which as explained makes rape more a sexual offence than a violent one. Consent highlights the sexual act that was performed and forces the victim to first overcome the hurdle of proving that they were not a willing participant in the sexual act. The term coercive circumstance however concentrates on the prevailing circumstances at the time of the act and not on the victim's conduct in response to the sexual act.

From the above discussion, it is clear that the above mentioned inadequacy would have been eradicated by the removal of consent as an element of the crime and its replacement with the word's coercive circumstances.

CHAPTER THREE

FAIR LABELLING

3.1 INTRODUCTION

A study conducted by Erika Kelley[84] revealed that victims of anal rape and oral rape did not regard themselves as having been raped. The victims agreed that a sexual violation of their anatomy had been done and perpetrators ought to be punished by law, but did not consider the acts to have amounted to rape. The majority of those interviewed even refused to be referred to as rape victims.[85] This indicates the significant impact labels have on offences not only for the offender but also the victim.

With South Africa's high statistics on gender-based violence and sexual offences,[86] it is imperative that the law governing sexual offences be clearly understood and properly enforced by the courts in order to deter perpetrators and potential perpetrators, as well as to empower the victims to seek justice. Ambiguous labelling or the grouping together of different offences under the same label causes uncertainty even amongst society.

The principle of fair labelling dictates that offences should not be vague but precise and easy to understand.[87] The average member of society should be able to understand the law that governs his conduct and thus be able to understand what conduct is regarded as criminal and what is legally acceptable. Lay persons do not generally concern themselves with elements of offences and legal principles; their understanding of a wrongdoing is largely based on the label that has been placed on the conduct. For example, when one deprives an owner of their property and they are charged with fraud, there is a general understanding that misrepresentations were

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[84] E L Kelley *Women's conceptualization of their unwanted sexual experiences: psychological functioning and risky sexual behaviour* (Thesis, Miami University, 2009) 11

[85] Ibid at 27

[86] Stats SA, '*Crimes against women in South Africa, an analysis of the phenomenon of GBV and femicide'* at *https:www.parliment.gov.za/storage/app/media/1_Stock/Events_Institutional/2020/womwns_charter_2020/doc/30-07-2020/* accessed 14 October 2021

[87] J Chalmer and F Leverick 'Fair labelling in criminal law' *The Modern Law Review* (2008) 71 at 237

done in order to deprive the owner. Similarly, if they are charged with robbery, the understanding is that force was used in order to secure the property from its owner. The role played by the label placed on an offence is thus a vital one for the wrong done to be understood. This is the essence of the principle of fair labelling.

3.2 FAIR LABELLING IN RAPE SITUATIONS

This issue of proper labelling of offences was first argued by DA Thomas in 1978[88] when he argued that offences ought to be given very narrow definitions, as opposed to broadly defined offences. He stated that the narrow definitions would limit the discretion that judicial officers would have when sentencing, thus ensuring that offenders of the same crimes are punished similarly.[89]

This argument was later picked up by Andrew Ashworth in 1981[90] where he argued that, though the criminal law can operate with only a few offences and incorporate blameworthiness in the sentences passed down, this would not be advisable as an offence ought to fairly represent the wrongful conduct perpetrated by the offender. He coined the term 'representative labelling'. In a response paper, G. William[91] coined the term 'fair labelling' and stated that;

> 'The concern of fair labelling, Ashworth states: is to see that widely felt distinctions between kinds of offences and degrees of wrong doing are respected and signalled by the law, and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking.'[92]

This principle requires that an offence ought fairly to represent the offender's wrongdoing.[93] The person hearing the charge which has been laid against the accused must understand exactly what wrongdoing is alleged against the perpetrator. Offences should be structured, labelled

[88] Ibid at 219

[89] Ibid at 219

[90] Ibid at 219

[91] G William 'Convictions and Fair Labelling' (1983) 42 *The Cambridge Law Journal* at 85

[92] Chalmer and Leverick op cit note 87 at 219

[93] Ibid at 225

and punished in a manner that reflects the wrongdoing and harm suffered. Offences should be clear and precise. The average lay person should, upon hearing the label attached to an offence, understand right away what wrongful conduct has been committed by the wrongdoer and what harm has been inflicted on the complainant. According to Clark, criminal offences must be structured in such a way that they communicate the differing degrees of rejection or unacceptability of different types of conduct.[94]

William argues that,

> 'Criminal offences are categorised for symbolic reasons. It is to communicate the differing degrees of rejection or unacceptability of different types of conduct. Such symbolic messages are not conveyed by the creation of broad morally uninformative labels such as 'unlawful homicide.' Further, such broadly defined offences increase the discretionary powers of the law enforcement agencies and the judges in sentencing, and infringe what Ashworth has called 'the principle of maximum certainty.'[95]

His sentiments are echoed by Powel[96] in her paper where she states that we should not have a single crime fit all approach to criminal offences. It is for this reason that we must have different offences which covers similar conduct, such as murder and culpable homicide.

The writer argues that there are two approaches that may be adopted to ensure that similar wrongful conduct is labelled distinctively: The first approach is to afford similar conduct completely different labels. An illustration of this approach is the different labels that South African law attached to the unlawful killing of a human being. Where it is alleged that the killing was intentional, the offence is referred to as murder. It carried a prescribed minimum sentence of 15 years' imprisonment. Where it is alleged that the killing was negligent, the offence is referred to a culpable homicide and it does not carry any prescribed minimum sentence. Where the killing was both intentional and pre-planned, the offence is referred to as premeditated murder and carries a minimum sentence of life imprisonment.[97] The individual labelling of the offences helps to clarify what wrong has been done and how much

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[94] CMV Clarkson 'Theft and fair labelling' (1993) 56 *The Modern Law Review* at 554

[95] Ibid at 555

[96] Helen Powel 'Towards a redefinition of Mens Rea of Rape' (2003) 23 *Oxford Journal of Legal Studies* at 382

[97] Criminal Law Amendment Act 105 of 1997 s51

blameworthiness is attached to each conduct. This approach is also used when dealing with offences involving property. The legislature has labelled similar conduct differently, such as theft, robbery, fraud, forgery and uttering.

The second approach is to categorise offences according to the seriousness of the harm caused. This is done by adding words to the label of the crime to show the degree of seriousness. An example of this is the offence of assault and that of assault with intent to cause grievous bodily harm and the offences of robbery and robbery with aggravated circumstances.

South Africa has adopted both forms to ensure fair labelling of offences. For instance, when dealing with offences involving the loss of property, the law noticeably distinguishes between offences involving deception and those involving the use of violence. Theft by deception is referred to as fraud and theft by the use of force or violence is referred to as robbery. Upon hearing the label attached to the offence, the average person has a clear understanding of what wrongful conduct was done.

The second approach is adopted when dealing with the offence of robbery. The law categorises the offence into levels of seriousness to ensure proper labelling of the wrong done. Where mere force is used, the offence is labelled to as common robbery, however, where a weapon is wielded the offence is labelled as robbery with aggravating circumstances. To further illustrate the importance of fair labelling, the legislature attached a prescribed minimum sentence to the robbery with aggravating circumstances.[98]

Neither of the two approaches to fair labelling have been adopted for the offence of rape. The legislature has not labelled rape involving the wielding of a weapon any differently to rape where no weapon has been used. There is also no distinction drawn between rape under false pretences and rape where force is used. The labelling of the offence of rape is thus inconsistent with the labelling of other offences and is moreover imprecise. The South African law governing sexual offences does not afford a different label to rape committed by multiple offenders[99] and does not give a different label to rape involving the infliction of assault. Instead

[98] Criminal Law Amendment Act 105 of 1997 s51

[99] L Vetten, S Haffejee 'Gang rape-A study in inner-city Johannesburg' available at *http://www.journals.assaf.org.za* accessed on 20 May 2021

the offence groups together different forms of sexual offences such as the crime of common-law rape, sodomy, fellatio (oral sex) and labels them all as rape.

It may be argued that this grouping together of offences was intentionally done by the legislature in order to provide victims of sexual abuse with the same protection and indicate the severity with which our law views such sexual abuse.[100] However, by bundling up the offences together as rape, the legislature has afforded unlawful acts of sexual penetration a single crime fit all approach. The law becomes very unclear when it conflates different acts of wrongdoing under one umbrella. This is why the statutory offence of rape is perplexing and flies in the face of the fair labelling principle.

Barry Mitchel[101] argues that even the same wrongdoing in categories of seriousness and not merely labelled as being the same offence as the harm done is not the same. He argues further that, just as we distinguish between murder and culpable homicide, we ought to consider having a third degree rape which looks at the harm caused and the intention of the perpetrator. The law should recognise widely-felt distinctions between different forms of wrongdoing. Thus, crimes should be separated from one another and be labelled so as to reflect the nature and gravity of the offending, as a failure to label correctly leaves a disorganised and confusing legal term along with a confused public and an unfair criminal justice system.[102] In terms of South African rape law, the approach suggested by Mitchel would result in rape laws being in categories of seriousness. The legislature could have a separate offence of rape where no weapon is wielded and no additional violence is inflicted and an offence of rape with aggravating circumstances where there has been violence inflicted or the use of a weapon. The writer suggests that such categorising of rape offences would clarify the amount of harm caused and the blame worthiness to be attached to each conduct. It is further suggested by the writer that such categorising would prospectively have a positive effect on just punishment being handed down to the perpetrators in accordance with the harm caused to the victims. The disparity caused by the current statutory rape offence was clearly evident when the court had passed its sentence in the case of *S v Nkomo*.[103] The accused was convicted of kidnapping and

[100] Supra note 17 at para 39

[101] B Mitchell 'Multiple wrongdoing and offence structure: A plea for consistency and fair labelling' (2001) 64 *The modern law review* at 409

[102] Ibid at 407

[103] 2007 (3) ALL SA 596 (SCA)

repeatedly raping the complainant. During the ordeal he has assaulted her, kicked her and forced her to perform oral sex on him. The regional magistrate convicted him of kidnapping and five counts of rape and referred the matter to the High court for sentencing. The High court sentenced him life imprisonment. The Supreme Court hearing the appeal on sentence reduced the sentence to a mere 16 years because, amongst other reasons, the court stated that life imprisonment must be reserved for the most heinous of rape cases and that the one before it was not as bad.[104] It is almost impossible to imagine a rape more gruesome and more violent that that suffered by the victim in the hands of Mr Nkomo, but due to the offence of rape not having categories of seriousness, the accused was punished similarly to every other rape convict. It is submitted that had the rape by Mr Nkomo been correctly labelled as rape with aggravating circumstances, it would not have been difficult for the appeal court to confirm the sentence of life imprisonment, thus affording the victim the deserved justice.

When crafting a new statute, the law makers must ensure that the statute is in keeping with the principle of legality and is labelled in a manner that is in accordance with the principle of fair labelling. When the statutory offence of rape was being drafted, the legislature opted to include under the offence of rape crimes which were previously referred to as indecent assault. This was done to show how seriously the law views sexual misconduct and to make rape a gender-neutral crime, thus affording all people equal protection and punishment of all offenders of sexual crimes.[105] The negative result however is a wide and baffling offence that indicates that completely different sexual acts must be seen and punished the same.

The statutory offence of rape currently consists of the following criminal offences:

- The sexual penetration of the genital organ of a person by the genital organ of another person.
- The sexual penetration of the mouth of a person by the genital organ of another person.
- The sexual penetration of the anus of a person by the genital organ of another person.

[104] Ibid at para 22

[105] Supra note 17 at para 44

- The sexual penetration of the genital organ of a person by anybody part of another person.
- The sexual penetration of the anus of a person by anybody part of another person.
- The sexual penetration of the genital organ or anus of a person by any object
- The sexual penetration of the mouth of a person by the genital organs of an animal.

These offences can be easily summed up as:

- Vaginal rape
- Fellatio
- Anal rape
- Digital rape
- Rape with an object
- Rape using animal genitalia

As all these sexual acts are labelled the same, they must be prosecuted and adjudicated in the same manner. This becomes a challenge at trial due to the acts of sexual penetration being so vastly different.

3.3 EFFECTS OF LABELLING ON TRIAL PROCEDURE

Rape and other forms of sexual offences are adjudicated in specialised courts referred to as Sexual Offences courts.[106] These courts are equipped with CCTV cameras and intermediary facilities in order to ensure that victims of sexual crimes are not subjected to unnecessary secondary trauma. However, the main cause of secondary trauma is the trial procedure itself as the victim has to give an account of every detail of how the rape occurred. This is due to the principle that an accused person is innocent until proven guilty. A typical rape trial consists of the evidence of the victim, the first report, the medical evidence and the evidence of the accused person.[107] Since in most rape cases are not witnessed by anyone, the only two people who can give evidence on what transpired is the accused person and the victim. This is why a rape trial mostly becomes a 'she-said'- 'he-said scenario'. The court therefore largely relies on the corroborative evidence of the first report and on the medical evidence of the doctor who examined the complainant after the alleged rape. Medical evidence is commonly adduced by

[106] Criminal Procedure Act 51 of 1977 s158(2)(3)

[107] A first report is the person to whom an alleged rape incident is first reported. In the case of a minor victim or a mentally ill victim the state will also lead the evidence of a clinical psychologist.

way of handing in a J88 form.[108] Rape cases have been adjudicated in this manner for many years in South Africa.[109]

In terms of both common law rape and the Sexual Offences Act sexual penetration is deemed to have occurred when the slightest penetration has taken place.[110] For a conviction on rape to be attained, the state must prove beyond a reasonable doubt that sexual penetration occurred. This is very difficult to do when there is no medical evidence to substantiate the claim and collaborate the victim's version of events. Penile-vaginal and penile-anal rape ordinarily results in injuries being sustained and can be collaborated by medical evidence.[111] This is not the case with oral rape, digital rape and rape with small objects as they are less likely to cause injuries. This sort of penetration ordinarily leaves no evidence and no traces behind. The court is therefore presented with two opposing versions of what transpired and must decide which version is more probable. Because of the burden of proof being beyond a reasonable doubt, the accused person frequently gets acquitted.

To cement the allegation of penetration, swabs are taken from the vagina or anus of the victim and sent for DNA testing. If the DNA results link the perpetrator, then there can be no doubt that sexual penetration occurred. This is not possible to do with oral, digital and object rape. Thus makes the successful prosecution of these types of rape extremely difficult as compared to others.[112]

Regardless of the differences in relation to the evidence that can be produced at trial the law demands that a perpetrator who inserts the tip of a pen in the anus of another person be tried and convicted of the same offence as a person who inserts his entire penis in the vagina of another person and proceeds to have sexual intercourse with them. As the law stands, these two

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[108] A J88 form is a legal document that is completed by a medical doctor or a registered nurse. The injuries suffered by a victim are documented in the form and it is accompanied by a statement made in terms of s212 of the Criminal Procedure Act 51 of 1977

[109] *S v Thobela Manqaba* 2005 ZAGPHC 32 (23 March 2005)

[110] *H v S* 2014 ZAGPJHC 214 (16 September 2014) 51

[111] R Jina, R Jewkes, L Vetten, N Christofides, R Sigsworth, L Loots 'Genito-Anal injury patterns and associated factors in rape survivors in an urban province of South Africa: a cross sectional study' *BioMed Central Women's Health* (2015) available at *http://bmcwomenhealth.biomedcentral.com/track/pdf/10.1186/s12905-015-0187-0.*pdf accessed on 24 January 2020

[112] Ibid

perpetrators are guilty of the same offence and must be put on trial and be punished according to the same applicable prescribed minimum sentence.

Prior to the enactment of the Sexual Offences Act oral rape and digital rape were forms of indecent assault and did not require any collaborative medical evidence. The J88 form was not necessary to prove the penetration. At present victims of these forms of rape must be subjected to a medical examination and lead evidence on penetration. Effectively this means that to secure a conviction on oral rape and digital rape the state must prove beyond a reasonable doubt that sexual penetration took place without having any collaborative medical evidence. Presently courts tend to acquit or convict on the lesser offence of sexual assault.

By disregarding the second method of fairly labelling offences in categories of seriousness, the law is confusing to presiding officers.

3.4 CONCLUSION

This chapter of the study explained the principle of fair labelling and applied it to the statutory offence of rape. It further illustrated the failure of the South African law makers to implement just labelling of sexual offences by highlighting the different methodologies that have been used by other jurisdictions to safeguard the proper labelling of sexual crimes.

The South African legislature elected to use the term rape for all unlawful, intentional acts of sexual penetration without consent. They further did not distinguish by labelling differently rape with the infliction of grievous bodily harm and rape without any additional violence. Instead of using different labels, the legislature elected to impose different prescribed minimum sentences.[113] This has had an effect on trial procedure in terms of acts that were previously prosecuted as indecent assault and did not require collaborative medical evidence now being prosecuted as rape and requiring both the evidence of a first witness and collaborating medical evidence in order to secure a conviction. In the next chapter, the writer will analyse the effectiveness of the South African approach in terms of sentencing of the offenders.

[113] Criminal Law Amendment Act 105 of 1997 s51

CHAPTER FOUR

LABELLING AND SENTENCING:

4.1 INTRODUCTION

In the process of passing sentence, presiding officers are tasked with ensuring that a sentence is in accordance with the violation and harm caused, and they must safeguard that an accused is not let off too leniently but likewise must not be punished too harshly. One of the ways that the courts do this is by looking at sentences passed by other courts in similar cases. This is because all people are equal before the law.[114] Perpetrators of the same wrong doing must be punished in a similar manner. This is part of the reason fair labelling is important because it ensures that people who have committed the same wrong doing are convicted of the same offence and sentenced similarly. This is not easy to do in relation to the offence of rape as it groups together different acts of sexual penetration and forces that they be viewed as the same conduct. Due to the other less common forms of sexual penetration having the same label as vaginal-penile rape they end up being viewed as less serious and less heinous. This is evident in the sentences to follow that are handed down by presiding officers.

4.2 LABELLING AND SENTENCING

In 2004, prior to the enactment of the Sexual Offences Act, Mr Masiya[115] was tried in a regional court on a count of rape. During the trial, the evidence lead displayed that he had sexually penetrated the nine-year-old girl victim in the anus with his penis. The defence argued for a conviction on indecent assault as such type of sexual penetration, in terms of the common-law offence, did not amount to rape. The prosecutor acting for the state agreed with the submission of the defence attorney. The Presiding Officer however held that Magistrate's Courts have a right to develop the common law to be in keeping with current views of society. The Magistrate proceeded to convict Mr Masiya of rape. The matter was then taken to the High Court for

[114] Constitution of the Republic of South Africa 1996 s9 (1)

[115] Supra note 17 at para

confirmation of the conviction and for sentencing. The High Court confirmed the conviction and stated that it was developing the definition of rape to include anal penetration of both males and females, and the court declared the common-law definition of rape as unconstitutional as it was not in keeping with the Constitution of the country.

The case was taken further to the Constitutional Court for the confirmation of the law as unconstitutional. Mr Masiya seized that opportunity by challenging that his case had not been dealt with in accordance with the requirements of the Constitution. Without dwelling much into the constitutional issues raised by both parties, what is important for this study is the finding that was arrived at by the majority of the judges compared to that arrived at by the minority of the judges. The majority decision confirmed that the definition of rape was to be extended to include anal penetration of females only and the minority decision was that it ought to be extended to include the anal penetration of both males and females. *Masiya's* case not only changed the definition of rape but cemented, at the time, that South African courts still view sexual penetration of males differently to sexual penetration of females and though the court acknowledged that the anal sexual penetration of males was not any less degrading, humiliating and traumatic, it still did not extend the definition to include the anal penetration of males.

The court's findings were highly criticised and regarded as discriminatory by many scholars.[116] They argued that the court's reasoning trivialised the humiliation suffered by male victims of sexual assault as it cocooned their violent experience and the touching of breasts under the same umbrella of the crime of sexual indecency. The argument was further that the decision would thus not assist in combating the phenomenon of male prisoners' rape.[117] Therefore, the labelling of male anal penetration as indecent assault was unfitting and lead to lenient sentences being handed down by the courts. This same argument is currently equally applicable in relation to the broad statutory definition of rape. The Constitutional Court's majority decision was a clear indication that the highest court in the land did not view the different forms of

[116] Phelps op cit note 24 at 659

[117]ZSL Muntingh 'Sexual violence in prisons-part2: The Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007: Its implications for male rape in prison and the Department of Correctional services' (2011) 2 *SACJ* at 24
There are no current statistics depicting the frequency of rape in South African prisons but it is a renowned problem. The authors explain that "rape is the most egregious form of sexual violence in prisons and can happen quickly through intimidation and violence".

sexual penetration the same. This is perplexing because the acts are presently all labelled the same and therefore subject to the same prescribed minimum sentences.[118] The minimum sentence for rape in South Africa is 10 years' imprisonment if the victim is an adult; life imprisonment if the victim is a mentally ill person, a child, or if the victim was raped more than once, was raped by more than one perpetrator or if assault with intent to cause grievous bodily harm was inflicted during the rape.[119] These are prescribed regardless of the type of sexual penetration done. According to South African rape law, these different types of penetration cause the same violation and harm and must be sentenced exactly the same.

Just months after the passing of the *Masiya* judgment, the Sexual Offences Act came into being. The same presiding officers who, when they had the opportunity to do otherwise, held that the rape of a female is completely different to rape of a male, are now tasked with sentencing offenders of all different types of sexual penetration as the same offence. The cases to follow will indicate that the presiding officers' views on rape have not changed as clearly shown in their sentences.

After a guilty verdict has been passed, the state prosecutor and the defence counsel must address the court on mitigation and aggravation of sentence. The state ordinarily requests that the court impose the prescribed minimum sentence and the defence highlights to the court the factors that are mitigating and requests that the court deviate from imposing the minimum sentence. Factors that are considered as mitigating in sentencing are youthfulness, being a first offender, remorse, pleading guilty to the offence and being a primary care giver of minor children.[120] However, in October 2013, the Gauteng High Court convicted Mathys van Zyl of one count of rape, in that he had sexually penetrated a 3-year-old child by inserting his finger in her genital organ.[121] When addressing the court in mitigation of sentence, his attorney, Mr

[118] Criminal Law Amendment Act 105 of 1997. The minimum sentences legislation was created in 1997 in order to bring uniformity to the sentences handed down for serious offences. There have been many discussions about the legislations impact on judicial independence but the courts have on many occasions highlighted that the legislation does not take away the powers of a judicial officer to hand down a sentence that they perceive as just and fair and in keeping with the interest of justice where they find that substantial and compelling circumstances exist which allow for the deviation from the prescribed minimum sentence. Such sentences however still have to be consistent with the norm.

[119] Ibid at s51

[120] *S v Malgas* 2001 (1) SACR 469

[121] *S v Mathys van Zyl* (Palm Ridge Magistrate's Court) unreported case (29 October 2014)

Jesse Penton, submitted to the court that Mr Mathys van Zyl[122] ought not to be harshly sentenced as the offence of rape which he had been convicted of was not a serious one as only digital penetration had occurred and not penile penetration.

The legal practitioner's sentiments were echoed by the Bloemfontein Magistrate's court in the case of *Potgieter v S,*[123] where the accused was also convicted of digital rape and sentenced to 8 years' imprisonment. In the ruling on an application for leave to appeal, the presiding officer stated that the court must grant the application for leave to appeal as the accused was only convicted of rape in the form of vaginal sexual penetration with a finger, which is a case in which a different court might give a more lenient.

The September 2014 issue of the *Spectator Magazine* published an article by Mathew Parris titled "Rape is rape serves no one well, least of all rape victims". In the article, Mr Parris argues that "The very word rape 'has been weakened; and the complainants as a class have been brought into disrepute."[124] He states that the feminist who lobby for the widest definition of rape do not understand how ill they serve those victims who have known rape in its strictest definition. He further argued that the slogan, "Rape is rape" has proved the rapist's friend."[125] This view and that of the majority judges in *Masiya* is seen to be held by many other judicial officers as vastly different sentences are handed down for rape, depending on the type of sexual penetration done.

This was evident in 2015 when the Western Cape High Court heard an appeal by the appellant where he was appealing against the sentence of two life imprisonments handed down by the trial court.[126] The appellant was convicted on two counts of raping children. On count one, he was convicted of raping a three-year-old boy by inserting his penis in the child's mouth. On count two, he was convicted of case of raping an eight-year-old girl by inserting his finger in her vagina. Both counts attract a minimum sentence of life imprisonment but count two had a

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[122] Supra

[123] *Potgieter v S* 2015 ZASCA 15

[124] Mathew Parris 'Rape is rape serves no one well, least of all rape victims' *The Spectator*, 4 September 2014 available at *https://www.spectator.co.uk/article/-rape-is-rape-serves-no-one-well-least-of-all-rape-victims/amp* accessed on 22 June 2021

[125] Ibid

[126] *CC v S* 2015 ZAWCHC 69

bigger aggravating factor as the accused had a two previous conviction for the same conduct in that he had been convicted in October 2003 of inserting his finger in the vaginas of two young girls aged four and five respectively. The accused had been sentenced to 10 years on those two counts of indecent assault. If the appeal court found substantial and compelling circumstances to validate deviating from applying the minimum sentence, it still had to give a harsher sentence on the second count due to previous convictions. In further aggravation, the victim's impact report stated that:

> 'In X's case, he had been too young to understand what was happening to him. He had not become less playful since the incident and was observed to be very playful during the interview with the social worker. The literature nevertheless indicated that there might be a negative outcome, cognitively, mentally and in regard to his social development. In Y's case, she was functioning normally for her age. There were no signs of inappropriate sexual behaviour. During the interview she was observed to be anxious, tense and tearful when asked about the incident. She felt shame. There were indications of day-dreaming or loss of focus, which can be a symptom of Post Traumatic Stress Syndrome. Even small sounds sometimes frightened her. She avoided contact with males. She experienced headaches and stomach pain following the incident.'[127]

The previous convictions were a justifiable reason for the appeal court to sentence more severely for the digital rape. Contrary to the expectation, the court stated that 'perpetrators of this type of rape are not sentenced to life imprisonment.'[128] The court then sentenced the appellant on count one to 15 years' imprisonment with five years suspended and on count two the appellant was sentenced to 12 years of which three years are suspended. The appeal court's view is that the two acts of sexual penetration are not worthy of a punishment of life imprisonment and must not be punished the same, this is despite the fact that both victims were minor children and both did not suffer any injuries. While the victim of digital rape was shown to have suffered more psychological harm and the appellant had previous convictions for the same conduct, the court still viewed penile penetration as more serious than digital penetration and deserving of a harsher sentence.

[127] *CC v S* 2015 ZAWCHC 69

[128] Ibid at para 19

The Limpopo division of the High Court held in Polokwane heard the appeal against sentence by Mr Maluka[129] in 2018. He was convicted of one count of rape of a 14 year old girl; the charge being that he had penetrated her vaginally with his penis.[130] The trial court sentenced him to life imprisonment. He appealed to the High Court and the judge found that 'the complainant was 14 years old and was still traumatised and having nightmares'[131] and further stated that;

> 'Rape of women and children has become a scourge in this country as it is a daily occurrence. Without generalising, it seems men no longer have respect for women and children. They see the women and children as objects which they can use to satisfy their sexual desires at any given moment without any repercussions. This cannot be allowed to continue as if it is business as usual. It is the duty of the court to protect the vulnerable.'

The appellant was only 26 years old at the time of the commission of the offence and used youthfulness as a mitigating factor, the court however still dismissed his appeal. This judgment points to the courts appalled attitude towards penile-vaginal rape as well as the severity of the sentences the courts deem necessary for such acts. This attitude is not consistent with that shown for digital and oral rape.

In the case of *Radebe v S*,[132] the accused was charged and convicted of raping a 10-year-old girl by way of sexual penetration of the vagina with a penis. Though his personal circumstances were more favourable than those of the Appellant in the Western Cape High Court case discussed above and would have easily justified a deviation from the minimum sentence, he was sentenced to life imprisonment. The appeal court dismissed his appeal application on sentence and held that the sentence of life imprisonment was justified as vaginal penile rape is a heinous act. This is despite the fact that research has shown that anal-penile penetration results in more physical trauma than vaginal-penile penetration[133]. The last two cases are a clear sign

[129] *Maluka v S* 2020 ZALMPPHC 6

[130] The accused had also been charged with one count of assault, which he pleaded guilty to and was sentenced to 12 months' imprisonment. This charge is not dealt with in the appeal ruling.

[131] Supra note 129 at para 11

[132] 2019 JOL 45032 (GP)

[133] I McLean 'Forensic Medical Aspects of Male-on-Male Rape and Sexual Assault in greater Manchester' *Med Sci Law* (2004) 44 at 165.

that the courts view penile vaginal penetration vastly differently to the other forms of sexual penetration.

In the case of *S v E,*[134] the court held that that the absence of violence is not a mitigating factor. This statement is however inconsistent with the sentences being handed down by the courts in rape cases. The courts clearly view lack of injuries as a mitigating factor thus trivialising the pain, trauma and degrading experience of the victims of the less common forms of rape. One can argue that though it is not implicitly implied in the law, presiding officers have the discretion to apply a grading approach to rape cases and the sentences that they deliver. The problem arises when most courts appear to disregard the seriousness of certain types of rape cases. This is highlighted in the cases of *S v Swartz*[135] where the court held that not all rapes require equal punishment, some rapes are worse than others. This was confirmed in the case of *S v Mahomotsa*[136] where the presiding officer ruled that 'the rapes that we are concerned with here cannot be classified as falling within the worst category of rape' and 'there are bound to be some differences in the degree of their seriousness; they will all be serious but some will be more serious than others.'[137]

It is clear from sentences such as that of *Bran v S*[138] who was convicted of digital rape of a five-year-old girl and only sentenced to 12 years, and that of Andries Henricks[139] was sentenced to 10 years' imprisonment for digitally raping a 16-year-old girl that digital rape is not viewed the same by the courts.

Judicial officers equally have a negative view of male rape. This was elaborated by a Regional Court Magistrate who presided over a male rape case and stated that

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[134] 1992 (2) SACR 625 (A)

[135] 1999(2) SACR 380 C

[136] 2002(2) SACR 435 SCA para 17

[137] *Rammoko v Director of Public Prosecutions* 2003(1) SACR 200 SCA

[138] *Davis Colin Bran v S* A248/2017 ZAGPPHC 316

[139] *Andries Hendricks v S* (2011) ZACGHC 77

> 'There are a lot of developments in our country, as a first year student I never thought that one day in this country there will be somebody, a man who is convicted for raping another man. As a student of law I never thought that one day a man will be convicted for raping another man.'[140]

The Magistrate granted the accused leave to appeal to the High Court because of his personal views as he stated that 'I do not want to confine myself in this matter to my conservative views. That the applicants perhaps may have the benefit of some liberal views.'[141] The writer argues that as a direct consequence of the labelling these acts of penetration the same, victims of less conventional forms of rape are not getting justice as lenient sentences are being handed down by the courts. This is evident in the irrational sentences that have been handed down, such as in the *Peli* case[142] where the accused was convicted of rape of a six-year-old boy by a Magistrate's court. The court agreed that the evidence produced was enough to prove that the accused had sexually penetrated the young boy's anus with his penis. The court however found that a suitable sentence for rape of a six-year-old male child is 10 years with six years suspended, thus effectively six years' imprisonment. Though this sentence was eventually appealed and replaced with life imprisonment, it goes far in proving the attitude of judicial officers towards less common forms of rape. It is the writer's submission that if the said offence had a different label, it would not find itself having to compete with vaginal rape, it would have its own identity and therefore its own level of seriousness.

In 2019, the Regional Court Magistrate Kholeka Bodlani who presided over the uMlazi Sexual Offences Court was suspended for inappropriate behaviour, this being in the form of shockingly unfitting sentences she handed down for rape cases. Magistrate Bodlani[143] was noted in her sentence as stating that 'gay men are incapable of rape'[144] and 'how does a man

[140] *Setlaba v S* 2015 ZAFSHC 160

[141] Ibid

[142] *Director of Public Prosecution, Grahamstown v Peli* 2018 (2) SACR 1 (SCA)

[143] Lyse Comins 'Lenient child rape sentences undermine justice' *The Mercury News* 29 July 2019, available at *https://www.iol.c.za/amp/mercury/news/lenient-child-rape--sentences-undermine-justice*, accessed on 22 June 2021

[144] Ibid

rape another man'[145]. In her article on the sentencing of rape offenders, Amanda Spies[146] states that the introduction of the Sexual Offences Act and the imposition of harsher minimum sentences established by the Criminal Law Amendment Act have done little to address the perpetration of rape and have done even less for fairness in the sentences handed down. What has been made clear by the legislation is "the acceptance by the judiciary of commonly held rape myths and stereotypes."[147]

It is impossible for one to argue that court rulings do not influence society's views of rape, rape offenders and rape victims. By trivialising sexual violence by means of handing down farcically lenient sentences, the courts send out a message that rape is not viewed as a serious and harmful act worthy of more severe consequences. In the case of *Moatshe v Legend and Safari Resort Operations (Pty) Ltd,*[148] the judicial officer who presided over the criminal case handed down a wholly suspended sentence for rape. According to Spies, such sentences further legitimise and enforce rape myths and serve as an offender's dream. This communicates to the public that the suffering of male rape victims is not viewed by South African courts in the same manner as that of female victims. This is made worse where the rape has been committed with seemingly insignificant objects such as a pen or a finger.

4.2 CONCLUSION

When tasked with expanding the common-law rape offence in Masiya's case, the Constitutional Court judges ruled that it must not be included under the definition of rape, that such definition must be reserved for penile–vaginal penetration. Other forms of sexual penetration are equally violating, humiliating and abusive but do not need to be referred to as rape as the label demands that they contend with the offence of rape in its original form and as such end up being viewed as less violating. This results in the less common acts of sexual penetration being viewed as less heinous and the victims of such acts not receiving justice. If the different acts were labelled in keeping with the principle of fair labelling this problem

[145] Ibid

[146] Amanda Spies, Perpetuating harm: The sentencing of rape offenders under south African Law 2016 (2) *SALJ* at 389

[147] Ibid at 389

[148] (2014) ZALCJHN 458

would not exist as each act would be viewed as an offence on its own not in comparison with others labelled like it.

CHAPTER FIVE

CONCLUSION

The Law Commission's[149] initial recommendations, as stated in Chapter 1, did not include all forms of sexual penetration under the term rape and did not include consent as an element of the offence. These recommendations were more in keeping with the stance taken by other jurisdictions in their rape law reformation. The writer's recommendations are inclined with those of the Commission as explained below.

4.1 RECOMMENDATION 1

The above discussion explains that the retention of consent as an element has stunted the reformation of rape laws and held the offence as a sexual private offence. During a rape trial a lot of focus is placed on how the victim was dressed, her state of sobriety, her conduct at the time of the rape, and how clearly she indicated that she was not consenting to the act or that she was withdrawing her consent. This approach has perpetuated beliefs that certain women ask to be raped due to their dress code and behaviour.

It is therefore recommended that the element of consent be replaced with the term coercive circumstances. This would provide the necessary shift from the victim's behaviour to the prevailing circumstances at the time of the conduct. This would unburden the victim of the duty to prove that she was not a willing participant but would also not infringe on the accused person's right to be presumed innocent. A mere replacement of the word consent with coercive circumstances would have a profound impact on how a rape trial is conducted in the court room and ultimately on how society views the offence and the victims of it. It is further submitted that this change of wording would not be confusing or difficult to understand to the average member of society as it does not have the effect of altering the offence but rather how it is tried in a court room.

[149] South African Law Commission op cit 4

4.2 RECOMMENDATION 2

As illustrated the cocooning together of different acts under the umbrella of rape is not in keeping with fair labelling. The offence of rape has been burdened with shortfalls that characterised the common-law offence of indecent assault, which grouped together under one label all acts of sexual violation that did not amount to common-law rape. Likewise, the statutory offence of rape is unjustifiably broad and too inclusive. It forces the judiciary to hand down inconsistent sentences for the same offence. It is therefore recommended that a narrow definition be given for the offence of rape. That the offence remains one that can only be committed by penile-vaginal penetration. This would align with the general understanding of rape and the court's attitude towards acts of penile-vaginal penetration. The offence would only be committed by a male against a female. The offence would continue to distinguish between children and adult victims and carry the applicable minimum sentences as at present.

It is recommended that that a new offence be created, this may be referred to as an offence of Laius.[150] This offence would govern acts of penile penetration of the anus. The offence would not distinguish between male and female victims but would only be committed by males. The offence would distinguish between children and adult victims and have the same minimum sentences as those applicable to rape.

It is further recommended that a new offence dealing with sexual penetration be created, which may be referred to as aggravated sexual assault. This offence would govern acts of penetration of the vagina and anus committed with any object or finger and also govern acts of penetration of the mouth committed with human or animal genitalia. As with the other offences, the prescribed minimum sentence for the offence would distinguish between adults and child victims.

This individualised form of labelling would make the offences easy to understand and thus easy to adjudicate and sentence. By stipulating the same minimum sentences for rape and sodomy the legislature would illustrate that the law views the sexual violation of men as severely as that of women.

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[150] The term was chosen as a play on the Greek mythology
T K Hubbard 'History's first child molester: Euripides' Chrysippus and the marginalization of pederasty in Athenian democratic discourse' 2006 *Bulletin of the Institute of classical studies, supplement* 223

4.3 CONCLUSION

Based on the above discussion it is clear that great strides have been taken in terms of rape being recognised as a serious offence but further rape reformation is still needed in terms of South African law. Such reformation would assist in ensuring that the offence is labelled in a manner that is clear and precise and does not cocoon different acts under the same term. This would have positive influence on the precise sentencing of rape offenders as each offence would be viewed in its own light without its seriousness being compared to the other forms of sexual penetration, thus ensuring that sentences properly reflect the amount of harm caused.

Further reformation would also result in the desexualisation of rape by the removal of consent from the definition and replacement with the term coercive circumstances.

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