

***MOTHER'S OF AFRICA:
CRIMES AGAINST WOMEN - A MEDICO-LEGAL
GUIDE***

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FOREWORD

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CHAPTER ONE

SOUTH AFRICA THE EMERGING DEMOCRACY

1.1 Introduction

O that my head was water and mine eyes a flood of tears that I might weep day and night for the slain of the daughters of my people. Is there no balm in Gilead? Is there no physician? Is not the health of the daughters of my people recovered? They are broken with a great breath, with a grievous blow. Through all the land the wounded shall groan. The harvest is passed and the summer is ended and we are not saved. The land is desolate because of the presence of the oppressor. For the hurt of the daughters of my people, I am hurt.¹

In South Africa, it is said that if you strike a woman you strike a rock and yet after just over twelve years of democracy, gender inequalities remain a central feature of South African society. Since the implementation of democracy, we have seen vast changes in government policies and attitudes towards the subordination of woman. It is evident from the policies that have been implemented that South Africa is examining and defining the gender realities, which criss-cross our cultural divides. However, the implementation of progressive policies aimed at healing past divides are often frustrated by high levels of unemployment, HIV/AIDS and sexual violence perpetrated against woman.

When seen from a surface level, it can easily be said that in some cases government has failed to respond to the needs of women and in some instances has even perpetuated the struggle. For evidence of this, one needs

¹ Le Sueur 1986:1.

only to look, for example, towards governmental attitude towards the provision of nevirapine² to HIV/AIDS positive, expectant mothers.³

In 2005 the Institute for Democracy in South Africa (IDASA)⁴ published a series of reports regarding the rights of women in South Africa under the title *Investigating the Implication of Ten Years of Democracy for Women*⁵ which provides an in depth analysis on the following issues:

- Poverty: According to the report poverty continues to be a pervasive factor in our society. Forty percent of our population lives well below the poverty line.⁶ Since women are the primary care givers in the domestic environment, they shoulder much of the burden of poverty.

In response to this, government has significantly increased the social development budget, in order to provide social security grants, in both real and nominal terms.⁷ The addition of child care grants, provided to mothers with children up to and inclusive of the age of seven years, has further alleviated a degree of the difficulty experienced. In 2005 the grants assisted approximately six million people⁸ and it is expected that this figure will grow exponentially. However, no system is flawless and challenges still exist, within the system, with regard to the administration and management, or rather mismanagement, of the grants.

- Unemployment: Our fledgling democracy is thwarted in its growth by the increasing unemployment rate amongst both men and women.⁹ Women account for more than half of all unemployed people with

² Nevirapine is defined as a pharmaceutical agent which reduces the chances of the transmission of the HIV virus, from a mother to a newborn child, when administered shortly after birth.

³ *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 103 (CC).

⁴ www.flysax.com:13 June 2005.

⁵ www.flysax.com:13 June 2005.

⁶ Parenzee *et al* 2004:34.

⁷ www.flysax.com:13 June 2005.

⁸ Parenzee *et al* 2004:34.

⁹ www.flysax.com:13 June 2005.

African women accounting for the highest rate of unemployment.¹⁰ The Unemployment Insurance Fund¹¹ has created a governmental safety net in response to this, however the fund covers only a portion of previous wages and the payouts are often inadequate to cover living expenses.¹² In response to the call for the improvement of working conditions for women the Labour Relations Act,¹³ the Basic Conditions of Employment Act¹⁴ as well as the Employment Equity Act¹⁵ have vastly increased the protection for pregnant women against dismissal and provided for longer maternity leave, family responsibility leave and stricter limits on working hours.¹⁶

- Justice: Considering the high levels of domestic and sexual violence against women, it has become frightening apparent that the South African criminal justice system has failed women.¹⁷ In an attempt to make the justice system more sensitive to the needs of women, the Departments of Justice and Constitutional Development implemented two major plans of actions, namely; The Justice Vision 2000¹⁸ and the Gender Policy Statement.¹⁹ However, once again lack of personnel and resources plague the admirable plans.²⁰ In the prosecutorial sphere, increased attention is being paid to the prosecution of maintenance defaulters and there has been a call to adapt the courtroom process to make it more accommodating to the needs of woman.²¹ Within the National Prosecuting Authority, the Sexual Offences and Community Affairs Unit provides assistance to vulnerable women and children through the Sexual Offences Courts of which there are thirty-nine nation-wide.

¹⁰ www.flysax.com:13 June 2005.

¹¹ Act 30 of 1966.

¹² Solomon *et al* 2004:37.

¹³ Act 66 of 1995.

¹⁴ Act 35 of 1997.

¹⁵ Act 55 of 1998.

¹⁶ www.flysax.com:13 June 2005.

¹⁷ Solomon *et al* 2004:38.

¹⁸ www.flysax.com:13 June 2005.

¹⁹ www.flysax.com:13 June 2005.

²⁰ Mathew 2004:125.

²¹ www.flysax.com:13 June 2005.

1.2 Mothers of Africa: Crimes against women – Aim and scope

With the above in mind, the purpose of this dissertation is to provide an explanatory foundation regarding the societal development of the rights of women in an emerging democracy with specific attention to crimes of a sexual nature committed against women and their subsequent medical examination. Although the author is well aware that the offences to be examined are also committed against men, the scope of this dissertation will fall on the rights of women since it is evident that they fall within the majority of affected victims. Although some of the transgressions to be discussed are not, in themselves, statutorily described as offences, for example, female genital mutilation, they will be reviewed since they do affect the rights of woman and can be seen as *contra bonos mores*. The aim of this dissertation is not to provide complex reflections on legal or medical science, but the aim lies rather in providing an overview of the legal position, with regards to crimes against women, which may be of some use to medical practitioners and forensic nurses, whilst at the same time providing an overview of the medical procedure and examinations utilised by the medical fraternity in examining the victims of crime, which may be of some use to legal practitioners.

Chapter one will provide a basic introduction to the development of democracy and the subsequent development of the rights of women, whilst chapter two is intended to provide an explanatory insight into the legal position of certain crimes committed against women. Chapter three will focus on the medical examination and medical intervention with regard to the victims of crime, whilst chapter four will explain and clarify the use of medical evidence in a court of law. The aim of chapter five is to move away from the victims of crime and focus on the sentencing of the offender. Chapter six will contain the concluding and final remarks of the author hereof.

1.3 The impact of violence on a developing democracy

The current upsurge of violence in South Africa affects not only the rights protected and enshrined in the Constitution of the Republic of South Africa²² but also impacts negatively on the delivery of basic government services.²³ This situation in turn further perpetuates the poverty and dissatisfaction in previously disadvantaged communities. Violence in whatsoever form, unless controlled, threatens the tapestry of any state and that harsh reality is further expounded in a state, which can only be described as a fledgling democracy such as is the situation in South Africa.

The violent *apartheid* past of South Africa is a well-documented chapter of history and yet the influence of that history is still felt today. During the *apartheid era* government organisations such as the South African Police Force often propagated the culture of violence amongst majority groups and violence became the acceptable measure of conflict resolution. A further influence on the acceptance of violence against women was the fact that the South African Police Service failed to view violence against women in a serious light.

During the nineteen eighties' laws were enacted, such as the laws relating to the distribution of land, which ignored the basic fundamental rights of people and caused a loss of faith in the law and its containment of violence. Coupled with this was the strong patriarchal influence that existed in most cultures and religions in South Africa, which led to the belief that violence was an acceptable method of dispute resolution.²⁴

The political unrest of the nineteen eighties' was not the only factor, which contributed to the culture of violence. The economic exploitation and social segregation of groups of people led to extremely high levels of poverty caused by the fact that many groups of people were unable to exercise a choice as

²² Of 1996.

²³ McQuoid-Mason *et al* 2002:10.

²⁴ McQuoid-Mason *et al* 2002:10.

to where to work or where their particular skills were most in demand thereby propagating a large, unskilled, underpaid labour force. The mass movement of rural people to over crowded cities and the break down of traditional family societies lent a further hand to the acceptance of violence as a method of conflict resolution.²⁵

The end of the *apartheid era* is perhaps even better documented than the era itself and the biggest challenge facing the subsequent governmental structure was that of converting apartheid's legacy of violence to a human rights culture.

1.4 The birth of a human rights culture

The Transitional Government of 1994 rose to the challenge of creating and enforcing human rights by introducing a comprehensive and impressive collection of new laws and government policies in order to right the wrongs of the past. These laws included an initial Interim Constitution²⁶ which later became the Constitution of the Republic of South Africa.²⁷ This Constitution contained, in chapter two, a Bill of Rights which provides for basic fundamental human rights for all people of South Africa.

More importantly, the Constitution required the education and training of members of communities and institutions on the value and importance of human rights.²⁸ Despite the provision of law, focusing on human rights, there are still groups²⁹ which argue for the re-introduction of harsh laws which limit individual and human rights.³⁰ The main argument revolves around the hypotheses that the limitation of rights will assist in controlling criminal activity

²⁵ McQuoid-Mason *et al* 2002:13.

²⁶ Act 200 of 1993.

²⁷ Of 1996.

²⁸ McQuoid-Mason *et al* 2002:13.

²⁹ Such as those calling for the re-introduction of the death penalty.

³⁰ Such as the limitation of section 11 of the Constitution which provides for the right to life. Some argue this right should be limited in cases of convicted persons convicted of certain acts of violence such as murder, rape and violent crimes against women.

and the impact thereof. A distinctive example of the call for the limitation of rights can be found in the public request to re-introduce the death penalty. Proponents and opponents of this form of punishment have both put forth equally convincing arguments to support their cause, however it would seem, in authors opinion, that in destroying or disregarding the fundamental right to life we would not only be re-paving the road to a culture of human oppression, but would also disregard the rights enshrined in the Constitution³¹ and the Bill of Rights.³² Although South Africa is a democratic state in which public opinion is heard and often abided by, the Court stated in *S v Makwanyane*³³ that:

.....while public opinion may be relevant, it is in itself no substitute for the duty vested in the Court to interpret the Constitution...If the Court were to attach too much significance to public opinion, it would be unable to fulfill its function to protect the social outcasts and marginalized people of our society.....

1.5 The Constitution of the Republic of South Africa of 1996

The Interim Constitution of South Africa³⁴ came into affect on 27 April 1994.³⁵ The effect on the South African legal system can be described as nothing short of revolutionary.³⁶ As an oversimplification, it can be stated that the Interim Constitution had three basic effects:

- Franchise and associated political and civil rights were granted to all people regardless of race.
- The doctrine of parliamentary sovereignty was repealed and replaced with the era of constitutionalism. The Bill of Rights was inscribed and

³¹ Of 1996.

³² Chapter two of the Constitution of the Republic of South Africa of 1996.

³³ 1995 (3) SA 391 (CC):para 9.

³⁴ Act 200 of 1993.

³⁵ De Waal *et al* 2001:2.

³⁶ De Waal *et al* 2001:3.

the higher courts were given the power to declare any law in conflict with the Constitution and the Bill of Rights as invalid.

- The central government of the past was replaced with a system of separated powers and more authority was transferred to the provincial and local governments.³⁷

The Interim Constitution was the result of a lengthy and difficult process of negotiation between the apartheid state and its opponents. The 1996 Constitution³⁸ completed this process of negotiation and was drafted and adopted by an elected Constitutional Assembly.³⁹

One of the main areas of legal transformation resulting from the final Constitution was the idea of Constitutionalism.⁴⁰ This ideal purports the idea that a government should derive its power from a set, codified constitution and that those powers should be limited to those authorised by the Constitution.⁴¹ The government thereby becomes subject to the Constitution as well as to the Bill of Rights, and any law, which is in conflict with that ideal, may be declared invalid. This was a drastic change from the old ideal of parliamentary sovereignty.⁴² During the apartheid era, an official of the court was limited to simply applying the law, but constitutionalism provides that a presiding officer may take the monumental step of in fact making law. Under the idea of constitutionalism, a court may now declare that a law, which is in conflict with the Constitution, is invalid.

A further fundamental step was the creation of the Bill of Rights, which has been defined, in somewhat overused terminology, as the cornerstone of democracy. A law, which is in conflict with this Bill, will for all intents and purposes be deemed invalid.

³⁷ De Waal *et al* 2001:4.

³⁸ Of 1996.

³⁹ De Waal *et al* 2001:5.

⁴⁰ De Waal *et al* 2001:8.

⁴¹ De Waal *et al* 2001:8.

The Bill of Rights includes the following rights (those inscriptions in italics are of importance to the rights of women and the aim of this dissertation):

- *Equality.*⁴³ *This right dictates that neither the state nor a private person may discriminate directly or indirectly against another person based on race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*⁴⁴
- *The right to human dignity.*⁴⁵
- *The right to life.*⁴⁶
- *Freedom and security of a person: Section 12 (1) (c) dictates that all persons have the right to be free from all forms of violence from either public or private sources.*
- *The right not to be subjected to slavery, servitude and forced labor.*⁴⁷ The implementation of this right can be demonstrated in the right not to be forced to perform acts amounting to prostitution.
- The right to privacy.⁴⁸
- The right to freedom of religion, belief and opinion.⁴⁹
- The right to freedom of expression.⁵⁰
- The right to assemble, demonstrate, picket and petition.⁵¹
- The right to freedom of association.⁵²
- Freedom of political rights.⁵³
- The right of citizenship.⁵⁴

- The right of freedom of movement and residence.⁵⁵

⁴² De Waal *et al* 2001:9.

⁴³ Section 9 of the Constitution of the Republic of South Africa of 1996.

⁴⁴ According to section 9(3) and (4) of the Constitution of the Republic of South Africa of 1996.

⁴⁵ Section 10 of the Constitution of the Republic of South Africa of 1996.

⁴⁶ Section 11 of the Constitution of the Republic of South Africa of 1996.

⁴⁷ Section 13 of the Constitution of the Republic of South Africa of 1996.

⁴⁸ Section 14 of the Constitution of the Republic of South Africa of 1996.

⁴⁹ Section 15 of the Constitution of the Republic of South Africa of 1996.

⁵⁰ Section 16 of the Constitution of the Republic of South Africa of 1996.

⁵¹ Section 17 of the Constitution of the Republic of South Africa of 1996.

⁵² Section 18 of the Constitution of the Republic of South Africa of 1996.

⁵³ Section 19 of the Constitution of the Republic of South Africa of 1996.

⁵⁴ Section 20 of the Constitution of the Republic of South Africa of 1996.

- *Freedom of trade, occupation and profession.*⁵⁶
- *The right to fair labour practices.*⁵⁷
- The right to an environment which is not harmful to health or wellbeing.⁵⁸
- The right to own property without fear of arbitrary deprivation.⁵⁹
- The right of access to adequate housing.⁶⁰
- *The right of access to health care, food, water and social security.*⁶¹
- Every child has the right to a name and nationality.⁶²
- The right to basic education.⁶³
- The right to a language and culture of choice.⁶⁴
- The right to culture, religion and language of choice.⁶⁵
- The right of access to information.⁶⁶
- The right to just administrative action.⁶⁷

According to section 36 of the Constitution,⁶⁸ the Rights in the Bill of Rights may be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including:

- The nature of the right.
- The importance of the purpose of the limitation.
- The nature and extent of the limitation.
- The relationship between the limitation and its purpose.
- Consideration as to less restrictive means to achieve the purpose.

⁵⁵ Section 21 of the Constitution of the Republic of South Africa of 1996.

⁵⁶ Section 22 of the Constitution of the Republic of South Africa of 1996.

⁵⁷ Section 23 of the Constitution of the Republic of South Africa of 1996.

⁵⁸ Section 24 of the Constitution of the Republic of South Africa of 1996.

⁵⁹ Section 25 of the Constitution of the Republic of South Africa of 1996.

⁶⁰ Section 26 of the Constitution of the Republic of South Africa of 1996.

⁶¹ Section 27 of the Constitution of the Republic of South Africa of 1996.

⁶² Section 28 of the Constitution of the Republic of South Africa of 1996.

⁶³ Section 29 of the Constitution of the Republic of South Africa of 1996.

⁶⁴ Section 30 of the Constitution of the Republic of South Africa of 1996.

⁶⁵ Section 31 of the Constitution of the Republic of South Africa of 1996.

⁶⁶ Section 32 of the Constitution of the Republic of South Africa of 1996.

⁶⁷ Section 33 of the Constitution of the Republic of South Africa of 1996.

⁶⁸ Of 1996.

Many of the rights enshrined in the Constitution⁶⁹ reflect the international tendency to create and support open democratic societies. According to Article 2⁷⁰ of the Universal Declaration of Rights⁷¹ of the United Nations every person is entitled to the rights and freedoms set forth in the Declaration without distinction of any kind such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. Further The International Covenants on Human Rights declares in Article 2⁷² that all state parties to the Covenant undertake to guarantee that the rights enunciated in the Covenant will be exercised free of any discrimination.⁷³

1.6 Conclusion

South Africa is still in the process of migrating from a violent oppressed past to a free and open democratic society. The laws created by the governmental regime have partly paved the way to a culture of human rights.

⁶⁹ Of 1996.

⁷⁰ *Article 2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.*

⁷¹ Brownlie 1994:252.

⁷² *Article 2. 1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. 2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic right recognized in the present Covenant to non-nationals.*

⁷³ Brownlie 1994:261.

The protection granted by the Constitution⁷⁴ is fundamental to all humans. In order for South Africa to reach the ideal society, violence must be suppressed, equality promoted and enforced and all forms of discrimination must be uprooted. The need for these changes can be no more clearly seen than in the difficulties experienced, and in the violence suffered, by women. Women continue to be the most vulnerable members of society and despite all the constitutional protection, government needs to remain vigilant in the implementation of their policies and legislation. Besides the role of government, South Africa is in dire need of a societal paradigm shift against sexual violence and the unequal treatment inflicted on women. Without the support of communities, government will continue to battle to cope with the culture of violence which exists against women.

⁷⁴ Act 108 of 1996.

CHAPTER TWO

CRIMES AGAINST WOMEN

2.1 Basic concepts and definitions of criminal law

Chapter two is intended to provide an explanatory insight into certain crimes perpetrated mainly against women.

According to Burchell⁷⁵, criminal law, as a science, may be divided into a three-leg definition:

- National criminal law: Criminal law is the branch of national law that defines certain forms of human conduct as crimes and provides for the punishment of those persons with criminal capacity who unlawfully and with a guilty mind commit a crime.⁷⁶
- International criminal law: *With the lodging of the required sixtieth ratification of the Rome Statute, an International Criminal Court came into operation on the first of July 2002. This Court has jurisdiction over genocide, crimes against humanity, war crimes and, once agreement has been reached on its definition, the crime of aggression. The South African legislature has passed the implementation of the Rome Statute.*⁷⁷
- Transnational criminal law: *A body of laws arising out of the need for co-operation between states in order to combat terrorism. Domestic jurisdictions, in order to achieve this aim, have been enacting laws punishing organized crimes such as corruption and racketeering.*⁷⁸ The South African legislature, for example, enacted the Prevention of Organized Crimes Act⁷⁹ to which the Criminal Law Amendment Act,⁸⁰

⁷⁵ 2005:1.

⁷⁶ Burchell 2005:1.

⁷⁷ Burchell 2005:1.

⁷⁸ Burchell 2005:4.

⁷⁹ Act 121 of 1998.

commonly referred to as the act on minimum sentencing, is also applicable.⁸¹ Further the Financial Intelligence Centre Act⁸² serves as a protection device in terms of money laundering.

Crime may be defined as certain forms of conduct which society disapproves of. Inevitably, disapproval results in the desire for retaliation and this retaliation may therefore be referred to as punishment. Punishment may take the form of loss of life,⁸³ liberty, property or bodily harm.⁸⁴

In South Africa, punishment usually takes the form of retributive justice in the form of imprisonment or the payment of a fine. Capital and corporal punishment are no longer regarded as viable sentencing options in South Africa.⁸⁵

Further, section 300(1)⁸⁶ of the Criminal Procedure Act⁸⁷ provides for an award of compensation payable for the victim of crime where the offence causes damage to or loss of property. The South African Law Commission has taken this concept one step further and issued a discussion paper⁸⁸ entitled *A Compensation Scheme for Victims of Crime in South Africa*, in which it recommends compensation for certain categories of victims and the establishment of a *Victims of Crimes Fund*. The Commission has however

⁸⁰ Act 105 of 1997.

⁸¹ *Schedule 2 part 2: Any offence relating to exchange control, corruption, extortion, fraud, forgery, uttering or theft- (a) involving amounts of more than R500 000.00; (b) involving amounts of more than R100 000.00, if it is proved that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or ...*

⁸² Act 38 of 2001.

⁸³ The death penalty has however been repealed in light of the right to life guaranteed by the Constitution of the Republic of South Africa of 1996, but still applies in certain international jurisdictions.

⁸⁴ Burchell 2005:4.

⁸⁵ Burchell 2005:5.

⁸⁶ *Where a person is convicted by a superior court, a regional court or a magistrates court of an offence which has caused damage to or loss of property (including money), belonging to another person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person for such damage or loss.*

⁸⁷ Act 51 of 1977.

⁸⁸ Paper 97 of Project 82- June 15 2003.

recommended that this be a limited pilot project especially taking into account the problems of funding and administrative record keeping.⁸⁹

According to Burchell⁹⁰ the function and object of criminal law lies in the mere fact that it is a societal mechanism used to coerce members of that society to abstain from conduct that is harmful to the interest of society. The object of criminal law is to be found in the creation of a peaceful and ordered society that promotes fundamental human rights.

Criminal law is concerned not only in the listing and codification of crimes, but has a further three functions, namely: law enforcement, prosecution of offenders and the punishment of the convicted.⁹¹ However it should be noted that in the criminal justice system due regard must always be paid to the victims rights as well as the rights of the offender.

It is startlingly apparent that in the past a criminal trial excludes the victim who is treated no more than another witness with no independent right of audience.⁹² It is however an indisputable fact that the victim of a crime has certain rights in the prosecution of the offender, for example, the victim should be kept informed of the procedures and process of the trial and are never to be subjected to demeaning cross-examination.⁹³ As a current example one needs only to reflect on the *Zuma*⁹⁴ rape trial, recently tried before the Transvaal Provincial Division of the High Court. Ignoring the fact that the accused, in this matter, has the right to a fair trial and to the presumption of innocence, the cross-examination of the complainant has been nothing short of demeaning. However the actions of council, in this matter, are exemplary when compared to the action of the accuseds supporters, present daily, outside the court. One of the most shocking 'slogans' appearing on the posters of supporters reads*burn the bitch*.... in reference to the

⁸⁹ Burchell 2005:7.

⁹⁰ 2005:9.

⁹¹ Burchell 2005:11.

⁹² Meintjes Van der Walt 1998:166.

⁹³ Lansdowne 1956:1687.

⁹⁴ *S v Zuma* at time of writing unreported case heard before Judge Van Der Merwe , judgement delivered on 8 May 2006.

complainant. The complainant in this matter is effectively being tried publicly for reporting a rape.

The question could well be asked whether or not the victim should be given more extensive rights in the trial. Fletcher⁹⁵ goes as far as suggesting that the victim should be given the power to *veto* any plea bargaining agreement. He pleads for the victim to become more the focus of attention than the offender. Burchell⁹⁶ suggest that a convincing case can be made for the use of victim impact statements after the verdict, but before the sentence is passed. The statement can be used to reflect the effects of the crime on the victim, the circumstances surrounding the crime and the perceptions of the victim with regard to the sentence.

In terms of section 274(1)⁹⁷ of the Criminal Procedure Act⁹⁸ a court may before passing sentence receive any evidence as it thinks fit to inform itself as to the proper sentence to be passed. It would thus seem that section 274(1)⁹⁹ provides enough scope for the inclusion of a victim impact statement, which would serve the further purpose of allowing the victim to be a role player as opposed to being merely a witness. A victim impact statement usually takes the form of a statement made by the victim describing the impact such crime had on him/her as well as on his/her family.¹⁰⁰ This type of statement differs from general victim testimony, given in court, as it allows the victim to express the full range of anguish experienced as a result of the offence.

2.2 General principles of criminal liability

In order for criminal liability to result, the state must prove beyond reasonable doubt that the accused has committed:¹⁰¹

⁹⁵ 1996:247.

⁹⁶ 2005:13.

⁹⁷ *A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.*

⁹⁸ Act 51 of 1977.

⁹⁹ Act 51 of 1977.

¹⁰⁰ Kenny 2004:30.

¹⁰¹ Burchell 2005:138.

- voluntary conduct which is unlawful and accompanied by,¹⁰²
- criminal capacity and,
- fault.¹⁰³ For example an accused in a rape case cannot be convicted of the crime if he held a *bona fide* belief that the victim had consented to intercourse.¹⁰⁴

2.3 Specific crimes perpetrated against women

2.3.1 Rape

In 1956 Lansdown *et al*¹⁰⁵ defined rape as follows:

Rape is committed by a male of the age of fourteen years or older, who has unlawful carnal knowledge of a female without her consent. Anyone assisting such male in committing such act is also guilty of rape.

Before 1987 the position in South Africa entailed that a boy under the age of fourteen years of age was presumed to be incapable of having carnal knowledge of a woman. However in *S v Jeremy*¹⁰⁶ it was decided that a boy below the age of fourteen must be conclusively presumed to be incapable of carnal knowledge of a woman.

By this definition to constitute rape, the private parts of the female must be penetrated by the male organ.¹⁰⁷ Puttmann¹⁰⁸ submitted that for the completion of the offence ejaculation of semen had to take place, however even during this period South Africa followed the English rule that the slightest penetration was sufficient and that neither the emission of semen nor the

¹⁰² Sometimes referred to as *actus reus*.

¹⁰³ Sometimes referred to as *mens rea*.

¹⁰⁴ *S v B (2)* SACR 543 (C).

¹⁰⁵ 1957:1622.

¹⁰⁶ 12 CLJ 231.

¹⁰⁷ Lansdown *et al* 1957:1623.

¹⁰⁸ Lansdown *et al* 1957:1623.

rupture of the hymen had to be present in order for the offence to constitute rape.¹⁰⁹

Since law is not a static science, it is not surprising that the above definition has changed slightly with the passage of time. According to Snyman¹¹⁰ the current definition of rape reads as follows:

*Rape consist in a male having unlawful and intentional sexual intercourse with a female without her consent.*¹¹¹

Currently the slightest penetration¹¹² is sufficient¹¹³ to constitute rape and whether semen is emitted or not remains immaterial.¹¹⁴ Further it remains immaterial if the hymen is ruptured or not.¹¹⁵ Sexual intercourse is a continuing act which only ends with withdrawal.¹¹⁶ Each act of penetration and withdrawal constitutes a separate act even if the acts follow shortly after one another.¹¹⁷ At present the crime of rape can be committed only by a male against a female.¹¹⁸ Although a woman cannot commit the crime, she may be guilty as an accomplice.¹¹⁹ Prior to 1993 there was no clarity on the question of marital rape; however section 4¹²⁰ of the Prevention of Family Violence Act¹²¹ stipulated that a man may indeed be convicted of raping his wife.¹²² This position is supported by the absence of a fiction, in Roman-Dutch law, which allows forced intercourse within a marriage.¹²³ However in *S v Ncanywa*¹²⁴ it was stated that the courts should approach cases of alleged marital rape with a degree of caution in order to avoid a trial becoming a forum for settling

¹⁰⁹ Halsbury 1824:1438.

¹¹⁰ 1995:424.

¹¹¹ Absence of consent is generally regarded as a separate element of the crime and merely as a way of describing the requirement of unlawfulness.

¹¹² Meaning that entry into the labia (the outermost parts of the female genital organ) is sufficient.

¹¹³ Burchell 2005:706.

¹¹⁴ Snyman 1995:425. See also in this regard Burchell 2005:706.

¹¹⁵ *S v K* 1972 (2) SA 898 (A) at 900C

¹¹⁶ *Kaitamaki v R* (1985) AC 147 (HL) at 151H.

¹¹⁷ *S v Blaauw* 1992 (2) SACR 297 (CkA).

¹¹⁸ Snyman 1995:428.

¹¹⁹ *R v M* 1950 (4) SA 101 (T). See also in this regard Burchell 2005:707.

¹²⁰ *Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife.*

¹²¹ Act 133 of 1993.

¹²² Section 4 of Act 133 of 1993.

¹²³ *S v Ncanywa* 1993 SACR 297 (CkA).

¹²⁴ 1993 (4) SACR 297 (CkA).

marital grievances. This however does not make the burden of proof, with regard to the absence of consent, any heavier.

The irrebutable presumption that a boy under the age of fourteen was incapable of rape prevailed until 1987 when section 1¹²⁵ of the Law of Evidence and the Criminal Procedure Amendment Act¹²⁶ repealed this presumption. A boy under the age of fourteen years of age may now be convicted of rape provided he has the required criminal capacity.¹²⁷

Rape can only be committed if the act takes place without the woman's consent. In the older South African law the lack of consent was proven by showing strenuous physical resistance had been offered by the woman.¹²⁸ However this view overlooks the possibility of rape where the woman offers no resistance due to fear or duress or lack of capacity to consent.¹²⁹ It is thus more appropriate to define the offence in terms of lack of voluntary consent to the act. Mere acquiescence is no longer equated with consent.¹³⁰ Since rape is a continuing crime which ends only at withdrawal it is obvious that where a woman consents and then undergoes a change of mind after the penetration, a man who persists in the act is guilty of rape as the consent was withdrawn.¹³¹

For consent to operate as a defense it must be freely and consciously given by a woman who has the mental ability to understand what she is consenting to and it must be based on a true knowledge of the material facts relating to the intercourse.¹³² Burchell submits that the consent must be real (as a matter

¹²⁵ *Notwithstanding the provisions of any law or the common law, but subject to any rule of law relating to the accountability of any person under the age of 14 years, evidence may be adduced in legal proceedings where the question is in issue whether a boy under the age of 14 years has had sexual intercourse with any female, that such sexual intercourse has taken place, and no presumption or rule or law to the effect that such a boy is incapable of sexual intercourse shall come into operation.*

¹²⁶ Act 103 of 1987.

¹²⁷ Snyman 1995:427.

¹²⁸ Burchell 2005:706.

¹²⁹ *S v F* 1990 (1) SACR 238 (A).

¹³⁰ *S v B* (4) 1996 SACR 543 (C).

¹³¹ *Kaitamaki v R* (1985) AC 147 (HL) at 151H.

¹³² Snyman 1995:428.

of fact) and given before the penetration occurs.¹³³ However it must be born in mind that in certain circumstances a woman is deemed incapable of giving her consent:

- A mental defect may render a woman incapable of appreciating the nature of the act to which she gives consent which renders her consent invalid.¹³⁴ Mental defect is determined on a case to case basis.
- There is no consent when the woman is intoxicated into insensibility.¹³⁵
- A female below the age of 12 is irrebutably presumed incapable¹³⁶ of consenting to sexual intercourse.¹³⁷ Section 14 of the Sexual Offences Act¹³⁸ prohibits a male person from entering into sexual congress with a female below 16 years of age and with a male person below the age of 19 years.
- A woman who is asleep, insensible or hypnotized cannot consent to sexual intercourse.¹³⁹
- If a woman consents to intercourse due to duress (threat of physical harm to her or her loved ones) the consent is not real and therefore invalid. Consent is not submission although real consent contains an element of submission.¹⁴⁰ However the duress does not necessarily only encompass threats of physical harm. A police officer who induces a woman into intercourse by threatening to arrest her for a crime does not obtain valid consent but the consent is vitiated by the woman's fear.¹⁴¹
- There is no real consent if a woman consents to intercourse with a man who impersonates her partner and which she believes to be her partner. This refers to the *error in persona*.¹⁴² Further no real consent

¹³³ 2005:708.

¹³⁴ *R v Ryperd Boesman* 1942 (1) PHH63 (SWA).

¹³⁵ *R v K* 1958 (3) SA 420 (A).

¹³⁶ *S v W and Another* 2004 (1) SACR 460 (C).

¹³⁷ *R v Z* 1960 (1) SA 739 (A).

¹³⁸ Act 23 of 1957.

¹³⁹ *R v C* 1952 (4) SA 117 (O).

¹⁴⁰ *R v Swiggelaar* 1950 (1) PHH 61 (A).

¹⁴¹ *S v Volschenk* 1968 (2) PHH 283.

¹⁴² Burchell 2005:710.

exists if the woman is mistaken as to the nature of the act to which she consents.¹⁴³ This is the so called *error in negotio*.¹⁴⁴

It is evident from the above that the definition of rape has been altered and broadened slightly over the years. Certain other reformations have occurred to ease the burden placed on the complainant in sexual abuse cases. Section 227(2)¹⁴⁵ of the Criminal Procedure Act¹⁴⁶ improved the position in relation to the evidence to the complainants' sexual history in 1989.¹⁴⁷ Of further importance is the fact that section 227(4)¹⁴⁸ indicates that an accused's previous sexual history may be questioned at trial if such evidence is relevant. The Courts interpretation of section 227(2)¹⁴⁹ is clear in *Myeni v S*¹⁵⁰ in which the accused was charged with rape of his six-year old daughter. On appeal the court was required to deal with the issue of permissibility of certain questions, put to the complainant during cross-examination, regarding her previous sexual history. The Court stated:

The members of this Court are not aware of any instance where section 227(2) has been applied in this country. It seems likely that it is more honoured in the breach than in the observance. Since it requires of the courts that it be applied in the manner in which it was no doubt intended, namely to militate against offensive, hostile and irrelevant questioning of complainants without thereby diminishing a full and just investigation of the real issues of the case, it may be as well to make certain comments concerning the proper application of this section.

¹⁴³ *R v Williams* 1923 1 KB 340.

¹⁴⁴ *S v W and Another* 2004 (1) SACR 460 (C).

¹⁴⁵ *Evidence as to sexual intercourse by, or any other sexual experience of any female against or in connection with whom any offence of a sexual nature is alleged to have been committed shall not be adduced, and such female shall not be questioned regarding such sexual intercourse or sexual experience, except with the leave of the court, which leave shall not be granted unless the court is satisfied that such evidence or questioning is relevant: Provided that such evidence may be adduced and such female may be so questioned in respect of the offence which is being tried.*

¹⁴⁶ Act 51 of 1977.

¹⁴⁷ Act 51 of 1977.

¹⁴⁸ Section 227(4) of Act 51 of 1997-*The provisions of this section are mutatis mutandis applicable in respect of a male against or in connection with whom any offence of an indecent nature is alleged to have been committed.*

¹⁴⁹ Act 51 of 1977.

¹⁵⁰ Unreported SCA decision 397/01.

The Court went further in analyzing similar provisions to section 227(2),¹⁵¹ international jurisdictions, and concluded that the current section is inept at protecting complainants from unjustified lines of questioning. In giving the opinion of the Court the bench eluded to the South African Law Commission's proposals regarding section 227(2).¹⁵² The draft amendment of this subsection provides that the courts may grant an application under this section, to lead evidence of sexual history or conduct if it is satisfied that such evidence or questioning:

1. relates to a specific instance of sexual activity relevant to a fact in issue;
2. is likely to rebut evidence previously adduced by the prosecution;
3. is likely to explain the presence of semen or the source of pregnancy or disease or an injury to the complainant where it is relevant to a fact in issue; or
4. is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy; or
5. is fundamental to the accused's defence.

In the matter of *S v M*¹⁵³ the accused appealed against his 10 year sentence imposed for the rape of his six year old daughter. The defence requested that the matter be transferred back to the regional court due to new statements which indicated that the complainant had been sexually active during the time of the alleged offence. During the appeal Appeal Judge Heher stated:

When dealing with section 227(2) we are not detracting from the normal rules of evidence, regarding character evidence and evidence of collateral issues. When dealing with any evidentiary aspect the test is always whether it is relevant.

The accused may not, in light of the above, lead evidence as to the complainant's previous conduct with other men unless relevant to an issue

¹⁵¹ Act 51 of 1977.

¹⁵² Act 51 of 1977.

¹⁵³ 2002(2) SACR 441 (SCA).

other than by way of character, however such facts may be put to her during cross-examination as they may have a bearing on her character.¹⁵⁴ In the matter of *S v Zuma*¹⁵⁵ Judge Van Der Merwe granted the defence's application to lead evidence as to the complainant's previous sexual history, in light of her previous allegations of rape. This evidence became pivotal to the defence of the accused and was indeed relevant to the matter at hand.

The cautionary rule in sexual offence matters was abolished in 1998 by the Supreme Court of Appeal in *S v Jackson*¹⁵⁶ where Appeal Judge Olivier states:

*In my view, the cautionary rule in sexual assault cases is based on an irrational and outdated perception. It unjustly stereotypes complainants in sexual assault cases as particularly unreliable. In our system of law, the burden is on the state to prove the guilt of an accused person beyond reasonable doubt - no more, no less. The evidence in a particular case may call for a cautionary approach, but this is a far cry from the application of a general cautionary rule.*¹⁵⁷

In *S v Ngxumza*¹⁵⁸ Judge Kruger stated the following with regard to the application of the cautionary rule to the evidence of a child:

One should guard against the imagination of a young child...a child can be passionate after dreams and unconcerned with reality. The Court has come to assess the powers of observation, recollection and narration of the child witness.... That is of course, the case to the greater or lesser extent with all witnesses, not only children. In my view the important aspect of a child's evidence is whether the child has a proper appreciation of what reality is. For a child the distinction between reality and fantasy is more likely to be blurred than in the case of an adult. A child, through strong imagination, has the power to escape into fantasy away from reality much easier than an adult.

¹⁵⁴ *R v Adamstein* 1937 CPD 331.

¹⁵⁵ *S v Zuma*; at time of writing as yet unreported matter heard before Judge Van Der Merwe judgement delivered 8 May 2006.

¹⁵⁶ 1998 (2) SA 984 (SCA).

¹⁵⁷ At 476 e – f.

Despite the above it is clear if one examines such cases as *S v V*,¹⁵⁹ *S v J*¹⁶⁰ and *S v M*¹⁶¹ that the courts traditionally follow the decision in *S v Jackson*¹⁶² and do not evaluate the evidence of the complainant in a sexual offence any differently to that of any other witness. However such evidence is approached with caution as the complainant is ordinarily a single witness.¹⁶³ The cautionary rule is therefore a simple admonition of common sense.¹⁶⁴

2.3.2 Rape – a crisis in definition

In a statement issued in May 2005 by the Department of Information and Publicity,¹⁶⁵ the African National Congress¹⁶⁶ noted with concern the sexual abuse and rape statistics issued by the National Institute for Crime Prevention and the Rehabilitation of Offenders.¹⁶⁷

According to statistics 380 000 cases of rape are reported each year, however there is an alarming under-reporting in the rural areas.¹⁶⁸ Most of the victims are African and 40 percent below the age of fifteen.¹⁶⁹ 2006 statistics reveal that one woman is raped every 26 seconds in South Africa.¹⁷⁰ Further only one in every 20 rapes is reported.¹⁷¹ Underreporting is an alarming trend¹⁷² in South Africa.

Unsurprisingly the 2005 report blames the apartheid system for much of the problem and the problem is further fueled by the fact that rape cases are

¹⁵⁸ 2001 (1) SACR 408 (T).

¹⁵⁹ 2000 (1) SACR 453 (SCA).

¹⁶⁰ 1998 (2) SACR 984 (SCA).

¹⁶¹ 2000 (1) SACR 484 (W).

¹⁶² 1998 (2) SA 984 (SCA).

¹⁶³ *S v S* 1990 (1) SACR 5 (A).

¹⁶⁴ *S v M* 1992 (2) SACR 188 (W).

¹⁶⁵ www.anc.org.za: 7 January 2005.

¹⁶⁶ Hereinafter referred to as 'ANC'.

¹⁶⁷ Hereinafter referred to as 'NICRO'.

¹⁶⁸ www.anc.org.za:7 January 2005.

¹⁶⁹ www.anc.org.za:7 January 2005.

¹⁷⁰ Keyser *et al* 2006:5.

¹⁷¹ Keyser *et al* 2006:5.

¹⁷² Oosthuizen 2001:1.

increasing the HIV/ AIDS pandemic.¹⁷³ The ruling political party views sexual abuse as the worst form of violence against women and unequivocally condemns all forms of rape and sexual abuse.¹⁷⁴ Further, the report finds the attitude of the South African Police Service in dealing with such incidences as repugnant.¹⁷⁵

It is not only political parties who find the current definitions of rape and the alarming statistics repulsive, but members of the judiciary are further fueling the call for a reworking of the current rape laws.

A Sabie magistrate, Andries Lamprecht recently found an accused guilty, in the matter of *S v Masiya*,¹⁷⁶ of the crime of rape on the basis of anal penetration¹⁷⁷ after the accused was incorrectly charged with rape, as apposed to indecent assault, by the South African Police Service who took the victim's statement. The current definition of rape excludes anal penetration which is rather seen as a form of indecent assault. Anal intercourse with a male without his consent has all the reprehensible features of heterosexual rape and yet is not seen as constituting the common-law crime of rape. Indecent assault is defined as assault that by its nature or design is of an indecent character.¹⁷⁸

Section 51 of the Minimum Sentence Act¹⁷⁹ dictates that the *Masiya* case, now be referred to the High Court for sentencing and confirmation of the judgment. Should the Judge presiding concur with the judgment of Magistrate Lamprecht, this could open the floodgates for radical changes in the current definition of rape. Further, a judgment of this magnitude will put pressure on the legislature to pass the Criminal Law Sexual Offences Amendment Bill,¹⁸⁰

¹⁷³ www.anc.org.za:7 January 2005.

¹⁷⁴ www.anc.org.za:7 January 2005.

¹⁷⁵ www.anc.org.za:7 January 2005.

¹⁷⁶ Unreported regional court decision delivered on 11 July 2005.

¹⁷⁷ www.sabcnews.com:3 February 2005.

¹⁷⁸ Keyser *et al* 2006:7.

¹⁷⁹ Act 105 of 1997.

¹⁸⁰ 50 of 2003.

which is currently before parliament¹⁸¹ and will be discussed further in this dissertation at a later point.

There are clearly problems in the current law on rape, for example, the definition excludes male-on-male as well as female-on-female rape as well as anal penetration and does not include the insertion of foreign objects or forced oral sex as a form of sexual assault. Of further concern is that the current definition is gender specific and further excludes female-on-male rape. This may be due to the fact that rape is traditionally viewed as a crime perpetrated against women.

However in the American case of *People v Liberta*¹⁸² the court states that there is no reason, in principle, why a woman cannot commit rape. The court's reasoning can be summarized as follows:

The 'physiological impossibility of a female committing rape' argument was simply wrong. The court stated that this argument was based on the notion that a man could not engage in sexual intercourse unless he was sexually aroused and, if aroused, then was consenting to such intercourse and hence no rape occurred. However, since sexual intercourse occurred upon the penetration of the female organ by the male organ, even a slight one, the court stated that the degree of contact necessary for rape could be achieved without the male being aroused and thus without his consent.¹⁸³

Britain has already taken the fundamental step of legislating that the act of rape is indeed gender neutral. The Sexual Offences Act came to force in 1999 and stipulates that rape is:¹⁸⁴

*...vaginal penetration of a woman, or anal penetration of a person of either gender, without their consent, or with willful disregard to their consent.*¹⁸⁵

¹⁸¹ www.journalism.co.za: 18 January 2005.

¹⁸² 1984 64 NY 2d 152.

¹⁸³ Burchell 2005:707.

With the above in mind it is by no means surprising that society is disillusioned and concerned with the current governmental attitude toward sexual offences, which is displayed by the amount of vigilante revenge crimes portrayed in the media. As stated in *Carmichele v Minister of Safety and Security*:¹⁸⁶

Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women.

However South African law of rape is in the process of reform. This is especially evident in Project 107 of The South African Law Commission.¹⁸⁷

2.3.3 The South African Law Commission – Project 107

On the 7th of December 2002 the South African Law Commission¹⁸⁸ approved its Report and draft Bill on Sexual Offences covering both the substantive and procedural law. The intention of the SALC is to encourage the victims of sexual violence to utilize the criminal justice system and to increase the conviction rate whilst remaining within the bounds of the rights afforded to the alleged perpetrators.¹⁸⁹

The following legislative recommendations are included in the Draft Bill on Sexual Offences:¹⁹⁰

- Codification of the common law offence of rape. This offence addresses the unlawful and intentional penetration of a person by the genital organs of one person into the anus or genital organs of another person.¹⁹¹

¹⁸⁴ Saayman 2005:3.

¹⁸⁵ Saayman 2005:4.

¹⁸⁶ 2001 (4) SA 938 (CC) para 45.

¹⁸⁷ www.gov.co.za: 15 May 2005.

¹⁸⁸ Hereinafter referred to as the SALC.

¹⁸⁹ www.doj.gov.za: 15 May 2005.

¹⁹⁰ www.doj.gov.za: 15 May 2005.

¹⁹¹ www.doj.gov.za: 15 May 2005.

- The creation of the related offences of sexual violation and oral genital sexual violation. These offences respectively provide for the unlawful and intentional use of an object to penetrate a person's anus or genital organs; and the penetration of a person's mouth by persons or animal's genital organs.¹⁹²
- Rather than to rely on the absence of consent to the sexual act, the Commission recommends that penetrative sexual acts (rape, sexual violation and oral genital sexual violation) will be deemed to be unlawful if coercive or fraudulent circumstances are present or if circumstances exist in which a person is incapable in law to appreciate the nature of the act.¹⁹³
- The SALC is of the opinion that intentional non-disclosure by a person that he or she is infected by a life-threatening sexually transmissible infection in circumstances in which there is a significant risk of transmission of such infection to that person prior to sexual relations with another (consenting) person amounts to sexual relations by false pretences and would therefore constitute rape.¹⁹⁴
- Confirmation that a marital or other relationship is not a defense to the offence of rape, sexual violation or oral genital sexual violation.¹⁹⁵
- The creation of the offence of promoting a sexual offence with a child where a person manufactures or distributes an article that promotes a sexual offence with a child or where a person sells, supplies or displays to a child an article which is intended to perform a sexual act.¹⁹⁶
- The decriminalization of offences relating to children and mentally impaired persons who are prostitutes and in certain circumstances children benefiting from child prostitution, for example siblings in a child-headed household. A child is defined, for the purposes of this

¹⁹² www.doj.gov.za: 15 May 2005.

¹⁹³ www.doj.gov.za: 15 May 2005.

¹⁹⁴ www.doj.gov.za: 15 May 2005.

¹⁹⁵ www.doj.gov.za: 15 May 2005.

¹⁹⁶ www.doj.gov.za: 15 May 2005.

Act,¹⁹⁷ as a person younger than 18 years of age which is reflected further in the Constitution.¹⁹⁸

- The explicit criminalisation and severe penalisation of all role-players involved in child prostitution and the prostitution of mentally impaired persons. This offence targets pimps, clients, brothel-keepers and all other role-players involved in the commercial sexual exploitation of children.¹⁹⁹
- The organisation or promotion of child sex tours is specifically prohibited. This provision criminalizes the actions of both persons and bodies that facilitate such tours within or to South Africa in any way, whether by making travel arrangements for potential perpetrators or advertising such tours.²⁰⁰
- A provision is included which allows for extra-territorial jurisdiction in respect of all offences under the Act and not only those committed in relation to children. This means that the provisions contained in the Sexual Offences Bill²⁰¹ will be made applicable to South Africans traveling abroad.
- The State is to provide appropriate medical care, treatment and counseling to persons who have sustained physical, psychological or other injuries as the result of an alleged sexual offence.²⁰²
- The SALC has critically assessed the rules of evidence and procedure which govern and/ or are applied in sexual offence trials. In this regard the report recommends the following: The creation of a category of vulnerable witnesses which will include all complainants and child witnesses in sexual offence cases and which will afford them new protective measures, in addition to protective measures already provided for in the Criminal Procedure Act,²⁰³ (such as in camera hearings, the appointment of intermediaries and the use of closed-circuit television). The new protective measures would include the

¹⁹⁷ Section 1 Bill 50 of 2003.

¹⁹⁸ Of 1996.

¹⁹⁹ www.doj.gov.za: 15 May 2005.

²⁰⁰ www.doj.gov.za: 15 May 2005.

²⁰¹ www.doj.gov.za: 15 May 2005.

²⁰² www.doj.gov.za: 15 May 2005.

appointment of a support person to assist the witness during the trial as well as at pre-trial procedures. The abolition of the cautionary rule in relation to complaints in sexual offence cases and children, which currently requires or allows that such evidence should be treated with caution.²⁰⁴

- In relation to sentencing and the post-trial phase of the criminal procedure process in relation to sexual offences, the following recommendations are made: a court may upon conviction of a sexual offender subject him or her to a drug and alcohol rehabilitation order where it appears that the offender may benefit from treatment for the misuse of alcohol and drugs. A court may declare a sex offender a dangerous sexual offender and place him or her under long term supervision. Sex offender orders may prohibit a person convicted of a sexual offence from acting in a way that may cause harm to others, from frequenting specified locations and from contacting specified persons. The increase of the penalties for persons contravening the prohibition against publication of information or revealing the identities of complainants and witnesses in sexual offence cases.²⁰⁵

The Bill²⁰⁶ states in its preamble²⁰⁷ that South Africa has a high incidence of sexual offences and that women and children are particularly vulnerable to these types of crimes. The Bill²⁰⁸ goes further and stipulates that the South African common law and statutory law has failed to deal effectively and in a non-discriminatory fashion with activities related to sexual offences and have thereby failed to provide adequate protection to complainants.

²⁰³ Act 51 of 1977.

²⁰⁴ www.doj.gov.za: 15 May 2005.

²⁰⁵ www.doj.gov.za: 15 May 2005.

²⁰⁶ 50 of 2003.

²⁰⁷ *...Whereas there is a high incidence of sexual offences in the Republic which in turn has a particularly disadvantageous impact on vulnerable persons, the society and the economy and whereas women and children are particularly vulnerable to sexual offences including prostitution and whereas the South African common law and statutory law fail to deal effectively and in a non discriminatory manner with activities associated with sexual offences.....it is the purpose of this Act to afford complainants of sexual offences the maximum and least traumatizing protection that the law can provide.....*

²⁰⁸ 50 of 2003.

The purpose of the Bill²⁰⁹ lies, according to the preamble, in providing complainants of sexual offences with the least traumatizing protection, which the law can provide, and to strengthen the State's commitment to the eradication of the pandemic of sexual offenses committed by its citizens in and outside its borders.²¹⁰

The Bill,²¹¹ if enacted, will dramatically alter the definition of rape in South Africa. According to clause 2(1) of the Bill²¹² the new definition of rape will read as follows:

Any person, who intentionally and unlawfully 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.

Sexual penetration is defined in clause 1 of the Bill as:

Penetration to any extent by the genital organs of one person into or beyond the anus, mouth or genital organs of another person or any object, including any part of the body of an animal, or part of the body of one person into or beyond the anus or genital organs of another person in a manner which simulates sexual intercourse but does not include an act which is consistent with sound medical practices which is carried out for proper medical purposes

It is worth noting that the above definition is gender neutral and includes anal penetration as an act of rape. For the first time in South African law a woman

²⁰⁹ 50 of 2003.

²¹⁰ Bill 50 of 2003:Preamble.

²¹¹ 50 of 2003.

²¹² 50 of 2003.

may now be found guilty of the act of rape. This issue is however not without criticism. Temkin²¹³ submits in relation to this issue:

...as sexual abuse is mainly perpetrated by men, there is an argument that an offence of rape should reflect this and that rape should continue to be an offence that can in be perpetrated only by a male, albeit that women can be liable as accessories.

Of further interest is clause 2(2)(b) which states that an act which causes penetration is *prima facie* unlawful if it is committed under false pretenses or by fraudulent means. Clause 4(c) stipulates that failing to disclose the fact that one is infected with a life threatening, sexually transmissible disease, which is transmissible by the act, to a consenting partner constitutes penetration by fraudulent means and therefore constitutes an act of rape. Not surprisingly this has caused ferocious legal debate. It is argued that within the common law of rape consent not only has to relate to the identity of the person and the nature of the act but to all the risks involved in undertaking a specific act.²¹⁴ Despite objection the SALC opted to include the intentional non-disclosure of transmissible sexual diseases as a form of unlawful conduct constituting rape, however the SALC did included a provision that there must be a 'significant risk of transmission' in order to invoke section 4(c).

Clause 2(5)(f) of the Bill will lower the age of consent to sexual intercourse to twelve years in both sexes. Whether or not this falls in line with section 28 of the Constitution²¹⁵ remains to be seen.

Schedule 1 of the Bill²¹⁶ provides guiding principles to be considered in the application of the Act, should it be promulgated, and the adjudication of sexual offences generally. The provisions of this schedule read as follows:

- Complainants should not be discriminated against, either directly or indirectly, on the grounds of race, color, ethnic or social origin, birth status, sex, gender, sexual orientation, age, and developmental

²¹³ Burchell 2005:725.

²¹⁴ *Waring and Gillow Ltd v Sherborne* 1904 TS 340 at 344.

²¹⁵ Of 1996.

level, disability, religion, conscience, belief, culture or language. Effectively this guideline rests on the same grounds as those of section 9 of the Constitution.²¹⁷

- Complainants should be treated with dignity and respect.
- Complainants should be ensured access to the mechanisms of justice.
- Complainants should be informed of their rights and the procedures within the criminal justice system which affect them.
- Complainants should have the right to express an opinion, to be informed of all decisions, and to have their opinion taken seriously in any matter affecting them.
- In addition to all due process and constitutional rights, complainants should have the right –
 - (i) to have present, at all decisions affecting them, a person or persons important to their lives;
 - (ii) to have matters explained to them in a clear, understandable manner appropriate to their age and in a language and manner which they understand;
 - (iii) to remain in the family, where appropriate, during the investigation and whilst awaiting a final resolution of the matter and, if a child is removed from the family, to have the placement periodically reviewed;
 - (iv) to have procedures dealt with expeditiously in timeframes appropriate to the complainant and the offence.
- Complainants should have the right to confidentiality and privacy and to protection from publicity regarding the offence. In the matter of *S v Zuma*²¹⁸ the complainants' identity was kept secret and the court ordered her image not to be published without her permission or that of the National Prosecuting Authority.

²¹⁶ 50 of 2003.

²¹⁷ Of 1996.

²¹⁸ At time of writing an unreported judgement delivered on 8 May by Judge Van Der Merwe.

- The vulnerability of children should entitle them to speedy and special protection and provision of services by all role-players during all phases of the investigation, the court process and thereafter.
- Since the family and the community are central to the well-being of a child, consideration should be given, in any decisions affecting a child, to-
 - (i) ensuring that, in addition to the child, his or her family, community and other significant role-players are consulted;
 - (ii) the extent to which decisions affecting the offender will affect the child, his or her family and community;
 - (iii) the particular relationship between the offender and the child;
 - (iv) keeping disruptive intervention into child, family and community life to a minimum in order to avoid secondary victimization of the child.
- Restorative and rehabilitative alternatives should be considered and applied unless the safety of the complainant and the interests of the community requires otherwise.
- A person who commits a sexual offence should be held accountable for his or her actions and should be encouraged to accept full responsibility for his or her behavior.
- In determining appropriate sanctions for a person who has been found guilty of committing a sexual offence-
 - (i) the sanctions applied should ensure the safety and security of the victim and the community;
 - (ii) the sanctions should promote the recovery of the victim and the restoration of the family of the victim and the community;
 - (iii) where appropriate, offenders should make restitution which may include material, medical or therapeutic assistance to victims and their families or dependants;
 - (iv) the child sexual offender should receive special consideration in respect of sanctions and rehabilitation; the possibility of rehabilitating the sexual offender should be taken into account in

considering the long-term goal of safety and security of victims, their families and communities;

- (v) the interests of the victim should be considered in any decision regarding sanctions.
- In order to avoid systematic secondary victimization of the victim of sexual offences, binding inter-sectoral protocols following an interdisciplinary approach should be followed.
- All professionals and role-players involved in the management of sexual offence cases should be properly and continuously trained after going through a proper selection and screening process.
- Cultural diversity should be taken into account in all matters pertaining to the victim, the offender and to their communities. The existence of cultural differences should be no justification for or license to commit a sexual offence or to exclude a criminal justice process.

2.3.4 Criminological aspects of rape

2.3.4.1 Why do men rape?

Sociobiology explains the reasons for rape from an evolutionary aspect.²¹⁹ Sociobiologists aver that men rape as a method of passing on their genetic traits to the victim who is seen as a desirable mate. The aim therefore is to impregnate the victim.²²⁰ This argument lacks substance for the following reasons:

- It is evident that some men do not ejaculate during rape and many will ejaculate outside the vaginal orifice.²²¹
- The elderly and the very young, who are not capable of procreation, are often victims of rape.

²¹⁹ Vetten 2005:1.

²²⁰ Vetten 2005:2.

²²¹ Vetten 2005:2.

- Many rapists will kill the victim thereby defeating the purpose of impregnation.²²²

Vetten, the Gender Co-coordinator of the Center for the Study of Violence and Reconciliation, suggests that men rape as an expression of power and that the crime is a representation of the unequal power balance between men and women.²²³

Further research suggests²²⁴ that rape may be caused by societal attitudes which contribute to the belief that women seek or provoke rape. It has been further submitted that South Africa's past culture of violence and female subordination may be a further contributing factor towards the high incidence of rape.²²⁵

Rape is a very particular type of assault. The act, by the current definition involves the insertion of the penis into the vagina of an unwilling woman. This bodily invasion and the close proximity of the accused and the complainant, during the commission of the offence, completely destroys the victim's right to privacy, dignity and security of person. Besides this obvious desecration, the effects of rape are considerable. There is the fear of harm during the attack and the subsequent fear of any venereal disease or HIV, which may have been contracted from the accused. The victim may become pregnant, as a result of rape, and will then be forced to make the heart-wrenching decision as to whether to carry the pregnancy to term or to abort the foetus in terms of the Choice on Termination of Pregnancy Act.²²⁶ This Act specifically allows the performance of an abortion, in section 2(b)(iii), up to and including the 20th week of gestation if the pregnancy is as a result of rape.²²⁷ After charging the accused, the victim is then often subjected to secondary victimization, during

²²² Vetten 2005:3.

²²³ Vetten 2005:3.

²²⁴ Robertson 2004:1.

²²⁵ Robertson 2004:3.

²²⁶ Act 92 of 1996.

²²⁷ *2(b) From the 13th up to and including the 20th week of gestation if a medical practitioner, after consultation with the woman, is of the opinion that..... (iii) the pregnancy is as a result of rape or incest....*

the trial, in which all role-players are often not sympathetic enough to the physical and psychological pain she has suffered.

Many victims do not even report the incident due to the unacceptable level of victimization attached to this type of offence. There is a common fallacy that a woman is raped because she somehow asked for it which lends validity to the idea that the act of rape is catalyzed by the lust or sexual desire of the accused. Women are often accused of seducing the rapist by their manner of dress and public mannerisms. Suggesting that a rapist attacks due to lust is however tantamount to suggesting that an alcoholic drinks because he is thirsty.²²⁸

It is important to understand the real reasons for rape in order to negate the unfortunate stereotype that the victim must have somehow enticed or welcomed the sexual attention. As Kadish²²⁹ submits:

Since it is commonly assumed that the offender is committing his offense to gratify a sexual need, and since he is directing his sexual assault toward a particular victim, it can be further assumed that the victim must have done something, either deliberately or inadvertently, to arouse such desire in the offender. Victim credibility is impeached, and offender accountability is diminished, by focusing on the sexual aspects of the victim's appearance and behavior: how she looked, how she was dressed, and how she acted. One of the most persistent and insidious stereotypes regarding rape is that of the seductive or provocative female who 'only got what she asked for'. In reality, victim selection is determined primarily by availability and vulnerability rather than sexual desirability, and anyone could be a victim of sexual assault. Rape happens not only to young adult women but to both sexes and all age groups, from infant to the aged.

There are various rape 'myths' perpetuated by a lack of knowledge and understanding, for example:

²²⁸ Burchell 2005:700.

1. Rape is virtually impossible if the victim struggles hard enough.²³⁰ However, it is a known fact that the majority of victims are caught off-guard and are usually intimidated by the fear of physical harm.
2. A rapist is most often a stranger to the victim. According to research by the United States of America's Department of Justice, as much as 70% of rapists are known to the victim.²³¹ In the majority of cases the victim is related to the accused.²³²
3. The majority of rape offenders are black. Rapist's know no colour boundary and the majority of offenders rape within their own race group.²³³
4. If there is no evidence of sperm or acid phosphatase²³⁴ there is no proof of intercourse, however it is also obvious that ejaculation does not occur in every rape be it due to sexual dysfunction, retarded ejaculation, premature ejaculation, the use of a condom or the ejaculation outside of the body orifice of the victim.
5. If there is an absence of physical injury the rape could not have occurred, yet conventionally only 10%-30% of genital injuries are visible to the naked eye and a further 87% are visible using colposcopic²³⁵ magnification.²³⁶
6. Sexual assault only occurs at night. This is a fallacy since a rape can occur at any time although the occurrence is more prevalent between 8pm and 4am.²³⁷

²²⁹ Burchell 2005:701.

²³⁰ According to the International Criminal Investigative Training Assistance Program-US Department of Justice.

²³¹ According to the International Criminal Investigative Training Assistance Program-US Department of Justice.

²³² Keyser *et al* 2006:5.

²³³ According to the International Criminal Investigative Training Assistance Program-US Department of Justice.

²³⁴ A by-product produced by the degeneration of sperm.

²³⁵ A colposcope is an instrument used to examine the uterine cervix- Collins English dictionary 2004:231.

²³⁶ Shepard 2003:87.

²³⁷ According to the International Criminal Investigative Training Assistance Program-US Department of Justice.

2.3.4.2 Rapist typologies

Although much academic research has been conducted in the field of profiling and creating type-sets of rapist behavior it is important to bear in mind that a rapist is not a creature of scholarly classification and may therefore fall into more than one classification as discussed hereunder, however it is useful to be able to sketch a general picture of a perpetrator when attempting to apprehend an offender.

Hall²³⁸ submits that the following types of rapists may be identified:

- Type one: This subject is aroused by deviance which occurs in the thoughts he has connected to women. This rapist is extremely impulsive in action.²³⁹
- Type two: This subject is marked by cognitive disorders and will usually assume that women wish to be raped and that rape is a form of conquest and a manner of displaying masculinity.²⁴⁰
- Type three: This rapist is motivated by anger and emotional lack of control. This type displays misplaced anger towards women and views rape as a method of repaying these women for an imagined transgression.²⁴¹
- Type four: This type of offender is likely to be a repeat offender. It is likely that he was emotionally or sexually abused in his youth and has difficulty establishing normal human relations.²⁴²

Hazelwood's behavioral typology divides rapists into 'selfish' and 'unselfish' types of rapists.²⁴³ The 'selfish' rapist is characteristically concerned only for himself and his own feelings. He will atypically be derogatory towards the victim and will refrain from kissing her or trying to arouse her to any degree

²³⁸ www.psychologytoday.com: 23 January 2005.

²³⁹ Hall 2003:3.

²⁴⁰ Hall 2003:3.

²⁴¹ Hall 2003:4.

²⁴² Hall 2003:5.

²⁴³ www.faculty.ncwc.edu: 23 January 2005.

before penetration.²⁴⁴ This type of rapist will usually anally rape and then force the victim to fellate him.²⁴⁵

Contrastingly the 'unselfish' rapist is often caring and involves the victim in the act. He will act like a consensual lover and will usually be complimentary and apologetic towards the victim.²⁴⁶ This rapist usually kisses the victim and will often perform cunnilingus on her before he penetrates her in order to lubricate the entrance and thereby cause less pain for the victim.²⁴⁷

Groths²⁴⁸ motivational typology divides rapists into the following categories:

- Power-reassurance rapist: This subject will usually use a surprise attack method and will generally seek victims of their known age. They may contact the victim again after the rape and often keep written accounts of their attacks and will keep souvenirs from the victims. This type of rapist will usually rape every 7-15 days as he obtains a feeling of adequacy and social power through the domination of the victim.²⁴⁹
- Power-assertive: This type of rapist is exceedingly confident of his own sexual ability. He will choose victims of his own age and will usually transport the victim to a pre-selected location in order to rape her. He will rape when the need arises within him and usually follows a 20-25 day cycle. He is extremely selfish and will leave the victim heavily traumatized. The rape is a method of confirming his 'macho' image to himself.²⁵⁰
- Anger-retaliation: This rapist rapes to get even with women for real and imagined wrongs committed against him. Rape is used therefore as a method of punishment. He will often attack a victim older than himself who is a representation of another person. This rapist feels relieved after the attack, but will attack again if the anger surfaces, usually at six month intervals.²⁵¹

²⁴⁴ www.faculty.ncwc.edu: 23 January 2005.

²⁴⁵ www.faculty.ncwc.edu: 23 January 2005.

²⁴⁶ www.faculty.ncwc.edu: 23 January 2005.

²⁴⁷ www.faculty.ncwc.edu: 23 January 2005.

²⁴⁸ www.faculty.ncwc.edu: 23 January 2005.

²⁴⁹ www.faculty.ncwc.edu: 23 January 2005.

²⁵⁰ www.faculty.ncwc.edu: 23 January 2005.

²⁵¹ www.faculty.ncwc.edu: 23 January 2005.

- Anger-excitation: Commonly called the sadistic rapist. He is stimulated by the victims' pain. He will display brute force and the primary motivation is the infliction of pain. He will usually bind the victim and will bite and lick her flesh. In these types of rapists a drug and/or alcohol problem may be present. His patterns and intervals are difficult to predict as he rapes whenever he is sufficiently angered.²⁵²

The Massachusetts Treatment Center Typology²⁵³ is perhaps the most accurate and widely used typology.²⁵⁴ The Center was, for years, a prison for the sexually dangerous and developed the following rapist typologies:

- Type 1: Opportunistic assertive – This type is driven by an opportunity which arises in another situation such as a robbery. This type is impulsive, indifferent and callous.²⁵⁵
- Type 2: Opportunistic non-assertive – Similar to the opportunistic assertive type but less socially competent and has a long history of impulsive behavior.²⁵⁶
- Type 3: Pervasively angry – The subject has a non-sexual anger at the whole world and is quick tempered and/or psychopathic. No planning or inadequate planning is involved in the attack.²⁵⁷
- Type 4: Sexual sadistic non-fantasy – Demonstrates sexual and aggressive elements. Usually married with a large collection of sexual paraphernalia. Will view the victims' resistance as a game.²⁵⁸
- Type 5: Sexual sadistic fantasy – The subject acts out a well rehearsed fantasy with the victim.²⁵⁹
- Type 6: Sexual non-sadistic non-assertive – Attempts to prove sexual power and prowess to the victim. Lacks self control and believes that the victim will develop emotional feelings/love towards him.²⁶⁰

²⁵² www.faculty.ncwc.edu: 23 January 2005.

²⁵³ www.faculty.ncwc.edu: 23 January 2005.

²⁵⁴ www.faculty.ncwc.edu: 23 January 2005.

²⁵⁵ www.faculty.ncwc.edu: 23 January 2005.

²⁵⁶ www.faculty.ncwc.edu: 23 January 2005.

²⁵⁷ www.faculty.ncwc.edu: 23 January 2005.

²⁵⁸ www.faculty.ncwc.edu: 23 January 2005.

²⁵⁹ www.faculty.ncwc.edu: 23 January 2005.

²⁶⁰ www.faculty.ncwc.edu: 23 January 2005.

- Type 7: Sexual non-sadistic assertive – Socially competent rapist who will select and stalk a victim. This subject tends towards erotomania.²⁶¹
- Type 8: Vindictive non-assertive – Rapes to humiliate and degrade the victim. Chooses victims who assert a strong, individual character. Use much profanity during the attack and resistance from the victim simply escalates the violence used.²⁶²
- Type 9: Vindictive assertive – This rapist is usually married or seriously involved in a volatile relationship in which he frequently abuses his partner. The attack is often sadistic in nature with much biting, cutting or tearing of body parts.²⁶³

2.3.4.3 Rape trauma syndrome

Rape trauma syndrome is similar to post-traumatic stress disorder and is suffered by the victim of rape after the attack. The symptoms thereof are both physical and psychological in nature. It is important to note that rape trauma syndrome is a normal reaction to an abnormal stress and is not a form of mental illness.²⁶⁴

The use of the term rape trauma syndrome (hereinafter referred to as RTS) stems from research conducted by Burgess and Holmstrom in the 1970's²⁶⁵ after interviewing 129 rape survivors at hospital emergency wards. The symptoms, noted in their work, are listed hereunder and may overlap and may not appear. Not all rape survivors suffer from this disorder. The lack of this type of behavior in a survivor is not to be seen as evidence that the rape did not occur.

The symptoms of this disorder display as follows:

²⁶¹ www.faculty.ncwc.edu: 23 January 2005.

²⁶² www.faculty.ncwc.edu: 23 January 2005

²⁶³ www.faculty.ncwc.edu: 23 January 2005.

²⁶⁴ Combrinc 2004:25.

²⁶⁵ Combrinc 2004:25.

1. Physical symptoms:

- Immediately after the attack the victim is likely to be mentally confused and will feel cold and nauseous.²⁶⁶
- Pregnancy may result from the rape.
- Irregular or painful periods, vaginal discharge, bladder infections and sexually transmitted diseases.²⁶⁷
- Bleeding and/or infections resulting from tears and/or cuts in the vaginal area and/or rectal area.
- Throat irritations due to forced oral sex.²⁶⁸
- Tension headaches.
- Sleep disturbances.
- Eating disturbances in the form of eating less or more than prior to the attack.²⁶⁹

2. Behavioral symptoms:

- Crying more than usual.
- Difficulty concentrating.
- Feelings of agitation and restlessness.
- Social phobias.
- Feelings of not wanting to be left alone for any length of time.
- Stuttering and stammering occurs in speech pattern after attack.
- Being easily startled or frightened.
- Losing interest in activities which were previously of importance.
- Problems surfacing in interpersonal relationships which were previously stable.
- Loss of interest in sex or sexual pleasure.
- Problems at work or school such as truancy or absenteeism.
- Increase in use of alcohol and/or drugs.
- Increase in washing and bathing to the point of obsession. This results from the victims feelings of being dirty.

²⁶⁶ Hansson 1992:1.

²⁶⁷ Hansson 1992:1.

²⁶⁸ www.uct.ac.za: 30 January 2005.

²⁶⁹ Combrinc 2004:25.

- Denial of the rape and all related aspects.²⁷⁰

3. Psychological symptoms:

- Intrusive thoughts concerning the rape.
- Intrusive thoughts revolving around a feeling of being dirty and/or contaminated by the rape.
- Flashbacks to the rape and the feelings experienced.
- Nightmares about the rape itself.²⁷¹
- Fear of things that remind the victim of the rape.
- Loss of memory concerning parts or all of the rape. This disorder is called psychogenic amnesia.²⁷²
- Feelings of shortened life expectancy.
- Depression and suicidal thoughts.
- Feelings of humiliation and shame.
- Feelings of guilt and self-blame.²⁷³
- Feelings of helplessness and loss of self respect and self confidence.

The presentation of expert evidence on the emotional and psychological effects of sexual assault for the purpose of sentencing is fairly common-place in South Africa; however the acceptance of RTS is a recent phenomenon. In *S v Daniels*²⁷⁴ the complainant was abducted, robbed and raped repeatedly by four men. She was subsequently assessed by a clinical psychologist who testified to the effect of RTS, to which the Court made the following statement:

The state led evidence that highlighted the horror of this trauma in a very insightful manner. I accepted the clinical psychologists' testimony. She submitted a detailed report, and this as well as her testimony helped the Court to understand, in greater depth, the consequences of this cruel assault. Her description of what is appropriately termed 'Rape Trauma Syndrome' made sense and

²⁷⁰ Combrinc 2004:26.

²⁷¹ www.uct.ac.za: 30 January 2005.

²⁷² Combrinc 2004:25.

²⁷³ Hansson 1992:3.

²⁷⁴ Unreported judgment, Cape Provincial Division SS 162/92.

helped me to understand the variety of psychological problems as manifestations of a recognized pattern.

The presentation of evidence on RTS may be useful to explain the complainants' actions proceeding a rape which may otherwise seem irrational or unreasonable.²⁷⁵ As an example, consider the matter of *S v Hopkins*²⁷⁶ in which the complainant was cross-examined on the fact that after the rape she approached the accused and offered to withdraw the charges against him which obviously cast some doubt as to her version. The State however led evidence from her psychologist who explained that the complainant was in the denial phase of RTS in which she was attempting to pretend that the rape did not occur which explained her offer to withdraw the charges. The Court eventually accepted the complainants' version of events.

It is a great advancement in prosecution and in the defense of women's rights that the courts seem to be accepting of the adverse symptoms of RTS.

2.3.4.4 Compulsory HIV testing

The Compulsory HIV Testing of Alleged Sexual Offenders Bill²⁷⁷ states as its purpose the provision of a speedy and uncomplicated mechanism whereby, the victim of a sexual offence can apply to have the alleged sexual offender tested for HIV and to have such results disclosed to them.²⁷⁸

The Bill²⁷⁹ emanates from the South African Law Commission's Forth Interim Report on *Aspects of Law Relating to Aids*. The report noted the particular vulnerability under which women and children labour when they are victims of sexual offences. The Commission concluded that there is a definite need for legislation to provide for compulsory HIV testing of alleged offenders. The

²⁷⁵ Combrinc 2004:26.

²⁷⁶ Unreported judgement. Cape Provincial Division A959/93.

²⁷⁷ Bill 10 of 2003.

²⁷⁸ Bill 10 of 2003.

²⁷⁹ Bill 10 of 2003.

Bill²⁸⁰ seeks to enable a victim of an alleged sexual offence to apply to have the alleged offender tested for HIV/AIDS in order for the offender to make life altering choices if the virus has indeed been contracted.

According to clause 2 of the Bill²⁸¹ the police official to whom the alleged sexual offence is reported, must hand a notice containing the prescribed information regarding the compulsory testing, to the victim or any interested person. Further the police official must explain the contents of such notice.

Clause 3 of the Bill²⁸² sets the requirements for the application for HIV testing of the alleged offender, and reads as follows:

- 3(1) (a) Within 50 days after the alleged commission of a sexual offence, any victim, or any interested person on behalf of a victim, may apply to a magistrate in the prescribed form for an order that the alleged offender be tested for HIV.
 - (b) If the application is brought by an interested person, such application must be brought with the written consent of the victim, unless the victim is-
 - (i) under the age of 14;
 - (ii) mentally ill;
 - iii) unconscious;
 - (iv) a person in respect of whom a curator has been appointed in terms of an order of court; or
 - (v) a person whom the magistrate is satisfied is unable to provide the required consent.
- (2) (a) Every application must-
- (i) set out grounds on which it is alleged that a sexual offence was committed against the victim;
 - (ii) if it is brought by an interested person, state the nature of the relationship between the interested person and the victim, and if

²⁸⁰ Bill 10 of 2003.

²⁸¹ Bill 10 of 2003

²⁸² Bill 10 of 2003.

the interested person is not the spouse or a family member of the victim, the reason why the application is being made by such interested person;

- (iii) state that less than 50 days has elapsed from the date on which it is alleged that the offence in question took place.
- (b) The matters referred to in paragraph (a) must be verified by the victim or the interested person, as the case may be, by affidavit or solemn declaration.
- (3) The application must be made as soon as possible after the charge has been laid, and may be made before or after the arrest has been affected.
- (4) The application must be handed to the investigating officer, who must as soon as reasonably practical submit the application to a magistrate of the magisterial district in which the sexual offence is alleged to have occurred.

According to clause 4 of the Bill²⁸³ the magistrate, if satisfied that there is *prima facie* evidence that the sexual offence took place and that the victim was exposed to bodily fluids of the offender and that not more than 50 days has elapsed from the commission of the offence, must order the collection of two body specimens from the offender and the subsequent testing for HIV and the disclosure of those results to the victim.

Interestingly, according to clause 7²⁸⁴ the results of the testing are not admissible in civil or criminal proceedings. Despite this fact the Bill is designed to alleviate the vulnerability of the victims of sexual offences and is considered one of the more progressive pieces of legislation in South Africa. Whether this Bill will be promulgated remains to be seen but it would serve as a productive companion to the Criminal Law (Sexual Offences) Amendment Bill²⁸⁵ especially considering that one of the victim's main fears after a rape is whether or not she has contracted HIV/AIDS. The Criminal Law (Sexual

²⁸³ Bill 10 of 2003.

²⁸⁴ Bill 10 of 2003.

²⁸⁵ Bill 50 of 2003.

Offences) Amendment Act is a progressive legislative step which the author submits will be well complimented by another revolutionary statute in the form of the Compulsory HIV Testing Bill.

2.4.1 Female genital mutilation

On the 5th of March 2004, Amnesty International launched a global campaign to eradicate violence against women.²⁸⁶ One of the main issues on the agenda was the topic of female genital mutilation.²⁸⁷ Although not considered as a sexual crime in South Africa it can certainly be considered as unlawful conduct against *boni mores*. This type of action affects the rights of women and although not completely relevant in South Africa, it is viewed as a definite problem on the African continent.

2.4.2 What is Female genital mutilation?

The practice of FGM is thought to be over 4000 years old.²⁸⁸ FGM originated in Africa and remains a cultural versus a religious practice.²⁸⁹ Female genital mutilation, according to the American Academy of Pediatrics, refers to the removal of part, or all, of the female genitalia. The most severe form is referred to as infibulation which refers to the removal of the clitoris and the labia minora as well as the cutting of the labia majora to create a raw surface which is then stitched together to form a cover over the vagina. A small opening is left for urination and the flow of menstrual blood.²⁹⁰

Clitorectomy involves the excision of the skin surrounding the clitoris or part of or the entire clitoris.²⁹¹

²⁸⁶ www.amnesty.org: 1 February 2005.

²⁸⁷ Hereinafter referred to as FGM.

²⁸⁸ Van Rensburg 2004:38.

²⁸⁹ Van Rensburg 2004:38.

²⁹⁰ www.amnesty.org: 1 February 2005.

²⁹¹ Van Rensburg 2004:38

Excision refers to the removal of the entire clitoris and/or part of the labia minora.²⁹²

The type of mutilation, age at which it is carried out and the way in which it is performed varies according to ethnic group and country. The procedure can be performed at any stage between birth and before the first pregnancy but is usually carried out between the ages of four and eight.²⁹³ The procedure may be carried out in a variety of locations and is most often performed by a traditional midwife or an elder of the community. On rare occasions it is performed by a qualified doctor.²⁹⁴

On occasion the genital area is anesthetized or numbed with cold water, however most often no steps are taken to reduce the pain associated with the procedure. The mutilation is performed using broken glass, scissors, razor blades or other cutting instruments.²⁹⁵ The two parts of the labia majora are stitched together with thorns or stitches and the legs of the girl are then bound for 40 days in order for a thin, membranous covering to form over the vagina, which will later be torn open by the girls' husband on her wedding night.²⁹⁶

2.4.3 Physical effects of female genital mutilation

Due to risk of infection the practice of FGM may lead to death in extreme circumstances. It is further possible that the opening to the bladder may be closed and urine is thus retained leading to serious infection. The most problematic area of FGM is the risk of HIV transmission²⁹⁷ as the same blade may be used on various girls', without sterilization of the cutting instrument, between victims.

²⁹² Van Rensburg 2004:38

²⁹³ www.amnesty.org: 1 February 2005.

²⁹⁴ www.amnesty.org: 1 February 2005.

²⁹⁵ www.amnesty.org: 1 February 2005.

²⁹⁶ www.amnesty.org: 1 February 2005.

²⁹⁷ Van Rensburg 2004:39.

Infibulation can cause long term side effects such as chronic urinary tract infections, kidney damage, pelvic infections, infertility, keloid scarring and dermoid cysts.²⁹⁸ Sexual intercourse may also be painful as the scar tissue must first be dilated and/or cut before intercourse can occur.²⁹⁹ The experience of childbirth is frustrated by the small vaginal opening which must usually be enlarged to allow the head of the baby to emerge.³⁰⁰

2.4.4 Psychological effects of female genital mutilation

According to Amnesty International there have been no scientific inquiries into the psychological effects of FGM. However personal accounts from women who have been subjected to this treatment indicate feelings of anxiety, terror, humiliation and betrayal.³⁰¹ These feelings may well have negative, long-term effects.

2.4.5 Why female genital mutilation is practiced?

The following are amongst the reasons advanced for the practice of FGM:

- Cultural identity.
- Gender identity.
- Control of a woman's sexuality and reproductive functions.
- Beliefs concerning hygiene and health.
- Religious beliefs.
- The belief that an uncircumcised clitoris may lead to masturbation or lesbianism.³⁰²
- There is a belief in some tribes that the clitoris is a poisonous organ which will cause the death of a man if it comes into contact with his penis.³⁰³

²⁹⁸ www.amnesty.org: 1 February 2005.

²⁹⁹ www.amnesty.org: 1 February 2005.

³⁰⁰ Van Rensburg 2004:39.

³⁰¹ www.amnesty.org: 1 February 2005.

2.4.6 Geographical occurrence of female genital mutilation

- In Benin it is estimated that 50% of females undergo excision.³⁰⁴
- 70% of women in Burkino Faso undergo excision.³⁰⁵
- In Camaroon it is approximated that 20% of the female population undergo clitoridectomy³⁰⁶ and excision.³⁰⁷
- The Central African Republic reports that 50% of women undergo clitoridectomy and excision.³⁰⁸
- In Chad 60% of women are infibulated.³⁰⁹
- In Djibouti 98% of women experience either excision or infibulation.³¹⁰
- 97% of Egyptian women undergo clitoridectomy, excision or infibulation.³¹¹
- In Ethiopia 90% of women undergo excision or clitoridectomy.³¹²
- Mali reports a 94% incidence of clitoridectomy amongst its female population.³¹³
- Somalia and the Sudan report a 98% incidence of infibulation.³¹⁴

The incidence in South Africa is unknown as the practice has not been studied, however it is believed that FGM occurs in the Limpopo Province (specifically in Mapulaneng) and, although not a part of South Africa, in areas of Lesotho.³¹⁵

In Egypt it is forbidden to perform circumcision on females either in hospitals or private clinics.³¹⁶ The procedure may only be performed where a

³⁰² Van Rensburg 2004:39.

³⁰³ Van Rensburg 2004:38.

³⁰⁴ www.amnesty.org: 1 February 2005.

³⁰⁵ www.amnesty.org: 1 February 2005.

³⁰⁶ Removal of part or the entire clitoris- Collins English dictionary 2004:242.

³⁰⁷ www.amnesty.org: 1 February 2005.

³⁰⁸ www.amnesty.org: 1 February 2005.

³⁰⁹ www.amnesty.org: 1 February 2005.

³¹⁰ www.amnesty.org: 1 February 2005.

³¹¹ www.amnesty.org: 1 February 2005.

³¹² www.amnesty.org: 1 February 2005.

³¹³ www.amnesty.org: 1 February 2005.

³¹⁴ www.amnesty.org: 1 February 2005.

³¹⁵ Van Rensburg 2004:38

³¹⁶ Order No 261 of 1996 of the Minister of Health and Population.

gynecological problem exists and that is the only treatment option available.³¹⁷ However, as shown above, Egyptians disregard this order and continue to circumcise their women as is evident in the high rate of reported incidence.

Ghana prohibits excision, infibulation and mutilation of the genital area of women and imprisons offenders for periods not less than 3 years.³¹⁸ This prohibition has effectively lowered the rate of FGM to 15% of the population.³¹⁹

Guinea prohibits any form of mutilation except where performed on medical grounds and where no other treatment option is available.³²⁰

The Tanzanian Sexual Offences Special Provision Act³²¹ penalizes the mutilation of any female person. This is evident in Tanzania's low incidence of FGM.

2.5 Domestic abuse/violence

The notion of women being subject to subordination is by no means a novel idea in our society, there are many such examples of traditions inherited from the Roman-Dutch law on which South Africa's common law is based.

Law in the Roman Empire, governing domestic violence, was introduced around the second and third centuries BC.³²² The basic principle underlying these regulations was the notion that the power within a household vested in the husband and that the wife, children and slaves were mere possessions, subject to the control of the head of the household.³²³ Due to this notion of marital possession the law of 'reasonable chastisement' was enacted which

³¹⁷ Order No 261 of 1996 of the Minister of Health and Population.

³¹⁸ Act 484 of 1994.

³¹⁹ www.amnesty.org: I February 2005.

³²⁰ Decree No D/96/205/PRG/SGG.

³²¹ Act 4 of 1998.

³²² www.csvr.org.za: 30 June 2005.

³²³ www.csvr.org.za: 30 June 2005.

allowed the husband to physically punish his wife for any transgressions.³²⁴ This notion is not entirely irrelevant in the South African context if one considers that the notion of marital power was only removed from our law in 1984 by the Matrimonial Property Act,³²⁵ whilst rape within a marriage was only criminalized in 1993.³²⁶

It is estimated that between one in four and one in six women are subject to violence within a domestic relationship.³²⁷ It can no longer be denied that domestic violence is alive and thriving in South Africa and is often closer to home than we would like to believe. This is often a crime shrouded in secrecy and leads to very real disempowerment of women on a physical, emotional and psychological level.³²⁸

The Bill of Rights contained in Chapter 2 of the Constitution³²⁹ entrenches the right of every person to equality and to freedom and security of person. This right imposes a duty on all government institutions to protect the security of all people and yet the increase in the incidence of domestic violence infringes on the right of all people to freedom and security of person. In *Christian Education South Africa v Minister of Education*³³⁰ it was held, by the Court, that the State is obliged to take appropriate steps to reduce violence in public, as well as, private life. The obligation which rests on the state may well imply a positive obligation on authorities to take steps to protect an individual whose life is threatened by the criminal acts of another person.³³¹ Having realized that the Prevention of Family Violence Act³³² was ineffective, the South African government took the fundamental, legislative step of promulgating the Domestic Violence Act 116 of 1998.³³³

³²⁴ www.csvr.org.za: 30 June 2005.

³²⁵ Section 11 of the Matrimonial Property Act 88 of 1984.

³²⁶ Section 5 of the Prevention of Family Violence Act 133 of 1993.

³²⁷ www.iss.co.za: 30 May 2005.

³²⁸ Legal Education and Development Training Manuel- Aspects of Gender Law:31.

³²⁹ Of 1996.

³³⁰ 2000 (4) SA 757 (CC).

³³¹ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

³³² Act 133 of 1993.

³³³ Legal Education and Development Training Manuel- Aspects of Gender Law:31.

The preamble of the Domestic Violence Act³³⁴ describes domestic violence as a social evil and gives recognition to the vulnerability of its victims. The purpose of the Act³³⁵ lies in the provision of the maximum protection affordable by the State. The Act does not criminalize the act of domestic violence but provides a civil remedy in terms of a protection order. Nothing then prevents the victim from laying criminal charges in terms of assault, assault with the intent to do grievous bodily harm, attempted murder, rape, pointing a firearm, malicious damage to property, *crimen inuria* and so forth.³³⁶ The only act which is criminalized by this Act is the breach of the protection order in terms of which the offender is charged with contempt of court.³³⁷

Domestic violence is often thought to only include physical violence but the act, behavior and consequences that make up domestic violence vary in nature and frequency.³³⁸ The Domestic Violence Act³³⁹ applies to domestic violence that takes place in a domestic relationship. A domestic relationship qualifies as a marital partner (including marriages under African customary law or any other religious right), parents or guardians, any family member including children, a person with whom the victim co-habitates, whether there is a marital relationship with that person or not, a life partner or same-sex-partner, a person whom the victim dated or someone the victim had sexual relations with or someone with which they share a child. Non South African citizens may be granted a protection order; however the protection extends only within the borders of South Africa.³⁴⁰

The following are, according to section 1 of the Act, forms of domestic violence:

³³⁴ 116 of 1998.

³³⁵ 116 of 1998.

³³⁶ Legal Education and Development Training Manuel- Aspects of Gender Law:31.

³³⁷ Legal Education and Development Training Manuel- Aspects of Gender Law:31.

³³⁸ www.saps.gov.za: 30 July 2005.

³³⁹ Act 116 of 1998.

³⁴⁰ Legal Education and Development Training Manuel- Aspects of Gender Law:34.

- Sexual abuse: any conduct which abuses, humiliates, degrades or otherwise violates the integrity of the complainant.³⁴¹ This type of abuse is irrespective of whether or not a marital relationship exists with the offender.³⁴²
- Physical abuse or assault for example, slapping, biting, kicking and threats of physical violence.³⁴³
- Emotional, verbal and psychological abuse: repeated insults, ridiculing, obsessive jealousy towards the victim and the causation of repeated emotional pain.³⁴⁴
- Economic abuse: this is defined to include the unreasonable deprivation of economic or financial resources to which a complainant is entitled to under the law. It further includes the disposal, by the offender, of any property in which the complainant has an interest.³⁴⁵
- Intimidation: the uttering of a threat which induces fear in the complainant.³⁴⁶
- Harassment: for example, repeatedly telephoning the complainant or loitering outside the complainants' property, repeatedly sending packages or causing such packages to be sent to the complainant.³⁴⁷
- Stalking.
- Damage to the complainant's property.
- Entry into the complainant's home without consent in the situation where the victim and offender do not share a joint household.
- Any other controlling or abusive behavior.

Once it is ascertained whether the complainant falls within the scope of the Act, section 4(3)³⁴⁸ affords her the opportunity to approach the court to apply for a domestic violence interdict against the alleged offender. Further, the application may be brought by a third party, who has a material interest in the

³⁴¹ Legal Education and Development Training Manuel- Aspects of Gender Law:33.

³⁴² www.info.gov.za: 30 July 2005.

³⁴³ Legal Education and Development Training Manuel- Aspects of Gender Law:33.

³⁴⁴ Legal Education and Development Training Manuel- Aspects of Gender Law:33.

³⁴⁵ Legal Education and Development Training Manuel- Aspects of Gender Law:33.

³⁴⁶ Legal Education and Development Training Manuel- Aspects of Gender Law:33.

³⁴⁷ Legal Education and Development Training Manuel- Aspects of Gender Law:33.

³⁴⁸ Act 116 of 1998.

well being of the complainant, on behalf of the complainant.³⁴⁹ However in this instant the complainant must give his or her written consent to the third party with the exception of complainants who are minors, mentally retarded, unconscious or otherwise unable to provide consent.³⁵⁰

Section 12 of the Act³⁵¹ provides that any magistrate's court/family court within the area, in which the complainant permanently or temporarily resides, may be approached. Further the applicant may approach the magistrate's court in the area in which the respondent is ordinarily or temporarily resident. The protection order is valid throughout the Republic and any police station may be approached to give effect to its breach.³⁵²

The procedure is as follows: once the jurisdiction is established the applicant approaches the clerk of the court and completes Form 2 in order to apply for a protection order. The magistrate then makes a decision based solely on the information contained in the form. The court will then grant the application if satisfied that *prima facie* evidence exists that the respondent is committing or has committed an act of domestic violence which has caused, or will likely cause, undue hardship to the applicant should the application not be granted. In this instance the magistrate will issue an interim protection order together with a suspended warrant of arrest. The order and the application are then served on the respondent and a return date is set at which time he/she may be heard as to why the interim order should not be made final against him/her. On the return date the respondent can then stipulate his/her side of the matter and the decision, as to the finality of the interim order, lies with the magistrate. If the respondent does not appear on the return date and the applicant can show that the documents were served (usually by way of a sheriff's return of service) the magistrate must grant the final protection order in favour of the applicant. If a protection order is disobeyed the victim will immediately contact the South African Police Service who will then take a statement from the victim. The victim will then provide the police with a warrant of arrest which

³⁴⁹ Act 116 of 1998.

³⁵⁰ Act 116 of 1998.

³⁵¹ Act 116 of 1998.

was received together with the protection order. If there is eminent danger towards the complainant, the abuser will be arrested immediately. In the alternative the abuser will be given notice to appear in court the following day.

Despite the above it may occur that the complainant will defend herself against her abuser, by harming him or murdering him, before she considers approaching or approaches the magistrate's court to make such application. In such cases it is worth noting the value of using the so-called 'battered woman syndrome' as a defence in court. Recognition of this syndrome not only appears in academic literature³⁵³ but also in case law in various jurisdictions such as Canada³⁵⁴ and the United States of America.³⁵⁵

The syndrome has also been dubbed the *Walker Cycle Theory of Violence*³⁵⁶ and can assist courts, legal practitioners and prosecutors to understand why a woman, who has been subjected to abuse, will often not respond by less violent means of self-defence such as calling the police or ending the relationship as opposed to striking back with violence, often with fatal results. In *S v Ferreira*³⁵⁷ the syndrome was led in evidence for mitigation of sentence. The evidence of the cycle of abuse, experienced by the accused, and her subsequent psychological trauma led to the imposition of a much lighter sentence for the accused.

The Domestic Violence Act³⁵⁸ has been hailed as a much improved successor to the old Family Violence Act³⁵⁹ in that it vastly broadens the scope of a domestic relationship.³⁶⁰ Furthermore the new legislation takes a very liberal view of what constitutes domestic violence.³⁶¹ The new legislation takes the laudable step of taking cognisance of domestic violence and its occurrence in

³⁵² Legal Education and Development Training Manuel- Aspects of Gender Law:36.

³⁵³ Horder 1981..

³⁵⁴ *R v Lavallee* (1990) 1 SCR 85 (55 CCC).

³⁵⁵ *Middleton v McNeil* 2004 US Lexis 3381.

³⁵⁶ Burchell 2005:452.

³⁵⁷ Burchell 2005:452.

³⁵⁸ Act 116 of 1998.

³⁵⁹ Act 133 of 1993.

³⁶⁰ Hoosen 1999:145.

³⁶¹ Hoosen 1999:146.

homosexual relationships which previously received little or no attention.³⁶² Despite these obvious improvements there are still glitches in the system designed to protect women.

The South African Police Service is often undermanned and unable to effect the suspended arrest warrant should the respondent breach the terms of a protection order. Further it appears that members of the South African Police Service are refusing to accept criminal charges, from a victim of abuse, until an interdict has been issued.³⁶³ Further, even when offenders are arrested, they are being released from police custody on warning despite the fact that the act makes clear provision for release only on order of a judge or magistrate.³⁶⁴ Further the dedicated courts established to hear these applications, such as Tsepong Centre for Domestic Violence in Bloemfontein, are faced with more applications than available staff. Matters are often postponed for the simple reason of time constraints thereby effectively allowing the abuse to continue. It would appear that the South African Police Service members, involved in the domestic violence sphere, need to be facilitated through training in the area of domestic violence.³⁶⁵ Further, it would appear that women are afraid to approach such centres and in some instances are not aware that the law provides a remedy.³⁶⁶

The Domestic Violence Act should not be used as a method of secondary victimisation. Shortages of qualified staff and unsympathetic role players (especially those who do not view domestic violence as a serious issue)³⁶⁷ will only force the issue of abuse further into the dark as it allows the victim to be abused twice, once by the abuser and once by the law.

³⁶² Pantazis 1998:379.

³⁶³ Oosthuizen 2000:64.

³⁶⁴ Oosthuizen 2000:64.

³⁶⁵ Kruger 2004:188.

³⁶⁶ Kruger 2004:188.

2.6. Intimate femicide

Intimate femicide can be described as the killing of a woman by her intimate partner.³⁶⁸ The term was coined at the *International Tribunal on Crimes against Women* in 1976 in order to explain that some crimes are indeed gender motivated.³⁶⁹

In South Africa a woman is more likely to be killed by her boyfriend, husband or ex-lover than by a stranger.³⁷⁰ It is a shocking occurrence that young women are often brutally killed by the men who proclaim to love them and are sworn to protect and cherish them. However even more shocking is the fact that this kind of crime is common in South Africa.³⁷¹

The phenomenon of femicide was no more aptly explored than in *S v De Blasi*,³⁷² a matter in which the victim was stalked and eventually murdered by her ex-husband. The court found that the accused had attempted to justify his actions by stating that he had been humiliated by her, in that she had no right to institute divorce proceedings against him. The court further held that control, ownership and an unequal power dynamic, in intimate relationships, catalyses intimate femicide.³⁷³

It is estimated that every six hours a woman in South Africa, most often in her twenties or thirties, is murdered by her current or former boyfriend or spouse.³⁷⁴ This figure is a conservative one although it is the highest recorded in the world.³⁷⁵ According to Vetten, the Director of the *Centre for the Study of Violence and Reconciliation* in Johannesburg, the motives for these killings are often sexual jealousy.³⁷⁶ In most cases the man suspects the woman of

³⁶⁷ Parenzee 2001:104.

³⁶⁸ Kenny 2004:46.

³⁶⁹ Kenny 2004:46.

³⁷⁰ Lund 2005:111. See also Brown and Williams 1993 and Kellerman and Mercy 1992.

³⁷¹ Lund 2005:111.

³⁷² 1996 (1) SACR 1 (A).

³⁷³ 1996 (1) SACR 1 (A).

³⁷⁴ Kenny 2004:46.

³⁷⁵ Lund 2005:111.

³⁷⁶ Kenny 2004:46.

having an affair, whether she actually is or not, and feels obsessive jealous towards her. Further, these types of obsessive relationships often end in violence when the woman indicates her decision to leave.³⁷⁷

Most forms of domestic violence, the precursor of intimate femicide, are charged as common assault, assault with the intent to do grievous bodily harm or attempted murder and in the charging of these accused the following should be borne in mind:

1. An understanding of why abused women do not leave their partners and the difficulty therein.³⁷⁸
2. The occurrence of alcohol and drug related violence must be taken into account in these types of crimes.³⁷⁹
3. The sentence given to the accused should reflect the attitude of the courts and the community to these types of offenders. In the matter of *S v Roberts*³⁸⁰ the State appealed against a sentence of 15 years which was wholly suspended for 5 years, handed down for the accused's murder of his wife. The Appeal Court stated, in the judgment on appeal:

*It (the sentence of the court a quo) fails utterly to reflect the gravity of the crime and to take account of the prevalence of domestic violence in South Africa. It ignores the need for the courts to be seen to be ready to impose direct imprisonment for crimes of this kind, lest others be misled into believing that they run no risk of imprisonment if they inflict physical violence upon those with whom they have intimate personal relationships.*³⁸¹

According to Taylor,³⁸² a psychology researcher at Rhodes University, the crime of intimate femicide is often about wanting exclusive sexual ownership of the woman. There is no objective partnership. The offender views his

³⁷⁷ Kenny 2004:46.

³⁷⁸ Kenny 2004:46.

³⁷⁹ Kenny 2004:46.

³⁸⁰ 2000 (2) SACR 522 SCA.

³⁸¹ At p 528 para i-j.

partner simply as a thing, or an object, and if she makes it clear that she wants to leave, or if she in fact does leave, this is often a trigger for intimate femicide.³⁸³ According to Taylor, these men have the typical mindset of 'if I can't have you no one else will.' According to Vetten,³⁸⁴ many perpetrators of this type of crime give no explanation for the murder of their partner and will often claim amnesia during the incident. Those who do remember the incident claim that the woman drove them to it by not looking after him properly or by talking back in a superior manner or by not listening to or obeying him.

Taylor³⁸⁵ submits that there is no typical profile of men who murder their wives or their girlfriends. However there seems to be a common obsessive desire to remain in control of their partners and these men will often have a profound sense of ownership, low self esteem and suffer from excessive jealousy. A study on intimate femicide conducted by Vetten,³⁸⁶ with the funding of AusAid in 2000, found that in 20% of cases the accused has a history of violent behavior towards his partner and 8% have previously threatened to kill their partners. Furthermore in 14% of cases the offender committed suicide after the murder of his partner³⁸⁷ and a further 10% harmed others in the commission of the crime.³⁸⁸ Taylor contends that men who commit intimate femicide are often inclined towards depression, have violent mood swings or lose their tempers easily and are highly irritable. Often they are highly insecure and have a constant need for reassurance. He will often put the woman or her family down and is obsessively jealous of other men, often on an unjust basis. It can be said that he degrades woman and has little respect in general for women.

A further cause for alarm is the fact that the typical perpetrator will often own a fire-arm, whether by legal or illegal means and this weapon will likely be used

³⁸² Kenny 2004:48.

³⁸³ Lund 2005:111.

³⁸⁴ Kenny 2004:47.

³⁸⁵ Kenny 2004:48.

³⁸⁶ Kenny 2004:48.

³⁸⁷ Kenny 2004:49.

³⁸⁸ Kenny 2004:49.

in the commission of an offence.³⁸⁹ The legislature has however attempted to avert this situation by the provisions of the Domestic Violence Act³⁹⁰ which gives the presiding officer, in an application for a protection order, the power to order the seizure of any arm or dangerous weapon in the possession or control of the respondent.³⁹¹ From this it is obvious that the legislature is cognisant of this particular phenomenon and has taken steps to ensure that the complainant is thus protected.

Abraham's³⁹² advice to all South Africans is this:

We need to start tackling intimate femicide seriously as a key part of building Gender Equality in our society. This is not really about death; this is about how we value woman's lives.

³⁸⁹ Kenny2004:49.

³⁹⁰ Act 116 of 1998.

³⁹¹ Section 9 of act 116 of 1998: *The court must order a member of the South African Police Service to seize any arm or dangerous weapon in the possession or under the control of the respondent, if the court is satisfied on the evidence placed before it, including any affidavits supporting an application referred to in section 4(1), that- a) The respondent has threatened or expressed the intention to kill or injure himself or herself, or any person in a domestic relationship, whether or not by means of such arm or dangerous weapon.....*

³⁹² Kenny 2004:49.

CHAPTER THREE

MEDICAL PRACTICE AND THE VICTIMS OF CRIME

3. Introduction

3.1 Medical ethics

There are a plethora of branches of medical practice available globally. There is what is generally considered the science based Western Medicine, Traditional Chinese Medicine, Ayurvedic Medicine in India and the many native systems from Africa and Asia as well as the rapidly expanding mode of fringe medicine in westernized countries.³⁹³ The main emphasis in this dissertation will be on what is considered ‘western medicine’.

It is somewhat of a misnomer to describe medicine as ‘western medicine’ as this is a historically inaccurate description due to the fact the origins of medicine can be traced rather to the ancient Greeks and the synthesis of Asian, North African and European Medicine.³⁹⁴ The Greek tradition of medical practice was epitomized by the Hippocratic School on the Island of Cos³⁹⁵ around 400 BC. It was there that both the foundations of medical practice as well as the ethical facets of the profession were laid. The famous and renowned Hippocratic Oath³⁹⁶ was developed around this time, although most of its content is today considered obsolete.³⁹⁷

³⁹³ Shepherd 2003:8.

³⁹⁴ Shepherd 2003:8.

³⁹⁵ An island in the South East Aegean Sea, settled in ancient times by the Dorians and famous for literature and medicine- Collins English dictionary 2004:359.

³⁹⁶ An oath taken by a doctor to observe a code of medical ethics, supposedly derived from that of Hippocrates- Collins English dictionary 2004:746.

³⁹⁷ A generally accepted translation of the Oath reads as follows: I swear by Apollo the physician and Aesculapius and health and all heal and all the gods and goddesses that according to my ability and judgment I will keep this oath and this stipulation- to hold him who taught me this art, equally dear to me as my own parents, to make him a partner in my livelihood: when he is in need of money, to share mine with him, to consider his family as my own brothers and teach them this art, if they want to learn it, without fee or indenture. To impart precept, oral instruction and all other instructions to my own sons, to the sons of my teacher and to those who have taken the disciples oath, but to no one else. I will use treatment to help the sick according to my ability and judgment, but never with the view of injury or wrongdoing. Neither will I administer a poison to anybody when asked to do so, nor will I suggest such a course. Similarly, I will not give a woman

What is today broadly called medical ethics has developed and changed over thousands of years. Since medicine is not a static science it is obvious that the ethics of the practice change constantly and vary accordingly to fit changing circumstances.³⁹⁸ Laws regarding medical practice vary from country to country but the broad principal of medical ethics remains basically the same. Medical ethics are thus universal and formulated, not only by medical associations, but by international organizations such as the World Medical Association.³⁹⁹

During World War II horrific violations of medical ethics were carried out by doctors in Germany and in Japan who conducted medical experiments in concentration camps. At this time the international medical community restated the Hippocratic Oath⁴⁰⁰ in a modern form in the Declaration of Geneva in 1948. This was again amended by the World Medical Association in 1968 and once again in 1983. The most recent version was approved in 1994.⁴⁰¹ The declaration now stated at the time of being admitted as a medical practitioner reads as follows:

I solemnly pledge myself to consecrate my life to the service of humanity. I will give to my teachers the respect and gratitude which is their due.

I will practice my profession with conscience and dignity.

The health of my patients will be my first consideration.

I will respect the secrets which are confided in me, even after the patient has died.

a peccary to produce abortion. But I will keep pure and holy both my life and my art. I will not use the knife, not even sufferers with the stone, but leave this to be done by men who are practitioners of this work. Into whatsoever houses I enter, I will go into them for the benefit of the sick and will abstain from any voluntary act of mischief or corruption and further, from the seduction of females or males, of free men or slaves. And whatever I shall see or hear in the cause of my profession or not in connection with it, which ought not to be spoken of abroad, I will not divulge, reckoning that all such should be kept secret. While I carry on this oath, and not break it may it be granted to me to enjoy life and the practice of the art, respected by all men: but if I should transgress it, may the reverse be my lot.

³⁹⁸ Shepherd 2003:9.

³⁹⁹ Shepherd 2003:9.

⁴⁰⁰ Refer to footnote 395.

⁴⁰¹ Shepherd 2003:9.

I will maintain by all means in my power, the honor and noble traditions of the medical profession.

My colleagues will be my brothers and sisters.

I will not permit considerations of age, disease or disability, creed, ethnic, religion, gender, nationality, political affiliation, race, sexual orientation or social standing to intervene between my duty and my patients.

I will maintain the utmost respect for human life from its beginning and even under threat I will not use my medical knowledge contrary to the laws of humanity.

I will make these promises solemnly, freely and upon my honour.

There are many subdivisions of medical ethics and the subject has blossomed to the point where there is now an *Institute of Medical Ethics* and full time specialists called medical ethicists.⁴⁰² Many older ethical considerations have made progress into laws while other, new concerns have arisen. However, despite all the changes the basic principle of medical ethics has remained the same:

The patient is the center of the medical universe around which all ethics of the doctor revolves.

The doctor exists for the patient and therefore the doctor must always act in the best interest of the patient and in all considerations of the doctor-patient relationship. A doctor must for example:

- Always have an overriding consideration for the patient whilst also accepting his duty to medical colleagues and to the community at large. A doctor cannot abandon his patient without insuring that medical care is handed over to someone equally competent or, for example, leave a patient because it is the end of his shift or the end of the day.⁴⁰³
- The doctor must always act in the best interest of the patient's physical or mental health without consideration for race, wealth, religion, nationality,

⁴⁰² Shepherd 2003:10.

⁴⁰³ Shepherd 2003:11.

sexual orientation or gender. The doctor must always act free of political or administrative doctrines or pressure to establish a diagnosis and to carry out treatment.⁴⁰⁴

- Doctors must always act courteously and reasonably to each other for the benefit of the patient. A medical practitioner should not interfere in the treatment of patients, by another doctor, except in an emergency when discussion regarding the treatment is not possible. A doctor should not criticize another doctor's judgment or treatment directly to a patient except in extreme and unusual situations, but should rather confront the other doctor directly if it is thought that the maximum benefit is not being afforded to the patient. However if a doctor is concerned about the professional skills or health of a colleague he is morally obliged to draw those concerns to the attention of the authorities.⁴⁰⁵

Medical ethics can be considered as the moral principles that govern the practice of medicine by doctors and other health care professionals. Basically these principles are usually regarded as:

- Respect for patient autonomy.⁴⁰⁶
- The non-infliction of harm on patients.⁴⁰⁷
- A positive duty to contribute to the welfare of patients.
- Justice or fair treatment of all patients.⁴⁰⁸

Patient autonomy, or independence, refers to the principle that a patient is autonomous in making decisions and independent in acting on the basis of such decisions. It recognizes the mental and legal capacity of the patient to communicate his/her wishes to doctors and other healthcare workers. This is strictly in line with the right of freedom and security of persons provided for in the Constitution.⁴⁰⁹

⁴⁰⁴ Shepherd 2003:11.

⁴⁰⁵ Shepherd 2003:11.

⁴⁰⁶ McQuoid-Mason *et al* 2002:124.

⁴⁰⁷ McQuoid-Mason *et al* 2002:124.

⁴⁰⁸ McQuoid-Mason *et al* 2002:124.

⁴⁰⁹ Section 12 of Act 108 of 1996.

The principle of non-infliction of harm to patients is also referred to as *non-maleficance* and is based on the principle that a doctor or healthcare worker should not inflict harm on their patients even if such harm is the wish of the patient such as in the case of active euthanasia.⁴¹⁰

Contributing to a patient's welfare is also called *beneficence* and is a principle founded on the contribution, by the medical practitioner, to the welfare of a patient and requires that a doctor or other healthcare worker always furthers the best interests of the health of a patient.⁴¹¹

The principle of justice or fair treatment of patients requires that doctors and healthcare workers treat all patients equally irrespective of such factors as mentioned in section 9(4)⁴¹² of the Constitution.⁴¹³ Further, every patient has a constitutionally enshrined right according to section 27(1)(a)⁴¹⁴ to have access to healthcare services including reproductive healthcare. The State must further take reasonable legislative steps within its available resources to achieve the progressive realization of each of these rights.⁴¹⁵ However ultimately a patient's health, is also his/her own responsibility and for each and every right there is a corresponding duty.

⁴¹⁰ Refers to actively causing the death of a patient by, for example, the delivery of an overdose of morphine as opposed to passive euthanasia such as, for example, in the case of allowing the patient to starve to death. Active euthanasia involves a positive act whereas passive euthanasia is ordinarily an omission to act.

⁴¹¹ McQuoid-Mason *et al* 2002:124.

⁴¹² Section 9(4): *No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of sub-section (3) to wit: including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*

⁴¹³ Act 108 of 1996.

⁴¹⁴ Section 27(1) (a): *Everyone has the right to have access to (a) health care services, including reproductive health care.*

⁴¹⁵ Section 27(2): *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.*

3.2 The relationship between the doctor and the patient

3.2.1 The contract between the doctor and the patient

A patient who consults a doctor in a private practice enters into a contractual relationship with the doctor. The doctor has a corresponding duty to care for the patient.⁴¹⁶ A patient who however presents for treatment at a private or provincial hospital for treatment by the staff of such hospital enters into a contract with the relevant hospital authority.⁴¹⁷

The contract takes the form of an implied agreement that the doctor will diagnose the patient's complaint and treat the person in the normal manner according to generally accepted medical procedures.⁴¹⁸ Any procedure which is to be used by the doctor to treat the patient must first be explained and discussed with the patient and the patient's consent must be obtained.⁴¹⁹ However, the examination of the patient by the doctor is not an undertaking that the doctor will treat the patient personally. He/she may refer the patient to another doctor.⁴²⁰ If the original doctor does not make the necessary referral to the second doctor his conduct may constitute negligence. Note that consent to treatment from the patient to the first doctor who diagnoses the illness does not necessarily mean that the consent extends to the treatment by the second doctor.⁴²¹ The referral doctor will have to obtain independent consent from the patient.⁴²² Should a doctor depart from his or her patients expressed instructions or fail to treat a patient with no valid reason, the doctor is guilty of the breach of contract and will be denied the right to claim remuneration for the services rendered.⁴²³ The contract between the doctor and the patient expires once the treatment is ended and the doctor need no longer attend to the patient.⁴²⁴

⁴¹⁶ *Freedman v Glicksman* 1996 (1) SA 1134 (W).

⁴¹⁷ *Strauss* 1992:5.

⁴¹⁸ *Dada et al* 2001:5.

⁴¹⁹ *Dada et al* 2001:5.

⁴²⁰ *Dada et al* 2001:5.

⁴²¹ *Castell v De Greef* 1994 (4) SA 408 (C).

⁴²² *Dada et al* 2001:5.

⁴²³ *Dada et al* 2001:5.

⁴²⁴ *Dada et al* 2001:6.

As with all rights there is a corresponding responsibility upon the patient. The patient must perform their part of the contract with the doctor by making themselves available for the treatment.⁴²⁵ However, should a patient fail to report for treatment the doctor cannot force the patient to submit to treatment, however a patient who fails to keep an appointment, for medical treatment, may be held liable by the doctor for any financial losses incurred i.e. lost fees.

3.2.2 Doctors duty to treat

With regard to the duty to treat a distinction can be made between private practitioners and those employed by State health services. Generally a private practitioner may accept or refuse patients at their own choice and there is no duty upon them to treat patients who are not already their patients, with the exception of emergency cases whereby there is a legal duty to act or, whereby failure to act may be seen as *contra bona mores*.⁴²⁶ An example of this, in practical terms, may be found, where a doctor drives past the scene of an accident where emergency personal have not arrived and can clearly see that the people in the vehicle need emergency medical assistance.

Conversely a State doctor or medical officer may not refuse to treat a patient as they are bound in terms of their contract of employment or bound by a statutory duty imposed on them such as in the case of the New National Health Act.⁴²⁷ Despite the fact that there is no duty on a private practitioner to treat, ethically they are required to assist those in emergency situations where the injured or ill person's life or health is seriously endangered, unless some other medical help is at hand or the physician's own life would be at risk.⁴²⁸ In such circumstances, there may also be a legal duty to render medical assistance. The courts have defined an 'emergency situation as *'a dramatic, sudden situation or event which is of passing nature in terms of time'*.⁴²⁹

⁴²⁵ Dada *et al* 2001:6.

⁴²⁶ *Magware v Minister of Health NO* 1981 (4) SA 472 (Z).

⁴²⁷ Act 61 of 2003.

⁴²⁸ Dada *et al* 2001:6.

⁴²⁹ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

Although there is no obligation on a private doctor to take on a patient's case, once the doctor has already done so he is obliged to continue treating such patient unless:

- The doctor can leave the patient's care in the hands of another competent practitioner.⁴³⁰
- The doctor issues sufficient instructions for further treatment to support staff.⁴³¹
- The patient is cured or does not require further treatment⁴³² which for all intents and purposes ends the doctor/patient contract.
- The patient refuses further treatment or insists on being discharged from the hospital provided that the patient is mentally capable of doing so.
- The doctor gives the patient reasonable notice that he or she intends to discontinue his or her practice, in which case the doctor should ensure that other treatment facilities and options are available and have been explained to the patient.

When determining whether or not the failure to treat by a doctor is unreasonable the court will take the following factors into account:

- The doctors' actual knowledge of the patient's condition.⁴³³
- The seriousness of the patient's condition.⁴³⁴
- The professional ability of the doctor to do what is required⁴³⁵ by the patient or the situation at hand.
- The availability of other practitioners or nurses or paramedics.⁴³⁶

3.2.3 Consent to treatment

A patient has an absolute constitutional right⁴³⁷ in terms of section 12(1) and (2) of the Bill of Rights⁴³⁸ to his or her bodily integrity and security.⁴³⁹ Due to

⁴³⁰ Dada *et al* 2001:7.

⁴³¹ Dada *et al* 2001:7.

⁴³² Dada *et al* 2001:7.

⁴³³ McQuoid-Mason *et al* 2002:133.

⁴³⁴ McQuoid-Mason *et al* 2002:133.

⁴³⁵ McQuoid-Mason *et al* 2002:133.

the existence of these rights a doctor cannot simply treat a patient unless the latter consents to such treatment.⁴⁴⁰ The performance of medical intervention on a patient, who has not given consent, is considered assault⁴⁴¹ and the doctor may be held liable both criminally and civilly.

In terms of section 7 of the National Health Act⁴⁴² a patient may not be treated without his or her informed consent. For purposes of the National Health Act⁴⁴³ “informed consent” means consent for the provision of a specified health service given by a person with legal capacity to so consent. However there is an exception to the rule that a patient cannot be treated without consent in instances where the needs of society will override those of the individual and will justify medical action, for example where statute requires compulsory vaccination against a communicable disease.⁴⁴⁴ Furthermore a patient may be treated without their personal consent if as a result of age or mental capacity they are unable to do so and another is authorized to consent on their behalf,⁴⁴⁵ for example in the case of a minor, generally the parent or guardian of such child must give consent to any medical intervention.⁴⁴⁶ However the Child Care Act⁴⁴⁷ provides that a minor over the age of 18 may consent to a surgical procedure and a minor over 14 years of age may consent to medical treatment. Further the Choice on Termination of Pregnancy Act⁴⁴⁸ allows any female, regardless of age, to consent to the performance of an abortion procedure.

Consent is valid if the person so consenting has substantial knowledge concerning the nature and effect of the act consented to.⁴⁴⁹ The defence of

⁴³⁶ McQuoid-Mason *et al* 2002:133.

⁴³⁷ Section 12 (1) and 12(2) of Act 108 of 1996.

⁴³⁸ Chapter 2 of Act 108 of 1996.

⁴³⁹ Act 108 of 1996.

⁴⁴⁰ Schwär *et al* 1984:8.

⁴⁴¹ *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T).

⁴⁴² 61 of 2003.

⁴⁴³ 61 of 2003.

⁴⁴⁴ De Wet *et al* 1975:94.

⁴⁴⁵ Dada *et al* 2001:8.

⁴⁴⁶ *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T).

⁴⁴⁷ Section 39(4) of Act 74 of 1983.

⁴⁴⁸ Section 5 of Act 92 of 1996.

⁴⁴⁹ Dada *et al* 2001:13.

consent in medical matters applies when the patient has given ‘informed consent’ which encompasses the following requirements:

- The patient has knowledge of the nature or extent of the harm or risk involved in the medical procedure.⁴⁵⁰
- The patient appreciates and understands the nature of such harm or risk.⁴⁵¹
- The patient has consented to the harm or the assumption of the risk.⁴⁵²
- The consent is comprehensive and extends to the entire transaction inclusive of its consequences.⁴⁵³

Furthermore, the person giving his consent must be legally capable of doing so and not a minor or insane person.

Generally consent can be defined into two categories and expressed as follows:⁴⁵⁴

- Implied consent: Most medical practice is concluded under the principle of implied consent. Where the very fact that the person presents at a doctors surgery to be examined, or asks the doctor to visit him, implies that he or she is willing to undergo the basic clinical methods of examination⁴⁵⁵ such as history taking, observation, palpitation and auscultation.⁴⁵⁶ This type of consent does not extend to intimate examination such as vaginal and rectal examination or to invasive examinations such as venipuncture.⁴⁵⁷ An intimate and invasive procedure, such as a genital examination, must be discussed with the patient and her express consent must be specifically obtained after explaining the complete procedure and the possible risks to the patient.

⁴⁵⁰ *Castell v De Greef* 1994 (4) SA 408 (C) at 425.

⁴⁵¹ *Dada et al* 2001:13.

⁴⁵² *Castell v De Greef* 1994 (4) SA 408 (C) at 425.

⁴⁵³ *Castell v De Greef* 1994 (4) SA 408 (C) at 425.

⁴⁵⁴ *Sheherd* 2003:14.

⁴⁵⁵ *Shepherd* 2003:14.

⁴⁵⁶ The method of listening to the various internal sounds made by the body, usually with the aid of a stethoscope- *Collins English dictionary* 2004:98.

⁴⁵⁷ Medical procedure of puncturing a vein to draw blood or to inject a drug- *Collins English dictionary* 2004:2804.

- Express consent: Where the medical procedure is more complex the specific permission of the patient must be obtained.⁴⁵⁸ Express consent is often given in writing, but this is not a legal requirement and written consent is no more valid than verbal consent. However if a dispute arises at a later date obviously written consent is much easier to utilize as evidence than oral consent. Ideally verbal or written consent must be witnessed by another person.⁴⁵⁹ This type of consent extends only to that which was explained to the patient beforehand and nothing extra may be performed during an operation for which consent has not been obtained.⁴⁶⁰

With regard to consent to treatment reference should also be made to consent to medical examinations in sexual offence cases. The examination of a complainant in a rape case is limited to the normal requirements of consent⁴⁶¹ and should ideally only be undertaken on presentation of a SAP 308⁴⁶² form which contains the following information:

1. Name of person being so examined or that of a guardian in the case of a minor.
2. Permission to perform medical examination.
3. Signature of patient or guardian.
4. Name of investigating officer in the matter.
5. Request by such investigating officer to undertake the examination.
6. Signature of investigating officer.
7. General particulars of the case.

The accused may also be medically examined during the scope of an investigation, especially in rape cases where the offence is most often proven using medical evidence which can link the complainant and the accused. An accused person may be examined, with his consent, on presentation of an

⁴⁵⁸ Shepherd 2003:14.

⁴⁵⁹ Shepherd 2003:14.

⁴⁶⁰ Schwär *et al* 1984:11.

⁴⁶¹ Schwär *et al* 1984:11.

⁴⁶² Schwär *et al* 1984:11.

SAP 308(a), to the medical practitioner, which contains similar information to that contained in the SAP 308.⁴⁶³ If the accused refuses to undergo medical examination a court order must be sought under the auspices of the Criminal Procedure Act (section 37(2))⁴⁶⁴ which mandates the examination, without consent of the accused, but which is usually limited to the drawing of blood samples in order to reference DNA samples found on the person of the complainant.⁴⁶⁵

3.2.4 Confidentiality

Since the doctor patient relationship is of an intimate nature and facts are disclosed, by the patient to the doctor, which are of a private nature, medical ethics require that the medical practitioner should not divulge information which ought not to be divulged, about their patients, without:⁴⁶⁶

- The patients consent if they are over the age of 14.
- The written consent of parents or guardians if the patient is below the age of 14.
- In the case of a deceased person, with the consent of the next of kin or the executor of the deceased person's estate.⁴⁶⁷

The British Medical Association defines confidentiality as:

*The principle of keeping secure the secret from others, information given by or about an individual in the course of a professional relationship.*⁴⁶⁸

⁴⁶³ Schwär *et al* 1984:11.

⁴⁶⁴ Act 51 of 1977.

⁴⁶⁵ Section 37(2): (a) Any medical officer or any prison or any district surgeon or, if requested thereto by any police official, any registered medical practitioner or registered nurse may take such steps, including the taking of a blood-sample, as may be deemed necessary in order to ascertain whether the body of any person referred to in (a) (i) or (ii) of subsection (1) has any mark, characteristic or distinguishing feature or shows any condition or appearance. (b) If any registered medical practitioner attached to any hospital is on reasonable grounds of the opinion that the contents of the blood of any person admitted to such hospital for medical attention or treatment may be relevant at any later criminal proceedings, such medical practitioner may take a blood-sample of such a person or cause such sample to be taken.

⁴⁶⁶ Dada *et al* 2001:17.

⁴⁶⁷ Health Professions Council of South Africa:Rule 20.

⁴⁶⁸ Shepherd 2003:11.

A medical practitioner may however disclose confidential information, concerning a patient, in the following instances:⁴⁶⁹

- When a court of law orders such disclosure.⁴⁷⁰
- An act of parliament requires a medical practitioner to make a disclosure.⁴⁷¹
- When there is a moral or legal obligation on a medical practitioner to make a disclosure to a person or agency that has a reciprocal moral or legal obligation to receive the information.
- The patient consents to the disclosure being made.⁴⁷²

In a criminal case a testifying doctor can breach confidentiality by the direction of the court. If, after such direction, he refuses to give testimony, he may be held in contempt of court and he may be sentenced to direct imprisonment for a period of between two and five years according to section 189(1)⁴⁷³ of the Criminal Procedure Act.⁴⁷⁴

3.2.5 Medical malpractice

Malpractice can be divided into two broad types:

- 1) Medical negligence – where the standard of medical care given to the patient is considered to be inadequate.⁴⁷⁵

⁴⁶⁹ Dada *et al* 2001:17.

⁴⁷⁰ Dada *et al* 2001:17.

⁴⁷¹ Such as the case with the Child Care Act 74/83 which requires disclosure by a medical practitioner who suspects a minor is being abused.

⁴⁷² Dada *et al* 2001:17.

⁴⁷³ *If any person present at criminal proceedings is required to give evidence at such proceedings and refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or refuses or fails to produce any book, paper or document required to be produced by him, the court may in a summary manner enquire into such refusal or failure and, unless the person so refusing or failing has a just excuse for his refusal or failure, sentence him to imprisonment for a period not exceeding two years or, where the criminal proceedings in question relate to an offence referred to in Part III of Schedule 2 to imprisonment for a period not exceeding five years.*

⁴⁷⁴ Act 51 of 1977.

⁴⁷⁵ Shepherd 2003:15.

- 2) Professional misconduct – where the personal and professional behavior falls below that which is expected of a doctor.⁴⁷⁶ Medical treatment is never provided with any guarantee of success. Despite advances and changes in medical techniques and sciences there are and always will be things that go awry. However all patients have a legal right to expect a satisfactory standard of medical care from their doctor even though it is accepted that this cannot mean that a doctor guarantees a satisfactory outcome of the treatment.⁴⁷⁷ In order to succeed in a civil action for damages as a result of medical malpractice the patient must first establish:
- 1) that the doctor had a duty of care towards the patient; and⁴⁷⁸
 - 2) that there was a failure in that duty of care which, resulted in a physical or mental damage to a patient.⁴⁷⁹

It is impossible to give an exhaustive list of the types of medical negligence in medical practice. An English judge once remarked: *The categories of negligence are never closed.*⁴⁸⁰ With advances and changes in medical techniques there is always an opportunity for something to go wrong. However there seems to be a central core of situations that frequently give rise to the allegations of negligence.⁴⁸¹

A medical practitioner is required to exercise the degree of skill and care of a reasonably skilled practitioner in his/her field.⁴⁸² The test for the standard of skill or care required is that of the reasonable man, namely; how a reasonably competent practitioner, in a particular branch of medicine, would have acted in a similar situation.⁴⁸³ The degree of skill is generally a matter of evidence.⁴⁸⁴ In the case of sudden emergency the same degree of skill and care may, however may not always be required, depending on the circumstances;

⁴⁷⁶ Shepherd 2003:15.

⁴⁷⁷ Shepherd 2003:15.

⁴⁷⁸ Shepherd 2003:15.

⁴⁷⁹ Shepherd 2003:15.

⁴⁸⁰ Shepherd 2003:17.

⁴⁸¹ Shepherd 2003:18.

⁴⁸² *Mitchell v Dixon* 1914 AD 519.

⁴⁸³ *Buls v Tsatsarolakis* 1976 (2) SA 891 (T).

⁴⁸⁴ *Blyth v Van den Heever* 1980 (1) SA 191 (A).

however failure to obtain consent from the patient may be deemed as a form of negligent conduct and as assault.⁴⁸⁵

Besides the above requirements it is further expected of a doctor to be responsible, diligent, honest and discreet as it is believed that patients are less likely to reveal intimate details of their medical history or to co-operate in treatment without the necessary ingredient of faith and confidence in the treating doctor.⁴⁸⁶

3.3 The initial interview with the survivor of rape or sexual abuse

Healthcare workers as well as medical practitioners may at any time be requested by a member of the South African Police Service to examine the survivor of an alleged sexual offence, in terms of section 37⁴⁸⁷ of the Criminal Procedure Act,⁴⁸⁸ and to establish whether or not such an assault took place.⁴⁸⁹ In addition to this task often a healthcare worker needs to establish whether there is any evidence to link the suspect to the survivor. In the alternate to this circumstance, the patient may present at a health-care facility alleging sexual assault and requiring treatment.⁴⁹⁰ This is by no means a simple task for practitioners and healthcare workers. Often they are faced with a distraught survivor to whom they have to give sufficient healthcare while at the same time concerning themselves with the collection of forensic evidence. Forensic evidence is usually of crucial importance in cases of sexual offences because there are usually no witnesses due to the very nature of the crime.⁴⁹¹ In fact, the forensic evidence gathered may be the only corroborating evidence of the survivor's account of their attack and the court may rely heavily on the expert testimony of the examining doctor.⁴⁹² The management of a survivor of rape is ideally conducted on a holistic basis

⁴⁸⁵ *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T).

⁴⁸⁶ Shepherd 2003:19.

⁴⁸⁷ Refer to footnote 419 above.

⁴⁸⁸ Act 51 of 1977.

⁴⁸⁹ Dada 2001:248.

⁴⁹⁰ Dada *et al* 2001:248.

⁴⁹¹ Dada *et al* 2001:248.

⁴⁹² Dada *et al* 2001:248.

and involves a multi disciplinary approach including forensic examination, social intervention and questioning by a police officer.⁴⁹³

In a designated area there should be trained medical practitioners or healthcare workers who conduct examinations in accordance with acceptable protocol. The protocol for the management of a rape survivor should include the requirements for the examination, the history, the physical examination, the collection and preservation of biological evidence and the treatment for the prevention of pregnancy, STD's, and HIV/AIDS.⁴⁹⁴

A rape survivor should never be turned away from a healthcare facility even if the case falls outside the drainage area of that healthcare facility. However, if there is a twenty-four-hour crisis center available within the area, it is appropriate to refer the patient to such healthcare facility.⁴⁹⁵

It need not be stated that a rape survivor should always be treated with sympathy by all roll players. This helps to lessen the initial psychological trauma suffered by the survivor of rape and in the long term dampens the psychological effects of the crime. It goes further without saying that an interview with a rape survivor should always be conducted in a private room and it is advised that a trusted friend, relative or nurse provides support to the survivor during the initial interview.⁴⁹⁶

Should the survivor of a sexual offence wish to report the attack, the South African Police Service should be contacted who will then come to the hospital or the clinic, take a statement from the victim as well as collect the appropriate specimens and then open a case docket as well as investigate the offence. If the rape survivor does not wish to report the attack it is advised that a full forensic examination should none the less be conducted should the victim choose to report the case at a later date.⁴⁹⁷ Before the collection of any medical evidence from the victim, the full procedure should be carefully

⁴⁹³ Dada *et al* 2001:248.

⁴⁹⁴ Dada *et al* 2001:248.

⁴⁹⁵ Dada *et al* 2001:248.

⁴⁹⁶ Dada *et al* 2001:248.

⁴⁹⁷ Dada *et al* 2001:249.

explained to the victim and after the procedure is complete as much reassurance as possible should be given to the patient regarding the injuries and the consequences of the rape.⁴⁹⁸

With regard to the issue of consent, consent must be given before any examination can take place on the person of the survivor. If the rape was first reported to the South African Police Service, a member thereof will usually provide the healthcare worker with a SAP 308 consent form. However, if the patient has reported first to the clinic without reporting the case to the police consent should be obtained in a normal manner by the healthcare worker assisting the patient.⁴⁹⁹

The finding of any examination of a rape victim must be recorded in detailed notes. If a police official has brought the complainant in for an examination they will usually provide the prescribed form, the J88, for completion by the healthcare worker. The J88 is often considered insufficient as there is insufficient space for recording detailed aspects of the examination such as the history of the patient. These should be added either on the form itself or preferably on an annexure which must be properly labeled by the medical practitioner performing the examination.⁵⁰⁰

The initial step in the examination of a patient concerns taking a complete history regarding the incident from the complainant. This should include the date and the time of the alleged incident. This is of the utmost importance in the examination as a correct history will usually correlate the observed injuries, both in respect of the time and location of the injuries. Further, a detailed history enables the practitioner to look for corroborating evidence during the examination such as the presence of foreign material and the state of the survivor's clothing.⁵⁰¹ The complainant should be approached with caution and the correct amount of sympathy should be used when questioning

⁴⁹⁸ Dada *et al* 2001:249.

⁴⁹⁹ Dada *et al* 2001:249.

⁵⁰⁰ Dada *et al* 2001:249.

⁵⁰¹ Dada *et al* 2001:249.

the patient with regards to the events that occurred before, during and after the rape incident.⁵⁰²

Before the examination a complete history of the patient before the incident should be taken and this should include:

- Her past medical and surgical history.⁵⁰³
- Her gynecological and obstetric history, including the date of last menstruation and any menstrual abnormalities.⁵⁰⁴
- The last time she engaged in normal consensual sexual activity especially within the last 24 to 36 hours.⁵⁰⁵
- Any medication that she is currently taking.
- Any drug or alcohol used by her.⁵⁰⁶

With regard to the series of the events that occurred during the incident the following information should be obtained from the patient:

- The date and time of the alleged offence.
- The place of the incident, for example a field, an alley, bed or house.
- The number of assailants and whether they were known or unknown to the patient.
- The clothing that was removed from the survivor and by whom.
- The relative position of the parties during the incident.
- Whether the complainant was threatened with or without a weapon.
- Whether the complainant sustained any injuries.
- The steps taken by the complainant to resist the attack.
- Whether the complainant injured the assailant during the commission of the offence.
- Which sexual acts the complainant was compelled to perform.
- Whether any foreign objects were used on the person of the complainant during the incident.

⁵⁰² Dada *et al* 2001:249.

⁵⁰³ Schwär *et al* 1984:355.

⁵⁰⁴ Schwär *et al* 1984:355.

⁵⁰⁵ Schwär *et al* 1984:355.

⁵⁰⁶ Dada *et al* 2001:249.

- Whether and where the rapist ejaculated.
- Whether the rapist used a condom.
- Whether the complainant lost consciousness at any point during the attack.⁵⁰⁷

The following information should be obtained from the patient regarding the events that occurred after the incident:

- Whether the complainant experienced any bleeding, pain or vaginal discharge.⁵⁰⁸
- Whether the complainant changed her clothing, washed, douched, showered or bathed after the incident.⁵⁰⁹
- Whether anyone assisted the complainant immediately after the incident.
- The person to whom she reported the incident to if applicable.⁵¹⁰

South Africa has been described as the rape capital of the world with an estimated rape every 26 seconds.⁵¹¹ In order to alleviate the problem of examining the rape victim the Department of Health has placed emphasis on the holistic approach towards the examination of the rape survivor. In KwaZulu Natal the following procedure has been suggested for the management of a rape survivor at Primary Healthcare Facilities and Provincial Hospitals:⁵¹²

- All rape survivors must be interviewed by the sister in charge of a Clinic or medical officer, gynecology register at a hospital.
- No person may be turned away to seek help elsewhere.
- All rape survivors must be seen in a private room.
- It must be established whether the matter was reported to the South African Police.

⁵⁰⁷ Dada *et al* 2001:248.

⁵⁰⁸ Schwär *et al* 1984:355.

⁵⁰⁹ Schwär *et al* 1984:355.

⁵¹⁰ Dada *et al* 2001:250.

⁵¹¹ McQuoid–Mason *et al* 2002:55.

⁵¹² McQuoid–Mason *et al* 2002:55.

- If not reported to the South African Police the advantages and disadvantages of reporting the incident must be discussed to establish whether the survivor wishes to report the rape or not.
- If the patient wishes to report the rape the relevant police station must be contacted and a police officer should be requested to come to the hospital or clinic to take a statement and collect specimens.
- If the rape survivor is under the age of 18 the Child Protection Unit of the SAPS must be contacted for the purposes outlined above.
- If a crisis care center exists in the area and the patient so wishes, she should be transferred to this center for examination and treatment
- If the survivor is not referred to a crisis care center, the examination and treatment must be performed by a forensic nurse or a doctor.
- The examination and treatment of the patient should not be delayed beyond two hours even if the SAPS are unable to come to the clinic within that period. This serves the purpose that valuable evidence is not lost.
- All specimens taken from the victim should be sealed, labeled and kept in safe keeping until handed over to the SAPS if the survivor wishes to lay a complaint against the perpetrator.

Besides the actual examination of the patient it is essential to take into account the survivor's feelings. Typically the survivor will feel overwhelmed, emotionally drained, immobilized, unable to cope, guilty as if they were to blame for the incident, overly dependant or overly independent and, the patient will often present the need to eat, drink or smoke excessively.⁵¹³

It should be borne in mind by the healthcare worker or doctor who assists the survivor of rape that the survivor will usually be in a crisis situation and will move through the following phases:⁵¹⁴

- Phase 1 – Impact phase: The survivor will feel stunned, disorientated and unable to speak.⁵¹⁵

⁵¹³ McQuoid–Mason *et al* 2002:136.

⁵¹⁴ McQuoid–Mason *et al* 2002:136.

⁵¹⁵ McQuoid-Mason *et al* 2002:136.

- Phase 2 – Disequilibrium phase: The victim will feel overwhelmed by a mixture of anger, resentment, depression, guilt or shame. The survivor's balance is severely disturbed and she will appear to be withdrawn into herself.⁵¹⁶
- Phase 3 – Adjustment phase: A new sense of hope and future orientated thoughts come to the fore. This phase will usually occur well after phase 2.
- Phase 4 – Reconstruction phase – The victim will begin to reconnect and start to rebuild her life.⁵¹⁷

It is important to note that the reconstruction phase as well as the adjustment phase will often occur long after the initial examination by the healthcare worker or doctor.

3.3.1 Basic traumatology⁵¹⁸

Before any discussion on basic traumatology⁵¹⁹ it is important to note the following distinction:

- Clinical forensic medicine: This refers to the part of medicine that deals with the examination and completion of a medico-legal report on survivors⁵²⁰ of crime in instances where legal proceedings may follow from the incident. The results of tests carried out on surviving victims, are of utmost importance for subsequent evidence which is led in court.⁵²¹
- Forensic pathology: This refers to the study of disease and tissue injury by scientific methods⁵²² and relates to the investigation on the effects of trauma, poisoning, occupational hazards and certain natural diseases in both the living and the deceased.⁵²³

⁵¹⁶ McQuoid–Mason *et al* 2002:136.

⁵¹⁷ McQuoid–Mason *et al* 2002: 136.

⁵¹⁸ Refers to the study of bodily wounds and injuries- Collins English dictionary 2004:1705.

⁵¹⁹ Refer to footnote 468 above.

⁵²⁰ Shepherd 2003:186.

⁵²¹ McQuoid–Mason *et al* 2002:16.

⁵²² Saayman 2005:3.

⁵²³ McQuoid–Mason *et al* 2002:16.

One often hears, and uses the term injury, in basic everyday language and yet the exact definition of the word injury seems to escape common knowledge. An injury or wound is the damage to the body caused through the application of force or violence to the body, for example, by a fist.⁵²⁴ A wound will occur to the body when the force applied is greater than the body's ability to absorb such a force safely. The injury may be due to physical or chemical factors and a mechanical force can be generally divided into those caused by blunt force and those caused by sharp force. An injury may be localized to one region of the body or may involve various parts of the body. The effect can be local or wide spread and may be complicated by further complication of the injury. It is however important to note that the absence of skin injury does not necessarily exclude injury to the underlying internal organ. Due to the great variety of tissues in the body, an injury will vary from tissue to tissue. The effects of a blunt injury to the scalp overlying the rigid skull, for example, will be different to that of the abdomen which is pliable and different in underlying rigidity.⁵²⁵

For the purposes of this dissertation the main focus will be on mechanical force injuries.

A mechanical force injury can be divided into blunt force injuries and sharp force injuries.⁵²⁶ Blunt force injuries and sharp force injuries are further divided as follows:

- Blunt force injury: This refers to the application of force to the body by a blunt instrument or where the body strikes a surface such as a wall or the ground.⁵²⁷ Blunt force injuries are further divided into three categories namely abrasions, bruises and lacerations.⁵²⁸

⁵²⁴ McQuoid–Mason *et al* 2002:17.

⁵²⁵ Dada *et al* 2001:153.

⁵²⁶ Saayman 2005:3.

⁵²⁷ Schwär *et al* 1984:34.

⁵²⁸ Dada *et al* 2001:156.

An abrasion is a superficial injury to the skin in which the outer layer of the skin is scraped of.⁵²⁹ An interesting fact of an abrasion is that it allows an inference to be drawn about the nature and shape of the object causing the injury, the time of the injury and the type of assault as well as the cause and mechanism of death.

A bruise or a contusion is a blunt force injury which occurs when blood vessels in the skin or internal organs are ruptured.⁵³⁰ Much like an abrasion a bruise allows an inference to be drawn about the nature and shape of the object used during the assault, the time of the injury, the type of assault and the cause of mechanism of death, to be drawn. Bruising is highly dependant on age, gender and the presence of underlying disease in the patient.⁵³¹

A laceration is a wound with irregular edges which results from the application of blunt force which causes the tearing or splitting of the skin. Lacerations allow an inference to be drawn about the nature and the shape of the object used to cause such laceration, the time of injury and the cause and mechanism of death, to be drawn.⁵³²

- A sharp force injury: This type of injury is caused by the cutting of the skin with a sharp instrument such as a knife, dagger, tin edge, glass, razor blade and other sharp tools.⁵³³ A sharp force injury also allows an inference to be drawn concerning the nature and size of the instrument causing the injury or death, the force used to inflict the injury, the time of the injury and whether the victim attempted to defend him or herself.⁵³⁴ A sharp force injury can be further divided into incised wounds, which is a superficial wound in which the size of the wound on the surface is larger than the depth of the wound⁵³⁵ or into a penetrating incised wound which

⁵²⁹ McQuoid–Mason *et al* 2002:221.

⁵³⁰ McQuoid–Mason *et al* 2002:221.

⁵³¹ McQuoid–Mason *et al* 2002:221.

⁵³² McQuoid–Mason *et al* 2002:221.

⁵³³ Schwär *et al* 1984:32.

⁵³⁴ Dada *et al* 2001:161.

⁵³⁵ McQuoid–Mason *et al* 2002:222.

is characterized by being deeper than it is wide.⁵³⁶ A further division is a chop wound which is caused by a heavy weapon or instrument which has at least one sharp cutting edge.⁵³⁷ It may easily be mistaken for a laceration especially if the wound is over bone and there is a groove or a cut in the underlying bone caused by such incision.⁵³⁸

By comparison a sharp force wound is characterized by:

- Sharply outlined edges that may be straight, curved or angled, depending on how the blade was used on or in the body.⁵³⁹
- The absence of bruise clash abrasion on the edge of the wound.⁵⁴⁰
- No loss of hair around the wound.⁵⁴¹
- No bridging strands of tissue across the wound.⁵⁴²
- Usually no foreign material is found in or around the wound.⁵⁴³
- The wound would bleed profusely.⁵⁴⁴

By contrast a lacerated wound is characterized by:⁵⁴⁵

- Characterized by straight, round, oval, star shaped, slit like shape of wound.⁵⁴⁶
- Edges may be irregular, ragged and may have associated abrasions and bruises.⁵⁴⁷
- Hair around the wound may be absent.
- Tissue bridges may be present.⁵⁴⁸
- Foreign material or debris is often present if the injury was caused by a dirty instrument or surface.⁵⁴⁹

⁵³⁶ McQuoid–Mason *et al* 2002:222.

⁵³⁷ Shepherd 2003:66.

⁵³⁸ McQuoid–Mason *et al* 2002:222.

⁵³⁹ Schwär *et al* 1984:31.

⁵⁴⁰ Shepherd 2003:60.

⁵⁴¹ Schwär *et al* 1984:60.

⁵⁴² McQuoid–Mason *et al* 2002:222.

⁵⁴³ Dada 2001:161.

⁵⁴⁴ McQuoid–Mason *et al* 2002:222.

⁵⁴⁵ Dada *et al* 2001:162.

⁵⁴⁶ Saayman 2005:2.

⁵⁴⁷ McQuoid–Mason *et al* 2002:222.

⁵⁴⁸ Schwär *et al* 1984:61.

⁵⁴⁹ McQuoid–Mason *et al* 2002:222.

- The bleeding is less than an incised wound except when it occurs on the scalp.⁵⁵⁰

3.3.2 Female reproductive anatomy and physiology

The most appropriate genital examinations, with respect to patient comfort, and indeed the most legally valuable as far as interpretation is concerned, are those done macroscopically⁵⁵¹ by doctors with considerable experience in the examination of normal, diseased and traumatized genitalia and a sound knowledge of the principles of injury interpretation.⁵⁵²

In order to prosecute on behalf of an adult female or a minor child who has survived a sexual crime it is essential that legal practitioners understand basic female anatomy and physiology under the following headings:

The female breasts

The female breasts are functionally closely related to the genital organs and are small in size until puberty where after they develop to their mature size due to hormonal stimulation.⁵⁵³ The enlargement is as a result of the growth of ductile⁵⁵⁴ and alveolar⁵⁵⁵ tissues and an increase in fat deposits.⁵⁵⁶

On a J88⁵⁵⁷ medical report there is a tanner scale which denotes breast development and the pubic hair development of a victim. With regard to the tanner scale for breast development the stages present as follows:⁵⁵⁸

⁵⁵⁰ Schwär *et al* 1984:61.

⁵⁵¹ Refers to an object large enough to be visible to the naked eye. In examining sexual assault injuries a wound may be examined with the aid of a micro-scope in order that it is enlarged for examination: Collins English dictionary 2004:1065.

⁵⁵² Lincoln 2001:41.

⁵⁵³ McQuoid-Mason *et al* 2001:226.

⁵⁵⁴ Bodily passage capable of carrying fluid i.e. milk ducts- Collins English dictionary 2004:482.

⁵⁵⁵ Denotes connective tissue- Collins English dictionary 2004:45.

⁵⁵⁶ McQuoid-Mason *et al* 2002:226.

⁵⁵⁷ Prescribed medical form completed by the medical examiner and submitted as explanatory material to be used in a criminal case.

⁵⁵⁸ Girardin *et al* 1997:110 – 113.

- Stage one – There is a slight elevation of the nipple which usually presents only in pre-adolescence.
- Stage two – The breast bud appears as a small mound that is palpable.⁵⁵⁹
- Stage three – There is an enlargement and elevation of the breast and areola without a separation of their contours.⁵⁶⁰
- Stage four – The areola⁵⁶¹ and nipple are projected to form a secondary mound with the nipple and breast contours separated.⁵⁶²
- Stage five – This presents as the mature breast with the areola receding to the same contours of the breast and the areola⁵⁶³ is strongly pigmented.⁵⁶⁴

The female reproductive system

The female reproductive system can be divided into internal and external genitalia.⁵⁶⁵

The external genitalia

The external genitalia or vulva⁵⁶⁶ and perineal⁵⁶⁷ areas comprise of the following:⁵⁶⁸

- *Mons pubis* - The *mons pubis* is a fleshy pad over the pubic symphysis⁵⁶⁹ and is covered by pubic hair.⁵⁷⁰

⁵⁵⁹ Defined as that which is obvious or that which one is able to touch- Collins English Dictionary 2004:1173.

⁵⁶⁰ McQuoid-Mason *et al* 2002:227.

⁵⁶¹ Small, circular, pigmented area of the breast around the nipple- Collins English Dictionary 2004:77.

⁵⁶² McQuoid-Mason *et al* 2002:227.

⁵⁶³ Refer to footnote 512 above.

⁵⁶⁴ McQuoid-Mason *et al* 2002:227.

⁵⁶⁵ McQuoid-Mason *et al* 2002:227.

⁵⁶⁶ External genitalia of a human female- Collins English Dictionary 2004:1827.

⁵⁶⁷ The area of the human body between the genitals and anus- Collins English Dictionary 2004:1209.

⁵⁶⁸ McQuoid-Mason *et al* 2002:227.

⁵⁶⁹ An adhesion of two or more bony structures connected by intermediate layers of fibrous cartilage- Collins English Dictionary 2004:1651.

⁵⁷⁰ McQuoid-Mason *et al* 2002:228.

- *Labia majora* – The *labia majora* are longitudinal skin folds that form the outer lips of the vagina that run from the *mons pubis* to the perineum.⁵⁷¹ Together with the *mons pubis* the *labia majora* forms a distinctive triangle which, in adult females, is covered by pubic hair.⁵⁷²
- *Labia minora* – The *labia minora* are thin skin folds that surround the vestibule⁵⁷³ of the vagina.⁵⁷⁴
- Clitoris – The clitoris is an erectile structure that is analogous to the male penis and is situated behind the interior commissure of the *labia majora*. Most of the clitoris is enclosed by the *labia minora*.⁵⁷⁵
- Urethral orifice – The urethral orifice lies behind the clitoris and immediately in front of the vaginal orifice. It appears as a short vertical slit with a slightly raised margin.⁵⁷⁶
- The vaginal orifice – This appears as a vertical slit below the urethral orifice and the size varies inversely with that of the hymen.⁵⁷⁷
- The hymen – The hymen is a thin mucus membrane within the vaginal orifice. The size and appearance of the hymenal opening varies according to age, anatomical type; time elapsed since injury occurred and the position of examination.⁵⁷⁸ Confirmation of sexual assault cannot be made purely on the presence of an enlarged hymenal orifice.⁵⁷⁹ The hymen may be described as a collar or a semi-collar of tissue surrounding the vaginal orifice.⁵⁸⁰ The hymen separates the external genitalia from the vagina and the internal surface is folded and the vaginal orifice appears as a cleft between them. Ordinarily the hymen has a central opening to allow for menstrual flow and this opening will vary greatly in shape and size. The hymen may take different shapes.⁵⁸¹ The hymen may be described as annular⁵⁸² (circumferential). This refers to the situation where the

⁵⁷¹ Area between the genitals and anus- refer to footnote 567 above.

⁵⁷² McQuoid-Mason *et al* 2002:228.

⁵⁷³ Body cavity at the entrance of the vaginal passage- Collins English Dictionary 2004:1809.

⁵⁷⁴ Schwär *et al* 1984:351.

⁵⁷⁵ McQuoid-Mason *et al* 2002:229.

⁵⁷⁶ McQuoid-Mason *et al* 2002:229.

⁵⁷⁷ Agur 1991:148.

⁵⁷⁸ Els *et al* 2001:66.

⁵⁷⁹ Els *et al* 2001:68.

⁵⁸⁰ Agur 1991:148.

⁵⁸¹ McQuoid-Mason *et al* 2002:229.

⁵⁸² Agur 1991:149.

circumference of the vaginal opening is completely surrounded by the hymen.⁵⁸³

The hymen may also be described as crescentic⁵⁸⁴ which presents as a hymen which is deficient at a twelve o' clock position and is attached at the eleven o' clock and one o' clock position.⁵⁸⁵ When referring to the twelve o' clock, eleven o' clock and one o' clock position it is worth noting that the vagina is usually presented as a clock formation super imposed over the actual vagina.⁵⁸⁶ The hymen may further present as septate⁵⁸⁷ which presents as a hymen which has bands of tissue creating two or more openings within the vaginal orifice.⁵⁸⁸ The hymen may also be cribriform which is described as a hymen with multiple openings and presents as a sieve like structure. The hymen may also be imperforate; which is a hymen without an opening in its membranous structure. This form of hymen is extremely rare and usually has to be surgically cut to allow for intercourse or for birth.⁵⁸⁹ Further the hymen may present as micro-perforate which refers to a hymen with only a small opening. Lastly the hymen may present as multiparous which is a hymen consisting of residual tags around its sides.⁵⁹⁰ The hymen is greatly under the influence of estrogen and may present with a number of congenital and non-specific findings such as notches, bumps, ridges and bands.⁵⁹¹ Estrogen affects the elasticity and thickening of the hymen.⁵⁹²

The vestibule

This is a cleft; between the *labia minora* and contains the opening of the vagina, the urethra and the ducts of the greater vestibular glands.⁵⁹³

⁵⁸³ Schwär *et al* 1984:351.

⁵⁸⁴ Saayman 2005:6.

⁵⁸⁵ Mcquoid-Mason *et al* 2002: 230

⁵⁸⁶ Mcquoid-Mason *et al* 2002: 230

⁵⁸⁷ Schwär *et al* 1984:351.

⁵⁸⁸ Mcquoid-Mason *et al* 2002: 230

⁵⁸⁹ Schwär *et al* 1984:351.

⁵⁹⁰ Mcquoid-Mason *et al* 2002: 230

⁵⁹¹ Mcquiod-Mason *et al* 2002:230.

⁵⁹² Mcquiod-Mason *et al* 2002:231.

The fossa navicularis

The *fossa navicularis* occurs at the six o' clock position and is usually injured during a forced sexual penetration.⁵⁹⁴ It is a shallow depression in the vestibule between the vaginal orifice and the frenulum⁵⁹⁵ of the labia. Ordinarily the fossa navicularis is obliterated by child birth.⁵⁹⁶

Ordinarily the J88⁵⁹⁷ medical report will require the tanner stage of the pubic hair development of the victim. The status may be presented as follows:⁵⁹⁸

- Stage one – Fine vellus⁵⁹⁹ hair similar to that on the abdomen appears on the pre-adolescent vagina.
- Stage two – There is a sparth growth of straight or slightly curled, lightly pigmented downy hair along the *labia majora*.⁶⁰⁰
- Stage three – The hair presents as coarser, darker, and curlier and sparsely spread over the *labia majora* and *mons pubis*.⁶⁰¹
- Stage four – The pubic hair will present as coarse, curled and darker but the area is not covered as extensively as in that of an adult.⁶⁰²
- Stage five – This presents as the adult distribution of coarse, curled and dark hair in the classic triangle shape which spreads to the inner thigh.⁶⁰³

The internal female genitalia

The internal female genitalia lies in the pelvic cavity and comprises of the following:⁶⁰⁴

The vagina

The vagina is a muscular tube line by stratified⁶⁰⁵ epithelium⁶⁰⁶ extending from the vestibule to the uterus.⁶⁰⁷ The vagina runs upwards and backwards at an

⁵⁹³ McQuiod-Mason *et al* 2002:231.

⁵⁹⁴ Agur 1991:147.

⁵⁹⁵ Refers to the fold of the membrane connecting the labia.- Collins English Dictionary 2004:613.

⁵⁹⁶ McQuiod-Mason *et al* 2002:231.

⁵⁹⁷ Refer to footnote 508 above.

⁵⁹⁸ Girardin 1997:110–113.

⁵⁹⁹ Fine downy hair similar to that of an infant child- Collins English Dictionary 2004:1803.

⁶⁰⁰ McQuiod-Mason *et al* 2002:231. See also the works of Els *et al* 2001 in this regard.

⁶⁰¹ McQuiod-Mason *et al* 2002:231. See also the works of Els *et al* 2001 in this regard.

⁶⁰² Dada *et al* 2001:253. See also the works of Els *et al* 2001 in this regard.

⁶⁰³ Dada *et al* 2001:253.

⁶⁰⁴ McQuiod-Mason *et al* 2002:232.

angle of 60° from the horizontal between the bladder in front and the anus and rectum behind⁶⁰⁸ and forms an angle of about 90° with the uterus. The anterior wall, of the vagina, is 7.5 cm long and the posterior wall is approximately 9 cm long.⁶⁰⁹

The uterus

The uterus presents as a hollow organ composed of smooth muscle which has, as a sole function, gestation.⁶¹⁰ The uterus lies behind the rectum and the bladder and is continuous with the vagina. In an adult the uterus is about 7.5 cm long, 5 cm wide and 2.5 cm thick and is divided into the fundus, body and cervix.⁶¹¹

The perineum and the anus

The perineum

The perineum is the term to describe the area between the posterior commissure and the anus.⁶¹²

The anus

The anus is the opening of the anal canal which is about 3 - 4 cm long and extends from the perineal skin to the rectum.

The human female sexual response

According to Girardin⁶¹³ the normal human sexual response prepares individuals for sexual intercourse. It can be described as occurring in four phases namely: excitement, plateau, orgasmic and resolution. The excitement phase is marked by the preparation of the female genital tract to receive the penis by increasing lubricating secretions and by muscle

⁶⁰⁵ The epithelium is formed in layers or strata- Collins English dictionary:1605.

⁶⁰⁶ Cellular tissue covering the inside of the vaginal cavity- Collins English Dictionary 2004:526.

⁶⁰⁷ McQuiod-Mason *et al* 2002:232.

⁶⁰⁸ McQuiod-Mason *et al* 2002:232.

⁶⁰⁹ McQuiod-Mason *et al* 2002:233.

⁶¹⁰ Dada *et al* 2001:157.

⁶¹¹ McQuiod-Mason *et al* 2002:233.

⁶¹² Schwär *et al* 1984:62.

⁶¹³ 1997:13.

relaxation.⁶¹⁴ At this stage the inner two thirds of the vagina start to expand. The plateau stage is marked by the engorgement of the *labia minora* in order to open the vaginal orifice and to support the penis, as well as the lengthening of the inner two thirds of the vagina.⁶¹⁵ During the orgasmic stage regular contractions of the outer one third of the vagina occur and there are involuntary contractions of the rectal sphincter. At the resolution phase there is a loss of tension and a gradual return to the pre-excitement or unstimulated stage.⁶¹⁶ The above response will usually not occur in cases of rape and further the penetration is hampered by the lack of pelvic tilt from the woman.

The oral cavity

The oral cavity or the mouth may be penetrated during a sexual assault and comprises of the space that is surrounded by the lips in the front, the pharynx in the back, the cheeks on the side, the palate on the top, and the tongue and the floor of the mouth on the bottom.

3.3.3 The forensic examination of survivors of sexual assault

As previously discussed in 3.3 above any forensic examination of the survivor of a sexual assault should be preceded by an initial interview, conducted by the doctor or a forensic nurse, during which the patient's history before the incident, during the incident and after the incident should be carefully recorded.⁶¹⁷ Emphasis should always be placed on the patients' obstetric and gynecological history as well as her sexual history and whether she has used any medications, drugs or alcohol. In addition record should always be kept as to her drug allergies, bruising tendencies and when she last received a tetanus injection.⁶¹⁸ Further the history of events that took place during the incident including such information as the date and time of the alleged assault, the type of assault, the place of assault and the consequences of the

⁶¹⁴ Agur 1991:144.

⁶¹⁵ Agur 1991:147.

⁶¹⁶ McQuiod-Mason *et al* 2002:236.

⁶¹⁷ McQuiod-Mason *et al* 2002:244.

⁶¹⁸ McQuiod-Mason *et al* 2002:244.

assault should be noted (as outlined in 3.3 above). The patient should be asked when she started menstruating and how regular her current menstruation cycles are including the amount of bleeding and the pain associated with her menarche. She should further be questioned as to when her last menstrual period occurred and whether she uses pads or tampons as a form of menstrual hygiene. The patient should further be questioned as to whether she is currently on any hormonal treatment or contraceptive methods and whether or not she is sexually active. If the answer to that question is positive, the age at which the first sexual intercourse took place and the date of the last consensual sexual intercourse, and whether or not a condom was used at the last coitus, should be ascertained. Patients should further be questioned as to whether there is ordinarily any post-coital bleeding and whether she suffers from any genital problems such as ulcers, rashes and discharge. The patient should further be asked whether she has a history of sexually transmitted diseases.⁶¹⁹

The forensic interview is a fact finding procedure usually performed by a neutral doctor or nurse. The information elicited must be recorded and carefully contained in a checklist to ensure a systematic presentation and subsequent acceptance in a court of law.⁶²⁰ The forensic interview must include information concerning the identity, race and age of the alleged assailant as well as the details of where the assault took place and the date and time of the assault. Although it may be painful or uncomfortable to the patient it should further be ascertained what the conduct of the assailant was, the amount of force used and the description of any weapons used. Detail must be obtained regarding the assault itself.⁶²¹

The patient should be asked whether the vagina was penetrated by a penis, finger or foreign object. The use of this information is to prove that penetration took place and to corroborate the injuries of the stated offence. Presently a sexual offence is only regarded as rape if there was penetration of

⁶¹⁹ McQuiod-Mason *et al* 2002:244.

⁶²⁰ Dada *et al* 2001:153.

⁶²¹ Schwär *et al* 1984:351.

the vagina by the penis. This information further allows the medical examiner to identify the need for swabbing of the vagina for semen or to look for injury caused by the finger of the assailant or by a foreign object.⁶²² Further the patient should be asked whether her rectum or anus was penetrated by a penis, finger or foreign object. Again this information is used to corroborate stated injuries and to identify the need for swabbing.⁶²³ Further the patient should be asked whether oral copulation of the genitals occurred by the victim or by the assailant to identify the need for swabbing for saliva of the assailant and for the presence of semen in the mouth of the victim. The patient should further be asked whether any masturbation occurred of the victim by the assailant or of the assailant by the victim. This again serves to corroborate injuries which may be identified and to identify the need for detecting and testing clothing and other surfaces for the semen of the assailant.⁶²⁴ Ejaculation in a bodily orifice, outside of a bodily orifice or in a condom should be noted in order to examine a stated site for the presence of semen. Further, if ejaculation took place in a condom, the police may be asked to locate and preserve the condom as further evidence.⁶²⁵ The victim should be questioned as to whether there was any foam, jelly or lubricant used during the assault and whether fondling, licking or kissing took place to any part of the body in order to swab the appropriate part of the body for the presence of saliva.

In order to corroborate any injury the victim needs to describe any weapon that was used during the assault and whether there were any physical blows by hands, feet or head to the person of the victim in order to corroborate her statement with her injuries. Further, any activity such as grabbing, grasping or holding any parts of the victim's body may be used to ascertain and to corroborate the injury patterns which may be found on the victim during the subsequent medical examination. If any restraints were used against the victim or if the victim was bitten, strangled, throttled or burned these actions should be described as they may be used to corroborate injury patterns. If the

⁶²² Schwär *et al* 1984:351.

⁶²³ McQuiod-Mason *et al* 2002:245.

⁶²⁴ McQuiod-Mason *et al* 2002:245.

victim lost consciousness at any point during the assault this must be noted by the medical examiner in order to investigate the possibility of drug facilitated rape and to clinically explain any loss of memory or any other incomplete recall concerning the event.⁶²⁶

The forensic examiner should also question the victim as to her post assault activities and hygiene. This will impact the presence of physical injury and the value of special investigations. For example if the victim has bathed after the incident the need for vaginal swabbing may be negated depending on the length of time between the rape and the examination. It should also be noted whether the victim has urinated, vomited, defecated, wiped the genital area, bathed, showered, douched, removed or inserted a tampon, sponge or diaphragm, eaten or drank, brushed her teeth, gargled or changed her clothing.⁶²⁷ After the initial medical interview the forensic examination of the victim will commence in terms of which the patient should be examined in terms of her general appearance, demeanor, and condition of her clothing, general body, external genitalia, vagina, cervix, anus and rectum.

As previously indicated, the clinical examination should be conducted in private but the patient should be allowed to request a person to support her, for example a family member or rape councilor.⁶²⁸ The general appearance and demeanor of the patient, that is, her level of calmness or stress should be recorded including her vital signs such as body temperature, pulse rate, respiratory rate and blood pressure. Her height and weight should also be noted. The patient's mental state should be noted by the medical examiner for example, was she confused, experiencing flashbacks, hyper aroused, dazed, in a state of coma or retarded and any physical deformities or weaknesses should further be recorded.⁶²⁹

⁶²⁵ McQuiod-Mason *et al* 2002:246.

⁶²⁶ Dada *et al* 2001:246.

⁶²⁷ McQuiod-Mason *et al* 2002:247.

⁶²⁸ McQuiod-Mason *et al* 2002:247.

⁶²⁹ Schwär *et al* 1984:355.

The type, appearance and state of the victim's clothing should be noted. If the patient is still wearing the clothes which she wore during the assault the clothing must be examined for stains, for example, semen, blood, faeces, hair or foreign material or for damage.⁶³⁰ An ultra violet light source may be used to scan any stain appearing on the victims clothing which then may be tested for the appearance of semen or saliva.⁶³¹ Should any stains show up under the ultra violet light they might be marked by the attending physician with indelible ink.⁶³² The patient should undress over a sheet of clean white paper in order to collect any foreign matter, for example the hair of the assailant, that might fall from her person or her clothing. That paper must then be carefully folded to prevent loss and submitted to a forensic laboratory for analysis.⁶³³ Relevant items of clothing for example, panties or skirts may be collected, dried and stored in paper bags which will then be sent to a forensic laboratory for analysis.⁶³⁴

The body in its entirety should be examined by the presiding medical practitioner in a systematic fashion and should include all the major organs in the system such as the cardiovascular, respiratory and central nervous system.⁶³⁵ Any tenderness and visual injury must be carefully recorded and marked on the rape protocol form currently called form J88.⁶³⁶

The mouth, hand, scalp, soles of the feet and the axillae⁶³⁷ should be examined for signs of injury, which injury should be classified as blunt or sharp.⁶³⁸

In terms of sexual assault specific injuries should be examined such as bite or suction marks, bruises on the inner thighs and buttocks and finger nail

⁶³⁰ Schwär *et al* 1984:355.

⁶³¹ McQuiod-Mason *et al* 2002:248.

⁶³² Form of ink which is incapable of being erased or obliterated- Collins English Dictionary 2004:799.

⁶³³ McQuiod-Mason *et al* 2002:248.

⁶³⁴ McQuiod-Mason *et al* 2002:248.

⁶³⁵ McQuiod-Mason *et al* 2002:248.

⁶³⁶ Refer to footnote 508 above.

⁶³⁷ Medical term referring to the human arm-pit- Collins English Dictionary 2004:104.

⁶³⁸ McQuiod-Mason *et al* 2002:248.

abrasions and bruises from throttling of the victim which may be apparent on the victim's neck.⁶³⁹ The entire body should be scanned with ultra-violet light to detect traces of saliva and semen that would not normally be visible. Genital injuries may not be the only injuries present after a sexual assault and the head and face, neck, breasts, torso and buttocks should also be examined for any such injury.⁶⁴⁰ Injuries to the head or face may be caused by the pulling of hair, biting of ears, nose or cheeks and slashing of the face with a sharp instrument. Further a rag may be stuffed into the mouth of the victim in order to silence her during the assault.⁶⁴¹

The forced performance of oral sex may have caused injuries to the mucosal surfaces of the lips, palate⁶⁴² and pharynx⁶⁴³ of the victim.⁶⁴⁴ Further the neck may often show signs of injury such as manual⁶⁴⁵ or ligature⁶⁴⁶ strangulation marks. The breasts may be injured by the biting, sucking, squeezing, pulling, pinching, burning, slashing and piercing actions of the assailant.⁶⁴⁷ The back and buttocks may be further injured during a sexual assault as well as the extremities of the victim of the assault by the tying or restraining of the hands, feet, arms and legs.⁶⁴⁸

Non consensual intercourse may cause injury to the genitalia. However it is not simply the forceful introduction of the penis that may have caused those injuries. The injuries may be caused by biting, burning and stabbing of the genital area by the assailant.⁶⁴⁹ In some instances fingers and other objects, may have been forcefully inserted into the vagina.⁶⁵⁰

⁶³⁹ Schwär *et al* 1984:355.

⁶⁴⁰ Ferris 1998:333.

⁶⁴¹ Shepherd 2003:132.

⁶⁴² Refers to the roof of the mouth which separates the oral and nasal cavities- Collins English Dictionary 2004:1170.

⁶⁴³ Refers to that part of the alimentary canal between the mouth and the oesophagus- Collins English Dictionary 2004:1220.

⁶⁴⁴ McQuiod-Mason *et al* 2002:249.

⁶⁴⁵ Schwär *et al* 1984:146.

⁶⁴⁶ Refers to a method of strangulation which is aided by the use of an object such as a length of rope as opposed to manual strangulation which refers to strangulation by use of hands.

⁶⁴⁷ Schwär *et al* 1984:355.

⁶⁴⁸ McQuiod-Mason *et al* 2002:249.

⁶⁴⁹ Schwär *et al* 1984:355.

After the general body examination the medical practitioner will move on to the genital examination of the victim.⁶⁵¹ The patient must be kept fully informed throughout the examination and the physical and sexual maturation of the patient should be noted using the tanner scale. Ordinarily the normal sexual response by the female rape survivor will not occur during a sexual assault therefore, for example, there will be no increased lubrication and no pelvic tilt to aid the penetration of the vagina.⁶⁵² A number of positions may be used to examine the genitalia of the survivor of rape but the preferred position is the supine position which refers to the patient lying supine with the legs pulled up to the chest or placed in stirrups.⁶⁵³

The dignity of the patient should be respected at all times and those parts of her body which are not subjected to examination should be covered during the examination.⁶⁵⁴ It may be necessary to examine the patient under general anesthetic where she has been penetrated by foreign objects or severally injured.⁶⁵⁵ Not all injuries to the vaginal tissue are immediately apparent to the naked eye and therefore subtle injuries are detected using two forms of tests referred to as the toluidine⁶⁵⁶ blue dye test and by using a colposcope.⁶⁵⁷

The toluidine blue dye test is used to identify recent or healed genital or anal rectal injury.⁶⁵⁸ In the toluidine blue dye test a 1 percent solution of toluidine blue is applied to the area of concern and then washed of with a lubricant. The injured mucosa⁶⁵⁹ or tissue will retain the dye and become more apparent to the naked eye.⁶⁶⁰ A colposcope is an instrument much like a microscope

⁶⁵⁰ McQuiod-Mason *et al* 2002:249.

⁶⁵¹ Els *et al* 2001:46.

⁶⁵² McQuiod-Mason *et al* 2002:249.

⁶⁵³ Els *et al* 2001:40.

⁶⁵⁴ Dada *et al* 2001:257.

⁶⁵⁵ McQuiod-Mason *et al* 2002:250.

⁶⁵⁶ An amine derived from toluene; used in making dyes- Collins English Dictionary 2004:1716.

⁶⁵⁷ Medical instrument used to examine the uterine cavity through magnification- Collins English Dictionary 2004:319.

⁶⁵⁸ McQuoid-Mason *et al* 2002:251.

⁶⁵⁹ The mucous secreting membrane lining the vaginal and anal cavities- Collins English Dictionary 2004:998.

⁶⁶⁰ Agur 1991:148.

which may be used to magnify images between 5–30 times.⁶⁶¹ A colposcope can be used individually or along with the toluidine dye test in order to detect subtle injuries and healed injuries in the genital and anal rectal areas⁶⁶² which may otherwise not be detected.

If the victim was assaulted whilst in the supine⁶⁶³ position the injuries will tend to occur where the penis first comes into contact with the perineum.⁶⁶⁴ This is referred to as a mounting injury and will normally occur on the *posterior fourchette*⁶⁶⁵ from the five o' clock to the seven o' clock position. Other areas which may indicate injury are the *labia majora*, *labia minora*, hymen, clitoris and urethral opening.⁶⁶⁶ Evidence of semen or saliva must be sought in this area and the examination may be facilitated by gently separating the *labia majora* laterally using the thumb and one finger of the hand.⁶⁶⁷ This procedure helps visualize the *labia minora*, clitoris, hymen and urethra.⁶⁶⁸

Damage or tearing of the hymen may occur when the vaginal opening is dilated.⁶⁶⁹ Hymen injuries are reflective of penetrating trauma to the vagina, because the hymen is an internal structure.⁶⁷⁰ A speculum⁶⁷¹ may be inserted into the vagina in order to visualize the vaginal walls and cervix for signs of disease, injury and foreign materials. The speculum however should not be lubricated with a lubricant, but rather with water as a lubricant usually interferes with forensic evaluation.⁶⁷²

Injuries to the perineum and anus should also be examined by the attending physician and may be caused by over stretching of the anal sphincter, from

⁶⁶¹ Els 2001:40.

⁶⁶² McQuoid-Mason *et al* 2002:251.

⁶⁶³ Refers to lying on the back with the face and palms facing upwards- Collins English Dictionary 2004:1635.

⁶⁶⁴ Refers to the area between the vaginal entrance and the anus- refer to footnote 567 above.

⁶⁶⁵ Refers to the thin layer of skin which joins the labia minora at the bottom of the vaginal entrance.

⁶⁶⁶ McQuoid-Mason *et al* 2002:252.

⁶⁶⁷ McQuoid-Mason *et al* 2002:252.

⁶⁶⁸ Shepherd 2003:132.

⁶⁶⁹ Schwär *et al* 1984:357.

⁶⁷⁰ McQuoid-Mason *et al* 2002:252.

⁶⁷¹ Medical instrument used in procedures requiring the dilation of bodily cavities in order that their interior surface may be examined- Collins English Dictionary 2004:1566.

⁶⁷² McQuoid-Mason *et al* 2002:252.

the forced insertion of the penis of the assailant or other objects.⁶⁷³ A common cause of injury to this area is obviously sodomy, however in some instances an entire hand or arm may have been forced into the anus and rectum causing severe injury.⁶⁷⁴ The perineum and the anus may be visualized if the patients' knees are pressed against her chest while she is either prone or supine.⁶⁷⁵

After the internal and external examination of the genitalia all survivors should be offered an anti-microbial⁶⁷⁶ therapy to prevent sexually transmitted infections especially if signs of such infections are present.⁶⁷⁷ The use of anti-retroviral drugs in the prevention of HIV transmission is further recommended in order to prevent the transmission of this virus.⁶⁷⁸ It may further be advisable to offer the survivor a Hepatitis⁶⁷⁹ B⁶⁸⁰ vaccination as this disease may be fatal.⁶⁸¹

3.4 The collection of forensic evidence

In terms of Locard's⁶⁸² principle:

The person or persons at the scene when a crime is committed will almost always leave something behind and take something away.

This is the rationale which lies behind the collection of forensic evidence to link the suspect to the victim of the crime. Specimen collection should be performed as soon as possible in order to minimize the loss and degradation

⁶⁷³ McQuoid-Mason *et al* 2002:253.

⁶⁷⁴ McQuoid-Mason *et al* 2002:253.

⁶⁷⁵ Els *et al* 2001:40. See also McQuoid-Mason in this regard.

⁶⁷⁶ Medical therapy which prevents the reproduction of and symptoms caused by micro-organisms- Collins English Dictionary 2004:1021.

⁶⁷⁷ Els *et al* 2001:52.

⁶⁷⁸ McQuoid-Mason *et al* 2002:254.

⁶⁷⁹ Inflammation of the liver- Collins English Dictionary 2004:735.

⁶⁸⁰ A form of hepatitis caused by a virus transmitted by infected blood, contaminated hypodermic needles, sexual contact, or by contact with any other body fluid- Collins English Dictionary 2004:735.

⁶⁸¹ McQuoid-Mason *et al* 2002:254.

of the sample.⁶⁸³ A control sample is usually taken from the victim such as blood, hair or tissue which may then be later compared with the sample obtained from the crime scene and may thus link the perpetrator with the victim of the crime.⁶⁸⁴ Such evidence may be further introduced in court as evidence of the perpetrator's involvement in the crime in terms of section 37 of the Criminal Procedure Act.⁶⁸⁵

In order to assure that a forensic analysis is accepted in a court as evidence it should be insured that all specimens are sealed in appropriate containers or bags, labeled properly and sealed properly and further that they are secure and stored effectively in order to insure the maintenance of the chain of custody.⁶⁸⁶ The sample must always be initialed and dated by the collector and handed to the investigating officer who will sign for its receipt. Should there be any delay in handing over the samples; the samples must be securely stored, preferably in a locked facility with restricted access, until they are handed over to the relevant role players involved.⁶⁸⁷ Any sample which is wet or damp, for example clothing, must be air dried to prevent the growth of bacteria and fungi which may then degrade DNA⁶⁸⁸ making the sample unsuitable for analysis.⁶⁸⁹

The Sexual Assault Evidence Collection Kit⁶⁹⁰ must be used to package and store evidentiary material in order to preserve the specimens and chain of custody.⁶⁹¹ The SAECK is a crime kit, issued by the South African Police Service, which is used to collect and preserve forensic evidence.⁶⁹² The collected evidence is then analyzed by the South African Police Service

⁶⁸² Saayman 2005:1.

⁶⁸³ McQuoid-Mason *et al* 2002:259.

⁶⁸⁴ Shepherd 2003:131.

⁶⁸⁵ Act 51 of 1977. Refer to footnote 420.

⁶⁸⁶ McQuoid-Mason *et al* 2002:259.

⁶⁸⁷ McQuoid-Mason *et al* 2002:259.

⁶⁸⁸ Deoxyribonucleic acid is the main constituent of the chromosomes of all organisms (with the exception of some viruses) in the form of a double helix. DNA is self-replicating and is responsible for the transmission of hereditary characteristics- Collins English Dictionary 2004:460.

⁶⁸⁹ McQuoid-Mason *et al* 2002:259.

⁶⁹⁰ Hereafter referred to as SAECK.

⁶⁹¹ McQuoid-Mason *et al* 2002:260.

⁶⁹² Dada *et al* 2001:254.

Forensic Science Laboratory in Pretoria or Cape Town.⁶⁹³ There are three types of SAECK's available: Kit 1 is used for complete evidence collection⁶⁹⁴ whilst Kit 2 comprises of swabs and slides for the collection of evidence from one body⁶⁹⁵ and Kit 3 is used to collect hair, test samples and control samples.⁶⁹⁶ The presentation of the SAECK, as evidence in court will be discussed in subsequent writings herein.

The purpose of taking a swab, from the person of the victim, is to collect samples of any body fluid, that may have been deposited by the perpetrator on the outside of the rape survivors body or in any internal orifice, which may be subsequently analyzed for DNA. Furthermore the area of the body from which the sample is taken may corroborate the survivor's version of the events. The areas on which DNA samples are usually found include the inside of the mouth, exterior of the vagina and the area around the areola of the breast, the face, neck, cheeks or the lips and any area of the body on which the perpetrator may have ejaculated. Further, DNA material may be found under the fingernails where the survivor may have scratched the assailant whilst resisting the attack.⁶⁹⁷

Bodily fluids, of the victim or the assailant, may remain on the survivor's skin if they have become air-dried and not washed of. Saliva will evaporate but will leave cells from the oral mucosa behind. The length of time that sperm will survive, within the survivor's body, will depend on where on the body they were deposited. Sperm samples may be collected from the endocervical⁶⁹⁸ area up to a hundred and forty four hours after the events took place.⁶⁹⁹ An internal vaginal swab will show the presence of sperm up to a hundred and twenty hours⁷⁰⁰ after the deposit of such sperm and a rectal swab up to sixty five hours later. An anal swab will show the presence of sperm up to forty six

⁶⁹³ Dada *et al* 2001:254.

⁶⁹⁴ Dada *et al* 2001:254.

⁶⁹⁵ Dada *et al* 2001:254.

⁶⁹⁶ Dada *et al* 2001:254.

⁶⁹⁷ McQuoid-Mason *et al* 2002:260.

⁶⁹⁸ The lower part of the uterus which extends into the vagina- Collins English Dictionary 2004:396.

⁶⁹⁹ McQuoid-Mason *et al* 2002:261.

⁷⁰⁰ Saayman 2005:3.

hours later and the lips of the mouth up to nine hours later.⁷⁰¹ An oral swab will indicate spermatozoa⁷⁰² up to six hours after the event have occurred. The time periods are however dependent on loss through drainage, arising from the activities of the survivor, for example washing the genital area or rinsing the mouth.⁷⁰³

The Sexual Assault Evidence Collection Kit provides step by step guidelines for the collection of evidence in sexual assault cases. These steps are indicated as follows:⁷⁰⁴

- Step one – oral specimen. The aim of this step is to collect seminal fluid in the oral cavity for DNA analysis in cases where there is suspected oral / genital contact.⁷⁰⁵ This process is performed by swabbing the underside of the tongue, the gum line, inner cheeks and palate.⁷⁰⁶
- Step two – collection of panties and sanitary pads. The aim of this step is to collect the panties worn by the survivor during and after the incident.⁷⁰⁷ If a sanitary towel is attached to the panties it must not be removed and if it was detached, the sticky side of the sanitary towel must be covered with a wax sheet to prevent the towel from sticking to the paper collection bag which is provided in the kit.⁷⁰⁸
- Step three – evidence on the patients' body. The aim of this step is to collect and preserve any physical or biological evidence present on the patient's hair, skin or fingernails and to collect additional foreign debris.⁷⁰⁹ If bite marks are present on the patient's body, they should be photographed with or without the evidence documentation ruler after taking the necessary swabs.⁷¹⁰
- Step four – pubic hair. The aim of step four is to comb the pubic hair in order to obtain any loose hair or debris that may assist in the identification

⁷⁰¹ Saayman 2005:3.

⁷⁰² Indicating male reproductive cells released in the semen during ejaculation- Collins English Dictionary 2004:1567.

⁷⁰³ McQuoid-Mason *et al* 2002:261.

⁷⁰⁴ McQuoid-Mason *et al* 2002:264.

⁷⁰⁵ Els *et al* 2001:16.

⁷⁰⁶ Dada *et al* 2001:255.

⁷⁰⁷ Els *et al* 2001:16.

⁷⁰⁸ Schwär *et al* 1984:357.

⁷⁰⁹ McQuoid-Mason *et al* 2002:265.

of the assailant.⁷¹¹ The kit itself contains a plastic comb, catch paper and evidence seals. The catch paper should be placed under the survivor's buttocks and the hair should be combed in downward strokes so that any loose hair or debris will fall onto the paper which is then folded and labeled.⁷¹² For reference purposes the patient should be asked whether she would allow ten hairs to be pulled from the pubic region which should also be placed on the catch sheet and carefully folded and labeled.⁷¹³

- Step five – collection of anal-rectal specimens. The aim of this step is to collect any evidence or biological material for DNA analysis and to confirm anal-rectal assault.⁷¹⁴
- Step six – genital specimens. The aim of step six is to perform an examination of the genital area to identify and record any trauma⁷¹⁵ and to obtain biological material for DNA analysis which may assist in identifying the suspect.⁷¹⁶
- Step seven – reference DNA specimen. The patient should be asked to provide a reference DNA sample by depositing blood obtained through venipuncture on a Marshall⁷¹⁷ cassette. The blood is then placed in a plastic device containing three wells with absorbent paper at the base. After the collection of the blood a single drop is deposited into each well using the blood dispensing device provided in the kit.⁷¹⁸ The blood is then allowed to dry for ten minutes before being packaged in a padded envelope which is further divided in the kit.⁷¹⁹

⁷¹⁰ Els *et al* 2001:16.

⁷¹¹ Schwär *et al* 1984:359.

⁷¹² Els *et al* 2001:16.

⁷¹³ McQuoid-Mason *et al* 2002:265.

⁷¹⁴ Dada *et al* 2001:255.

⁷¹⁵ Els *et al* 2001:16.

⁷¹⁶ McQuoid-Mason *et al* 2002:266.

⁷¹⁷ Device used for the collection of blood samples; provided in the SAECK.

⁷¹⁸ Els *et al* 2001:16.

⁷¹⁹ McQuoid-Mason *et al* 2002:266.

3.5 The medical examination of a male accused in sexual offence cases

If an offender is arrested for a suspected sexual offence a medical examination is often essential, however the accused will not have to submit to the examination unless he gives informed consent.⁷²⁰ He may further wish a legal representative to be present and his wishes must be accommodated.⁷²¹

At the outset of the examination of the accused the general physical development of the accused should be noted.⁷²² Further the accused mental status and general demeanor should be observed, for example, if he appears to be under the influence of alcohol, this fact must be recorded.⁷²³ The accused should then be undressed and carefully inspected for external injuries.⁷²⁴ The penis should be examined for injuries, sores, blood or other foreign matter⁷²⁵ while the external meatus⁷²⁶ should be examined for evidence of discharge.⁷²⁷

If consent has been given a specimen of the accused persons blood should be taken for serological testing.⁷²⁸ If the assault had been one where a struggle was involved the perpetrator may have received injuries or scratches on his face, neck and chest from the victims fingernails.⁷²⁹ In exceptional circumstance the prepuce⁷³⁰ of the penis may be bruised and the fraenum⁷³¹ may be damaged. Fecal material may also be recovered if anal penetration has been achieved with the victim.⁷³²

⁷²⁰ Currie *et al* 2005:764.

⁷²¹ Shepherd 2003:133.

⁷²² Gordon *et al* 1988:361.

⁷²³ Schwär *et al* 1984:361.

⁷²⁴ Schwär *et al* 1984:361.

⁷²⁵ Schwär *et al* 1984:361.

⁷²⁶ Natural opening or channel such as the opening of the penile structure- Collins English Dictionary 2004:1003.

⁷²⁷ Gordon *et al* 1988:361.

⁷²⁸ Gordon *et al* 1988:362.

⁷²⁹ Shepherd 2003:133.

⁷³⁰ Commonly referred to as the foreskin- Collins English Dictionary 2004:1283.

⁷³¹ Refers to a fold of skin or membrane- Collins English Dictionary 2004:612.

⁷³² Shepherd 2003:133.

The recovery of trace evidence is often more important than the genital inspection of the accused. Samples of pubic hair, head hair and moustache or beard hair should be taken as these may correlate with the hair found on the victim. The pubic hair of the accused should be combed out to recover foreign hair or fibers from the victim.⁷³³

Blood should be taken for grouping, alcohol and DNA analysis and any evidence of venereal infections should be noted in the accused.⁷³⁴ Obviously any seminal stains on the garments of the accused or of the victim are of extreme importance. Seminal stains on a garment have a stiff consistency and are creamy white or yellowish white in color.⁷³⁵ The stains show equally well on both sides of a thin garment and have a greenish blue florescence when examined under the rays of an ultra violet lamp.⁷³⁶

Naturally the accused has a right to refuse to undergo medical examination; however section 37(2)(a)⁷³⁷ of the Criminal Procedure Act⁷³⁸ may be invoked to compel such examination. Section 37(2)(a)⁷³⁹ makes serious inroads on the accused's right to bodily integrity and security which may however be justified if one considers that the taking of prints or blood samples forms an important component of the criminal investigation and usually plays a role in the conviction of an offender.⁷⁴⁰ In the matter of *S v Orrie*⁷⁴¹ the presiding officer noted that the taking of blood samples has long been a vital tool in the administration of criminal justice. The rights of the accused in terms of his bodily integrity and security are read, in this regard, with section 36 of the

⁷³³ Shepherd 2003:133.

⁷³⁴ Shepherd 2003:133.

⁷³⁵ Benson *et al* 1988:362.

⁷³⁶ Gordon *et al* 1988:362.

⁷³⁷ Section 37(2)(a) of 51 of 1977: *Any medical officer of any prison or any district surgeon or, if requested thereto by any police official, any registered nurse may take such steps, including the taking of a blood sample, as may be deemed necessary in order to ascertain whether the body of any person referred to in paragraph (a)(i) or (ii) of subsection (1) has any mark, characteristic or distinguishing feature or shows any condition or appearance.*

⁷³⁸ Act 51 of 1977..

⁷³⁹ Act 51 of 1977.

⁷⁴⁰ Du Toit *et al* 2004:3-1.

⁷⁴¹ 2004 (1) SACR 162 (C).

Constitution⁷⁴² and limited as such to ensure the effective administration of the justice system.⁷⁴³

3.6 The analysis of specific forensic evidence

3.6.1 Introduction

Wilson⁷⁴⁴ explains the origin of the forensic examination of crime by way of the following case.

In 1881 the German Police were called to investigate the death of a mother and her five children. All the victims were found in a room that was bolted from the inside. The windows were also locked from the inside and it was evident that the mother had killed the children and then committed suicide by hanging herself from a hook in the wardrobe. Although the husband, Mr. Fritz Conrad, seemed to be of a suspect, nature all concerned had to agree that there was no way that he could have been involved in the death of his family. However Inspector Ratcliffe noticed a book on the families bookshelf called *Nena Sahib* which described a man murdering his wife in a room and then attempting to conceal his crime, by making the scene appear as if she had committed suicide, by drilling a hole in the door and inserting a horse hair, tied around the end of a bolt, which then facilitated the locking of the door from the outside by pulling the horse hair. Afterwards he sealed up the hole in the wall with brown wax.⁷⁴⁵ The inspector subsequently examined the bolt on the door to the room in which the family had died. Underneath it he found a tiny hole and on the outside of the door he found that the hole had been sealed with brown sealing wax. Conrad, the husband, was subsequently charged with the murder of his wife and the family and executed.

⁷⁴² Act 108 of 1996.

⁷⁴³ Du Toit *et al* 2004:3-1.

⁷⁴⁴ 1991:7.

Although this type of battle of wits between investigator and murderer always wins public attention the word detective had been invented a mere 25 years earlier by Charles Dickens, who introduced Inspector Bucket in the novel *Bleak House*, as a detective officer. It would then be another five years before a young and unsuccessful doctor named Conan Doyle would invent the most famous of all detectives, Sherlock Holmes.

The story of modern criminology began in 1879 in the Police Headquarters in Paris. A man named Alphonse Bertillon began copying and filing descriptions of criminal body types and measurements based on the hypotheses that no two human beings have identical physical measurements, for example in the length of forearms, circumference of the skull, etc. Bertillon asked permission to take various measurements of convicts who passed through headquarters. The permission was granted and in a matter of weeks Bertillon became convinced that his hypothesis was correct. People may have one or two measurements in common but never more than that. Eventually Bertillon's system of identification was being used in police forces all over the world.⁷⁴⁶

Around the same time an Indian civil servant named William Herschel began the science of fingerprinting.⁷⁴⁷ Herschel was employed as a clerk who paid pensions to Indian ex-soldiers. To the English eye each soldier looked much alike and so some of them succeeded in collecting pensions twice. Herschel then began to make them sign for their pensions by making an inky fingerprint beside their name on the list.⁷⁴⁸

A few years after that Sir Francis Galton devised a simple method by which fingerprints could be classified and filed. Eventually the Galton method of fingerprinting replaced Bertillon's method of identification.

⁷⁴⁵ Wilson 1991:7.

⁷⁴⁶ Wilson 1991:9.

⁷⁴⁷ Wilson 1991:9.

⁷⁴⁸ Wilson 1991:10.

In 1900 Paul Uhlenhuth discovered how to test blood to ascertain if it was human based on the concept that blood serum (the liquid in which red cells float) develops defensive properties against germs and also against organic substances.⁷⁴⁹ If a rabbit's blood is injected into human blood the serum develops a defense against it. If the rabbit's blood is then sucked out with a hypodermic syringe and left in a test tube it clots and the serum separates out from the brown blood cells. If a drop of human blood is introduced to the serum the serum turns a milky color. Uhlenhuth found that this procedure works on old blood stains as well as fresh stains. Old blood stains had only to be dissolved in salty water and they would still react to rabbit serum.⁷⁵⁰

Over the last 80 – 100 years the science of forensics as well as of criminology has evolved to such great lengths that it is almost impossible to commit the perfect murder. A recent advancement in forensic detection and criminology is that of profiling. Profiling consists in identifying certain characteristics of an alleged offender.⁷⁵¹ Profiling may be an extremely useful tool in future specifically in the identification of sexual perpetrators.

3.7 DNA evidence

3.7.1 The history of DNA

There are many contributors to the field of forensic science and there are further many contributors to the development of DNA as a human identification tool:⁷⁵²

- Alphonse Bertillon began developing the science of anthropometry which consists as a systematic procedure of taking a series of body measurements as a means of differentiating between individuals.⁷⁵³

⁷⁴⁹ Wilson 1991:11.

⁷⁵⁰ Wilson 1991:11.

⁷⁵¹ Wilson 1991:11.

⁷⁵² Botha 2000:3.

⁷⁵³ Wilson 1991:9.

- In 1908 Doctor Karl Landsteiner discovered that blood can be grouped into different categories, today known as group A, B, AB and O.⁷⁵⁴
- Johnson and Crick published a paper on the double helix structure of DNA in 1953.⁷⁵⁵
- In 1984 Alex Jeffreys developed the first DNA fingerprint and published it in 1985. In 1987 DNA fingerprinting was first used in a court case.⁷⁵⁶
- The polymerize chain reaction was conceived originally by Mullis and Saki in 1985.⁷⁵⁷

Prior to the establishment of DNA profiling there was a clear difficulty in distinguishing between individuals in a unique manner whilst at the same time creating a link between individuals as the victim and perpetrator of a crime. DNA is an obvious answer to this problem as it may be used to distinguish two individuals except in the case of identical twins who have identical DNA.⁷⁵⁸

DNA is a sound and effective method to distinguish between individuals and is internationally accepted as such.⁷⁵⁹ DNA was first used in a criminal case in the United States of America in 1987.⁷⁶⁰ The matter under investigation was one of sexual assault and was a landmark case in terms of DNA use, in evidence, to link the suspect to the crime.

In South African law blood typing (serology) was used prior to 1990 as a method of identification, in terms of which individuals were characterized into blood groups to wit A, B, O and AB. DNA typing was introduced in late 1991.⁷⁶¹ In the matter of *S v R*,⁷⁶² for example, both of the accused were

⁷⁵⁴ DNAbiotic 2005:2.

⁷⁵⁵ Botha 2000:3.

⁷⁵⁶ Botha 2000:3.

⁷⁵⁷ Botha 2000:3.

⁷⁵⁸ DNAbiotic 2005:1.

⁷⁵⁹ DNAbiotic 2005:1.

⁷⁶⁰ *Florida v Andrews* 533 So.2d 841; Fla App.5Dist.1988.

⁷⁶¹ DNAbiotic 2005:2.

charged with rape and blood samples were obtained from both, who were minors, and despite objections to its production at trial, it was deemed admissible and led to an eventual conviction.

DNA is now used extensively in criminal law and has negated the use of prior testing methods such as blood grouping.⁷⁶³

3.7.2 What is DNA?

DNA is the abbreviation of Deoxyribonucleic Acid.⁷⁶⁴ DNA is a chemical molecule and the so-called *blue print of life*.⁷⁶⁵ DNA carries the genetic information that supplies a species with all its physical and functional characteristics.⁷⁶⁶ Parts of the DNA are universal for the specific species while other parts are unique to the individual.⁷⁶⁷

DNA contains the genetic program for all the various cells, tissue and organs. DNA is constant for a specific individual and does not change during a life span. A DNA molecule presents as a long thread like molecule composed of two complementary strands which can only bind to one another in a specific manner.⁷⁶⁸ DNA from blood cells is identical to that found in other tissue and bodily fluid, for example DNA in semen and saliva of the same individual would be identical. Therefore DNA from a blood sample of the accused can be compared to DNA from body fluid found on the victims clothing.

DNA can be extracted from hair, blood, teeth, saliva, tissue, bone and semen.⁷⁶⁹ Half of DNA is inherited from the father and half from the mother when fertilization of the ovum by the spermatozoa takes place⁷⁷⁰ and is found

⁷⁶² 2000 (1) SACR (WLD):at 33.

⁷⁶³ DNAbiotic 2005:1.

⁷⁶⁴ Hereafter referred to as DNA.

⁷⁶⁵ DNAbiotic 2005:4.

⁷⁶⁶ DNAbiotic 2005:4.

⁷⁶⁷ Botha 2000:1.

⁷⁶⁸ DNAbiotic 2005:4.

⁷⁶⁹ Botha 2000:2.

⁷⁷⁰ DNAbiotic 2005:4.

in every cell, in a specific area which is known as the nucleus, and therefore cells which contain no nucleus, for example mature red blood cells, contain no DNA.⁷⁷¹ Within the nucleus the DNA occurs in units known as chromosomes.⁷⁷² In human beings there are 23 pairs or 46 chromosomes in total. Of these 23 pairs, one pair, the XY chromosome pair determines the gender of the individual.⁷⁷³

3.7.3 The appearance of DNA

The structure of DNA is called a double helix structure and consists of two strands or strings of DNA twisted around each other.⁷⁷⁴ The strands resemble a ladder formation.⁷⁷⁵ The molecule can be visualized as a spiral rope ladder with the rungs representing the backbone of the DNA molecule which consists of alternating sugars and phosphates.⁷⁷⁶ The rungs of the ladder consist of four building blocks (basis or nucleotides). These blocks are called Adenine (A),⁷⁷⁷ Guanine (G),⁷⁷⁸ Cytosine (C)⁷⁷⁹ and Thymine (T).⁷⁸⁰ These bases occur in various sequences, and it is the sequence in which these base pairs are arranged, which confers genetic traits on an organism.⁷⁸¹

Each Adenine binds only with a Thymine on the opposite strand and each Cytosine bind only with Guanine on the opposite strand.⁷⁸² The DNA alphabet therefore comprises of only four letters being A, G, C and T.⁷⁸³ These are known as complimentary base pairs and form a double stranded DNA helix comprising of billions of base pairs which encodes structural, regulatory and hereditary information.⁷⁸⁴ The place of interest on a chromosome is called a

⁷⁷¹ Mader 1993:Part 2.

⁷⁷² DNAbiotic 2005:4.

⁷⁷³ Botha 2000:3.

⁷⁷⁴ Botha 2000:4.

⁷⁷⁵ DNAbiotic 2005:4.

⁷⁷⁶ Botha 2000:4.

⁷⁷⁷ DNAbiotic 2005:4.

⁷⁷⁸ DNAbiotic 2005:4.

⁷⁷⁹ DNAbiotic 2005:4.

⁷⁸⁰ DNAbiotic 2005:4.

⁷⁸¹ Botha 2000:5.

⁷⁸² DNAbiotic 2005:4.

⁷⁸³ DNAbiotic 2005:4.

⁷⁸⁴ Botha 2000:5.

locus and each different form of a locus is referred to as an allele and the combination of the two alleles at a locus is known as a genotype.⁷⁸⁵ An individual has two alleles for a single locus, one from each parent; collectively a population can have several different alleles for any given locus.⁷⁸⁶ This forms the basis of DNA typing.⁷⁸⁷

3.7.4 The value of and collection procedure of DNA evidence

DNA is analyzed in bodily fluids, stains and other biological tissues recovered for evidence purposes.⁷⁸⁸ The results of DNA analysis of a questioned biological sample are compared with the results of DNA analysis of a known sample, known as the control sample.⁷⁸⁹ This analysis can associate victims and suspects with each other or with a crime scene.⁷⁹⁰

In forensic analysis there are two sources of DNA used. Nuclear DNA⁷⁹¹ is typically analyzed in evidence containing blood, semen, saliva, body tissues and hairs that have tissue at their root ends.⁷⁹² Mitochondrial DNA⁷⁹³ is typically analyzed in evidence containing naturally shed hairs, hair fragments, bones and teeth.⁷⁹⁴

When collecting evidence for DNA analysis it is essential that it retains its original integrity until it reaches the laboratory to exclude the possibility of degenerated DNA which cannot yield positive results. If DNA evidence is not properly documented its origin can be questioned in court by the defence.⁷⁹⁵ If not properly collected biological activity can be lost and if it is not properly packaged contamination can occur. Further if DNA is not properly preserved,

⁷⁸⁵ Botha 2000:5.

⁷⁸⁶ DNAbiotic 2005:4.

⁷⁸⁷ Botha 2000:5.

⁷⁸⁸ Dada *et al* 2001:238.

⁷⁸⁹ Botha 2000:4.

⁷⁹⁰ www.fbi.gov: 30 July 2005.

⁷⁹¹ DNA inherited in equal parts from both parents.- DNAbiotic 2005:12.

⁷⁹² www.fbi.gov: 30 July 2005.

⁷⁹³ This DNA is inherited maternally- DNAbiotic 2005:12.

⁷⁹⁴ www.fbi.gov: 30 July 2005.

decomposition and deterioration can occur.⁷⁹⁶ These factors will result in the DNA evidence being put to question at trial.

According to the *American Federal Bureau of Investigation Handbook on DNA Examination*, the following techniques shall be used when selecting various samples according to their source:⁷⁹⁷

- A blood examination can determine the presence or absence of blood in a stain.⁷⁹⁸ The examination can only determine whether the blood is human or not and will not determine the age and the race of a person.

When collecting a blood sample, only qualified medical personnel should collect samples from an individual. At least two 5 ml tubes of blood in a purple topped tube containing an anticoagulant agent should be used for DNA analysis. Drug or alcohol test samples should be collected in a gray top tube which contains sodium fluoride.⁷⁹⁹ Each tube must be marked with the date, time, subjects name, location, collectors name, case number and evidence number.⁸⁰⁰

Blood samples should never be frozen but rather refrigerated using cool packs and not dry ice during shipping. Liquid blood tubes should be individually packed in styrofoam or cylindrical tubes with absorbent material surrounding the tubes and the container in which the tubes are contained should be labeled, kept in a cool dry place and refrigerated on arrival. Further the container should be marked with the word bio-hazard.⁸⁰¹ All blood samples should be submitted to a laboratory as soon as possible.⁸⁰² Liquid blood on a person should be absorbed onto a clean cotton cloth or swab. A

⁷⁹⁵ DNAbiotic 2005:12.

⁷⁹⁶ www.fbi.gov: 30 July 2005.

⁷⁹⁷ www.fbi.gov: 30 July 2005.

⁷⁹⁸ Botha 2000:6.

⁷⁹⁹ www.fbi.gov: 30 July 2005.

⁸⁰⁰ Botha 2000:5.

⁸⁰¹ www.fbi.gov: 30 July 2005.

⁸⁰² www.fbi.gov: 30 July 2005.

portion of the cloth or swab should remain unstained and be used as a control. The cloth or swab should then be air dried and packed into a clean paper envelope with sealed corners.⁸⁰³ It should not be stored in a plastic container. Dried blood should be absorbed by using a cotton cloth swab which is moistened with distilled water. Again a portion of the cloth should remain unstained as a control and the swab should thereafter be air dried and packed in a clean paper envelope with sealed corners.⁸⁰⁴ In terms of seminal evidence from a sexual assault victim the victim must be examined in a hospital using the standard sexual assault evidence kit to collect vaginal, oral and anal evidence which must be refrigerated and submitted as soon as possible to the laboratory.⁸⁰⁵

- Oral swabs – clean cotton swabs must be used to collect oral samples. The inside surface of the cheeks should be rubbed thoroughly and the swabs then air dried and placed in a clean paper envelope with sealed corners.⁸⁰⁶ Each sample must be identified with the date, time, subject's name, location, collectors name, case number and evidence number. Oral samples need not be refrigerated.⁸⁰⁷
- Saliva and urine – suspected saliva or urine must be absorbed onto a clean cotton cloth or swab, a portion of which must be remained unstained to be used as a control and which must then be air dried and packed in a clean paper envelope with sealed corners and submitted to the laboratory.⁸⁰⁸

Cigarette buds must be picked up with gloved hands or a clean forceps and must be air dried and submitted in an envelope with sealed corners.⁸⁰⁹ The ashtray itself need not be submitted unless a latent print is requested.

⁸⁰³ www.fbi.gov: 30 July 2005.

⁸⁰⁴ www.fbi.gov: 30 July 2005.

⁸⁰⁵ Dada *et al* 2001:256.

⁸⁰⁶ www.fbi.gov: 30 July 2005.

⁸⁰⁷ www.fbi.gov: 30 July 2005.

⁸⁰⁸ www.fbi.gov: 30 July 2005.

⁸⁰⁹ www.fbi.gov: 30 July 2005.

Similarly chewing gum must be picked up with gloved hands or clean forceps and must be air dried and submitted to the laboratory in a clean paper envelope.⁸¹⁰

- Hair samples – all hair samples must be picked up carefully with clean forceps to prevent damaging the root tissue. If the hair is encased with bodily fluid it must be air dried and then sealed into a paper envelope and refrigerated and thereafter submitted to a laboratory as soon as possible.⁸¹¹
- In terms of tissue, bones and teeth the suspected tissue, bones and teeth must be picked up with gloved hands or clean forceps and if possible the collection of one to two cubic inches of red skeletal muscle must be collected for analyses and, in terms of bone tissue, a three to five inch section of a long bone such as a fibula or femur must be collected for analyses purposes.⁸¹² Tissue samples must be placed in clean air tight plastic containers without formalin or formaldehyde. Teeth and bone samples must be placed in clean envelopes with sealed corners. All evidence must be frozen and placed in styrofoam containers and shipped on dry ice.⁸¹³

3.8 Seminal fluid / spermatozoa

It goes without saying that matching seminal fluid or semen from a rape victim with a suspect goes a long way towards the identification of the perpetrator of a sexual offence and towards a subsequent conviction.

Semen is a thick yellowish white glary secretion which contains certain cellular elements known as spermatozoa.⁸¹⁴ The fluid portion⁸¹⁵ of semen is

⁸¹⁰ www.fbi.gov: 30 July 2005.

⁸¹¹ www.fbi.gov: 30 July 2005.

⁸¹² www.fbi.gov: 30 July 2005.

⁸¹³ www.fbi.gov: 30 July 2005.

⁸¹⁴ Gordon *et al* 1988:363.

⁸¹⁵ Gordon *et al* 1988:363.

formed by the seminal vesicle and the prostate gland and spermatozoa are formed in the testes. On average 2-4 ml of semen is discharge in one emission and the normal ejaculate contains 400–500 million spermatozoa.⁸¹⁶ Each spermatozoon has a head, neck, body and tail but only the head and tail can be recognized clearly in ordinary preparations.⁸¹⁷

Aspermia⁸¹⁸ is a condition in which spermatozoa are absent from the seminal fluid. This is caused either by a failure in the formation of spermatozoa or by an obstruction of the ducts which prevents spermatozoa from reaching the urethra. Although spermatozoa cannot be detected if the individual is suffering from aspermia a positive chemical test for semen may be obtained on such extracts.⁸¹⁹

The Florence test is a simple micro chemical test for seminal stains and is carried out in the following manner:⁸²⁰

A portion of the stain is dissolved in a 1% hydrochloric acid solution. Some of the extract is then placed on a clean glass slide and is covered with a clean cover glass. A drop of modified Wagners reagent is then allowed to run under the cover glass and the preparation is examined microscopically. Dark brown needle shape crystals of choline⁸²¹ iodide develop along the line of confluence between the extract and the reagent.

Although the Florence test is not a specific test for semen as choline⁸²² occurs in other secretions it may be used as a rapid preliminary test for seminal stains. If the test is positive an opinion of the stain as a seminal stain should only be given after spermatozoa had been found in an extract of the stain.⁸²³ A test for acid phosphate is highly reliable in finding the presence of semen in

⁸¹⁶ Gordon *et al* 1988:363.

⁸¹⁷ Gordon *et al* 1998:364.

⁸¹⁸ Gordon *et al* 1988:363.

⁸¹⁹ Gordon *et al* 1988:363.

⁸²⁰ Gordon *et al* 1988:363.

⁸²¹ A colourless viscous soluble alkaline substance present in animal tissues- Collins English Dictionary 2004:287.

⁸²² Refer to footnot 812.

⁸²³ Gordon *et al* 1988:364.

a stain, as acid phosphates only occur in high concentrations in the semen of human beings and monkeys.⁸²⁴

If a vaginal swab is taken in a case of rape it may be possible to find spermatozoa as long as 72–96 hours after their deposit in the vagina.⁸²⁵ There are proponents of the hypothesis that vaginal spermatozoa may be found up to a 120 hours after intercourse.⁸²⁶ In fatal cases where sexual assault occurred prior to death, spermatozoa may be found in the vagina for a considerable period after death.⁸²⁷

⁸²⁴ Gordon *et al* 1988:364.

⁸²⁵ Gordon *et al* 1988:365.

⁸²⁶ Gordon *et al* 1988:365.

⁸²⁷ Gordon *et al* 1988:366.

CHAPTER FOUR

THE ROLE OF THE EXPERT WITNESS AND OF MEDICAL EVIDENCE IN A COURT OF LAW

1. The expert witness

There are certain issues, which face the court, which simply cannot be decided without expert guidance and therefore the court receives evidence on issues relating to, for example ballistics, engineering, chemistry, medicine, accounting and psychiatry, which is by no means an exhaustive listing of sources.⁸²⁸

In *S v Melrose*⁸²⁹ the court found it necessary to point out that the *viva voce* evidence of a medical practitioner in cases involving homicide, rape and serious assault is very relevant.⁸³⁰ The expert's opinion is received because his skill is greater than that of the court but the true criteria for the receipt of such evidence is whether the court can receive appreciable help from the opinion of an expert witness.⁸³¹

In the matter of *S v Nangutuuala*⁸³² it was decided that in order to address the opinion of a witness as expert opinion the court must be satisfied that the opinion or the evidence is not irrelevant. In order to determine relevancy the court must be satisfied that:

- a) The witness not only has specialist knowledge, training, skill or experience but can furthermore, on account of these qualities assist the court in deciding the issues.⁸³³

⁸²⁸ Skeen *et al* 1997:86.

⁸²⁹ 1985 (1) SA 720 (Z):at724 I.

⁸³⁰ Skeen *et al* 1997:86.

⁸³¹ Skeen *et al* 1997:87.

⁸³² 1974 (2) SA 165 (SWA):16 MC.

⁸³³ Skeen *et al* 1997:87.

- b) That the witness is indeed an expert for the purpose for which he is called upon to express an opinion.
- c) That the witness does not or will not express an opinion on hypothetical facts, that is facts that have no bearing on the case or which cannot be reconciled with all the other evidence in the case.⁸³⁴

In essence this does not mean the expert has to have an over abundance of degrees or formal qualifications. He may be simply experienced in a particular field, for example an experienced stock farmer may give expert evidence on the value of cattle.⁸³⁵ The essence of the test is whether the evidence can assist the court and therefore formal qualifications without practical experience may not necessarily be enough to qualify a witness as an expert.⁸³⁶

In essence an expert witness is required to support his opinion with valid reasons. However there is no hard and fast rule that can be laid down and much will depend on the nature of the issue and the presence or absence of an attack of the opinion of the expert.⁸³⁷ In the case of *Coopers LTD v Deutsche Gesellschaft Für Schädlingbekämpfung GmbH*⁸³⁸ it was stated:

An experts opinion represents his reasonable conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bold statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, is disclosed by the expert.

However conversely it was said in *R v Nksatlala*⁸³⁹ it was stated:

⁸³⁴ *S v Mkhole* 1990 (1) SCR 95 (A):100.

⁸³⁵ *Skeen et al* 1997:88.

⁸³⁶ *Skeen et al* 1997:88.

⁸³⁷ *Skeen et al* 1997:88.

⁸³⁸ 1976 (3) SA 352 (A): 371 F.

⁸³⁹ 1960 (3) SA 543 (A): 564 B.

A court should not blindly accept and act upon the evidence of an expert witness, even of a fingerprint expert, but must decide for itself whether it can safely accept the experts opinion. But once it is satisfied that it can accept it, the court gives effect to that conclusion even if its own observation does not positively confirm it.

From the above it is clear that in cases of an extremely technical nature the court may not be in a position to follow the exact reasoning of the expert. In these instances greater emphasis will be placed on the general repute of the witness's profession and the absence or presence of possible bias.⁸⁴⁰

The opinion of an expert should be ignored and strictly be considered inadmissible if it is based on some hypothetical situation which has no relation to the facts in issue or which is entirely inconsistent with the facts so proven.⁸⁴¹ It can be accepted that an expert can also make mistakes. In *S v Venter*⁸⁴² the trial court rejected the expert witness's testimony and said:

The State Pathologist who performed the post mortem examination on the body of the child supported the appellant's denial. His opinion was that the child's head was not submerged in water. The trial court however refused to accept that this was so. This was a bold approach. One does not likely depart from the uncontroverted views of the impartial, well qualified and experienced expert. But I am persuaded that in the present matter it is warranted. The reasons given by Judge Southwood for rejecting the doctor's evidence are as follows: consider the following. The photograph clearly showed that the child sustained burn injuries to his head and face, the condition of the inner lining of the wind pipe was consistent with the swallowing of hot water, the lungs contained fluid, and there is a singular, undisputed feature that despite the injuries having been immediately painful, the child did not cry out or scream. The cumulative effect of what had been referred to

⁸⁴⁰ Skeen *et al* 1997:89.

⁸⁴¹ Skeen *et al* 1997:91.

⁸⁴² 1996 (1) SACR 664 (A):666.

supports the trial court's finding that the appellant plunged the child into water and that his head was emerged for a number of seconds and that there was therefore no chance for the child to cry out. Confirmation that the child's head was submerged in the water comes from the appellant himself. ⁸⁴³

From the above it is apparent that a trial court is willing to reject the evidence of the expert witness if it does not correlate with the facts present. In the matter of *S v Zuma*⁸⁴⁴ the trial court rejected the evidence of a psychologist who testified to the fact that the complainant may have “frozen” during her alleged assault which rendered her incapable of calling for assistance.

It is of further importance that the expert witness should remain objective. Despite the fact that South Africa has an adversarial system of law an expert may be called to testify for either party. For an expert witness to be helpful to the court he is to be impartial to either party's case.⁸⁴⁵

As a general rule; an expert witness may not base his opinion on statements made by persons not called as witnesses, which would technically be defined as hearsay evidence. However in *S v Kimimbi*⁸⁴⁶ it was held that:

No one professional man can know, from personal observations, more than a minute fraction of the data which he must every day treat as working truths. Hence the reliance on the reported data of fellow scientists learned by pursuing their reports in books and journals. The law must accept this kind of knowledge from scientific men. To reject a professional physician or mathematician because the fact or some of the facts to which he testifies are known to him only upon the authority of others would be to ignore the accepted methods of professional work and to insist on impossible standards.

⁸⁴³ Skeen *et al* 1997:90.

⁸⁴⁴ *S v Zuma*; as yet unreported judgement delivered on 8 May 2006 by Judge Van Der Merwe.

⁸⁴⁵ Skeen *et al* 1997:91.

⁸⁴⁶ 1963 (3) SA 250 (C):251.

An expert who relies on information contained in text books written by someone not called as a witness is technically relying on the use of hearsay evidence. However, he is allowed to do so if he complies with the conditions set out in *Menday v Protea Assurance Company Ltd.*⁸⁴⁷ which states:

*Where an expert relies on passages in a textbook, it must be shown, firstly that he can, by reason of his own training affirm the correctness of the statements in that book, and, secondly, that the work to which he refers is reliable in the sense that it has been written by a person of established prepuce or proved experience in that field. In other words an expert with purely theoretical knowledge can not in my view support his opinions in a special field by referring to authority in a work which has itself not been shown to be authoritative. The dangers of holding to the contrary are obvious.*⁸⁴⁸

Of further importance to the expert witness are the rules of procedure which govern the evidence of an expert witness. The Magistrate's Court Rules⁸⁴⁹ as well as the Supreme Court Rules⁸⁵⁰ provide that any person shall not be entitled to call, as a witness, any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless he gives notice not less than 15 days before the hearing, of his intention to do so and not less than 10 days before the trial, deliver a summary of such expert opinion and his reasons therefore to the other party. It is however true that these rules are only confined to civil cases but that in a criminal case prior disclosure may be demanded and should generally be granted on constitutional grounds.⁸⁵¹

In the South African Criminal Law System witnesses who are to testify for the court may not be present in court when another witness testifies. The only exemption to this is that the accused himself is present during the entire time.

⁸⁴⁷ 1976 (1) SA 565 (E):569.

⁸⁴⁸ Skeen *et al* 1997:92.

⁸⁴⁹ Act 32 of 1944.

⁸⁵⁰ Act 59 of 1959.

⁸⁵¹ Skeen *et al* 1997:92.

However an expert witness may sometimes be allowed to be present in court before being called upon to testify. The purpose of this is to give the expert an opportunity to assess the issues, background, circumstances and nature of the case in order to place himself in a better position to give a valued opinion when he is eventually called upon to testify. The court may grant permission to the expert witness to be present in the court before he testifies.⁸⁵²

2. The cautionary rule

Prior to 1998 South African Law took the view that the cautionary rule as it applied in the case of accomplices should be applied in the same way to the evidence of a complainant in a sexual offences case.⁸⁵³ It was thought that there was an inherent risk on relying on the testimony of these witnesses as they had various motives to substitute the accused for the culprit and that the charge of rape was very difficult for a man to refute. It was further thought that a frightened woman is especially inclined to hysteria and might imagine things that might not have happened at all.⁸⁵⁴ It was further thought that it was relatively easy for a complainant in a sexual offence case to substitute the accused for the real subject in her testimony.⁸⁵⁵

With the dawning of the Constitutional era it was however decided in a variety of court cases that the cautionary rule had no basis for existence and discriminated against women complainants. The most important ruling in this regard is *S v Jackson*⁸⁵⁶ in which it was held that the notion that women are more inclined to lie about rape is a myth. It was further held that it was not easy to bring a charge of rape as it is often a humiliating experience for a woman to cry rape and then endure cross examination and public exposure which follows such an accusation.⁸⁵⁷ It was further held that the cautionary rule has been abolished in many apparently modern systems such as

⁸⁵² Skeen *et al* 1997:288.

⁸⁵³ Du Toit *et al* 2000:24 – 6 A.

⁸⁵⁴ *R v Rautenbach* 1949 (1) SA 135(A):143.

⁸⁵⁵ *S v Snyman* 258 D.

⁸⁵⁶ *S v Jacson* 1998 (1) SACR 470 (A).

Namibia, Canada, Australia and New Zealand and that, although the evidence in a particular case may well call for a cautionary approach, there was no warrant for the application of a general cautionary rule.⁸⁵⁸ It was decided that in summing up a particular witness, a cautionary approach may be called for if the witness was particularly unreliable or was thought to have lied or made previous false complaints or had a grudge against the accused. However it was stressed that there had to be an evidential basis for suggesting such unreliability.⁸⁵⁹

3. The J88 medical report

The J88 medical report (see annexure A) is commonly used by district surgeons, medical officers and medical practitioners to record their findings after conducting a medical examination in the case of an alleged assault or other crime. The J88 is intended to be completed as an unsworn certificate by the person completing it relating to the condition of the person allegedly involved in some way in a crime. It can not be regarded as a certificate contemplated by section 212(4)(a) of the Criminal Procedure Act.⁸⁶⁰

According to *S v Hlongwa*⁸⁶¹ in order for the J88 to be brought within the provisions of section 212 (4)(a) of the Criminal Procedure Act⁸⁶² the person signing such certificate must also allege in the certificate:

- That he or she is in the service of the State or qualified in some other manner as contemplated by section 212 (4); and
- That he or she established the facts recorded in the certificate by means of an examination or process requiring skill in one or more of the disciplines contemplated by section 212(4) of the Criminal Procedure Act.⁸⁶³

⁸⁵⁷ Du Toit *et al* 2000:24 – 7.

⁸⁵⁸ *S v Jackson* 1998 (1) SACR 470 (A).

⁸⁵⁹ Du Toit *et al* 2000:24 – 7.

⁸⁶⁰ Act 51 of 1977.

⁸⁶¹ 2002 (2) SACR 280 (A) :37.

⁸⁶² Act 51 of 1977.

⁸⁶³ Act 51 of 1977.

According to *S v Hlongwa*⁸⁶⁴ without the doctor's oral evidence in the witness box a non complying certificate is not admissible at all. If there is a request from the accused or his representative for the doctor to be called the court must exercise its discretion under section 212(12) of the Criminal Procedure Act⁸⁶⁵ and the court should grant the request unless it is clear that the request is without a basis or that no good purpose could possibly be served by calling the doctor.

A controversial aspect of the J88 medical report is paragraph 5 which is headed as the clinical findings of the examiner including the nature, position and extent of any abrasions, wound or other injury which must be described and noted together with the injuries possible date and manner of causation.⁸⁶⁶ Paragraph 8 of the J88 is headed conclusion of the medical practitioner. Practice indicates that usually paragraph 5 and 8 will indicate what the victim related to the doctor, concerning the incident and the injuries experienced, at the time of the offence and whether such injuries correlate to the doctor's findings. The controversy lies in whether these paragraphs may be seen as a previous consistent statement made by the victim.

4. Previous consistent statements

A previous consistent statement may be defined as a written or oral statement made by a witness on some occasion prior to testifying and which corresponds or is substantially similar to his or her testimony in court.⁸⁶⁷ It is a general rule of law of evidence that evidence of previous consistent statements may not be led to support the credibility of a witness.⁸⁶⁸ Such evidence is excluded on the basis of the fact that the evidence is irrelevant as the witness is assumed to have adhered to the same story and a lie can be

⁸⁶⁴ 2002 (2) SACR 37.

⁸⁶⁵ Act 51 of 1977.

⁸⁶⁶ J88 Medical Report:1.

⁸⁶⁷ Anonymous 2002:16.

⁸⁶⁸ Du Toit *et al* 2004:23-18.

repeated as easily as the truth.⁸⁶⁹ To this rule however there are six exceptions, one of which is complaints in sexual offence cases. However, even though previous consistent statements are admissible in evidence in a sexual offence case, it is never evidence of the truth of the contents of such statement so as to corroborate the witness but rather goes to the weight of his evidence.⁸⁷⁰

The general rule against the admissibility of previous consistent statements is known as the rule against self serving statements and self corroboration.⁸⁷¹ The exclusion of previous consistent statements does not apply, as previously stated, to rape cases; however there are requirements which must be satisfied before such statements will be admissible in court. Schwikkard *et al*⁸⁷² sets out these requirements as follows:

1. Voluntary complaint: The complaint must have been made voluntarily by the complainant.⁸⁷³
2. Victim must testify: It is a condition of admissibility that the victim must testify in person.⁸⁷⁴
3. The complaint must be made at the first reasonable opportunity: This is commonly referred to as the first report.⁸⁷⁵
4. The offence must be of a sexual nature: It is not necessary that there be any physical violence involved in the sexual offence. It is however required that the act involves some form of physical contact.⁸⁷⁶

In answering the question as to whether the J88 is a previous consistent statement cognizance must be taken of the above requirements. The only statement which is admissible, should it fulfill the above requirements, is the first statement made by the complainant. No subsequent statement is admissible. Therefore paragraph 5 of the J88 may be admissible if the doctor

⁸⁶⁹ Du Toit *et al* 2004:23-18.

⁸⁷⁰ Du Toit *et al* 2004:23-18.

⁸⁷¹ Anonymous 2002:16.

⁸⁷² 1997:98.

⁸⁷³ Schwikkard *et al* 1997:99.

⁸⁷⁴ Anonymous 2002:17.

⁸⁷⁵ Anonymous 2002:17.

⁸⁷⁶ Anonymous 2002:18.

is the first person to whom the complainant complains even though it would have little value as evidence as it only goes toward consistency. However paragraph 5 of the J88 may also not be admissible if the complainant, for example, first reported the rape to a family member or the police. It must be borne in mind that a previous consistent statement has little or no evidential value with the exception of showing consistency of the complainant's version of events and is usually therefore excluded on the basis of its lack of probative value.⁸⁷⁷ Corroboration for the complainant's version must come from an independent source and the complaint itself is not an exception to the hearsay rule.⁸⁷⁸

⁸⁷⁷ Schwikkard *et al* 1997:95.

CHAPTER FIVE

SENTENCING PRACTICE WITH REGARD TO RAPE

1. Introduction

According to Terblanche⁸⁷⁹ sentencing is a highly usual event in the South African Judiciary. Roughly 1.4 million sentences were imposed during 1998.⁸⁸⁰ Without examining definite statistics it is evident in examining the Bloemfontein case load as a microcosm that the amount of offenders is growing exponentially. For evidence of this fact one needs only to reflect on the dire overcrowding in South African prisons and detention centers.⁸⁸¹

Although sentencing is a common occurrence it is not a procedure without fault. In overstressing the legal detail involved in a trial a legal practitioner is inclined to be unfamiliar with the common features involved in sentencing. It would thus seem that the sentencing phase of a criminal hearing plays the ugly stepsister to Cinderella's trial. Hiemstra⁸⁸² comments on the question of sentencing as follows:

Aan die vraag van skuld of onskuld word die mees noulettende aandag gewy; geen talent, tyd of kragte word gespaar in die proses nie en 'n ingewikkelde stel reëls van bewyslewing is daaromheen opgebou. Wanneer die beskuldigde eers skuldig bevind is, kom die strafoplegging meestal binne enkele minute.

With reference to the offence of rape the severity of punishment is often inversely proportionate to the severity of the crime so proved. This situation is however in a state of change especially when seen in the light of *Rommoko v*

⁸⁷⁸ Anonymous 2002:18.

⁸⁷⁹ 1999:1.

⁸⁸⁰ Terblanche 1999:1.

⁸⁸¹ Volksblad 31 March 2006:6.

⁸⁸² 1967:407.

*Director of Public Prosecutions*⁸⁸³ in which sentencing guidelines were laid down for sentencing of the rape offender which will be discussed hereunder.

2. Sentencing versus punishment

The question of what must be done with an offender, convicted of a crime, is answered by the law which dictates that a criminal offender must be punished, not only by the application of a specific sanction, but must be seen to be punished in the eyes of the community.⁸⁸⁴

According to Friedmann⁸⁸⁵ punishment works through official sanctions calculated to interfere with the life, liberty or property of the offender. Fitzgerald⁸⁸⁶ goes further and states that punishment is the authoritative infliction of suffering for an offence.

Invariably punishment and sentencing is linked and may be considered synonymous.⁸⁸⁷ According to the *Collins English Dictionary*⁸⁸⁸ punishment is defined as a penalty for a crime or offence. The *Shorter Oxford English Dictionary* defines punishment in terms of the infliction of penalty or to inflict suffering to a transgressor.⁸⁸⁹ The *Collins English Dictionary*⁸⁹⁰ defines sentencing as the judgment formally pronounced upon a person convicted in criminal proceedings. It would thus seem that punishment has an element of suffering attached to it whereas sentencing is a more formal concept which can be described as the finalization of the courts dealing with the convicted offender.⁸⁹¹

⁸⁸³ 2003 (1) SACR 200 (A).

⁸⁸⁴ Burchell 2005:68.

⁸⁸⁵ Burchell 2005:68.

⁸⁸⁶ Burchell 2005:68.

⁸⁸⁷ Terblanche 1999:3.

⁸⁸⁸ 2004:1314.

⁸⁸⁹ Terblanche 1999:3.

⁸⁹⁰ 2004:1481.

⁸⁹¹ Terblanche 1999:5.

For a full discussion of punishment and retributive justice reference should be made to the works of Burchell⁸⁹² and Terblanche.⁸⁹³ The work which follows refers to the practice of sentencing in the South African Courts especially in light of comments made by Kriegler *et al*⁸⁹⁴ pertaining to the fact that many sources exist in regard to sentencing and that sentencing is a creature of practice as opposed to academic writing.⁸⁹⁵

3. Sources of sentencing

Sentencing takes its direction in practice from various sources which may be categorized as follows:

1. Common law: Common law is of some importance to sentencing and our courts have made some reference to such in case law.⁸⁹⁶ In the matter of *S v Rabie*⁸⁹⁷ Appeal Judge Holmes set out guidelines for sentencing:⁸⁹⁸
 - The punishment should fit the crime.⁸⁹⁹
 - The punishment should fit the offender.⁹⁰⁰
 - The interests of society should be taken into account.⁹⁰¹
 - Mercy should not reduce sentence but the approach towards an appropriate sentence must be tempered by a certain degree of mercy and humility.⁹⁰²
 - The main purpose of punishment is deterrence, preventative, reformatory and retributive.⁹⁰³

According to Terblanche the common law in its application to sentencing has virtually no value.⁹⁰⁴

⁸⁹² 2005:Chapter 4.

⁸⁹³ 1999:Chapter 1.

⁸⁹⁴ 2002:682.

⁸⁹⁵ Kriegler *et al* 2002:682.

⁸⁹⁶ Terblanche 1999:11.

⁸⁹⁷ 1975 (4) SA 855 (A).

⁸⁹⁸ Terblanche 1999:157.

⁸⁹⁹ *S v Rabie* 1975 (4) SA 861 (A).

⁹⁰⁰ *S v Rabie* 1975 (4) SA 861 (A).

⁹⁰¹ *S v Rabie* 1975 (4) SA 861 (A).

⁹⁰² *S v Rabie* 1975 (4) SA 861 (A).

⁹⁰³ *S v Rabie* 1975 (4) SA 861 (A).

2. Statute: It need not be said that each and every statute, which creates a criminal offence is of importance to sentencing with regard to the sanction imposed by such statute.⁹⁰⁵ In the area of criminal law the Criminal Procedure Act⁹⁰⁶ is the primary source of procedural guidelines with regard to sentencing.⁹⁰⁷
3. Case law: The principle of precedent applies to the imposition of sentencing and yet the extent of such duty has not yet been tested fully in court.⁹⁰⁸
4. Academic writings⁹⁰⁹
5. The Constitution of the Republic of South Africa: The right to freedom and security of person as reflected in the Bill of Rights includes the right not to be treated or punished in a cruel, inhumane or degrading manner.⁹¹⁰ The rights enshrined in the Bill of Rights must be kept in mind during the sentencing phase of a criminal trial.⁹¹¹

4. Rape: sentencing as a consequence

Despite the abovementioned sources of sentencing the courts place a high value on the guidelines enunciated in the matter of *S v Zinn*⁹¹² with regard to the sentencing of an offender in terms of any crime. Appeal Judge Rumpff was the author of the dictum in Zinn which has become a trite aspect of our law.

The principles of *S v Zinn*⁹¹³ are often referred to as the triad in Zinn and reflect as follows:

⁹⁰⁴ Terblanche 1999:11.

⁹⁰⁵ Terblanche 1999:11.

⁹⁰⁶ Act 51 of 1977.

⁹⁰⁷ Terblanche 1999:11.

⁹⁰⁸ Kriegler *et al* 2002:683.

⁹⁰⁹ Terblanche 1999:12.

⁹¹⁰ Burchell 2005:68.

⁹¹¹ Terblanche 1999:12.

⁹¹² 1969 (2) SA 537 (A).

⁹¹³ 1969 (2) SA (A).

1. The crime: The seriousness of the crime must be kept in mind when sentencing. The prevalence of a certain type of crime may lead to an increase in the severity of the sentence imposed in such offences.⁹¹⁴ However prevalence should not lead to a drastic increase in sentence based on this consideration. In the matter of *S v Seegers*⁹¹⁵ Appeal Judge Rumpff gave the following guidance on the matter of prevalence:

Prevalence of a particular offence, such as, does not, of course, necessarily elevate a case in which a fine only ought properly to be imposed to a category of cases where imprisonment ought to be imposed. Whether or not the prevalence of a particular offence ought to be considered as an aggravating feature depends on the type of offence committed and the circumstances in which the offence is committed.⁹¹⁶

Prevalence is not the only factor under consideration in the crime. Other factors have come to light in case law with regard to the crime itself:

- The brutality of an assault.⁹¹⁷ In the matter of *S v Makie*⁹¹⁸ the amount of brutality involved was highlighted in sentencing.
- Compensation of the victim may have a tempering effect on the sentence imposed.⁹¹⁹
- The seriousness of the consequences of the crime must be taken into account as enunciated in *S v Bengesa*.⁹²⁰
- The defenselessness of the victim is an aggravating factor.⁹²¹

The above is not an exhaustive list of factors taken into account when examining the crime itself. Every case must be considered on its own merits

⁹¹⁴ Terblanche 1999:219.

⁹¹⁵ 1970 (2) SA 506 (A).

⁹¹⁶ 1970 (2) SA 506 (A):511 c-f.

⁹¹⁷ Van Zyl 2003:C2.

⁹¹⁸ 1991 (2) SACR 139 (A).

⁹¹⁹ *S v Zindogo* 1980 (2) SA 911 (RA).

⁹²⁰ 1979 (4) SA 448 (ZR).

⁹²¹ *S v Nkosi* 1992 (1) SACR 607 (T).

as punishment is not extracted from a slot machine but requires serious and thorough consideration.⁹²²

The crime of rape is therefore examined on the above principles and should be considered as a serious crime especially when seen in light of the comments made by Appeal Judge Ebrahim in the matter of *S v S*⁹²³

The abolition of the death sentence in respect of rape does not imply any lessening of repugnance for the crime. It represents a shift in attitude to capital punishment. The gravity with which rape is regarded; in my view has two aspects. First, the crime itself consists of an assault of a particularly vicious nature. This is invariably the case. There may be different degrees in the viciousness, but a rape always implies vicious assault. The nature of the assault in most cases remains with the victim for life because, while whatever physical injury is incurred may heal in time, the psychological trauma may never heal. The memory will, in all probability, influence, perhaps drastically, the victims attitude to society in general, and men in particular, as long as she lives. Secondly, the crime is unique in that it is usually committed by men against women. A perpetrator of rape can never know what it is to be raped. (If he is very unfortunate he may be sexually assaulted but I think it may be accepted that even the worst sexual assault on a male cannot be compared to rape).

Similarly the court in *S v C*⁹²⁴ described rape as one of the most heinous of crimes and rightly so. A rapist does not murder his victim but murders her self respect and destroys her feeling of physical and mental integrity and security.

2. The interests of society: Although included in the triad it seems uncertain to which interests the triad refers.⁹²⁵ The public's interest must be borne in mind when passing effective sentence as determined

⁹²² *S v Scheepers* 1977 (2) SA 154 (A).

⁹²³ 1995 (1) SACR 50 (ZS):60 J-61E.

⁹²⁴ 1996 (2) SACR 181 (C):186D-E.

by Du Toit when he stated that the interest of society can operate both to increase and decrease the punishment.⁹²⁶ In the matter of *S v Chapman*⁹²⁷ the court stated that the courts are under a duty to send a clear message to the accused, to other potential rapists and to the community that the courts are determined to protect the equality, dignity and freedom of all women and to show no mercy to those who seek to invade those rights. In *S v S*⁹²⁸ the principle was further emphasized by alluding to the fact that the essence of the crime of rape is an assault on the bodily integrity of a woman's femininity. The function of the criminal law lies in the protection of society, from those who employ illegal means to prey on those less able to defend themselves and in regarding rape as a crime of the utmost gravity. In the matter of *S v V*⁹²⁹ the court enunciated the idea that pity for an offender cannot take precedence over the court's duty to protect the public interest.

3. The offender: The rapists' personal circumstances are to be taken into consideration when determining sentence. It is however important to bear in mind that not all circumstances are taken into account and only those which will cause a substantial difference in sentence are to be considered.⁹³⁰ In the matter of *S v Swartz and Another*⁹³¹ Judge Davis stated:

.....as not all murders carry the same moral blameworthiness, so not all rapists deserve equal punishment. That is in no way to diminish the horror of rape; it is however to say that there is a difference even in the heart of darkness.

⁹²⁵ Terblanche 1999:173.

⁹²⁶ Terblanche 1999:173.

⁹²⁷ 1997 (3) SA 341 (A):345.

⁹²⁸ 1995 (1) SACR 50 (ZS).

⁹²⁹ 1972 (3) SA 611 (A):620 F-G.

⁹³⁰ Terblanche 1999:222.

⁹³¹ 1999 (2) SACR (A) 380:386.

Examples of the personal circumstances usually taken into account are as follows although this is by no means an exhaustive list:

- Previous convictions:⁹³² In the case of *R v Zonele*⁹³³ the court stated that the value of previous convictions lies in the indicative nature as to the deterrent value of previous sentences served by the accused.
- First offenders: In the matter of *S v Tshondeni*⁹³⁴ it was stated that the courts should, where possible, attempt to keep first offenders out of prison and the criminal framework of such detention.
- Family responsibility of the accused: In *S v Van Niekerk*⁹³⁵ the court stated that sentence can have a devastating effect on the family of the accused and may be seen as a mitigating factor.
- Youthfulness: In the matter of *S v Nkosi*⁹³⁶ the court laid down the following principles in sentencing a child offender:
 1. Whenever possible a sentence of imprisonment should be avoided, especially in the case of a first offender.
 2. Imprisonment should be considered as a means of last resort, where no other sentence can be considered appropriate. Serious violent crimes fall into this category.
 3. Where imprisonment is considered appropriate it should be of the shortest possible period of time having regard to the nature and gravity of the offence and the needs of society as well as the particular needs and interests of the child offender.
 4. If at all possible, the judicial officer must structure the punishment in such a way as to promote the

⁹³² Du Toit *et al* 1999:27-1.

⁹³³ 1959 (3) SA 319 (A).

⁹³⁴ 1971 (4) SA 79 (T).

⁹³⁵ 1993 (1) SACR 482 (NK).

⁹³⁶ 2002 (1) SACR 135 (W).

rehabilitation and reintegration of the child concerned into his or her family or community.

5. The sentence of life imprisonment may only be considered in exceptional circumstances such circumstances would be present where the offender is a danger to society and there is no reasonable prospect of his or her rehabilitation.

In the matter of *Jan Hendrik Brandt v S*⁹³⁷ the applicant was 17 years and 7 months when he committed the offence and was sentenced to life imprisonment which was substituted, on appeal, to a sentence of 18 years imprisonment.

- Remorse: In the matter of *S v Martin*⁹³⁸ the court laid the foundation for the definition of remorse and its usefulness in sentencing.
- Other personal circumstances which the court may take cognizance of are the health of the accused, indigence of the accused, voluntary withdrawal, intoxication, employment of the accused, lack of planning, political motive, belief in witchcraft and religion, time in custody awaiting trial, mental and emotional factors, age of accused, standard of education and level of intelligence.⁹³⁹

5. Minimum sentence legislation

Faced with the high levels of sexual violence against women Parliament enacted section 51 of the Criminal Law Amendment Act,⁹⁴⁰ which came into operation on the 1st of May 1998 in terms of Proclamation R43 (GG18879) of 1 May 1998.⁹⁴¹ Section 51 created certain mandatory minimum sentences for

⁹³⁷ Unreported SCA decision delivered on 13 November 2004 under case number 513/03.

⁹³⁸ 1996 (2) SACR 378 (W):383H.

⁹³⁹ Terblanche 1999:222-237.

⁹⁴⁰ Act 105 of 1997.

⁹⁴¹ Du Toit *et al* 2001:28-15.

specific crimes, including egregious forms of rape.⁹⁴² Further the Act⁹⁴³ mandated the courts to approach sentencing from the presumption that the sentence ordinarily imposed for offences in terms of Part I of Schedule 2 is life imprisonment. It must be borne in mind that the so called Minimum Sentencing Act is applicable to offenders under 18 but over 16, however the court has discretion to depart from the provisions of such act.⁹⁴⁴

In terms of section 51 certain minimum sentences are prescribed for various serious offences. Section 51(1)(b)⁹⁴⁵ reads as follows:

Notwithstanding any other law but subject to subsection (3) and (6), a High Court shall (a) if it has convicted a person of an offence referred to in Part I of Schedule 2; or (b) if the matter has been referred to it under section 52(1) for sentence after the person concerned has been convicted of an offence referred to in Part 1 of Schedule 2, sentence the person to imprisonment for life.

Part I of Schedule 2 pertains to the crime of rape when committed as follows:

- (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;
- (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
- (iii) by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such conviction;
- (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

This also includes rape where the victim:

- (i) is a girl under the age of 16 years;
- (ii) is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable; or

⁹⁴² Kubista 2005:77.

⁹⁴³ 105 of 1997.

⁹⁴⁴ *S v B* (1) SACR 311 (SCA).

⁹⁴⁵ Act 105 of 1997.

- (iii) is a mentally ill woman as contemplated in section 1 of the Mental Health Act, 1973⁹⁴⁶; or rape involving the infliction of grievous bodily harm.

Section 51 (2)(b)⁹⁴⁷ of the Act⁹⁴⁸ stipulates that notwithstanding any other law but subject to subsection (3) and (6), a regional court or a High Court shall if it has convicted a person of an offence referred to in Part III of Schedule 2, sentence the person, in the case of:

- (i) a first offender, to imprisonment for a period not less than 10 years;
- (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and
- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years.

Part III of the said Act includes rape in circumstances other than those referred to in Part I.

It is thus evident from the above that there is a minimum statutorily prescribed sentence applicable to all offences of rape.

Section 51 (3)(a) further stipulates that if any court referred to in the above subsections is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

As to the question of what constitutes substantial and compelling circumstances there has been no clear guideline provided by the Act⁹⁴⁹ and the answer has been left entirely up to the courts.

Prior to the Act⁹⁵⁰ coming into force the high courts were free, in the exercise of their discretion, to impose sentences of life

⁹⁴⁶ Act 18 of 1973.

⁹⁴⁷ Act 105 of 1997.

⁹⁴⁸ Act 105 of 1997.

imprisonment. However the very fact that the legislation has been enacted indicates that Parliament was not content with that and that it was no longer to be “business as usual” when sentencing for the commission of the specified crimes (here rape).⁹⁵¹

As stated in *S v Malgas*⁹⁵² it would appear that the courts discretion is not extreme in nature:

... a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment of the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring a severe, standardized, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public’s need for effective sanctions against it.

Although it is slightly off the topic here under discussion, the case of *S v Rommoko*⁹⁵³ indicates guidelines as to what constitutes substantial and compelling circumstances, clearing much confusion and misunderstanding of the exact nature of such circumstances.

The court held in the *Rammoko*⁹⁵⁴ case, that the community is entitled to expect that an offender will not escape life imprisonment – which has been prescribed for a very specific reason – simply because such circumstances are, uncaringly, held to be present. Evidence relating to the extent to which

⁹⁴⁹ Act 105 of 1997.

⁹⁵⁰ Act 105 of 1997.

⁹⁵¹ *Rammoko v Director of Public Prosecutions* 2003 (1) SACR: 200 D.

⁹⁵² 2001 (1) SACR 469 (SCA):476 G.

⁹⁵³ 2003(1) SACR 200 (SCA).

the complainant has been affected by the rape and will be affected in future is relevant, and indeed important. Such evidence could be led from the complainant's mother, her school teacher or a psychologist.⁹⁵⁵

The court held further that the duty to place this information before the court does not rest solely on the State, but that the presiding officer must satisfy himself that no substantial and compelling circumstances exist before imposing the prescribed sentence.

It is thus logical that nothing prevents a court from directing the complainant to be interviewed by a psychologist or other qualified person to establish the effect of the rape on her present and future.

Although the court is admirable in its attention to the effects on the complainant it may be that this legislative amendment may result in the victim having to undergo further trauma by reliving the experience and facing the accused once again in a court of law in order to present her psychological trauma in aggravation of sentence.

It may seem that the legislative amendments created by minimum sentence legislation has effectively created yet another loop-hole for the offenders of rape to escape life imprisonment by the inclusion of substantial and compelling circumstances which may be reduced effectively, to a 'get out of jail free card'. However when viewed in light of recent case law it can be argued that although the loop-hole has been legislatively created it has also been filled by raising the bar, on what constitutes normal circumstances in mitigation to a much higher level. In the matter of *S v Dodo*⁹⁵⁶ the Court stated:

In the sentencing process, appropriate weight must be given to the protection of women in particular against violent crimes, as pointed out by the Constitution, international treaty obligations and relevant

⁹⁵⁴ 2003(1) SACR 200 (SCA).

⁹⁵⁵ 2003(1) SACR 205 (SCA):D-F.

⁹⁵⁶ 2001 (3) SA 882 (CC):at 38.

case law. However there should always be a relation between the length of the sentence and the gravity of the offence or to what the committed offence merits for a period of imprisonment.

CHAPTER SIX

CONCLUSION

Despite the attitude of government, and the various initiatives taken, such as the Sixteen Days of Activism Against Violence Against Women and Children, it would seem that, in South Africa if you strike a woman, you do not strike a rock but rather a semi-precious gem corroding in the quagmire of abuse.

It is an unacceptable situation that in a country, such as South Africa, a woman is raped every 26 seconds. The underreporting of such crimes only reflects the inability of the current law to protect and guard against such abuse.

It is apparent that the State is making a fledgling attempt to correct this situation by creating laws, such as the Sexual Offences Bill, however the delay in its enactment reflects negatively on the importance of women in South Africa. The Bill, until enactment, is effectively useless despite its fundamental importance. With that said, the legislature has made monumental improvements in the lives of women by, for example giving her control over her reproductive health in the form of the Choice on Termination of Pregnancy Act, however this would seem a classic case of cure superceding prevention, in relation to rape. If we prevent rape women will have no need to 'cure' the results thereof whether such results are that of pregnancy or disease.

It has been said that a revolution is very rarely instigated by a rich man but usually by an oppressed one. On that note the women of South Africa need to begin fighting for the rights as have been so gallantly awarded by the Constitution. The education of the masses is essential in the quest for a complete culture of human rights. The African Renaissance cannot exist without the pivotal role played by the woman of this continent, but between

the pandemic of HIV and abuse a woman may be unable to stand for such a utopian concept.

A document, essentially a sheet of paper containing the thoughts of man cannot grant rights nor can it protect them, rights are a product of being born human with all of aspects of humanity attached thereto.

Real men don't rape: These words were uttered in a media production and caused a degree of public outcry to the point where the offending advert was withdrawn. Perhaps a classic example of the truth hurts. We cannot tar all men with the same brush; however it would appear that the duty to prevent violence against women lies with them.

The medical fraternity plays a pivotal role in the presentation and preservation of evidence in criminal, sexual offences, cases and it cannot be denied that they are often direct contributors to justice being served, but the demand for medical evidence in these types of cases would not be so high if society began to, as a group, stem the swell of sexual violence against women.

Hopefully the new Sexual Offences Criminal Law Amendment Bill will soon become a workable Act. This Act could potentially revolutionize the law on sexual offences and will serve the community far more adequately than the current laws.

A highly effective partner to the abovementioned Bill appears in the form of the Compulsory HIV Testing Bill⁹⁵⁷ which will serve to protect those who have been victims of the heinous crime of rape. Should the victim have been infected with the virus she may then make choices based on fact instead of labouring under the thought that she may have been infected. At present victims simply have to wait for the window period to pass to ascertain if they have been infected with the HIV virus. This leads to the woman being

⁹⁵⁷ Bill 10 of 2003.

victimized a second time as she cannot continue with her life whilst continuously wondering about her death.

It cannot be denied that it is the height of impossibility to completely eradicate sexual violence, there will always exist an element in society who view this type of conduct as acceptable, however the law can be altered to protect the victim and to lower the occurrence of these crimes. Further the law can be utilized to ensure that the perpetrator receives a punishment befitting his crime.

South Africa is a forerunner in constitutional democracies and revamping the current rape laws would only elevate this status as well as protecting the rights which were fought for, for so long, by so many.

In conclusion:

1. The rights guaranteed to women, in terms of the Constitution, are not protected and enforced to an acceptable level specifically when viewed in light of the unacceptable levels of sexual and domestic abuse perpetrated against women.
2. Rape, domestic abuse and the general insubordination of women is rife and is slowly eroding the fabric of a South African, democratic society.
3. Medical intervention and examination is often essential in the capture and effective prosecution of the perpetrators of gender based crimes and yet, it is submitted that those who are charged with the prosecution of such offences are often frustrated by the lack of medical knowledge required and the amount of bureaucratic red-tape involved in the procurement of such evidence.
4. The production and presentation of medical evidence at trial is an essential element to the effective prosecution of such offenders and the degree of skill required to lead such expert evidence is acquired by academic knowledge and practical experience.
5. The so called Act on Minimum Sentencing is effective in the punishment of offenders but seems to create categories of victims and categories of offenders. Substantial and compelling circumstances

allow an accused to be sentenced to a lesser degree and yet this creates the illusion that rape is only rape if there is extreme physical and psychological damage to the victim. This sends a mixed message to the women of this country that their pain is not important unless it extends to extreme degrees. Why is rape only punishable, to the maximum effect of the law if the crime itself is extreme? Rape is rape whether there are physical scars or not.

I cannot conclude, nor send a more effective message to the perpetrators of these crimes, more aptly than by using the words of Judge Van Der Merwe, who stated in the matter of *S v Zuma*:

With reference to the poem If by Rudyard Kipling 'If you can control your bodily and sexual desires, then you are a man my son.'

SUMMARY/OPSOMMING

The women of South Africa continue to labour under the yoke of sexual violence and misuse.

1. The constitutional development of the rights of women is examined in chapter one.
2. The crimes of rape, domestic violence and sexual abuse continue to be a pervasive factor in our society despite laws to the contrary. The current law relating to such acts are clarified in chapter two.
3. A victim of the aforementioned crimes will usually undergo a medical examination which is used as evidence at trial. This work clarifies the procedure involved in such examination as well as the current law relating to such acts of violence.
4. The Criminal Law (Sexual Offences) Amendment Act as well as the Bill on Compulsory HIV testing is explored.
5. The statutory and common law position is examined with regard the crime of rape as well as the legislation applicable to sentencing of such offenders.
6. The use and presentation of medical evidence and the role of expert witnesses is examined and well as the legislation so applicable.

This work contains criminological elements in that it examines rapist profiles and the propensity towards the commission of such crimes.

Vroue van Suid-Afrika staan steeds gebuk onder die juk van seksuele geweld en misbruik.

1. In Hoofstuk Een word die grondwetlike ontwikkeling van vroueregte ondersoek.
2. Verkragting, gesinsgeweld en seksuele misbruik bly steeds 'n kommerwekkende faktor in ons samelewing, ten spyte van wette tot die teendeel. Die huidige wetgewing wat op hierdie handeling betrekking het word in Hoofstuk Twee uiteengesit.
3. 'n Slagoffer van voormelde misdrywe sal gewoonlik 'n mediese ondersoek ondergaan welke as getuienis gebruik word tydens die verhoor. Hierdie werk sit die prosedure uiteen met betrekking tot sodanige ondersoek, asook die geldende reg wat van toepassing is ten aansien van sulke dade van geweld.
4. Die Strafwysigingswet, asook die Wetsontwerp met betrekking tot verpligte MIV toetsing word ondersoek.
5. Die statutêre- en gemeenregtelike posisie word nagevors in soverre dit betrekking het op verkragting, asook wetgewing wat spesifiek van toepassing is vir vonnisdoeleindes.
6. Die gebruik van en wyse van aanbieding van mediese getuienis, die rol van deskundige getuienis, asook toepaslike wetgewing word ondersoek.

Hierdie werk bevat strafregtelike elemente insoverre dit verkragtingsprofiële ondersoek en die geneigdheid om sulke misdade te pleeg.

KEYWORDS IN RELATION TO SUBJECT OF DISSERTATION

1. Human rights/ Mense regte
2. Impact of the Constitution of the Republic of South Africa/Impak van die Grondwet van die Republiek van Suid- Afrika
3. Rape/ Verkragting
4. Domestic Violence/ Gesinsgeweld
5. Femicide
6. Common law/ Gemene reg
7. Statutory law/ Statutêre reg
8. Medical ethics/ Mediese etiek
9. Medical/Forensic evidence/ Mediese/Forensiese getuienis
10. Female physiology/ Vroulike fisiologie
11. DNA/ DNS
12. J88 medical report/ J88 mediese verslag
13. Medical expert/ Mediese deskundige
14. Sentencing/ Vonnis

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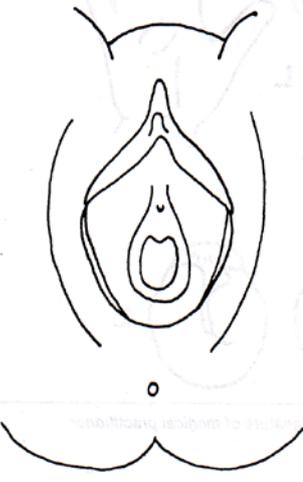
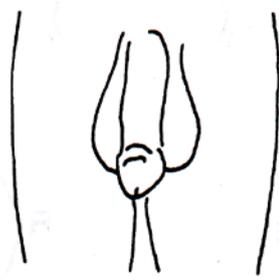
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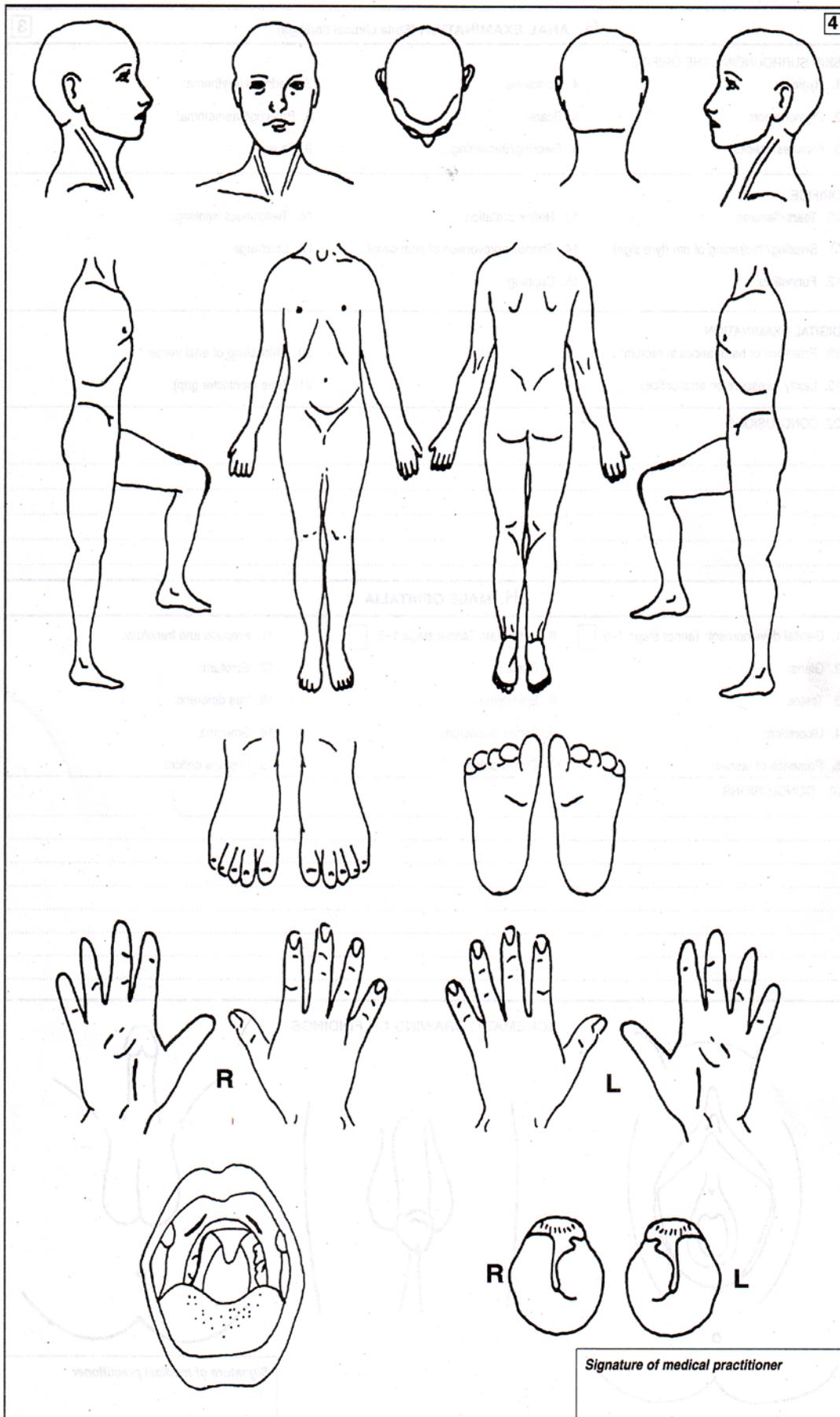
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2. Child Care Act 74 of 1983.
3. Choice on Termination of Pregnancy Act 92 of 1996.
4. Criminal Law Amendment Act 105 of 1997.
5. Domestic Violence Act 116 of 1999.
6. Financial Intelligence Centre Act 38 of 2001.
7. Labour Relations Act 66 of 1995.
8. Law of Evidence and Criminal Procedure Amendment Act 103 of 1987.
9. Matrimonial Property Act 88 of 1984.
10. Mental Health Act 18 of 1973.
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12. National Health Act 61 of 2003.
13. Prevention of Family Violence Act 133 of 1993.
14. Prevention of Organized Crime Act 121 of 1998.
15. The Constitution of the Republic of South Africa Act 108 of 1996.
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1. The International Covenants on Human Rights.
2. Universal Declaration of Rights.

G. ANAL EXAMINATION (State clinical findings)		
3		
SKIN SURROUNDING THE ORIFICE		
1. Hygiene:	4. Abrasions:	7. Redness/erythema:
2. Pigmentation:	5. Scars:	8. Bruising/haematoma:
3. Fissures/cracks:	6. Swelling/thickening:	9. Tags:
ORIFICE		
10. Tears/fissures:	13. Reflex dilatation:	16. Twitchiness/winking:
11. Swelling/thickening of rim (tyre sign):	14. Shortening/eversion of anal canal:	17. Discharge:
12. Funnelling:	15. Cupping:	
DIGITAL EXAMINATION		
18. Presence of hard faeces in rectum:		20. Thickening of anal verge:
19. Laxity (pressure on anal orifice):		21. Tone (sphincter grip):
22. CONCLUSIONS		
.....		
H. MALE GENITALIA		
1. Genital development: Tanner stage 1-5 <input type="checkbox"/>	6. Pubic hair: Tanner stage 1-5: <input type="checkbox"/>	11. Prepuce and frenulum:
2. Glans:	7. Shaft:	12. Scrotum:
3. Testes:	8. Epididymus:	13. Vas deferens:
4. Ulceration:	9. Penile discharge:	14. Smegma:
5. Presence of faeces:	10. Circumcision:	15. Urethral orifice:
16. CONCLUSIONS		
.....		
SCHEMATIC DRAWING OF FINDINGS		
		
		Signature of medical practitioner



ANNEXURE "B"

G.P.-S. 002-0350

SAPD 308
SAPS

Suid-Afrikaanse Polisie diens



South African Police Service

AANSOEK AAN GENEESHEER VIR ONDERSOEK IN GEVAL VAN BEWEERDE AANRANDING OF ANDER MISDAAD
REQUEST TO DOCTOR FOR EXAMINATION IN A CASE OF ALLEGED ASSAULT OR OTHER CRIME

DEEL/PART I
MOET ALTYD VOLTOOI WORD/MUST BE COMPLETED IN EVERY CASE

VERSOEK AAN MEDIESE BEAMPTTE/PRAKTISYN * REQUEST TO MEDICAL OFFICER/PRACTITIONER			
Ek. No. I. No.	Rang Rank	Naam Name	Stasie Station
'n lid van die Suid-Afrikaanse Polisie diens versoek hiermee die mediese beampte van die distrik a member of the South African Police Service, hereby request the medical officer of the district om die klaer/klaagster (volle naam) to examine the complainant (full name) to examine te ondersoek in 'n saak van in a case of			
Plek Place Datum Date			
HANDTEKENING VAN POLISIEBEAMPTTE SIGNATURE OF POLICE OFFICIAL			

Besonderhede van saak/Particulars of case:

Datum	Tyd	Plek	MR/MAS No.
Date	Time	Place	CR/CAS No.
Stasie	Kort beskrywing		
Station	Short description		

DEEL II/PART II
TOESTEMMING/CONSENT

Ek, (volle name)
I, (full names)

Ouer/Voog van (in geval van minderjarige)
Parent/Guardian of (in case of minor) Ouderdom
Age

verleen hiermee toestemming dat hy/sy/ek volledig deur die mediese beampte van
hereby consent to his/my/her being subjected to examination by the medical officer of

ondersoek word en dat die bevindinge vir strafregtelike verrigtinge genoteuler mag word.
and to the recording of findings for criminal proceedings.

Ek verleen ook toestemming vir die neem van alle monsters, soos benodig, vir laboratoriumtoetse asook vir die neem van die nodige foto's van beserings
I also consent to the collection of all necessary specimens for laboratory tests and for the taking of necessary specimens for laboratory tests and for the

wat verband hou met die rede vir hierdie ondersoek.
taking of necessary photographs of injuries related to the reason for this examination.

Plek
Place
Datum
Date

HANDTEKENING VAN KLAER
SIGNATURE OF COMPLAINANT

HANDTEKENING/SIGNATURE
GETUIE I/WITNESS I

HANDTEKENING/SIGNATURE
GETUIE II/WITNESS II

In geval van minderjarige waar voog nie beskikbaar is nie moet Deel III van die vorm ook voltooi word.
In case of minor where guardian is not available, Part III of form must be completed as well.

DEEL III/PART III			
MOET SLEGS VOLTOOI WORD I.G.V. AANSOEK INGEVOLGE ART 335B VAN DIE STRAFPROSESWET, NO. 51 VAN 1977 MUST ONLY BE COMPLETED I.T.O. APPLICATION IN TERMS OF SECTION 335B OF THE CRIMINAL PROCEDURE ACT, NO. 51 OF 1977			
Ek, No. I, No. (distrik) (district)	Rang Rank	Naam Name	versoek die landdros te request the magistrate at om toestemming te verleen tot die mediese ondersoek van to grant consent for the medical examination of die minderjarige slagoffer om die volgende redes: a victim; who is a minor, for the following reasons:
Merk toepaslike blokkie met X Mark applicable block with X		Die ouer/voog van sodanige minderjarige— The parent/guardian of such minor—	
-		kan nie binne 'n redelike tyd opgespoor word nie; of cannot be traced within a reasonable time; or	_____
-		kan nie betyds toestemming verleen nie; cannot grant consent in time;	_____
-		is 'n verdagte ten opsigte van die misdryf waarvan die mediese ondersoek uitgevoer moet word; is a suspect in respect of the offence for which the medical examination must be conducted;	_____
-		weier onredelik om toe te stem dat die ondersoek uitgevoer word; unreasonably refuses to consent that the examination be conducted;	_____
-		weens geestesongesteldheid onbevoeg is om toe te stem dat die ondersoek uitgevoer word; of is incompetent on account of mental disorder to consent that the examination be conducted; or	_____
-		oorlede is. is deceased.	_____
Motivering vir noodsaaklikheid van ondersoek (moet in alle gevalle voltooi word) Reason for necessity of examination (must be completed in all cases)			
Plek Place			
Datum Date			
Tyd Time			
HANDTEKENING VAN POLISIEBEAMPTTE SIGNATURE OF POLICE OFFICIAL			
TOESTEMMING VAN LANDDROS/CONSENT OF MAGISTRATE			
Ek, I,	landdros van die distrik magistrate of the district		
verleen hiermee toestemming tot die mediese ondersoek van hereby grant consent for the medical examination of			
Ek verleen ook toestemming vir die neem van alle monsters, soos benodig, vir laboratoriumtoetse, asook vir die neem van die nodige foto's van I also consent to the collection of all necessary specimens for laboratory tests and to the taking of the necessary photographs of injuries related to beserings wat verband hou met die redes vir hierdie ondersoek. the reasons for this examination.			
Plek Place			
Datum Date			
Tyd Time			
HANDTEKENING VAN LANDDROS SIGNATURE OF MAGISTRATE			
TOESTEMMING VAN POLISIE-OFFISIER/STASIEKOMMISSARIS * CONSENT OF POLICE OFFICER/STATION COMMISSIONER			
ARTIKEL 335B VAN DIE STRAFPROSESWET, NO. 51 VAN 1977 * SECTION 335B OF THE CRIMINAL PROCEDURE ACT, NO. 51 OF 1977			
Ek, No. I, No.	Rang Rank	Naam Name	verleen hiermee, op grond van beëdigde verklarings deur 'n polisiebeampte en 'n geneesheer aan my voorgelê, hereby, on the grounds of written affidavits by a police official and a medical practitioner given to me, toestemming tot die mediese ondersoek van consent to the medical examination of
Ek verleen ook toestemming vir die neem van alle monsters, soos benodig, vir laboratoriumtoetse, asook vir die neem van die nodige foto's van I also consent to the collection of all necessary specimens for laboratory tests and to the taking of the necessary photographs of injuries related to beserings wat verband hou met die redes vir hierdie ondersoek. the reasons for this examination.			
Plek Place			
Datum Date			
HANDTEKENING/SIGNATURE			

ANNEXURE "C"

G.P.-S. 002-0350

SAP 308

SOUTH AFRICAN POLICE SERVICE



SUID-AFRIKAANSE POLISIEDIENS

**APPLICATION FOR THE GRANTING OF MEDICAL EXAMINATION OF A MINOR
AANSOEK OM TOESTEMMING TE VERLEEN TOT DIE MEDIESE ONDERSOEK VAN
DIE MINDERJARIGE**

- Application by police service official
Aansoek deur polisiediensbeampte
- Request to district surgeon
Aansoek aan distriksgeneesheer
- Consent of person/parent/guardian
Toestemming van persoon/ouer/voog

- Consent of magistrate
Toestemming van landdros
- Consent of police official
Toestemming van polisiediensbeampte

**SWORN DECLARATION/CONFIRMATION
BEËDIGDE VERKLARING/BEVESTIGING**

I, (Surname and full firstnames)
Ek, (Van en volle voorname),

ID No.
ID Nr.

Residential address
Woonadres

I certify under oath that/confirms that
verklaar onder eed dat/bevestig dat.....

.....
.....
.....

Signature (date) (place)
Handtekening (datum) (plek)

**COMMISSIONER OF OATH
KOMMISSARIS VAN EED**

I certify that the deponent has acknowledged that he/she understand the contents of this statement which
Ek verklaar dat die verklaarder erken dat hy/sy vertrou is met die inhoud van hierdie verklaring wat voor my

was sworn to before me and the deponent's signature was placed thereon in my presence.
beëdig/bevestig is en dat hy/sy dit begryp en dat die verklaarder se handtekening in my teenwoordigheid
daarop aangebring is.

Signature (Persal No) (Rank)
Handtekening (Persal No) (Rang)

Full names and Surname
Volle name en Van

SOUTH AFRICAN POLICE SERVICE



SUID-AFRIKAANSE POLISIEDIENS

**APPLICATION IN TERMS OF SECTION 335(B) OF THE CRIMINAL PROCEDURE ACT,
NO 51 OF 1977
AANSOEK INGEVOLGE ARTIKEL 335(B) VAN DIE STRAFPROSESWET, NO 51 VAN 1977**

I, No Ek, No.....	Rank Rang.....	Name Naam.....	request the magistrate atversoek die landdros te
(district) (distrik).....			to grant consent for the medical examination ofom toestemming te verleen tot die mediese ondersoek van
			a victim, who is a minor, for the following reasons:die minderjarige slagoffer om die volgende redes:
MARK APPLICABLE BLOCK WITH X MERK TOEPASLIKE BLOKKIE MET X			
The parent or guardian of such minor— Die ouer of voog van sodanige minderjarige—			
cannot be traced within a reasonable time; kan nie binne 'n redelike tyd opgespoor word nie;			<input type="checkbox"/>
cannot grant consent in time; kan nie betyds toestemming verleen nie;			<input type="checkbox"/>
is a suspect in respect of the offence for which the medical examination must be conducted; is 'n verdagte ten opsigte van die misdryf waarvan die mediese ondersoek uitgevoer moet word;			<input type="checkbox"/>
unreasonably refuses to consent that the examination be conducted; weier onredelik om toe te stem dat die ondersoek uitgevoer word;			<input type="checkbox"/>
is incompetent on account of mental disorder to consent that the examination be conducted; or weens geestesongesteldheid onbevoeg is om toe te stem dat die ondersoek uitgevoer word; of			<input type="checkbox"/>
is deceased. oorlede is.			<input type="checkbox"/>
Reasons for necessity of examination Motivering vir noodsaaklikheid van ondersoek.....			
.....			
.....			
.....			
Place/Plek			
Date/Datum			
Time/Tyd			
Signature of police service official/Handtekening van polisiebeampte			

CONSENT OF MAGISTRATE • TOESTEMMING VAN LANDDROS	
I,	magistrate of the district landdros van die distrik
hereby grant consent for the medical examination of verleen hiermee toestemming tot die mediese ondersoek van.....	
I also consent to the collection of all necessary specimens for laboratory tests and to the taking of the necessary photographs of injuries Ek verleen ook toestemming vir die neem van alle monsters, soos benodig, vir laboratoriumtoetse, asook vir die neem van die nodige foto's van beserings wat verband hou met die redes vir hierdie ondersoek.	
Place/Plek	
Date/Datum	
Signature of magistrate/Handtekening van landdros	

SOUTH AFRICAN POLICE SERVICE



SUID-AFRIKAANSE POLISIEDIENS

**EXAMINATION IN A CASE OF ALLEGED ASSAULT OR OTHER CRIME
 ONDERSOEK IN 'N GEVAL VAN BEWEERDE AANRANDING OF ANDER MISDAAD**

CONSENT OF PERSON/PARENT/GUARDIAN • TOESTEMMING VAN PERSOON/OUER/VOOG

I, _____
 Ek, _____

the parent/guardian of _____ age _____
 ouer/voog van _____ ouderdom _____

hereby consent to him/her/me being subjected to examination by the district surgeon of
 verleen hiermee toestemming dat hy/sy/ek deur die distriksgeneesheer van _____

and to the recording of the findings for criminal proceedings.
 ondersoek word en dat die bevindinge vir strafregtelike verrigtinge genotuleer mag word.

I also consent to the collection of all necessary specimens for laboratory tests and to the taking of the necessary photographs of injuries
 Ek verleen ook toestemming vir die neem van alle monsters, soos benodig vir laboratoruimtoetse, asook vir die neem van die nodige
 related to the reasons for this examination.
 foto's van beserings wat verband hou met die redes vir hierdie ondersoek.

Place/Plek _____

Date/Datum _____

Signature/Handtekening _____

Witnesses:
 Getuies: (1) _____ (2) _____

CONSENT OF POLICE SERVICE OFFICER • TOESTEMMING VAN POLISIEDIENSOFFISIER
 SECTION 335(B) OF THE CRIMINAL PROCEDURE ACT, NO 51 OF 1977 • ARTIKEL 335(B) VAN DIE STRAFPROSESWET, NO 51 VAN 1977

I, No _____ Rank _____ Name _____
 Ek, No _____ Rang _____ Naam _____

hereby, on the grounds of written affidavits by a police service official and a medical practitioner given to me, consent to the medical
 verleen hiermee, op grond van beëdigde verklarings deur 'n polisiebeampte en 'n geneesheer aan my voorgelê, toestemming
 examination of _____
 tot die mediese ondersoek van _____

I also consent to the collection of all necessary specimens for laboratory tests and to the taking of the necessary photographs of injuries
 Ek verleen ook toestemming vir die neem van alle monsters, soos benodig, vir laboratoruimtoetse, asook vir die neem van die nodige
 related to the reasons for this examinations.
 foto's van beserings wat verband hou met die redes vir hierdie ondersoek.

Place/Plek _____

Date/Datum _____

Signature/Handtekening _____

REQUEST TO DISTRICT SURGEON • VERSOEK AAN DISTRIKSGENEESHEER

I, No _____ Rank _____ Name _____
 Ek, No _____ Rang _____ Naam _____

a member of the South African Police Service, hereby request the district surgeon of the district
 'n lid van die Suid-Afrikaanse Polisie, versoek hiermee die distriksgeneesheer van die distrik _____

to examine _____ a complainant in a case of _____
 om _____ 'n klaer/klaagster in 'n saak van _____

_____ te ondersoek.

Place/Plek _____

Date/Datum _____

Signature/Handtekening _____