

EXPLORING THE CRIMINALISATION OF RAPE IN MODERN TIMES: A COMPARATIVE STUDY

By

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To all the rape victims of South Africa:

“I can be changed by what happens to me, but I refuse to be reduced by it”

— Maya Angelou

Drawing done by N Bekker: June at Noon Creative

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God, for He is my safe place. To my dear husband, thank you for giving me this opportunity and for always being in my team. To my greatest gift, David, Jedidah and Joshua, thank you for letting me be your mom. This is for you. Mom and Dad, you are my rock and strength, thanks for always encouraging me.

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Chapter 1

Introduction

1.1 Introduction

South Africa's rape statistics are extensively reported on, familiar to all, and shock not only South Africans, but people across the globe. These rape statistics are alarming and emphasise the seriousness of the rate at which the crime of 'rape' is committed in South Africa. Below is a brief summary of reported rape statistics since 1988.

During 1988, there were 19 308 cases of rape reported to the South African Police Service.¹ Before the end of the apartheid era in 1994, the rape of a black woman was not taken that seriously.² At the end of 1994, when the rape of black women was considered more serious, there were 44 751 reported cases of rape.³

During 2018/2019, the South African Police Service recorded 41 583 cases of rape, which amounted to approximately 114 cases of rape each day.⁴ A Gallup survey done in collaboration with Interpol during 2009 stated the following when the results were released: "A woman is raped every 17 seconds in South Africa".⁵ This amounts to 5 000 women being raped per day; 35 000 women per week; 150 000 women per month; and 1 800 000 women being raped per year.⁶ Thus, when looking at the statistics mentioned above, it is understandable that South Africa has been labelled as the "Rape Capital of the World".⁷

With reference to South Africa's outrageous rape statistics, Judge Bosielo⁸ stated:

1 Vetten 1997:10.

2 Armstrong 1994:35.

3 Vetten 2014:3.

4 Africa Check, "Factsheet: South Africa's crime statistics for 2018/2019," <https://africacheck.org/fact-checks/factsheets/factsheet-south-africas-crime-statistics-201819> (accessed on 12 September 2019).

5 Delmeirin, "Rape nearly troubles all in South Africa", <https://news.gallup.com/poll/123800/rape-troubles-nearly-south-africa.aspx> (accessed on 19 March 2021).

6 News 24 Staff Reporter, "The Rape Capital of the world" <https://www.news24.com/MyNews24/The-Rape-Capital-of-the-World-20140821> (accessed on 18 November 2020).

7 News24 Staff Reporter, "The rape capital of the world," <https://www.news24.com/MyNews24/The-Rape-Capital-of-the-World-20140821> (accessed 16 April 2020).

8 *Director of Public Prosecutions, North Gauteng v Thabethe* 2001 (2) SACR 567 (SCA): 574.

It is regrettable that the rate of rape in the country has reached pandemic proportions. It is no exaggeration to say that rape has become a scourge or a cancer that threatens to destroy both the moral and social fabric of our society.

Traditionally, according to South Africa's Common Law, women were seen as less important than men. During the late Middle Ages, from the 13th to the 15th century, the sentence for rape was a fine payable to the father of the victim.⁹

In 1841, rape was defined in South African law as the unlawful and intentional intercourse with a woman by a man.¹⁰ After this development, sentencing developed in such a way that in 1887 the only sentence deemed fit for raping a woman was the death sentence.¹¹

Since 1994, there have been many developments in South Africa regarding the legal position of rape, especially concerning legislation dealing with the sentencing of rapists. The Common Law position concerning the sentencing of rape was repealed and the *Criminal Law Amendment Act 105 of 1997* took effect in 1998. The Act abolished the death penalty in accordance with Constitutional Court ruling, and mandatory minimum sentences were set out for rape.¹²

The definition of rape also evolved. On 14 December 2007, the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007* was implemented and repealed the Common Law definition of rape, resulting in the expansion of the Common Law definition of rape. The present definition of rape, according to section 3 of this Act, is:¹³

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

Sexual penetration is defined in section 1 of the Act as follows:¹⁴

sexual penetration includes any act which causes penetration to any extent whatsoever by—

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

9 Temkin 2002:57.

10 Milton 2008:465.

11 Milton 2008:465.

12 Milton 2008:343.

13 *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007: Section 3.*

14 *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007: Section 1.*

Today in South Africa, rape is seen as the execution of power by a perpetrator over a victim's dignity, integrity, and privacy, and less about the physical act of sex.¹⁵ Rape is recognised as an infringement on a person's human rights, whereas in the past rape was seen as "just being a part of life", especially for poverty-stricken black women.¹⁶

The International Criminal Tribunal for Rwanda described the dilemma surrounding rape as follows:¹⁷

...the essence of rape today is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion...

Currently, the primary motive for rape is not sexual lust, but rather the desire to dominate another person through sex; thus, the gender significance falls away.¹⁸

This study will investigate the legal position of the crime 'rape' in South Africa and shed light on the development of the crime and the sentencing of the perpetrator.

The definition and sentence of rape has not only evolved in South Africa but across the world; therefore, this comparative study between South Africa, England and Canada's rape legislation. This comparison will be made to determine whether South Africa is relevant and appropriate regarding rape legislation. As Aristotle said: Law is order, and good law is good order.¹⁹

1.2 Problem statement

1.2.1 Main research question

The main research question for this study is: "How adequate is the development of the law relating to the crime 'rape' in South Africa?"

1.2.2 Secondary questions

The secondary research questions are as follows:

15 *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another* CCT 54/06 [2007] ZACC 9:par. 25.

16 Armstrong 1994:35.

17 *S v Tshabalala; Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC 48.

18 *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another* CCT 54/06 [2007] ZACC 9:par. 36.

19 Aristotle 350BCE:part IV.

1. What did the Common Law definition of rape in South Africa entail?
This will include a discussion of the development of the definition according to Roman Law, Roman-Dutch Law, and English Law, as well as the original directives on sentencing of rape during these periods.

2. How did the crime of rape and the sentencing of convicted offenders develop in South Africa? This will include:
 - The influence of international obligations on the development of rape;
 - The implementation of the *Criminal Law Amendment Act*²⁰ and the effect thereof on the achievement of fair sentences in rape cases;
 - The influence of the South African *Constitution* of 1996 on the development of the crime of rape, with specific reference to the cases of *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another*²¹ and *Tshabalala v The State; and Ntuli v The State*;²² and
 - The development of Common Law rape sentencing.

3. What does the newly defined statutory definition of rape entail and does it have an influence on sentencing? This will include:
 - A discussion of rape in terms of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act*;²³
 - An explanation of how broad the new definition is;
 - A discussion of rape sentencing after the implementation of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act*.

4. How is rape defined and sentenced in England-Wales?

5. How is rape defined and sentenced in Canada?

20 *Criminal Law Amendment Act* 105 of 1997.

21 *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another* CCT 54/06 [2007] ZACC.

22 *Tshabalala v S; Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC 48.

23 *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

6. Are there any recommendations (based on the comparative study with England and Canada) that can be made for South Africa regarding the current definition of rape and the sentencing thereof?

1.3 Purpose of the study

The aim of this study is to investigate how adequate the development of the law relating to rape is in South Africa and the effect thereof on sentencing. If we desire respect for the law, we must first make the law respectable – this was said by Louis Brandeis.²⁴ Are South Africa's rape legislation and sentencing options respectable?

In determining the effectiveness of South Africa's legal position and legislation regulating rape, I will compare South Africa's position with that of Canada and England and investigate whether South African law on rape is in line with these two prominent countries. I have chosen Canada and England for my comparative study not only because they share the same Common Law as South Africa, but also because they have different forms of rape (or sexual assault where the word 'rape' is not used) and each form of rape has its own specific sentence.

The objective is to investigate whether South Africa is still in line with international standards and whether any recommendations in this regard can be made for the country.

1.4 Research method

In-depth research will be conducted to evaluate the historical development of the crime 'rape' from Roman Law up to and including the law currently applied in South African courts. The research will be conducted by way of theoretical analysis of the available legal literature.

Case law will be critically analysed to establish how the current *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007* is being applied practically, and what the effect of the new broader definition is on convicting and sentencing rape offenders.

24 Brandeis, "Brainyquote by Louis Brandeis", https://www.brainyquote.com/quotes/louis_d_brandeis_106240 (accessed on 4 February 2021).

Moreover, a comparative study will be done to investigate the present legal position regarding rape in England and Canada. As already stated under heading 1.3 above, I have chosen these two countries because South Africa, England and Canada share the same Common Law background, although these three countries' sentencing history is different and unique. The comparison will focus on the definition of rape in the two countries and the sentences that are imposed in respect of rape.

1.5 Chapter outline

This dissertation contains five chapters. Chapter 1 serves as the introduction to the dissertation. In this chapter, the prevalence of rape in society is outlined and the problem statement and the aim of the study are included. Chapter 2 focuses on rape in terms of the Common Law in South Africa, and the historical background and development thereof, including relevant case law. Chapter 3 contains a discussion of the present position of rape and the sentencing thereof in South Africa, as well as a discussion of notorious South African rape cases. Chapter 4 discusses the legal position regarding rape and the sentencing thereof in England and in Canada and includes a comparison between the legal position in South Africa, England, and Canada. Chapter 5 contains the summary, the conclusion, and the recommendations, which are based on the comparative study.

Chapter 2

Historical overview

2.1 Introduction

Historically South African law was not codified, implying that the law's origin can be found in multiple sources and not only in a single source. These different sources consisted of the following: minimal set legislation that existed at the time; previous case law; Common Law;²⁵ Customary Law and old authors'²⁶ writings.²⁷ Where there was no set legislation for a specific matter, the Common Law applied.²⁸ Common Law formed the foundation of today's modern South African law.

According to South Africa's Common Law, rape consisted of "a male having unlawful and intentional sexual intercourse with a female without her consent."²⁹ The definition required that only coercive sexual penetration of a female's vagina by a male's penis qualified as the crime of rape.³⁰ Thus, historically the male was always the accused, while the female was always the victim; in other words, it was impossible for a male to be the victim or for a female to be the accused.³¹ If the victim was a man and forced anal penetration took place, the offence was considered an act of indecent assault.³²

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- 25 Common Law in South Africa consists primarily of Roman-Dutch law, which was brought into the Cape in the 17th and 18th century. Common Law was sometimes affected by English law through exemplars.
Department of Justice, African Charter on Human and Peoples' Rights – Chapter 2: par. 2.2.3. <https://www.justice.gov.za/policy/african%20charter/afr-charter02.html#:~:text=South%20African%20common%20law%20is,%2C%20robbery%20and%20rape%2C%20etc> (accessed on 4 December 2020).
- 26 Examples of old authors being Hugo de Groot, Voet, van Leeuwarm and van der Linden.
Department of justice, African Charter on Human and Peoples' Rights – Chapter 2: par. 2.2.3. <https://www.justice.gov.za/policy/african%20charter/afr-charter02.html#:~:text=South%20African%20common%20law%20is,%2C%20robbery%20and%20rape%2C%20etc> (accessed on 4 December 2020).
- 27 Department of justice, African Charter on Human and Peoples' Rights - Chapter 2: par. 2.2.4. <https://www.justice.gov.za/policy/african%20charter/afr-charter02.html#:~:text=South%20African%20common%20law%20is,%2C%20robbery%20and%20rape%2C%20etc> (accessed on 4 December 2020).
- 28 Department of justice, African Charter on Human and Peoples' Rights - Chapter 2: par. 2.2.3. <https://www.justice.gov.za/policy/african%20charter/afr-charter02.html#:~:text=South%20African%20common%20law%20is,%2C%20robbery%20and%20rape%2C%20etc> (accessed on 4 December 2020).
- 29 Burchell & Milton 2000:487.
- 30 *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* (CCT54/06) [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827: par. 27.
- 31 Burchell 2005:707.
- 32 Artz & Smythe 2008:25-26.

It can thus be derived from the above that a woman could never be the perpetrator of Common Law rape.

The slightest penetration by the accused into the female's labia was sufficient to constitute rape. It was irrelevant whether one of the following took place: the emission of semen; the female became pregnant; or the hymen was ruptured.³³ If the accused, for instance, inserted his finger, tongue or a foreign object into the woman's anus or vagina, he did not commit rape; this action was prosecuted as a type of indecent assault.³⁴

Sentencing rape offenders has also developed over the years. According to the Common Law, South African presiding officers had absolute discretion when imposing an appropriate sentence on a convicted rapist.³⁵ At present, this discretion is restricted and may not be randomly utilised as the presiding officers please. Section 51 of the *Criminal Law Amendment Act* 105 of 1997³⁶ prescribes specific sentences for rape offenders.³⁷

In this chapter, the history of the crime 'rape' in South Africa, from when the crime emerged (including Roman Law, Roman-Dutch Law and English Law) until our current position, will be discussed.

2.2 Roman Law

2.2.1 Definition of rape in terms of Roman Law

Roman Law is still an operative source of law in South Africa.³⁸ In Roman Law, the act of rape was not restricted to only one word, namely 'rape', but rather the act was included under a range of legal terms.³⁹ Thus, there was no single word in Latin, which had the same extensive meaning as the word 'rape' has today.

33 Burchell 2005:706.

34 Snyman 2014:344. Also see Hall 1988:68.

35 Spies 2016:393.

36 *Criminal Law Amendment Act* 105 of 1997:section 51(1)(2)&(3).
Also see Van der Merwe 2015:359.

37 Van der Merwe 2015:359.

38 Erasmus 1989:666.

39 Nguyen 2006:76.

The Latin words *rapina*, *rapio* and *raptus* (tearing off, rending away, carrying off, abduction, plundering, to seize, snatch or tear away) were used to describe the crime of rape according to Roman Law.⁴⁰ *Raptus* was classified as a wrongdoing, which comprised the violent “carrying away” of a woman, this being synonymous with abduction.⁴¹ According to Roman Law, *raptus* could also involve the “successful seduction” of a woman. Because of this, the absence of consent of the woman was not required to be proven in rape cases.⁴²

During Emperor Augustine’s reign in 27 BC until 14 AD, he implemented laws to govern sexual activity. These laws stated that men were allowed to have sex with sex workers, whereas women were not allowed to have sex with any other man except their own husband.⁴³ Moreover, a victim of rape could not lay a charge herself; her father or husband had to lay the charge on her behalf. Women were viewed by law as minors.⁴⁴

From 284 to 305 AD, the policy regarding Roman Law rape was as follows:⁴⁵

The laws punish the foul wickedness of those who prostitute their modesty to the lusts of others, but they do not attach blame to those who are compelled to *stuprum* by force, since it has, moreover, been quite properly decided that their reputations are unharmed and that they are not prohibited from marriage to others.

When a woman was raped, it not only decreased her value, but also was considered a crime similar to theft, committed against the owner of the property – ultimately towards the husband or father. Women were not seen as anything more than legal objects.⁴⁶ A woman’s value rested in her ability to produce children for her husband. Virginity was of the utmost importance to men because men were then confident in

40 *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another* CCT 54/06 [2007] ZACC 9: par. 20.

41 Burchell 2016:489.

42 Gardner 1987:120-121.

43 Hayward, “Sexual Assault of Women in Ancient Rome”, <https://www.thecollector.com/sexual-assault-of-women-in-ancient-rome/> (accessed on 25 February 2021).

44 Hayward, “Sexual Assault of Women in Ancient Rome”, <https://www.thecollector.com/sexual-assault-of-women-in-ancient-rome/> (accessed on 25 February 2021).

45 Gardner 1987:120.

46 Germanos “Sexual Assault: Sexual Offences in the Criminal Justice Centre”, <http://www.politicsweb.co.za/opinion/sexual-assault-i-sexual-offences-in-the-criminal-j> (accessed on 22 May 2020).

the legitimacy of their children.⁴⁷ A man's worth was largely measured by his control over his women and his children. In contrast, a woman's social compliance to her man was an established social element.⁴⁸

Rape was subsequently redefined by Emperor Constantine during his reign from 306 until 337 AD, whereby rape was seen as a public offence.⁴⁹ Accordingly, his laws were divided into two categories: depending on whether the victim was willing or unwilling to participate in the act of rape.⁵⁰ Emperor Constantine ordered that if the victim gave consent to the sexual activity (willing), she must be punished alongside the "abductor", this punishment meant being burnt alive.⁵¹ In the instance where the victim did not give consent (unwilling), she was seen as an accomplice to the rape "on the grounds that she could have saved herself by screaming for help". The victim thus "participated" in the rape; therefore, she was disowned, regardless of whether her family consented or not.⁵²

2.2.2 Sentencing rape in terms of Roman Law

In Roman Law, the focus when sentencing a perpetrator of rape was not on the actions of the rapist but on the victim's status at the time of the crime. If the victim did not belong to a specific social class, the rapist's act had no legal significance.⁵³

According to Emperor Augustine's rules, a rapist could receive a large fine, the death penalty, or he was forced to marry the victim without a marriage settlement.⁵⁴ In serious instances, during Emperor Constantine's rule, both the victim and the rapist were burnt alive if the victim was found to be "willing".⁵⁵

47 Germanos "Sexual Assault: Sexual Offences in the Criminal Justice Centre", <http://www.politicsweb.co.za/opinion/sexual-assault-i-sexual-offences-in-the-criminal-j> (accessed on 22 May 2020).

48 Epstein "AIDS and Africa's hidden war", <https://www.vqronline.org/vqr-portfolio/aids-and-africa%E2%80%99s-hidden-war> (accessed on 4 January 2021).

49 Brundage 1987:107.

50 Hayward, "Sexual Assault of Women in Ancient Rome", <https://www.thecollector.com/sexual-assault-of-women-in-ancient-rome/> (accessed on 25 February 2021).

51 Gardner 1987:120.

52 Gardner 1987:120.

53 Nguyen 2006:76.

54 Hayward, "Sexual Assault of Women in Ancient Rome", <https://www.thecollector.com/sexual-assault-of-women-in-ancient-rome/> (accessed on 25 February 2021).

55 Gardner 1987:120.

Judge Nkabinde⁵⁶ stated that, according to Roman Law, rape cases were built on the forbidding of unchaste conduct. Paternal societies criminalised rape only to the extent that it protected males' property rights over women. Roman Law gave men civil rights over their spouses' property and person; thus, women were subjected to their husband's supervision. The status of the victim of rape ultimately determined the possibility of a charge being brought against the perpetrator, and what the punishment of the perpetrator would be if found guilty. If the victim did not belong to a certain status group in her community, the act of rape did not have any legal consequences for the perpetrator.⁵⁷ Punishment for coercive sexual intercourse secured the interests of the community in disciplining the forbidden conduct, rather than the interests of the survivor.⁵⁸ Consequently, the punishment for rape was frequently a fee payable to the father or the husband whose "property" was "impaired".⁵⁹

2.3 Roman-Dutch Law

2.3.1 Definition of rape in terms of Roman-Dutch Law

Roman-Dutch law was practised from the 15th until the 19th century in Holland and was transferred to the Cape of Good Hope by Dutch immigrants when they took up residence during 1652.⁶⁰ The law was distributed by whites from the Cape Colony to the rest of South Africa. Roman-Dutch law was a codified form of Roman law, which was interpreted by Renaissance traditionalists. These traditionalists read Roman Law while considering Dutch Common Law.⁶¹ Thus, the law was called 'Roman-Dutch Law' because it was formulated from Roman Law, which unified with Dutch Customary Law.⁶² Ultimately, Roman-Dutch Law became the basis of modern South African law.⁶³

56 *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another* CCT 54/06 [2007] ZACC 9: par. 20.

57 Nguyen 2006:76.

58 *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another* CCT 54/06 [2007] ZACC 9: par. 21.

59 Temkin 2002:57.

60 Long 2003:258-259.

61 Long 2003:258-259.

62 Baase, "Introduction to Law School 2020", http://www.law.uct.ac.za/sites/default/files/image_tool/images/99/Law%20for%20Non-Law%20Students%20-%20course%20reader%20Feb%202020.pdf (accessed on 1 March 2021).

63 Cowan "Roman-Dutch Law", <https://www.britannica.com/topic/Roman-Dutch-law> (accessed on 4 December 2020).

Thus, Common Law in South Africa is traditionally seen as the comprehensive and old 17th and 18th century Roman-Dutch law.⁶⁴ The historical source of the Roman-Dutch law was found in Dutch courts' rulings and the writings of educated authors, these authors being Hugo de Groot (his Latinised name was Hugo Grotius and he was viewed as the father of Roman-Dutch Law), Voet, Van Leeuwen and Van der Linden.⁶⁵ Some South African legal terms remain Latin because of this origin.

Constraint was at the centre of the Roman-Dutch Law's definition of rape, with the "hue and cry" rule as an accompanying requirement to show that the act of rape was non-consensual.⁶⁶ The offence of *struprum* was committed where intercourse was gained through fear, fraud, duress or deceit, including intercourse with an unconscious or mentally impaired woman.⁶⁷ The Roman-Dutch Law writers thus restricted rape (which was also called *verkrachtinge*, *vrouwen-kracht* or *stuprum violentum*) to cases of violent sexual intercourse with a woman without her permission.⁶⁸

Rape according to the 19th century Roman-Dutch Law entailed both the "forcible ravishing and the forcible carrying off of a woman or maid against her will".⁶⁹ Since the definition of rape continuously changed and had different restrictions, the above definition of rape formed the foundation of rape cases in the Cape of Good Hope. In the different smaller districts or colonies in South Africa, rape was seen as "an illegal act of reproduction".⁷⁰ According to the Roman-Dutch Law, violence was a crucial element in the crime of rape.⁷¹

The cautionary rule applied in rape cases and the rule prescribed that the victim's conduct be tried. The court had to find the victim to be a credible witness. The victim

64 Chanock 2001:155.

65 Department of justice, African Charter on Human and Peoples' Rights - Chapter 2: par. 2.2.3. <https://www.justice.gov.za/policy/african%20charter/afr-charter02.html#:~:text=South%20African%20common%20law%20is,%2C%20robbery%20and%20rape%2C%20etc.> (accessed on 4 December 2020). Also see Van Niekerk & Van Niekerk 2018:176.

66 Burchell & Milton 2000:490.

67 *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another* CCT 54/06 [2007] ZACC 9: par. 21.

68 Burchell & Milton 2000:490.

69 Scully 1995:343.

70 Scully 1995:343.

71 Van der Bijl & Rumney 2009:417.

was seen as guilty until proven innocent. The court questioned what the victim had done in order to bring the transgression upon herself.⁷²

According to Roman-Dutch law, an attempt to commit a crime (for example, attempted rape), was also punishable.⁷³

2.3.2 Sentencing rape in terms of Roman-Dutch Law

Traditionally in terms of Roman-Dutch Law, rape was regarded as a crime for which the death sentence could be imposed.⁷⁴ In 1887, the death penalty was made compulsory for rape, but the courts showed a disinclination to convict, and sentences were invariably commuted.⁷⁵ The practice was to impose the death sentence only where aggravating circumstances were present.⁷⁶

Where the rape was committed under threatening circumstances such as the use of arms or weapons; or when the attack was made on a married woman; or an unmarried girl; or the girl did not possess the mental capacity to consent, the punishment for the crime was capital. Under any other circumstances, the perpetrator was subjected to corporal punishment proportioned to the offence.⁷⁷

2.4 English Law

The Cape of Good Hope was occupied by the English during 1806. They brought with them their own unique law, which was known as the English Common Law. However, this English Common Law did not completely override the Roman-Dutch Law, but it had a remarkable influence on South African Law.⁷⁸

72 Germanos "Sexual Assault: Sexual Offences in the Criminal Justice Centre", <http://politicsweb.co.za/opinion/sexual-assault-i-sexual-offences-in-the-criminal-j> (accessed on 22 May 2020).

73 Burchell & Milton 2000:428.

74 Van Niekerk & Van Niekerk 2018:249.

75 Milton 1996:465.

76 Milton 1996:465.

77 Van Niekerk & Van Niekerk 2018:248-249.

78 Baase, "Introduction to Law School 2020", http://www.law.uct.ac.za/sites/default/files/image_tool/images/99/Law%20for%20Non-Law%20Students%20-%20course%20reader%20Feb%202020.pdf (accessed on 1 March 2021).

2.4.1 Definition of rape in terms of English Law

English Law made significant progress during the 12th and 13th century concerning rape legislation. Accordingly, a rape victim could open a civil claim against her rapist. The definition of rape was also expanded in such a way as to include the rape of children, widows, prostitutes, and nuns. Rape was thus finally seen as a public safety issue.⁷⁹

In 1285, rape in terms of English Common Law was defined by the “second Statute of Westminster” as the enchanting of any woman “without consent” and “with force”. Rape was understood as sexual intercourse with a woman against her will by defeating her defiance by overpowering her. Sexual intercourse, which was obtained by the accused through fraud, and without any force was thus not seen as “rape”.⁸⁰ No force meant no rape took place.

Thus, the main focal point in English Law originally was on the use of force to surpass a woman’s resistance. However, by the mid-18th century, force was no longer a requirement for the conduct to constitute rape. The definition of rape was also expanded in such a way as to include cases where a woman was raped by being defrauded or deceived into the act of rape.⁸¹ This English definition was accepted by the South African courts.⁸²

As discussed in paragraph 2.3.1 above, one of the requirements for a conviction of rape in Roman-Dutch Law was violence. However, in 1841 South Africa followed English Law, which did not require violence as an element for conduct to constitute rape.⁸³ The focus was rather on the lack of consent as the fundamental element in English Law.⁸⁴

79 Gillespie & King, “Legislative Origins, Reforms and Future Directions”, https://us.sagepub.com/sites/default/files/upm-assets/60334_book_item_60334.pdf (accessed on 11 March 2021).

80 Burchell & Milton 2000:490.

81 *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another* CCT 54/06 [2007] ZACC 9: par. 22.

82 Burchell & Milton 2000:491.

83 Naylor 2008:23.

84 Van der Bijl & Rumney 2009:417.

2.4.2 Sentencing rape in terms of English Law

Similar to Roman Law, rape was graded in the English Law, not by the viciousness of the crime, but by the stature of the victim. When a nobleman's serving maid was raped it cost the perpetrator twelve shillings, whilst when a commoner's maid was raped it cost the perpetrator five shillings. Forced intercourse with a woman who was not a virgin was not punished.⁸⁵

According to 10th century English Law, when a man raped a virgin, he was given the death penalty and his land and money was given to the victim. However, he could avoid this penalty if the woman agreed to marry him.⁸⁶

In 1841, the death penalty was abolished in English Law. At the same time, the English courts altered the conception of rape as forcible intercourse to intercourse without consent.⁸⁷

On 6 August 1861, the *Offences Against the Person Act*⁸⁸ took effect in England, whereby section 48 stated the following:

Whosoever shall be convicted of the crime of Rape shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour.

2.5 Common Law rape in South Africa and the sentencing thereof

The Common Law definition of rape that was applied in South Africa is the intentional and unlawful sexual intercourse with a woman without her consent.⁸⁹

The South African Law Commission found in 1985 that there was no reason to redefine the definition of rape as it was at the time.⁹⁰ This decision evoked widespread criticism. However, in 1994 after South Africa's democracy and liberal Constitution was adopted, the decision by the South African Law Commission was reconsidered whereby rape

85 Naylor 2008:23.

86 Gillespie & King, "Legislative Origins, Reforms and Future Directions", https://us.sagepub.com/sites/default/files/upm-assets/60334_book_item_60334.pdf (accessed on 11 March 2021).

87 Milton 2008:465.

88 *Offences Against the Person Act* 1861 (24 & 25 Vict c 100).

89 Burchell & Milton 2000:487.

90 Naylor 2008:41.

legislation was reformed.⁹¹ The Law Commission ultimately reached the following inference:⁹²

it is essential to redefine the offence of rape to be reliant on 'coercive circumstances' rather than absence of consent in order to establish prima facie unlawfulness. A shift from 'absence of consent' to 'coercion' represents a shift of focus of the utmost importance from the subjective state of mind of the victim to the imbalance of power between the parties on the occasion in question. This perspective also allows one to understand that coercion constitutes more than physical force or threat thereof, but may also include various other forms of exercise of power over another person: emotional, psychological, economical, social or organisational power.

The meaning of absence of consent was thus expanded to include abuse of power according to the *Criminal Law (Sexual Offences and Related Matters) Amendment Act*.⁹³

Regarding sentencing after 1910, the Native Territories Penal Code⁹⁴ had a great influence on South African Criminal Law.⁹⁵ This Code was documented and easily accessible to judges and magistrates throughout the courts. According to section 159 of the Code, rape offenders "shall be punished - with imprisonment, with or without hard labor, for a term which may extend to twenty years, or with flogging or whipping or with fine or any two or more of such punishments".⁹⁶

In 1917, the South African *Criminal Procedure and Evidence Act*⁹⁷ was passed in South Africa. In terms of this legislation, the death penalty was imposed for rape.⁹⁸

91 Naylor 2008:41.

92 Naylor 2008:42-43.

93 Combrinck & Artz, "Defining rape and indecent assault", <https://static.pmg.org.za/docs/2003/appendices/030917clc.htm> (accessed on 1 July 2021). See also *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007: Section 1(2) "Consent means voluntary or uncoerced agreement" & section 3(b).

94 *Native Territories Penal Code Act* 24 of 1886.

95 Koyana, "The influence of the Native Penal Code on South African Criminal Law", http://uir.unisa.ac.za/bitstream/handle/10500/18258/thesis_koyana_d.pdf.pdf?sequence=1&isAllowed=y (accessed on 17 March 2021).

96 Koyana, "The influence of the Native Penal Code on South African Criminal Law", http://uir.unisa.ac.za/bitstream/handle/10500/18258/thesis_koyana_d.pdf.pdf?sequence=1&isAllowed=y (accessed on 17 March 2021).

97 *Criminal Procedure and Evidence Act* 31 of 1917.

98 Seriti, "Argument in Favour of the Abolition of the Death Sentence in South Africa", http://uir.unisa.ac.za/bitstream/handle/10500/17716/dissertation_seriti_wl.pdf?sequence=1&isAllowed=y (accessed on 3 March 2021).

The death sentence could have been imposed until 6 June 1995 whereby the death sentence was found to be unconstitutional in the case *S v Makwanyane and Another*.⁹⁹ In this case, it was found that the death penalty is “a cruel, inhuman, and degrading punishment”.¹⁰⁰ After this case, the courts had wide discretion in sentencing rape perpetrators, until section 51 of the *Criminal Law Amendment Act*¹⁰¹ took effect on 1 May 1998. Accordingly, the Act set prescribed minimum sentences for rape offenders. This Act will be discussed below.

2.5.1 Implementation of the *Minimum Sentencing Act*

The minimum sentencing provisions of the *Criminal Law Amendment Act*¹⁰² came into force on 1 May 1998.¹⁰³ Mandatory minimum sentences for rape are set out in section 51 of the *Criminal Law Amendment Act*,¹⁰⁴ unless “substantial and compelling circumstances” justify a departure. Section 51 of the Act¹⁰⁵ reads as follows:

- According to subsection 1:

A High Court shall, if it has convicted a person of an offence referred to in Part I of Schedule 2,¹⁰⁶ sentence the person to imprisonment for life.

99 *S v Makwanyane and Another* (CCT 3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1.

100 *S v Makwanyane and Another* (CCT 3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1:11.

101 *Criminal Law Amendment Act* 105 of 1997.

102 105 of 1997.

103 *Criminal Law Amendment Act* 105 of 1997, Staatskoerant, http://www.saflii.org/za/legis/num_act/claa1997205.pdf (accessed on 14 April 2021).

104 *Criminal Law Amendment Act* 105 of 1997.

105 *Criminal Law Amendment Act* 105 of 1997.

106 Rape as contemplated in Part 1 of Schedule 2:

(a) When committed –

(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 or compelled rape, but has not yet been sentenced in respect of such convictions; or

(iv) By a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(b) Where the victim –

(i) Is a person under the age of 16 years;

(iA) Is an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006);

(ii) Is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or

(iii) Is a person who is mentally disabled; or

(c) Involving the infliction of grievous bodily harm.

It is important to note that during 2007 the *Criminal Law (Sentencing) Amendment Act 38 of 2007* also authorised Regional Courts to impose life imprisonment.

- According to subsection 2(b):

A Regional Court or a High Court shall—

If it has convicted a person of an offence referred to in Part III of Schedule 2¹⁰⁷ 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;

Provided that the maximum sentence that a Regional Court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose in terms of this subsection.

- According to subsection (3)(a):

If any court referred to in subsection (1) or (2) 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.

According to the Act, rape is divided into two categories: Part I and Part III offences. An accused charged with a Part I rape is sentenced to life imprisonment, while an accused charged with a Part III rape is sentenced to ten, fifteen and twenty years' imprisonment for a first, second and third offence, unless there are substantial and compelling circumstances that justify a lesser sentence.

Section 51(3)(a) of the Act¹⁰⁸ makes provision for the deviation from the prescribed minimum sentence when there are “substantial and compelling circumstances” justifying the deviation; however, this provision does not provide direction as to what sort of circumstances may be considered “substantial and compelling”. Judges regularly find “substantial and compelling circumstances” which, in their school of thought, defend their departure from the specified minimum sentences.¹⁰⁹

In *S v Malgas*¹¹⁰ the Constitutional Court held that:

107 Rape as contemplated in Part III of Schedule 2: Rape in circumstances other than those referred to in Part I.

It is also important to note that currently there is a debate and Bill (*Criminal and Related Matters Amendment Bill 2020* waiting to be assented) aiming to move Part III of Schedule 2 into Part II of Schedule 2, whereby rape will be on par with murder.

108 *Criminal Law (Sentencing) Amendment Act 38 of 2007*: Section 51.

109 Hoffman-Wanderer 2008:227.

110 *Malgas v S* 2001 (2) SA 220 (A): par. 25.

Substantial and compelling circumstances may arise from several factors considered together taken one by one, these factors need not be exceptional. If the sentencing court considers all the circumstances and is satisfied that the prescribed sentence would be unjust, as it would be disproportionate to the crime, the criminal and the needs of society, the court may impose a lesser sentence.

Presiding officers in magistrate courts have translated *S v Malgas* in such a manner as to allow them wide discretion in sentencing.¹¹¹ Research has shown that presiding officers also depart from the prescribed minimum sentences in a large number of cases. This “wide sentencing discretion” causes uncertainty in courts when sentencing rape accused.¹¹² The irregularity in judgements does however not suggest that judges are not obeying the set sentences; the presiding officers are simply looking for “substantial and compelling circumstances” in many of the cases, which justify a departure from the minimum sentence prescribed.¹¹³

Presiding officers depart from the prescribed minimum sentences to different extents. Subsequently, mandatory minimum sentences have not diminished conflicting sentences.¹¹⁴ The main purpose of mandatory minimum sentencing was to lessen crime, to dampen public fear, and to institute harsh and consistent punishment for serious crimes.¹¹⁵ However, despite the mandatory minimum sentences prescribed, the reported rate of rape has remained somewhat constant.¹¹⁶

Negative aspects regarding mandatory minimum sentencing include the following: prison overcrowding became even more of a problem; and the courts do not always promote consistency – as judges tend to try to avoid having to impose the minimum sentence and the judiciary is forced by legislation to provide clear-cut reasons for handing down lesser sentences, which warrants public inspection and arguments.¹¹⁷

It is argued that minimum and mandatory sentences do not have the benefits that they claim to have. The legislation does not reduce the number of rape cases being prosecuted. However, the sentences that are being imposed by the courts now are longer than they were before.¹¹⁸

111 Baehr 2008:227.

112 Van der Merwe & Mitchell 2020:4.

113 Baehr 2008:228.

114 Terblanche & Roberts 2005:200.

115 Sloth-Nielson & Ehlers 2005:20.

116 Baehr 2008:229.

117 Hoffman-Wanderer 2008:230.

118 Van der Merwe & Skelton 2015:359-360.

The *Criminal Law (Sentencing) Amendment Bill* ("the Amendment"),¹¹⁹ which was passed by Parliament in December 2007, was a step in the right direction. According to this Act, judges are prevented from finding substantial and compelling circumstances in the following facts in their presiding cases: the past sexual experiences of the victim; the absence of bodily injury to the victim; the accused's ethnic or spiritual beliefs about rape; and any prior relationship between the accused and the victim.¹²⁰

Judge Yacoob¹²¹ made the following statement regarding minimum sentences: "The Constitution, not the minimum sentencing legislation, is supreme. It is as well to emphasise that the minimum sentencing legislation is subordinate to the Constitution. All judges and magistrates are aware of this. Accordingly they know what the Constitution requires and will implement minimum sentencing legislation in a way that avoids injustice and in a way which ensures that the Constitution is observed as the primary instrument and the minimum sentencing legislation is at best secondary".¹²²

Cases discussed below will illustrate the continuous incompetence of South African courts to acknowledge the brutal essence of rape (the courts continue to depend on rape myths, which transfer the blame from the accused to the victim), as well the level of inconsistency shown by courts when sentencing convicted rapists.

They also emphasise the ineffectiveness of the *Criminal Law Amendment Act*¹²³ in ensuring consistent sentencing, and the urgent need for sentencing law reform by guaranteeing the harsh and consistent punishment for sexual offenders.¹²⁴

2.5.2 Case Law

2.5.2.1 S v Ntuli

On 22 August 2000, the accused instructed the victim (fourteen years old at the time of the incident), to undress herself and lie down on the ground. The accused then had

119 *Criminal Law (Sentencing) Amendment Act* 38 of 2007.

120 Baehr 2008:238.

121 *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (2) SACR 477 (CC); 2009 (6) SA 632 (CC).

122 *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (2) SACR 477 (CC); 2009 (6) SA 632 (CC):21.

123 *Criminal Law (Sentencing) Amendment Act* 38 of 2007.

124 Hoffman-Wanderer 2008:224.

sexual intercourse with the victim.¹²⁵ After the initial intercourse, the accused had intercourse with the complainant for a second time a few metres from where the first incident took place.¹²⁶ The trial proceeded in the Regional Court *in camera*. The accused was found guilty on one count of rape.¹²⁷

The Regional Court stated that the following conditions justified departure from the specified minimum sentence of life imprisonment: the complainant, being a pretty girl, could have brought out the worst in the accused; it would be wrong to not give the accused the opportunity to rehabilitate; the complainant suffered no emotional scars or negative effects from the incident; and, the complainant suffered no serious physical injuries and the complainant's HIV tests was negative.¹²⁸ The personal circumstances of the perpetrator were also taken into account, but were not found to be substantial and compelling evidence, which would justify a lesser sentence than the prescribed minimum sentence.¹²⁹

However, the Court found:¹³⁰

the inappropriateness of the prescribed sentence must be the result of the existence of substantial and compelling circumstances as there may be found to exist in any particular case...Section 51(3) provides that the court must be "satisfied that substantial and compelling circumstances exist. The subsection does not state that the court must find substantial and compelling circumstances unless it has a reasonable doubt that they exist.

The Regional Court imposed a sentence of eight years' imprisonment, half of which was conditionally suspended.¹³¹

The State appealed the sentence,¹³² whereby the matter was referred to the High Court for sentencing in terms of section 52 of the *Criminal Law Amendment Act*.¹³³

The learned Judge Visser reminded himself of what Judge Marais said in the case *S v Malgas*:¹³⁴

The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed

125 *S v Ntuli* [2005] JOL12442 (ECLD):3.
126 *S v Ntuli* [2005] JOL12442 (ECLD):4.
127 *S v Ntuli* [2005] JOL12442 (ECLD):6.
128 *S v Ntuli* [2005] JOL12442 (ECLD):17.
129 *S v Ntuli* [2005] JOL12442 (ECLD):12.
130 *S v Ntuli* [2005] JOL12442 (ECLD):16-17; 31-32.
131 *S v Ntuli* [2005] JOL12442 (ECLD):1-2.
132 *S v Ntuli* [2005] JOL12442 (ECLD):2.
133 *Criminal Law Amendment Act* 105 of 1997.
134 *Malgas v S* [2001] SA 220 (A): par. 22.

sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.

Consequently, the High Court was also of the opinion that life imprisonment would be a disproportionate sentence for the accused.¹³⁵ The High Court found the following facts to be substantial and compelling circumstances, which justified a lesser sentence: the accused had been in custody (awaiting trial) for two and a half years; the accused was still young, and he might still make something of his life; the complainant being a pretty girl might have brought out the worst in the accused; and it would have been wrong to not give the accused an opportunity to rehabilitate.¹³⁶

The Court agreed with the departure from a mandatory life sentence for rape, as prescribed by the *Criminal Law Amendment Act*, and confirmed the sentence of eight years' imprisonment, half of which was suspended for five years.¹³⁷

In this case, the Court deviated from the prescribed minimum sentence. The sentence is inappropriately lenient for this serious crime and taking into consideration the age of the complainant.

2.5.2.2 Baby Tshepang (meaning 'Hope')

Baby Tshepang's rape shocked South Africans and caused public outrage in the country and across the world, causing a media frenzy. I quote from a local newspaper:¹³⁸

She was just one more baby raped in South Africa.

Because of this case, South Africans called for the death penalty, which was abolished in 1994, to be reinstated.¹³⁹

The facts of the case can be summarised as follows: on 27 October 2001, a nine-month-old baby girl was found on her grandmother's bed without a nappy, with her

135 *S v Ntuli* [2005] JOL12442 (ECLD):14.

136 *S v Ntuli* [2005] JOL12442 (ECLD):35.

137 *S v Ntuli* [2005] JOL12442 (ECLD):34.

138 Joubert, "A community raped", <https://www.news24.com/w24/selfcare/wellness/a-community-raped-20051025> (accessed on 3 January 2021).

139 Seemungal, "Baby rape sparks outrage", <https://abcnews.go.com/WNT/story?id=130199&page=1> (accessed on 4 January 2021).

legs in the air. Her mother (fifteen years old) was at a local shebeen. On picking up the baby, the grandmother saw blood on her private parts, buttocks, and legs.¹⁴⁰

The baby had been raped. The trauma caused by forced penetration was so severe that the perineum between the vagina and anus was torn open to create a single canal.¹⁴¹ During the trial, Professor Theron (the chief surgeon at Kimberley Provincial Hospital) testified that the seriousness of the injuries implied that the victim was penetrated twice. The victim had a 10cm tear in her lower colon and a 1,5cm tear posterior to her genitals.¹⁴² Moreover, she was torn open between her vagina and anus.¹⁴³

The accused, David Potse, was arrested and charged with raping and sodomising the victim (charges of rape and indecent assault at the time). The accused's DNA matched semen that was found inside the baby. The accused's girlfriend also testified that she saw the accused raping the baby.¹⁴⁴

The accused was found guilty of rape and indecent assault. He was sentenced to life imprisonment on the rape charge and eighteen years' imprisonment on the indecent assault charge.¹⁴⁵

Judge Lacock said upon sentencing the accused:¹⁴⁶

It is a pity there is no longer a death penalty because I would not hesitate, not even for a moment, to let you hang.

140 Joubert, "A community raped", <https://www.news24.com/w24/selfcare/wellness/a-community-raped-20051025> (accessed on 3 January 2021).

141 Joubert, "A community raped", <https://www.news24.com/w24/selfcare/wellness/a-community-raped-20051025> (accessed on 3 January 2021).

142 News 24 Staff Reporter, "Hope for baby after horror rape", <https://www.news24.com/News24/hope-for-baby-after-horror-rape-20020723> (accessed on 4 January 2021).

143 Seemangul, "Baby rape sparks outrage", <https://abcnews.go.com/WNT/story?id=130199&page=1> (accessed on 4 January 2021).

144 Ngesi, "Unrepentant rapist of baby Tshepang gets life", <https://www.iol.co.za/travel/south-africa/unrepentant-rapist-of-baby-tshepang-gets-life-90451> (accessed on 3 January 2021).

145 Ngesi, "Unrepentant rapist of baby Tshepang gets life", <https://www.iol.co.za/travel/south-africa/unrepentant-rapist-of-baby-tshepang-gets-life-90451> (accessed on 3 January 2021).

146 Ngesi, "Unrepentant rapist of baby Tshepang gets life", <https://www.iol.co.za/travel/south-africa/unrepentant-rapist-of-baby-tshepang-gets-life-90451> (accessed on 3 January 2021).

Baby Tshepang's mother's life changed dramatically after the incident. She said that the biggest failure of her young life, her failure to protect her baby, would haunt her forever.¹⁴⁷

If this matter were brought before court today (with the broader definition of rape), the accused would have been charged with multiple counts of rape and ultimately sentenced to multiple life imprisonments. Fortunately, and correctly so, the Court did not find any substantial or compelling circumstances to deviate from the prescribed minimum sentence.

2.5.2.3 *S v Monageng*

In the case *S v Monageng*,¹⁴⁸ the complainant (fifteen years at the time) was raped by the accused on 26 September 2003.¹⁴⁹ The father of the complainant accepted a payment of seventeen cattle from the accused's family as retribution for the rape that was committed. The mother of the accused thought the accused deserved a beating for his act. According to the family's culture, they tried to settle this matter between themselves, but they could not reach an agreement and the matter went to court to be tried according to the law. The accused was subsequently sentenced to eighteen years' imprisonment.¹⁵⁰

According to section 51 of the *Criminal Law Amendment Act*¹⁵¹ Part 1(b)(i) of Schedule 2, the accused must be sentenced to life imprisonment where the victim is younger than sixteen. However, the court did not follow the Act and the prescribed minimum sentence.

Cases such as these illustrate two things: the continuing negligence of South African courts to recognise the vicious nature of rape (where the victim was younger than sixteen); and the courts' continued reliance on rape myths (in this matter, the victim

147 Joubert, "A community raped", <https://www.news24.com/w24/selfcare/wellness/a-community-raped-20051025> (accessed on 3 January 2021).

148 *S v Monageng* (590/06) [2008] ZASCA 129; [2009] 1 All SA 237 (SCA).

149 *S v Monageng* (590/06) [2008] ZASCA 129; [2009] 1 All SA 237 (SCA): par. 2-3.

150 *S v Monageng* (590/06) [2008] ZASCA 129; [2009] 1 All SA 237 (SCA): par. 6.

151 *Criminal Law Amendment Act* 105 of 1997.

was “beautiful”¹⁵² and she suffered no serious physical injuries¹⁵³), which shifted the blame from the offender to the victim. Thus, the mitigating factors for purposes of sentencing were the victim’s appearance and the fact that she did not suffer brutal physical injuries.¹⁵⁴

The ineffectiveness of the *Criminal Law Amendment Act* in ensuring consistent sentencing and the urgent need for sentencing law reform were re-emphasised by the latter case.

2.5.2.4 S v Jackson

On 26 December 1993 the victim, a 17-year-old schoolgirl got into a car with the accused. He stopped at a park where he held onto both of the victim’s hands, took off his sneakers, and exposed his penis. The accused proceeded to force open the victim’s legs in an attempt to have intercourse with her. He then inserted his finger in her vagina. The victim resisted and leaped out of the car, she dressed herself and ran to seek help.¹⁵⁵

The Regional Court accepted the victim’s evidence. During cross-examination, the victim repeatedly stated that according to her understanding, rape took place.¹⁵⁶ In the Regional Court, the accused was found guilty of attempted rape and sentenced to eighteen months’ imprisonment, which was fully suspended for five years.¹⁵⁷

The trial court had much consideration for the accused when imposing this lenient sentence,¹⁵⁸ which ultimately can be criticised. The accused appealed against his conviction and sentence, but the Supreme Court of Appeal dismissed both.¹⁵⁹ In

152 *S v Monageng* (590/06) [2008] ZASCA 129; [2009] 1 All SA 237 (SCA): par. 8.

153 *S v Monageng* (590/06) [2008] ZASCA 129; [2009] 1 All SA 237 (SCA): par. 35.

154 *S v Monageng* (590/06) [2008] ZASCA 129; [2009] 1 All SA 237 (SCA): par. 64.

155 *S v Jackson* (35/97) [1998] ZASCA 13; 1998 (4) BCLR 424 (SCA); [1998] 2 All SA 267 (A): par. 3-4.

156 *S v Jackson* (35/97) [1998] ZASCA 13; 1998 (4) BCLR 424 (SCA); [1998] 2 All SA 267 (A): par. 7 & 9.

157 *S v Jackson* (35/97) [1998] ZASCA 13; 1998 (4) BCLR 424 (SCA); [1998] 2 All SA 267 (A): par. 1.

158 *S v Jackson* (35/97) [1998] ZASCA 13; 1998 (4) BCLR 424 (SCA); [1998] 2 All SA 267 (A): par. 23.

159 *S v Jackson* (35/97) [1998] ZASCA 13; 1998 (4) BCLR 424 (SCA); [1998] 2 All SA 267 (A):

dismissing the appeal against the sentence, the Supreme Court of Appeal argued that the sentence imposed was lenient when taking the following aggravating factors into consideration: the accused was older, bigger and stronger than the victim; the victim was a slender schoolgirl that trusted the accused (who was a police officer); the accused misused his friendship with the victim; the accused invaded the victim's physical and moral integrity; the accused's action is unacceptable in society and the incident had a damaging impact on the victim.

If this matter was brought before the courts today, the accused would have been found guilty of rape (as penetration with the accused's finger would qualify as the act of rape). section 51(2)(b) of the *Criminal Law Amendment Act*¹⁶⁰ would then be applied, whereby a minimum of ten years' imprisonment would be the prescribed sentence.

2.6 Recently reported rape incidents from the past

Rape incidents, which occurred in the past, but which were only reported recently and were committed at a time when the Common Law definition of rape was applicable, must be prosecuted in terms of the Common Law. South African courts follow a victim-centred approach when sentencing such offenders. By doing this, the criminal justice system is sending a clear message that rape will not be entertained, even when the rape took place long ago. Complainants need to be encouraged to lay a charge when raped – the purpose being to expose the past abuse against them.¹⁶¹ These cases are not subject to current sentencing legislation, but rather to the prescribed sentencing options applicable at the time that the offence was committed.¹⁶²

One such notorious case is the case of *Hewitt v S*,¹⁶³ which will be discussed below.

2.6.1 Hewitt v S

The 75-year-old accused was convicted in 2015 on two counts of rape (committed during 1980) and one count of indecent assault (which was committed in 1994).¹⁶⁴ At

par. 24.

160 *Criminal Law Amendment Act* 105 of 1997.

161 Nortje & Du Toit 2017:11.

162 Nortje & Du Toit 2017:11.

163 *Hewitt v S* (637/2015) [2016] ZASCA 100; 2017 (1) SACR 309 (SCA).

164 *Hewitt v S* (637/2015) [2016] ZASCA 100; 2017 (1) SACR 309 (SCA): par. 1.

the time, the accused was a well-known professional tennis coach coaching young tennis stars.

The first victim, twelve years old at the time (count 1, rape), was raped at a Boksburg tennis club during her tennis lesson. Afterwards the victim reported the matter to her mother, but her mother disregarded it. Thus, the matter did not proceed.¹⁶⁵

The second victim (count 2, rape) was thirteen years old when she was raped by the accused. The accused raped the victim and pressurised her into oral sex at a tennis tournament. Initially, the relevant Director of Public Prosecutions (then referred to as the 'Attorney-General') declined to prosecute and issued a certificate *nolle prosequi* - the reason being that the court did not have the jurisdiction to proceed with the case since the rape took place in the former Republic of Bophuthatswana.¹⁶⁶ However, after 1994 and South Africa's new Constitution, the Republic of Bophuthatswana was reintegrated into South Africa, whereby it formed part of South Africa's provinces, namely the Free State, Gauteng, and the North West. When this matter again appeared before court in 2015, the jurisdiction was not an issue.¹⁶⁷

The third victim, 17 years old at the time (count 3, indecent assault) was molested over a period of time, on countless instances. However, she was never 'raped'.¹⁶⁸

Ultimately, the accused was found guilty in the High Court in Pretoria in 2015 on all three charges and sentenced as follows: count 1, eight years' imprisonment; count 2, eight years' imprisonment; and on count 3, two years' imprisonment. These sentences were ordered to run concurrently, and two years of each rape sentence were suspended. Thus, the accused was effectively sentenced to six years' imprisonment.¹⁶⁹

The accused appealed against the sentence imposed. Thus, the case appeared before the Supreme Court of Appeal of South Africa.

165 *Hewitt v S* (637/2015) [2016] ZASCA 100; 2017 (1) SACR 309 (SCA): par. 2.

166 *Hewitt v S* (637/2015) [2016] ZASCA 100; 2017 (1) SACR 309 (SCA): par. 3.

167 Hamilton, "Bob Hohler, Pain continues for Bob Hewitt's child sex abuse victims, The Boston Globe", <http://sol-reform.com/2015/04/bob-hohler-pain-continues-for-bob-hewitts-child-sex-abuse-victims-the-boston-globe/> (accessed on 1 July 2021).

168 *Hewitt v S* (637/2015) [2016] ZASCA 100; 2017 (1) SACR 309 (SCA): par. 4.

169 *Hewitt v S* (637/2015) [2016] ZASCA 100; 2017 (1) SACR 309 (SCA): par. 1.

On appeal, Judge Maya stated the following regarding this sentence imposed by the trial court:¹⁷⁰

the sentence must fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances... this is precisely the approach adopted by the court a quo when it determined sentence.

Judge Maya believed that the High Court sentence “fit the criminal and the crime and fairly balanced the competing interests”.¹⁷¹ At the time that these offences were committed, sentencing was *only* regulated by the “triad of Zinn” (named in 1969 after the *S v Zinn*¹⁷² case) whereby courts have to consider certain guidelines when sentencing offenders. These guidelines include the following: “the seriousness of the offense, the personal circumstances of the offender and the interest of society”.¹⁷³ The three guidelines have to be considered evenly; one factor should not weigh heavier than the other should when considering a suitable sentence. Thus, there was no set prescribed sentence; each presiding officer had the discretion to decide on an appropriate sentence.¹⁷⁴ If this matter occurred in South Africa today and the *Criminal Law Amendment Act*¹⁷⁵ was applied, it is possible that the accused would have been sentenced to two life imprisonment sentences, despite the fact that he was 75 years old. William Gladstone’s words, “Justice delayed is justice denied”, holds some truth in this case example.¹⁷⁶

2.7 Common Law rape and transformative constitutionalism

South African law has been transformed by the *Constitution*.¹⁷⁷ The *Constitution of South Africa of 1996* took effect on 8 May 1996, and it is the supreme legislation of the country.

170 *Hewitt v S* (637/2015) [2016] ZASCA 100; 2017 (1) SACR 309 (SCA): par. 10.

171 *Hewitt v S* (637/2015) [2016] ZASCA 100; 2017 (1) SACR 309 (SCA): par. 17.

172 *S v Zinn* 1969 (2) SA 537.

173 Goitom,” Sentencing Guidelines: South Africa”,
<https://www.loc.gov/law/help/sentencing-guidelines/southafrica.php>. See also
<https://tile.loc.gov/storage-services/service/ll/lglrd/2014504251/2014504251.pdf> (accessed
on 5 May 2021).

174 Goitom,” Sentencing Guidelines: South Africa”,
<https://www.loc.gov/law/help/sentencing-guidelines/southafrica.php>. See Also
<https://tile.loc.gov/storage-services/service/ll/lglrd/2014504251/2014504251.pdf> (accessed
on 5 May 2021).

175 *Criminal Law Amendment Act* 105 of 1997.

176 Gladstone, “William Gladstone Brainyquote”
https://www.brainyquote.com/quotes/william_e_gladstone_101551 (accessed on 4 February
2021).

177 *Constitution of the Republic of South Africa*, 1996.

The goals and the means by which the *Constitution* transformed South African law (including the criminal law, thus rape legislation) are called “transformative constitutionalism”. Transformative constitutionalism includes the confirmation of equality and socio-economic rights. The primary goal is to have good cooperation between the *Constitution*, legislation, and equity in South Africa.¹⁷⁸

The foundation of South Africa’s *Constitution* is found in Chapter One, which reads as follows:¹⁷⁹

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism. This is a magnificent goal for a Constitution: to heal the wounds of the past and guide us to a better future

The *Constitution* sets an admirable objective to be achieved by the courts. To reach this goal, the legislation had to change, including rape legislation (as discussed above).

The transformation of the legal position regarding rape can be seen in the Constitutional Court’s ruling in the following two cases, which will be discussed below. They are *Tshabalala v The State*; *Ntuli v The State*¹⁸⁰ and *S v Masiya*.¹⁸¹

2.7.1 Rape and the doctrine of common purpose (*Tshabalala v The State*; *Ntuli v The State*)

In the *Tshabalala v The State*; *Ntuli v The State* case,¹⁸² the application of the doctrine of common purpose to the Common Law crime of rape was determined. The Constitutional Court had to establish whether a co-accused could be convicted of the

178 Cohen, “Transformative Constitutionalism often includes an interplay between morality and law”, <https://openbooks.uct.ac.za/uct/catalog/download/25/38/1226-1?online=1> (accessed on 7 May 2021).

179 *Constitution of the Republic of South Africa*, 1996: Chapter 1.

180 *Tshabalala v S*; *Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC): par. 5.

181 *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another* CCT 54/06 [2007] ZACC 4: par. 6.

182 *Tshabalala v S*; *Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC): par. 5.

Common Law crime of rape based on the doctrine of common purpose in circumstances where the co-accused did not penetrate the victim himself.¹⁸³

In the case of *Tshabalala v The State; Ntuli v The State*,¹⁸⁴ a group of men ran riot in Umthambeka on 20 September 1998. They forced their way into numerous people's homes. The night of brutality included the rape of eight females; various members of the group raped some of the women repeatedly. The youngest victim was 14 years old. The accused were brought before the High Court on 13 August 1999 where the relevancy of the doctrine of common purpose to the Common Law crime of rape had to be determined.¹⁸⁵

The crime of rape according to Common Law was originally an autographic offence, which could only be committed by a male using his own private parts. A person who was merely present when the rape was committed, and who by his conduct either promoted or encouraged the successful commission of the offence, was not a perpetrator of rape, according to the Common Law.¹⁸⁶

Despite the aforementioned, the accused, Phetoe, Tshabalala and Ntuli, were found guilty on 23 November 1999 on eight counts of rape. The accused was found guilty on seven of those eight counts because of the implementation of the doctrine of common purpose. The High Court found that the men acted as a "cohesive whole".¹⁸⁷ The accused were each convicted and sentenced to effective life sentences.¹⁸⁸

Accused Phetoe approached the Full Bench in the High Court on appeal. It was argued on his behalf that the doctrine could not apply to autographic crimes, which can only be committed through the means of a person's own body. The Court agreed that the alliance with other group members rendered the accused accountable as an accomplice only. Consequently, the Court found that this accused did act as an

183 *Tshabalala v S; Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC): par. 22.

184 *Tshabalala v S; Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC): par. 5.

185 *Tshabalala v S; Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC): par. 7-8.

186 *Tshabalala v S; Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC): par. 2.

187 *Tshabalala v S; Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC): par. 8-10.

188 *Tshabalala v S; Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC): par. 12.

accomplice, whereby he was convicted of rape according to the Common Law. Thus, he was sentenced to life imprisonment.¹⁸⁹

Still not satisfied, accused Phetoe was then granted leave to appeal to the Supreme Court of Appeal. The Supreme Court of Appeal disagreed with the Full Bench of the High Court regarding accused Phetoe and held that “to convict the appellant on the basis of his mere presence is to subvert the principles of participation and liability as an accomplice in our criminal law”.¹⁹⁰

The Supreme Court of Appeal also disagreed with the High Court that there was a prior consensus to commit these crimes. Subsequently, and because of insufficient evidence, the Supreme Court of Appeal set the conviction aside. Spurred on by this success, co-accused Tshabalala and Ntuli directly applied to the Constitutional Court for leave to appeal.

It was left to the Constitutional Court to bring legal clarity regarding the applicability of the doctrine of common purpose to the Common Law crime of rape. The State in the Constitutional Court contended that applying the doctrine in this case was not unusual but was in accord with modern international standards. In support of their viewpoint, they relied on Article 25(3)(a) and (d) of the Rome Statute of International Criminal Court, whereby the Statute provides as follows:¹⁹¹

a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person commits such a crime: as an individual, or jointly with another or through another person, regardless of whether that other person is criminally responsible or in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or be made in the knowledge of the intention of the group to commit the crime.

According to the State, the above principles applied with equivalent power to the doctrine where involvement in the common purpose had been shown through preceding consensus or conspiracy.¹⁹² The Commission for Gender Equality (First

189 *Tshabalala v S; Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC): par. 13.

190 *Tshabalala v S; Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC): par. 15.

191 *Tshabalala v S; Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC): par. 40.

192 *Tshabalala v S; Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC): par. 41.

Amicus Curiae) submitted, “the instrumentality approach¹⁹³ is fundamentally flawed. It is both artificial and unprincipled in keeping with the expanded definition of rape under the *Sexual Offences and Related Matters Amendment Act*”.¹⁹⁴ The Act’s expanded definition of rape concedes that the crime can be committed using not only one’s body but also any other object.¹⁹⁵

Consequently, the Constitutional Court ruled that the “doctrine of common purpose applies to the Common Law crime of rape” and that the High Court rightly convicted the applicants.¹⁹⁶ Both appeals were dismissed.

After years of legal uncertainty, this case finally confirmed that the doctrine of common purpose is applicable to Common Law rape cases. This case was seen as groundbreaking for South Africa’s rape and minimum sentencing legislation.¹⁹⁷

2.7.2 Development of the definition of Common Law rape

As already stated above in paragraph 2.1, in terms of the Common Law definition of rape, rape only occurred when a man sexually penetrated a woman’s vagina with his penis. However, the *Masiya*-case¹⁹⁸ was a turning point in law in terms of the element of penetration in a rape case.

2.7.2.1 *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another*

193 *Tshabalala v S; Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC): par. 2 – “Under the common law, the crime of rape is an instrumentality offence which, by its nature, can only be committed by a male using his own genitalia, and not by an individual who is merely present when the offence is committed and by his conduct (through his association or active participation) either promotes, encourages or facilitates the successful commission of the offence”.

194 *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007: Section 1 and 3. Also see *Tshabalala v S; Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC): par. 43.

195 *Tshabalala v S; Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC): par. 43.

196 *Tshabalala v S; Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC): par. 66.

197 Van der Merwe 2020:512.

198 *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another* CCT 54/06 [2007] ZACC 4.

In *S v Masiya*¹⁹⁹ the accused appeared in the District Court on a charge of rape. The state alleged that on or about 16 March 2004 he had sexual intercourse with the complainant (nine years old at the time), without her consent. The accused pleaded not guilty and he remained silent. The evidence brought before the court was that the accused penetrated the complainant anally. According to the defense, the accused had to be convicted of the Common Law crime, indecent assault, and not rape, because the actions of the accused did not qualify as rape at the time.²⁰⁰

The Regional Court, voluntarily, evaluated whether the Common Law definition of rape needed to be developed.²⁰¹ The Court stated that there is nothing in the *Constitution* or other legislation that prevents the Court from making a ruling on the constitutionality of a Common Law rule and developing it where necessary.²⁰² The accused was thus convicted in the Regional Court on the charge of rape. The Regional Court held that “the definition of rape should be developed to further the constitutional objectives, and that courts may develop the current definition of rape”.²⁰³

The Regional Court thus expanded the definition of rape to include:²⁰⁴

acts of non-consensual sexual penetration of the male sexual organ into the vagina **or anus** of another person.

Where the victim is under the age of 16 years, the matter is referred to the High Court, for purposes of verification of conviction and sentencing.²⁰⁵ The High Court had to consider whether the conviction should be confirmed; and, whether the common law definition of rape should be expanded.²⁰⁶

199 *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another* CCT 54/06 [2007] ZACC 4: par. 6.

200 *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another* CCT 54/06 [2007] ZACC 43: par. 72.

201 *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another* CCT 54/06 [2007] ZACC 4: par. 8.

202 *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another* CCT 54/06 [2007] ZACC 4: par. 6-8.

203 *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another* CCT 54/06 [2007] ZACC 6: par. 10.

204 *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another* CCT 54/06 [2007] ZACC 7: par. 11.

205 *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another* CCT 54/06 [2007] ZACC 8: par. 12. See also *Criminal Procedure Act* 51 of 1977: Section 52(1)(b)(i).

206 *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another* CCT 54/06 [2007] ZACC 8: par. 12.

The High Court was satisfied that the accused had anally penetrated the complainant. Regarding the expansion of the definition of rape, it was found that in an indecent assault case, the accused will receive a more lenient sentence than in a rape case. Consequently, the High Court validated the conviction of rape and made an order of constitutional invalidity of the Common Law definition of rape, which had to be considered by the Constitutional Court.²⁰⁷

Some of the primary questions to be evaluated by the Constitutional Court were whether the Common Law definition of rape was in conflict with the *Constitution*; whether the rape definition needed to be expanded; and whether the accused was criminally liable in terms of this expanded definition.²⁰⁸

The following orders were made by the Constitutional Court: “The Common Law definition of rape was expanded to include acts of non-consensual penetration of a penis into the anus of a female”. The new definition was only relevant where the rape took place after the date of judgment in this matter. The conviction on the rape charge, by the Regional Court, was set aside and replaced with a conviction of indecent assault.²⁰⁹

In explaining the reason for replacing the conviction of rape with indecent assault, the Court referred to section 35(3)(l) of the *Constitution*. The section states:

Every accused person has a right to a fair trial, which includes the right...(l): not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted.

The legality principle requires that no one may be found guilty of a crime unless, at the time that the crime was committed, the accused’s conduct was already recognised by law as a crime. This implementation is known as the *ius praeivum* rule.²¹⁰ The judgement in this case was delivered before the legislature approved a new comprehensive definition of rape. The Constitutional Court however stated that even

207 *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another* CCT 54/06 [2007] ZACC 11: par. 15.

208 *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another* CCT 54/06 [2007] ZACC 13: par. 19.

209 *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another* CCT 54/06 [2007] ZACC 43: par. 74.

210 Snyman 2014:41-42.

if the accused had been convicted of indecent assault, it did not mean that the sentence to be imposed must be less or more lenient than that of a rape conviction.²¹¹

2.8 International obligations that contributed to the development of the crime “rape” in South Africa

Rape is not defined in International Human Rights Law. However, rape is outlined as:²¹²

...a physical invasion of a sexual nature committed on a person under circumstances which are coercive.

There rests a legal obligation on governments to examine, prosecute, and put a stop to human rights violations. Where governments do not forbid these violations or where there is a lack of response to evidence of for example rape, they indirectly suggest to the public that such violence is acceptable or will not be penalised. In most cases, this failure infringes women’s rights to physical integrity and reflects discrimination based on gender and/or race.²¹³

In the Carmichele case,²¹⁴ the court held:

South Africa ... has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights.

It is thus required by international law that South Africa addresses persistent contraventions of human rights and adopts adequate measurements to prevent the reoccurrence of such violations. If South Africa fails to acknowledge the rape or sexual assault of women, girls, or any other person, they convey the impression that such attacks can be committed without being punished.²¹⁵

South Africa signed Section 26 of the International Covenant on Civil and Political Rights (ICCPR) on 3 October 1994, whereas rape victims have an equivalent right as

211 *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another* CCT 54/06 [2007] ZACC 43: par. 72.

212 *Prosecutor v. Jean-Paul Akayesu* ICTR-96-4-T: par. 38.

213 Nowrojee 1995:39.

214 *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (40 SA 938 (CC)); 2001 (10) BCLR 995 (CC):62.

215 Human Rights Watch, “South Africa’s Obligations under International and National Law”, <https://www.hrw.org/reports/2001/safrica/ZA-FINAL-09.htm> (accessed on 13 May 2020).

any other victims to the implementation and protection of the law.²¹⁶ South Africa's fulfilment of the International Covenant on Civil and Political Rights (ICCPR) is monitored by the UN Human Rights Committee. The UN Committee states, "The state has a duty to protect its residents from violations, but also to investigate these violations when they transpire and to bring the offenders to justice".²¹⁷

In 1979, these provisions were further strengthened by the endorsement of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). CEDAW was ratified in 1995, while South Africa submitted an initial report in 1998.

Discrimination against women is prohibited by CEDAW. This discrimination is interpreted as follows: "any distinction, exclusion or restriction made on the basis of sex which has the effect of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".²¹⁸

Countries, which are affiliated to the Convention, undertook "to pursue by all appropriate means and without delay a policy of eliminating discrimination against women". This includes the duty "to refrain from engaging in any act of discrimination against women" and to ensure that public authorities and institutions act in accordance with this obligation. They also undertook "to take all appropriate measures, including legislation, to modify or abolish existing laws, customs or practices which constitute discrimination against women".²¹⁹

CEDAW during 1992 accepted recommendations and commentary that stated that governments have a duty to stop sexual violence, such as rape. These recommendations included the following: rape must become a gender-neutral offence; the definition should be expanded to incorporate anal, oral as well as penetration with an unknown object; the cautionary rule should be abolished by legislation; the

216 Nowrojee 1995:40.

217 Nowrojee 1995:40.

218 Convention on the Elimination of All Forms of Discrimination Against Women 34/180 of 1979 Part 1: Article 1.

219 Nowrojee 1995:41.

Department of Justice should ratify the recommendations on sentencing of rape offenders and distribute these recommendations to all judges and magistrates; and, prosecutors should undergo compulsory training regarding rape offences.²²⁰

It was left in the hands of South Africa's government to endorse its international obligations and to show the willpower to end the rape culture in our country.²²¹

Wallis said in the matter *Director of Public Prosecutions, Western Cape v Prins*:²²²

It is a sad reflection on our world, and societies such as our own, that women and children have been abused and that such abuse continues, so that their rights require legal protection by way of international conventions and domestic laws, as South Africa has done in various provisions of our Constitution and in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

2.9 Conclusion

This chapter focused on the historical development of the crime 'rape' in South Africa. Common Law in South Africa is a varied legal system – varied between its origins in Roman Law, Roman-Dutch Law, and English Law principles.²²³

In South Africa, the development of the Common Law crime of 'rape' and the sentencing thereof was a time-consuming process. On 1 May 1998, the *Criminal Law Amendment Act*²²⁴ was implemented. The main aim of the Act was to reduce the number of rape cases, to establish consistent sentences for rapists, and to convey to the public that the sentence for rape is severe.²²⁵ However, the question whether this aim was reached is debatable. The number of rape cases has not declined and the sentencing by courts is not consistent, as discussed in paragraph 2.5.2 above.²²⁶

220 Nowrojee 1995:42.

221 Nowrojee 1995:43.

222 *Director of Public Prosecutions, Western Cape v Prins and Others* (369/12) [2012] ZASCA 106;2012(2)SACR183(SCA);2012(10)BCLR1049(SCA);[2012]3AllSA245(SCA): par. 1.

223 Baase, "Introduction to Law School 2020", http://www.law.uct.ac.za/sites/default/files/image_tool/images/99/Law%20for%20Non-Law%20Students%20-%20course%20reader%20Feb%202020.pdf (accessed on 1 March 2021).

224 *Criminal Law Amendment Act* 105 of 1997.

225 Sloth-Nielson & Ehlers 2005:20.

226 Sloth-Nielson & Ehlers 2005:20.

In *Masiya v Director of Public Prosecutions Pretoria (The State) and Another*,²²⁷ the constitutional rationality of the Common Law definition of rape was considered. The definition at the time did not include anal penetration and was “gender specific”. This notorious case put an end to the Common Law definition of rape and made way for the development of the definition. This case extended the definition of rape to incorporate the following:²²⁸

acts of non-consensual sexual penetration of the male penis into the vagina or anus of another person.

The *Criminal Law (Sexual Offences and Related Matters) Amendment Act*²²⁹ took effect on 22 November 2007, whereby the rape definition was developed further.

The development of the definition through the Act will be discussed in the next chapter, Chapter 3.

227 *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* (CCT54/06) [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827.

228 *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* (CCT54/06) [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827: par. 2.

229 *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

Chapter 3

Present legal position in South Africa

3.1 Introduction

For years on end, the social and legal status of women in South Africa were determined by their fathers or husbands. Consequently, they were considered to be inferior citizens.²³⁰ Once South Africa's Interim *Constitution* came into effect on 27 April 1994, all women received formal recognition as equal citizens.²³¹

The final *Constitution of the Republic of South Africa*²³² came into effect on 4 February 1997, with the result that all people (women included) are now protected by the rights as promised in the *Constitution*, including the rights to life, dignity, and privacy. Women receive particular protection in section 9, which states:²³³

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The Bill of Rights in Chapter 2 of the *Constitution* also had an immense impact on the development of the crime 'rape' in South Africa. Rape in the present generation is seen as being "less about sex and more about the execution of power over the victim's dignity, integrity and privacy".²³⁴

In this Chapter, the current legal position regarding rape will be discussed. Recent and notorious rape cases will be examined as well as the courts' interpretation of the new, broader definition of rape and the sentencing thereof.

230 South African History Online, "Women's rights and representation", <https://www.sahistory.org.za/article/womens-rights-and-representation> (accessed on 16 June 2020).

231 South African History Online, "Women's rights and representation", <https://www.sahistory.org.za/article/womens-rights-and-representation> (accessed on 16 June 2020). Also see Constitution of the Republic of South Africa, 1996 - Chapter 2: Bill of Rights – Equality.

232 *Constitution of the Republic of South Africa*, 1996.

233 *Constitution*, 1996: section 9.

234 *Masiya v Director of Public Prosecutions (Pretoria) (The State) and Another* CCT 54/06 [2007] ZACC 9: par. 25.

3.2 *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*

According to John Jeffery (the Deputy Minister of Justice and Constitutional Development during 2018), the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007* was enacted following the view that South Africa's Common Law did not deal with rape in a fruitful and sufficient manner.²³⁵ It took almost fifteen years for the Act to be enacted by devoted communities who took part in the law reform process.²³⁶

The Parliament of South Africa passed the *Criminal Law (Sexual Offences and Related Matters) Amendment Act*²³⁷ on 22 November 2007. The Act has been in effect since 16 December 2007. The Act revoked the Common Law crime of rape and replaced it with a broadened statutory crime of rape, which is relevant to all forms of sexual penetration without consent, no matter what the gender of the perpetrator or the victim.²³⁸ The crime of rape was also formally defined through the Act. Finally, South Africa had concrete legislation governing this horrendous crime.

The new Act is a breath of fresh air for South Africa. It is a modernisation of the ancient law relating to sexual offences.²³⁹

The main aim of the Act, applicable to this dissertation, is to encompass all rape matters under one legislation; to define rape formally; to ensure that men and women are equally protected by the legislation; and to allow rape survivors to know a rapist's HIV status.²⁴⁰

235 Ramotsho, "Sexual Offences Act Reviewed", <https://www.derebus.org.za/sexual-offences-act-reviewed/> (accessed on 3 January 2021).

236 Waterhouse, "Civil Society and the History of SOUTH AFRICAN Sexual Offences Legislation", http://www.ghjru.uct.ac.za/sites/default/files/image_tool/images/242/documents/Sexual_Offences_Law_Community_Justice.pdf (accessed on 6 April 2021).

237 *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*.

238 Snyman 2020:305.

239 Van der Bijl & Rumney 2009:418.

240 Centre for Applied Legal Studies, "A Summary of the Criminal Law Sexual Offences Amendment Act 32 of 2007", file:///C:/Users/User/Downloads/Summary-criminal-law-sexual-offences.pdf. (accessed on 29 March 2021).

Also see: *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007:ACT* & PREAMBLE. https://www.gov.za/sites/default/files/gcis_document/201409/a32-070.pdf (accessed on 10 May 2021).

3.2.1 Defining rape in terms of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*

Section 3 of the Act defines rape as follows:

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

A separate form of rape, namely ‘compelled rape’, was also created in terms of section 4 of the Act. Section 4 reads as follows:

Any person (“A”) who unlawfully and intentionally compels a third person (“C”), without the consent of C, to commit an act of sexual penetration with a complainant (“B”), without the consent of B, is guilty of the offence of compelled rape.

The definition of “sexual penetration” in the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007* is defined in section 1 as follows:

“sexual penetration” includes any act which causes penetration to any extent whatsoever by –

- (a) The genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (b) Any other part of the body of one person, or any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c) The genital organs of an animal, into or beyond the mouth of another person, and “sexually penetrates” have a corresponding meaning.

Genital organs are further defined in section 1²⁴¹ as:

the whole or part of the male and female genital organs”, and further includes “surgically constructed or reconstructed genital organs.

From the above definitions it is clear that the following facts no longer play a role: whether the vagina or the anus is penetrated; whether the perpetrator is a male or a female; whether the victim is a female or a male; and, whether the penetration is by a penis or a finger or any other part of the perpetrator’s body, or by some object or part of an animal’s body. In some incidents, non-consensual penetration of the victim’s mouth may also amount to the commission of the crime rape.²⁴²

Thus, rape is no longer only defined as sexual intercourse *per se*, but it is seen as a sexual act, namely penetration. In the definition of rape, absence of consent is nevertheless still required.²⁴³

241 *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.*

242 Snyman 2020:308.

243 Van der Bijl 2010:224-225.

3.2.2 Defining consent in terms of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*

According to section 1 of the Act,²⁴⁴ consent means:

voluntary or uncoerced agreement.

Circumstances where consent will not be regarded as valid are further explained in section 1(3) of the Act.²⁴⁵ The section reads as follows:

Circumstances in respect of which a person ("B") (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration includes, but are not limited to, the following:

- (a) where B (the complainant) submits or is subjected to such a sexual act as a result of—
 - (i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or
 - (ii) a threat of harm by A against B, C or D or against the property of B, C or D;
- (b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;
- (c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that—
 - (i) B is committing such a sexual act with a particular person who is in fact a different person; or
 - (ii) such a sexual act is something other than that act; or
- (d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act—
 - (i) asleep;
 - (ii) unconscious;
 - (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgement is adversely affected;
 - (iv) a child below the age of 12 years; or
 - (v) a person who is mentally disabled.

According to Snyman,²⁴⁶ the interpretation of consent remained the same (penetration had to take place without the woman's consent).²⁴⁷ The Act merely codified the

244 *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.*

245 *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.*

246 Snyman 2020:313.

247 Snyman 2020:307-308.

Common Law rules that were previously applied in this regard, the Act does not “contain anything new as far as legal rules”.²⁴⁸

3.3 Conduct included in terms of the recent broad scope of rape

It is clear that the crime of rape under the present South African law has been revolutionised from a Common Law, formally defined crime to a statutory, materially defined crime, which consists in the creating of a certain situation, namely sexual penetration.²⁴⁹

The definition of sexual penetration *includes* a wide range of different acts, which qualify as acts of sexual penetration. Acts that qualify under the definition can be organised into the following categories:²⁵⁰

- (i) Acts committed by a male towards a female;
- (ii) Acts committed by a female towards a male;
- (iii) Acts committed by a male towards another male; and
- (iv) Acts committed by a female towards another female.

Category (i) refers to examples where the male inserts his penis into the vagina of the female, his penis into the anus of the female, his penis into the mouth of the female, any part of his body into the vagina or anus of the female, any object into the female’s vagina or anus, any part of the body of an animal into the female’s vagina or anus, the genital organ of an animal into the mouth of a female, and/or lastly a surgically constructed penis into the female’s vagina, anus or mouth.²⁵¹

Category (ii) examples include conduct where the female places her genital organ into the male’s mouth, places the male’s penis into her mouth, places another part of her body into the male’s anus, places an object into the male’s anus, places any part of an animal into the male’s anus, places the penis of the male into her vagina or anus, places the genitals of an animal into the mouth of the male, and/or places a part of the male’s body into her vagina or anus.²⁵²

248 Snyman 2020:313.

249 Van der Bijl 2010:224.

250 Snyman 2020:309.

251 Snyman 2020:309-311.

252 Snyman 2020:311-312.

According to Category (iii), conduct qualifies as rape where a male inserts his penis into the anus of another male, his penis into the mouth of another male, an object into the anus of another male, any part of the body of an animal into the anus of another male, a surgically constructed penis into the anus or mouth of another male, and/or places the genitals of an animal into the mouth of another male.²⁵³

Examples of conduct that may amount to rape in terms of category (iv) include scenarios where a female inserts her genital organ into the mouth of another female, some part of her body into the vagina or anus of another female, some object into the vagina or anus of another female, some part of the body of an animal into the vagina or anus of another female, and/or the genital parts of an animal into the mouth of another female.²⁵⁴

A study conducted in South Africa found that between 54 and 67 per cent of rapists had vaginal intercourse with the victim, between five and ten per cent had anal intercourse, and the least prevalent was the insertion of a foreign object, at between three and eight per cent.²⁵⁵

From the above examples, it becomes clear that the new definition of rape is much broader than the Common Law definition of rape. The words “causes” and “includes” extend the definition even further. Rape is now a materially defined crime, which forbids any conduct (not a specific conduct) that will cause a specific result (penetration),²⁵⁶ while the word “includes” indicates that the new definition of rape is not limited to the examples listed above. This leaves South Africa with an extremely broad definition of rape, accompanied by prescribed minimum sentences, which do not always fit the prohibited conduct.

According to Snyman,²⁵⁷ the Common Law definition of rape, whereby rape was limited to penile non-consensual penetration of a vagina by a penis, had a “rational basis and does not discriminate unjustifiably against men, and was therefore not in need of extension”. Females can become pregnant because of non-consensual forced

253 Snyman 2020:312.

254 Snyman 2020:312-313.

255 De Wet, “An exploratory analysis of serial rape in South Africa”, <https://repository.up.ac.za/handle/2263/25159?show=full> (accessed on 21 January 2021).

256 Van der Bijl 2010:232.

257 Snyman 2007:678. Also see Snyman 2014:345.

penile penetration of the vagina.²⁵⁸ According to him, it will be better to prosecute forced anal penetration of men as male rape.²⁵⁹

Van der Bijl²⁶⁰ agrees with this viewpoint and states that the South African legislator, in a rush to follow international trends to redefine rape as a gender-neutral crime, lost sight of the reasoning behind categorising certain specific victims as rape victims.

3.4 Sentencing rape: the recent position

The *Criminal Law (Sexual Offences and Related Matters) Amendment Act*²⁶¹ is regulated by minimum sentences, as discussed in Chapter 2, paragraph 2.5.1. This Act remains applicable today, even with the definition of rape as wide as it is.

The fact that the Act²⁶² does not contain a sanction for an offence created in the Act²⁶³ has been challenged in court in the case *Director of Public Prosecutions, Western Cape v Prins*.²⁶⁴ In this case, the accused touched the victim's breasts and vagina without her consent. He was charged with sexual assault, according to the *Criminal Law (Sexual Offences and Related Matters) Amendment Act*.²⁶⁵ Section 5(1) of the Act states the following:

A person ("A") who unlawfully and intentionally sexually violates a complainant ("B"), without the consent of B, is guilty of the offence of sexual assault.

The following was argued by the defence: the *Criminal Law (Sexual Offences and Related Matters) Amendment Act*²⁶⁶ does not allocate a sanction for an offence created by the Act and that the Act does not comply with the Common Law principles of *nullum crimen sine lege* (no crime without a law) and *nulla poena sine lege* (no punishment without a law).²⁶⁷

258 Snyman 2014:345.

259 Snyman 2014:346.

260 Van der Bijl, "Defining the crime of rape under South African law: a reconsideration", <https://repository.up.ac.za/bitstream/handle/2263/26436/01chapters1-2.pdf?sequence=2&isAllowed=y> (accessed on 6 July 2021).

261 *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

262 *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

263 *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

264 *Director of Public Prosecutions, Western Cape v Prins and Others* (369/12) [2012] ZASCA 106;2012(2)SACR183(SCA);2012(10)BCLR1049(SCA);[2012]3AllSA245(SCA); par. 1.

265 *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

266 *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

267 *Director of Public Prosecutions, Western Cape v Prins and Others* (369/12)[2012]ZASCA 106;2012(2)SACR183(SCA);2012(10)BCLR1049(SCA);[2012]3AllSA245(SCA); par. 7.

Judge Wallis from the Supreme Court of Appeal held that the title of the Act makes its intention noticeably clear. The Act's intent is to combine sexual offences in one single legislation; to replace and broaden the scope of existing Common Law crimes; and to create several new sexual offences.²⁶⁸

The Supreme Court of Appeal reached the following conclusion:²⁶⁹

I reject the argument that the Act, in creating the offences set out in chapters 2, 3 and 4 thereof, infringed the principle of legality by not prescribing the penalties to be imposed for those offences. I also reject the contention, unsupported by authority, that a statutory offence can only be created by parliament if it includes a penalty in the enacting legislation. That may be a requirement in countries where the criminal law is codified, but that is not the position in South Africa.

Since the judgment was delivered in the Prins-case,²⁷⁰ an amendment was passed in the *Criminal Law (Sexual Offences and Related Matters) Amendment Act*²⁷¹ section 56A which reads as follows:

- (1) A court shall, if
- (a) that or another court has convicted a person of an offence in terms of this Act; and
 - (b) a penalty is not prescribed in respect of that offence in terms of this Act or by any other Act,
- impose a sentence, as provided for in section 276 of the Criminal Procedure Act, 1977 (Act 51 of 1977), which that court considers appropriate, and which is within that court's penal jurisdiction

3.4.1 What role does the HIV status of the accused play?

In South Africa, there exists a myth that when you have sex with a virgin, you will be cured of HIV. This myth is prevalent among many communities, and while this myth exists, the incidence of rape in South Africa will increase.²⁷²

A study conducted by Rape Impact Cohort Evaluation from 2014 until 2020,²⁷³ found that even if women were HIV negative after they were raped, they had a 60 per cent chance of contracting HIV in a year or two after the incident. The Acting Director of Public Prosecutions at the time, Pierre Smith, said the results of this study could be

268 *Director of Public Prosecutions, Western Cape v Prins and Others* (369/12)[2012]ZASCA 106;2012(2)SACR183(SCA);2012(10)BCLR1049(SCA);[2012]3AllSA245(SCA): par. 19.

269 *Director of Public Prosecutions, Western Cape v Prins and Others* (369/12)[2012]ZASCA 106;2012(2)SACR183(SCA);2012(10)BCLR1049(SCA);[2012]3AllSA245(SCA): par. 38.

270 *Director of Public Prosecutions, Western Cape v Prins and Others* (369/12)[2012]ZASCA 106;2012(2)SACR183(SCA);2012(10)BCLR1049(SCA);[2012]3AllSA245(SCA): par. 37.

271 *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

272 Leclerc-Madlala 2002:87.

273 Abrahams *et al*, "Rape survivors need comprehensive, long-term health care and support to prevent HIV: Evidence from the Rape Impact Cohort Evaluation (RICE) study", <https://www.samrc.ac.za/sites/default/files/attachments/2020-11-30/RICEbrief.pdf> (accessed on 12 May 2021).

used by prosecutors in court as an aggravating factor to argue for harsher sentences in rape cases.²⁷⁴

At present, according to Schedule 2, Part 1 of the *Criminal Law Amendment Act 105 of 1997* read with section 51 of *Criminal Law Amendment Act 105 of 1997*, a High Court shall sentence a person it has convicted of rape to imprisonment for life where the rape was committed by a “person knowing he has the acquired immune deficiency syndrome or the human immunodeficiency virus”.

Judge Lowe in the case *Van Rooyen v State*²⁷⁵ stated that the accused’s knowledge of his HIV status at the time of the rape would determine if the accused received the minimum sentence of life imprisonment. Whether the victim contracted HIV from the accused, or whether the victim had concerns regarding contracting the disease after the rape, could only be factors to be considered when looking at the substantial and compelling circumstances of the incident.²⁷⁶

Despite the effect that HIV status has on sentencing, the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007* also makes provision for compulsory HIV testing of the accused. Chapter 5, Part 2, section 30 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*, determines that the victim or the investigating officer may apply to the court, within 90 days from the rape, if the victim was exposed to the body fluids of the accused, for the rapist to be tested for HIV. These results must then be disclosed to the victim. Where an accused is tested for HIV, the accused can possibly argue that his right to privacy, dignity and bodily integrity has been violated. However, if a Magistrate grants an order according to Chapter 5, Part 2, section 30 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*, such violation will be justified by the court order.²⁷⁷

The criminal charge against the HIV positive accused will depend on the circumstances of each case. In cases where the sexual penetration took place with

274 Malan, “How Rape Survivor’s long-term risk of HIV infection can lead to heavier sentences for rapists”, <https://www.news24.com/news24/southafrica/news/how-rape-survivors-long-term-risk-of-hiv-infection-can-lead-to-heavier-sentences-for-rapists-20201201> (accessed on 30 March 2021).

275 *Van Rooyen v State* (CA202/2018) [2019] ZAECGHC 12.

276 *Van Rooyen v State* (CA202/2018) [2019] ZAECGHC 12: par. 27.

277 Pienaar & Karels 2017:50-51.

the consent of the victim (without being aware of the HIV status of the accused), the charge will be attempted murder. If the complainant does not consent to sexual intercourse, the accused can be prosecuted of both rape and attempted murder. This is apparent in the court cases discussed below.

3.4.1.1 S v Phiri

In the case *S v Phiri*,²⁷⁸ the accused was convicted of attempted murder and sentenced to six years' imprisonment. The charge arose from the accused having had unprotected sex with the complainant, while knowing that he was HIV-positive.

The facts in this case are as follows: during February 2010, the victim went to a clinic to be tested for HIV. The accused was a HIV counsellor employed by the Department of Health at the same clinic. At the time, the victim was pregnant, but not in any relationship with the father of the unborn child, and her HIV test came back negative. The victim and accused started a sexual relationship, whereby the victim contracted HIV. The victim confronted the accused. He admitted that he was HIV positive and pleaded for forgiveness.²⁷⁹

During trial, the victim and accused were the only parties to testify; thus, it ultimately was her word against his. The court however favoured the victim's testimony over the accused as he changed his version of events during cross-examination.²⁸⁰ During judgement, the defence argued that the accused must be convicted of assault with the intent to cause grievous bodily harm, and not attempted murder.²⁸¹

Judge Makgoka and Baloyi made the following remarkable statement during appeal concerning the attempted murder conviction:²⁸²

It was sufficient for a conviction on the count of attempted murder, to establish that the appellant, knowing that he was HIV positive, engaged in sexual intercourse with the complainant, whom he knew to be HIV negative, without any preventative measures. This entails the presence of *mens rea* in the form of *dolus eventualis*. In this regard it must be accepted, and we can take judicial notice of the fact, that HIV-Aids has no cure presently, and the infection with the virus is likely to lead to reduced life span.

Regarding the sentence, the trial court took the fact that the accused was a counsellor whose job it was to inform the community about the risk of contracting HIV as an

278 *Phiri v S* (A 400/2012) [2013] ZAGPPHC 279; 2014 (1) SACR: par. 1.

279 *Phiri v S* (A 400/2012) [2013] ZAGPPHC 279; 2014 (1) SACR: par. 2-3.

280 *Phiri v S* (A 400/2012) [2013] ZAGPPHC 279; 2014 (1) SACR: par. 4-5.

281 *Phiri v S* (A 400/2012) [2013] ZAGPPHC 279; 2014 (1) SACR: par. 9.

282 *Phiri v S* (A 400/2012) [2013] ZAGPPHC 279; 2014 (1) SACR: par. 9.

aggravating factor.²⁸³ On appeal, the Northern Gauteng High Court found that the conviction and sentence imposed by the trial court was appropriate.²⁸⁴

3.4.1.2 S v Nyalungu

In another case, *S v Nyalungu*,²⁸⁵ the accused had non-consensual and unprotected sexual intercourse with the complainant knowing that he is HIV positive. The accused was convicted in the Regional Court of rape and attempted murder,²⁸⁶ and sentenced to one term of life imprisonment.²⁸⁷

This case established the fact that conduct by a HIV positive accused who does not take precaution to prevent the transmission of the virus, constitutes *mens rea*, whereby the accused's actions will amount to attempted murder, in addition to rape.²⁸⁸

Some legal specialists believe that an HIV positive accused who intentionally engages in unprotected sexual intercourse with another consenting person (being unaware of the accused's HIV status) must be charged with the crime of rape.²⁸⁹ They argue that where the victim had consented to sexual intercourse, but the did not know about the accused's HIV positive status, the consent is not valid.²⁹⁰

3.5 Recent case law examples of rape and the sentencing thereof

3.5.1 The Thabethe case

On the day of the incident in 2004, the complainant (who was living in the same house with the accused and the complainant's mother) was 15 years and 10 months old. The accused blackmailed the complainant into having sexual intercourse with him.²⁹¹

283 *Phiri v S* (A 400/2012) [2013] ZAGPPHC 279; 2014 (1) SACR: par. 15.

284 *Phiri v S* (A 400/2012) [2013] ZAGPPHC 279; 2014 (1) SACR: par. 19.

285 *S v Nyalungu* 2013 (2) SACR 99 (T).

286 *S v Nyalungu* 2013 (2) SACR 99 (T):100.

287 *S v Nyalungu* 2013 (2) SACR 99 (T):109.

288 *S v Nyalungu* 2013 (2) SACR 99 (T):104 & 110.

289 Van der Bijl & Rumney 2009:425.

290 Van der Bijl 2010:235.

291 *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA): 571.

The case was heard in the High Court in Pretoria. The essence of the probation officer's report adduced during the trial on sentence was that the complainant had stated unmistakably that she did not wish the accused to be sent to jail.²⁹²

The High Court ruled as follows:²⁹³

After establishing the accused's disposable monthly income and the fact that the victim was still at school in grade 10, the court found that there were a number of substantial and compelling circumstances that, individually and collectively, justified the imposition of a lesser sentence than the minimum sentence of life imprisonment prescribed by Act 105 of 1997 in Part I of Schedule 2 thereto, read with s51 of the Act.

The High Court then imposed a sentence of ten years' imprisonment, which was wholly suspended for five years.²⁹⁴

The State appealed this lenient sentence, and the matter was heard in the Supreme Court of Appeal. In the Supreme Court of Appeal, it was submitted that a sentence based on restorative justice is not appropriate for such an offence as the above and "it failed to reflect the gravity and seriousness of rape".²⁹⁵

The Supreme Court of Appeal stated the following:²⁹⁶

There is no doubt about the advantages of restorative justice as a viable alternative sentencing option provided it is applied in appropriate cases. Without attempting to lay down a general rule, the court feels obliged to caution seriously against the use of restorative justice as a sentence for serious offences, which evoke profound feelings of outrage and revulsion amongst law-abiding and right-thinking members of society. An ill-considered application of restorative justice to an inappropriate case is likely to debase it and make it lose its credibility, as a viable sentencing option... one of the essential ingredients of a balanced sentence is that it must reflect the seriousness of the offence and the natural indignation and outrage of the public.

The Supreme Court of Appeal found that section 51(2), read with Part III of Schedule 2 of the *Criminal Law Amendment Act* 105 of 1997, provides for a "prescribed minimum sentence of not less than ten years for a first offender, unless the court finds substantial and compelling circumstances to justify a lesser sentence".²⁹⁷ Having

292 *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA): 571.

293 *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA): 572.

294 *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA): 568.

295 *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA): 573.

296 *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA):575-576.

297 *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567(SCA): 579.

weighed all the circumstances of this specific case, the Court was of the opinion that ten years' imprisonment was an appropriate sentence.²⁹⁸

In the above case, the Court ultimately followed the law regarding minimum sentencing. However, the Supreme Court of Appeal did not follow section 51(1) read with Part I (b)(i) of Schedule 2, which requires life imprisonment where the victim is younger than 16 years (which she was in this case). The court followed section 51(2)(b)(i), as the state charged the accused with section 51(2)(b)(i), which allows for a sentence of no less than ten years' imprisonment for a first-time offender.²⁹⁹

3.5.2 The *Matyityi* case

In the case *S v Matyityi*,³⁰⁰ the court dealt with section 51 of the *Criminal Law Amendment Act* 105 of 1997 regarding sentencing. Schedule 51(1) states that the High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 (in this case rape) to imprisonment for life.

On 21 April 2008, the complainant was raped in succession by three accused.³⁰¹ They were charged in the Eastern Cape High Court with one charge of rape each. At the commencement of the trial Matyityi tendered a plea of guilty on the rape charge and he was thus convicted as charged by Matiwana AJ on his guilty plea. He was sentenced to 25 years' imprisonment on the rape charge.³⁰²

The High Court found that remorse and youthfulness will encompass substantial and compelling circumstances, which will suffice for a lesser sentence than the prescribed minimum sentence.³⁰³ Subsequently, the state appealed against the sentence that the High Court imposed. On appeal it was held that there were no circumstances to validate a lesser sentence.³⁰⁴

Judge Ponnar remarked as follows:³⁰⁵

298 *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA): 579.

299 *Criminal Law Amendment Act* 105 of 1997.

300 *S v Matyityi* 2011 (1) SACR 40 (SCA).

301 *S v Matyityi* 2011 (1) SACR 40 (SCA):44.

302 *S v Matyityi* 2011 (1) SACR 40 (SCA):44.

303 *S v Matyityi* 2011 (1) SACR 40 (SCA):40.

304 *S v Matyityi* 2011 (1) SACR 40 (SCA):54.

305 *S v Matyityi* 2011 (1) SACR 40 (SCA):53.

Parliament had ordained minimum sentences for certain specified offences, and these were to be imposed, unless there were utterly convincing reasons for departing from them. Courts were not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appeared to fit the particular sentencing officer's notions of fairness. Predictable outcomes, not outcomes based on individual whim, were foundational to rule of law that lay at the heart of the constitutional order.

Judge Ponnann further emphasised that there lies a duty on courts, notwithstanding any pejorative doubts or opposition that the judge may have about the effectiveness of the policy, to execute those sentences.³⁰⁶ As a result, the Supreme Court of Appeal granted the appeal by the State against the sentence, whereby the accused was sentenced on the rape charge to imprisonment for life.³⁰⁷

This case reflected the viewpoint of the Supreme Court of Appeal that the implementation of the minimum sentencing legislation meant that it was no longer 'business as usual' – courts were no longer in the position to inscribe whatever sentence they thought fit for the crime 'rape'.³⁰⁸

3.5.3 The *Willemse* case

The accused in this matter was charged with two counts of rape in the Regional Court. On the day of the incident, the accused strangled the complainant (60 years old), took off her underwear, climbed on top of her, and raped her.³⁰⁹ After raping her vaginally, he turned her on her side and raped her anally.³¹⁰

The accused was found guilty on two counts of rape in the Regional Court and sentenced to life imprisonment in terms of section 51 of the *Criminal Law Amendment Act* 105 of 1997.³¹¹ The accused appealed the conviction and sentence based on the fact that he should not have been convicted of two separate counts of rape. It was argued that the penetration of the complainant's vagina and anus was one continuous act of rape.³¹²

306 *S v Matyityi* 2011 (1) SACR 40 (SCA):53.

307 *S v Matyityi* 2011 (1) SACR 40 (SCA):54.

308 *S v Matyityi* 2011 (1) SACR 40 (SCA):46.

309 *S v Willemse* 2011 (2) SACR 531 (ECG):534.

310 *S v Willemse* 2011 (2) SACR 531 (ECG):534.

311 *S v Willemse* 2011 (2) SACR 531 (ECG):533.

312 *S v Willemse* 2011 (2) SACR 531 (ECG):2.

The matter appeared before the High Court. According to Judge Griffiths in the High Court, there were two independent and clear-cut acts of rape; thus, the accused was guilty of two separate acts of rape.³¹³

The Court further stated that the two acts of rape followed closely upon one another and that there was no lengthy pause between the two acts. If the accused had removed his penis from the complainant's vagina and reinserted his penis into her vagina, and not into her anus, this would have been one act of rape.³¹⁴

Consequently, the High Court set aside the life imprisonment sentence and replaced it with a sentence of 20 years' imprisonment.³¹⁵

As was stated in the *Matyityi* case, the implementation of the minimum sentencing legislation meant that it was no longer 'business as usual' – courts were no longer in the position to inscribe whatever sentence they thought fit.³¹⁶ However in this case, the High Court stated:³¹⁷

a sentence of life imprisonment was the ultimate penalty and should accordingly be reserved only for the most serious of cases.

These two cases were both heard in 2011, but they differ greatly in opinion with regards to sentencing rape offenders.

3.5.4 The *Ndlovu* case

On 14 June 2011, the accused was part of a group of three men who kidnapped the complainant at gunpoint, and he was one of two men who raped her. The other accused was never apprehended. The accused put his finger into the complainant's vagina; thereafter, he raped her vaginally using his penis.³¹⁸

The accused was found guilty in the Regional Court on one charge of rape using his penis (it is uncertain why the state did not charge the accused for the act of penetrating the victim's vagina with his finger) and was sentenced to life imprisonment based on section 51(1) of the *Criminal Law Amendment Act* 105 of 1997, which states:³¹⁹

313 *S v Willemse* 2011 (2) SACR 531 (ECG):537.

314 *S v Willemse* 2011 (2) SACR 531 (ECG):539.

315 *S v Willemse* 2011 (2) SACR 531 (ECG):540.

316 *S v Matyityi* 2011 (1) SACR 40 (SCA):46.

317 *S v Willemse* 2011 (2) SACR 531 (ECG):538.

318 *Ndlovu v S* (A005/2013) [2020] ZAGPJHC 95; [2020] 2 ALL 556 (GJ): par. 14.

319 *Ndlovu v S* (A005/2013) [2020] ZAGPJHC 95; [2020] 2 ALL 556 (GJ): par. 1 & 4-5.

51(1): Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.

Part I of Schedule 2 of the Act provides, *inter alia*, that a regional court or High Court shall have jurisdiction to impose life imprisonment on an offender who is convicted of:

(a) when committed -

(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.

The other accused was never apprehended; nevertheless, the victim was raped by more than one accused.

For a while confusion reigned in the courts about the minimum sentencing legislation when a victim was raped more than once by more than one perpetrator.³²⁰ This confusion originated in the *Mahlase v S*³²¹ case, where it was stated:³²²

an accused convicted of multiple rapes could not receive the mandatory minimum sentence of life imprisonment if his co-perpetrators or accomplices had as yet not been apprehended and convicted.

The accused, Mr Ndlovu, relied upon the above-mentioned statement, from the *Mahlase case*³²³ to appeal against both the conviction and the sentence. Regarding the sentence, the accused also argued that the charge sheet did not sufficiently set out the fact that the minimum sentence would be applicable.³²⁴

The High Court found that the charge sheet made specific mention of the fact that this rape charge was in terms of section 51(1) and Part 1 of Schedule 2 of the *Criminal Law Amendment Act* 105 of 1997.³²⁵ The Court further argued that gang rapes are of such a nature that they will involve a common purpose.³²⁶ The High Court stated as follows concerning the *Mahlase*³²⁷ case:³²⁸

The model of sentencing proposed by the *Mahlase* dictum led to an irrational result. It also created a motivation for a rapist to stay silent as to the crimes of his co-perpetrators.

320 *Ndlovu v S* (A005/2013) [2020] ZAGPJHC 95; [2020] 2 ALL 556 (GJ): par. 6.

321 *Mahlase v S* (255/13)[2013] ZASCA 191.

322 *Ndlovu v S* (A005/2013) [2020] ZAGPJHC 95; [2020] 2 ALL 556 (GJ): par. 6.

323 *Mahlase v S* (255/13)[2013] ZASCA 191.

324 *Ndlovu v S* (A005/2013) [2020] ZAGPJHC 95; [2020] 2 ALL 556 (GJ): par. 10.

325 *Ndlovu v S* (A005/2013) [2020] ZAGPJHC 95; [2020] 2 ALL 556 (GJ): par. 65.

326 *Ndlovu v S* (A005/2013) [2020] ZAGPJHC 95; [2020] 2 ALL 556 (GJ): par. 68.

327 *Mahlase v S* (255/13)[2013] ZASCA 191.

328 *Ndlovu v S* (A005/2013) [2020] ZAGPJHC 95; [2020] 2 ALL 556 (GJ): par. 68.

Thus, the appeal against the conviction and sentence was refused and the sentence of life imprisonment was confirmed.³²⁹

The accused was fortunate to be convicted of one count of rape only; he should have been charged with two counts, the counts being one of penetration with his finger and the second being penetration with his penis.

3.5.5 The ‘Sunday Rapist’

Between 2008 and 2011 the accused, the serial rapist Johannes Jacobus Steyn, respectively raped, kidnapped, sexually assaulted and murdered eleven young girls between the ages of 11 and 18 years.³³⁰

After the murder of the accused’s last victim (Louise de Waal) in 2011, the accused was arrested. Louise de Waal’s body was found burnt in an open veld in Magaliesberg three hours after her kidnapping.³³¹ The accused was brought before court and finally charged with 37 charges: two counts of murder, eleven counts of rape, ten counts of kidnapping, ten counts of sexual assault, one of attempted sexual assault, one of attempted kidnapping, and two of assault.³³² He was found guilty in the South Gauteng High Court by Judge Kolbe on 33 of these charges (nine rape guilty verdicts).³³³

During the time of arrest, the accused was already doing community service at a Krugersdorp hospital on Sunday mornings for a previous sexual assault conviction in 2007. It was between 10:00 and 13:00 that the accused performed these crimes with

329 *Ndlovu v S* (A005/2013) [2020] ZAGPJHC 95; [2020] 2 ALL 556 (GJ): par. 71.

330 SAPA TIMESLIVE “Sunday rapist gets five life sentences”, <https://www.timeslive.co.za/news/south-africa/2012-09-19-sunday-rapist-gets-five-life-sentences/> (accessed on 16 April 2021).

Unreported case - as per judgement received in *S v Steyn* from Presiding Officer Judge S Kolbe: par. 1.

331 News 24 Staff Reporter, “Sunday Rapist found guilty on 33 charges”, <https://www.news24.com/News24/Sunday-Rapist-found-guilty-on-33-charges-20120918> (accessed on 16 April 2021).

332 SAPA Sowetan Live, “Sunday Rapist is found guilty”, <https://www.sowetanlive.co.za/news/2012-09-18-sunday-rapist-is-found-guilty/> (accessed on 16 April 2021).

Also see News 24, “Sunday Rapist found guilty on 33 charges”, <https://www.news24.com/News24/Sunday-Rapist-found-guilty-on-33-charges-20120918> (accessed on 17 April 2021).

333 SAPA Timeslive, “Sunday rapist gets five life sentences”, <https://www.timeslive.co.za/news/south-africa/2012-09-19-sunday-rapist-gets-five-life-sentences/> (accessed on 16 April 2021).

As per judgement received in *S v Steyn* from Presiding Officer Judge S Kolbe: par. 547-583. Telephonic interview with Judge Kolbe on 12 August 2021.

the young victims.³³⁴ Most of the details pertaining to each rape incident had blatant resemblances. Most of the victims were walking in the street when the accused drove up to them and ordered them, at gunpoint, to get into his car. After the rape, the accused would take a memento “trophy” of each victim.³³⁵ The accused made the victims perform oral sex on him; he sexually assaulted them with a vibrator; he penetrated their vaginas with his finger and his tongue; fondled their breasts; and made them touch his private parts.³³⁶

One of the victims testified that the accused took her to an isolated place, where he sat on top of her, lifted one of her legs and began to rape her. She told him it was painful, but he kept on penetrating her, whereupon he instructed her to keep quiet.³³⁷ Another victim (18 years old at the time) was walking home when the accused drove up next to her, kidnapped her, and made her perform oral sex on him before raping her.³³⁸

During 2010, Lazanne Farmer jumped out of the car when the accused tried to kidnap her and broke her neck because of the incident.³³⁹ On this incident, the accused was found guilty of culpable homicide, for which Judge Kolbe received widespread criticism.³⁴⁰

As mentioned above, the accused was found guilty on 33 of the 37 charges, which ranged from rape to sexual assault, kidnapping, attempted kidnapping, murder, and culpable homicide.³⁴¹ The accused was found guilty on nine of the eleven initial rape

334 SAPA Sowetan Live, “Sunday Rapist is found guilty”, <https://www.sowetanlive.co.za/news/2012-09-18-sunday-rapist-is-found-guilty/> (accessed on 17 April 2021).

335 News 24 Staff Reporter, “Sunday Rapist found guilty on 33 charges”, <https://www.news24.com/News24/Sunday-Rapist-found-guilty-on-33-charges-20120918> (accessed on 16 April 2021).

336 SAPA Sunday Tribune, “Full horror of Sunday rapist's wrath”, <https://www.pressreader.com/south-africa/sunday-tribune-south-africa/20120805/281767036364163> (accessed on 17 April 2021).
Telephonic interview with Judge Kolbe on 12 August 2021.

337 Mooki, “Victims recount Sunday Rapist attacks”, <https://www.iol.co.za/news/victims-recount-sunday-rapist-attacks-1353791> (accessed on 17 April 2021).

338 Mooki, “Victims recount Sunday Rapist attacks”, <https://www.iol.co.za/news/victims-recount-sunday-rapist-attacks-1353791> (accessed on 17 April 2021).

339 News 24 Staff Reporter, “Sunday Rapist found guilty on 33 charges”, <https://www.news24.com/News24/Sunday-Rapist-found-guilty-on-33-charges-20120918> (accessed on 16 April 2021).

340 Telephonic interview with Judge Kolbe on 12 August 2021.

341 SAPA Mail & Guardian, “Sunday rapist given five life terms”, <https://mg.co.za/article/2012-09-19-sunday-rapist-given-five-life-terms/> (accessed on 7 July 2021).

counts. He was found not guilty on two rape charges, one being the rape of Louise de Waal; and the other being the sexual violation of a victim's vagina with the accused's tongue, whereby he was found guilty of sexual assault.³⁴² Ultimately, the accused was sentenced to five life imprisonments and another 170 years' imprisonment. The accused received 5 life imprisonment sentences for the following incidents (as the victims were under 16 years of age): penetrating the victim's vagina with his finger, two counts of penetrating the victim's mouth with his penis and two counts of penetrating the victim's vagina with an object.³⁴³ The victims in the 2 other rape charges were older than 16 years, on these charges the accused received 20 years imprisonment on each charge.³⁴⁴ The Court ruled that the life imprisonment sentences should run concurrently, although the accused had to serve at least half of the 170 years.³⁴⁵

Judge Kolbe made the following statement during sentencing: "The community must be protected against a person like you. There has been no justification for your conduct. Two girls lost their lives. Those who did not, have lost their proper lives."³⁴⁶ Judge Kolbe also stated that the accused could not be rehabilitated and had to be removed from society, as he was a danger to every child in South Africa.³⁴⁷

This case serves as a good example of a court that applied the prescribed minimum sentence to the broadened definition of rape. The broadened definition of rape (a finger and an object/vibrator were used to penetrate the victims in several of the rape charges) came into play in this matter.

3.5.6 The *Kana* case

As per judgement received in *S v Steyn* from Presiding Officer Judge S Kolbe.

342 Telephonic interview with Judge Kolbe on 12 August 2021.

As per judgement received in *S v Steyn* from Presiding Officer Judge S Kolbe.

343 Telephonic interview with Judge Kolbe on 12 August 2021 & Email correspondence on 24 August 2021.

344 Telephonic interview with Judge Kolbe on 12 August 2021 & Email correspondence on 24 August 2021.

345 Roane, "170 Years' jail for Sunday Rapist", <https://www.iol.co.za/news/170-years-jail-for-sunday-rapist-1387292> (accessed on 17 April 2021).

346 SAPA Times Live, "Sunday rapist gets five life sentences", <https://www.timeslive.co.za/news/south-africa/2012-09-19-sunday-rapist-gets-five-life-sentences/> (accessed on 17 April 2021).

347 SAPA Timeslive, "Sunday rapist gets five life sentences", <https://www.timeslive.co.za/news/south-africa/2012-09-19-sunday-rapist-gets-five-life-sentences/> (accessed on 16 April 2021).

This case made news headlines nationally and internationally. The President at the time, Jacob Zuma, mentioned the brutal rape and killing of the victim, Anene Booysen, in his State of the Nation Address. The war against rape was declared after this savage rape.³⁴⁸

The facts of the matter are as follows: on the evening of 1 and 2 February 2013 at or near Bredasdorp in the Western Cape, the accused brutally raped the victim (who was seventeen years old at the time) and then killed the victim by pulling out her intestines through her vagina. The victim passed away on 2 February in the Tygerberg Hospital.³⁴⁹

The victim was found on the scene by a security officer who was busy with his rounds. She was found lying with her pants on her knees, her eyes were swollen shut, and there was blood on her buttocks. When she tried to stand up, the official could see her intestines hanging from her vagina. The victim was taken to hospital by ambulance. She was scared of the ambulance personnel and wanted to kick and hit them when they wanted to assist her. Over a metre of her intestines was pushed back into her abdomen and she was given water while waiting to be transferred to a provincial hospital.³⁵⁰ The victim passed away on 2 February 2013 at the Tygerberg Hospital, as her injuries were too severe.³⁵¹

The accused pleaded not guilty in the Western Cape High Court on the rape charge, as well as on the murder charge. He, however, made certain formal admissions concerning the rape, according to section 220 of the *Criminal Procedure Act*.³⁵² The accused told the court that on 2 February 2013 he pushed himself on the victim; in return, she refused to kiss him, whereby he hit her with a fist, kicked her, and thereafter raped her. When he left the victim, she was still alive. The State rejected this version given by the accused in his formal admission.³⁵³ During trial, the accused did not give evidence and chose to remain silent.

348 September "The Anene Booysen Story", <https://ewn.co.za/2013/10/31/The-Anene-Booyesen-Story> (accessed on 22 December 2020).
349 *S v Kana* 2014 JDR 0942 (WCC):2-3.
350 *S v Kana* 2014 JDR 0942 (WCC):10&12.
351 *S v Kana* 2014 JDR 0942 (WCC):18-19.
352 *Criminal Procedure Act* 51 of 1977.
353 *S v Kana* 2014 JDR 0942 (WCC):2-3&7.

Dr Taylor, a general surgeon at Tygerberg Hospital, gave evidence about the victim's injuries. She stated that she has never seen such a degree of trauma before; such intense trauma was not even seen in motor vehicle accidents.³⁵⁴

The Court found that the cause of death was the sexual penetration of the victim by the accused, which in itself was very violent. The victim's genitalia were mutilated in such a bad way that it ultimately led to her death.³⁵⁵

Dr Quarrie who did the post-mortem on the victim wrote in the legal report that the cause of death was the following:³⁵⁶

mutilating genital injury and the consequences thereof.

Through the circumstantial evidence and the accused's confession, it is clear that the accused was the person who benefited most from the victim's brutal mutilated genitalia and her death. Through the mutilation, the accused could not be connected by DNA, which could have been found in the victim.³⁵⁷ The court found that the state proved its case beyond reasonable doubt; the circumstantial evidence brought before court was enough to prove that the accused raped and murdered the victim.³⁵⁸

The High Court took into consideration section 209 of the *Criminal Procedure Act*,³⁵⁹ which states the following:

An accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed.

The accused was found guilty on the rape and murder charge and sentenced to life imprisonment on both the charges.³⁶⁰

354 *S v Kana* 2014 JDR 0942 (WCC):18.
355 *S v Kana* 2014 JDR 0942 (WCC):99.
356 *S v Kana* 2014 JDR 0942 (WCC):3.
357 *S v Kana* 2014 JDR 0942 (WCC):95.
358 *S v Kana* 2014 JDR 0942 (WCC):99.
359 *Criminal Procedure Act* 51 of 1977.
360 *S v Kana* 2014 JDR 0942 (WCC):100.

Phumla Williams, the CEO of the Government Communication and Information System, said the following with regard to the Anene Booyesen rape case.³⁶¹

This sentencing clearly demonstrates that government will not tolerate such vile criminal acts and remains committed to ensuring that all South Africans feel and are safe.

This case was investigated and finalised within eight months, with a positive outcome being life imprisonment for this horrifying rape.³⁶² This case can be seen as a beacon of light for the justice system concerning rape cases. Although the rape in itself was horrific and brutal, this case was investigated quickly, the accused was brought before the court in an efficient manner, and the appropriate sentence was imposed.³⁶³

3.5.7 The *Leeuw* case

On 24 March 2013, the complainant (eight years old at the time) told her mother that she has been raped by someone who she would be able to identify.³⁶⁴ The evidence brought before the Regional Court was that the accused climbed on top of the complainant and inserted his penis into the complainant's vagina, whereby he had sexual intercourse with her. Thereafter, he turned her around and penetrated her anus using his finger. He then put his penis inside her mouth and ordered her to suck it.³⁶⁵

The accused appeared in the Regional Court on two charges of rape. The accused pleaded not guilty to both charges but was convicted on both counts and was sentenced to life imprisonment in respect of each count.³⁶⁶ The Regional Court stated that the appellant could consider himself fortunate that he was not charged with three counts of rape – the third count being the oral penetration into the girl's mouth.³⁶⁷

The accused appealed the sentence; he argued before the Northern Cape High Court that the sentence of life imprisonment was inappropriate. He contended that the

361 South African, "Attacker gets double life sentence for rape and murder of Anene Booyesen", <https://www.thesouthafrican.com/news/attacker-gets-double-life-sentence-for-rape-and-murder-of-anene-booyesen/> (accessed on 20 December 2020).

362 News 24 Staff Reporter, "Anene Booyesen murder: State seeks life sentence for Johannes Kana", <https://www.news24.com/news24/Archives/City-Press/Anene-Booyesen-murder-State-seeks-life-sentence-for-Johannes-Kana-20150429> (accessed on 17 May 2021).

363 Kiewit, "Johannes Kana sentenced to life for rape, murder of Anene Booyesen", <https://www.enca.com/south-africa/johannes-kana-sentenced-life> (accessed on 8 July 2021).

364 *Leeuw v S* (CA&R40/2018) [2019] ZANCHC 32: par. 4.

365 *Leeuw v S* (CA&R40/2018) [2019] ZANCHC 32: par. 7.

366 *Leeuw v S* (CA&R40/2018) [2019] ZANCHC 32: par. 2.

367 *Leeuw v S* (CA&R40/2018) [2019] ZANCHC 32: par. 13.

Regional Court overemphasised the interests of society and the deterrent effect of sentence.³⁶⁸

The High Court found that the Regional Court made the correct decision concerning the sentence – that there were no substantial and compelling circumstances in the personal circumstances of the appellant to impose a lesser sentence.³⁶⁹ The sentence of life imprisonment that was imposed on both counts of rape (one with his penis into her vagina and the second charge the rape with the accused’s finger into the complainant’s anus), as prescribed in the *Criminal Law Amendment Act*,³⁷⁰ was correct.³⁷¹

If this case occurred before the *Criminal Law (Sexual Offences and Related Matters) Amendment Act*³⁷² came into operation, the first act of the accused (penis into vagina) would be the only rape charge, while the accused’s finger into the complainant’s anus would have amounted to indecent assault only, with a much lesser sentence. The Court, however, had to adhere to the minimum sentence prescribed for both charges of rape, irrespective of the fact that the rape took place through different forms of penetration.

This case serves as one of the first examples where the Court applied the prescribed minimum sentence to the broadened definition of rape.

3.5.8 The case of CC v S

The accused was charged in the Regional Court on two counts of raping children. In July 2013, the appellant raped a three-year-old boy by inserting his penis into the child’s mouth. In the second count, it was alleged that during 2013 the appellant raped an eight-year-old girl by inserting his finger into the girl’s vagina.³⁷³ The accused pleaded guilty on both counts.³⁷⁴

The accused was convicted on both counts. The magistrate imposed two sentences of life imprisonment, stating that there were no substantial and compelling

368 *Leeuw v S* (CA&R40/2018) [2019] ZANCHC 32: par. 3.

369 *Leeuw v S* (CA&R40/2018) [2019] ZANCHC 32: par. 19.

370 *Criminal Law Amendment Act* 105 of 1997.

371 *Leeuw v S* (CA&R40/2018) [2019] ZANCHC 32: par. 20.

372 *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

373 *CC v S* (A595/14) [2015] ZAWCHC: par. 1.

374 *CC v S* (A595/14) [2015] ZAWCHC: par. 2.

circumstances to depart from the minimum sentence prescribed by section 51(1) of the *Criminal Law Amendment Act* 105 of 1997.³⁷⁵

The accused appealed against both the sentences. On appeal, the High Court accepted that the rape of a child under the age of 16 is a monstrous and despicable crime, which is why rape where children are involved attracts a life sentence in the absence of substantial and compelling circumstances.³⁷⁶ However, the Court decided that the minimum sentence of life imprisonment in this case would be disproportionate to the crime, the accused, and the needs of society.³⁷⁷

The reason provided by the Court in terms of complainant one (the boy) was that there was no evidence that the accused ejaculated in his mouth, as the boy was young at the time of the incident. He thus did not understand what was happening to him and did not suffer any ill effects after the incident.³⁷⁸

In terms of the second complainant (the girl), the Court found, “There is nothing to show that it was anything more than a fleeting incident”³⁷⁹ and held that life imprisonment in this matter was an unjust sentence on both counts.³⁸⁰

Therefore, the appeal against the sentences, imposed by the trial court on 16 October 2014, succeeded. On Count 1, the accused was sentenced to 15 years’ imprisonment, of which five years were suspended. On Count 2, the accused was sentenced to 12 years’ imprisonment, of which three years were suspended.³⁸¹

This was clearly again a lenient sentence for rape, especially the rape of young children, no matter the form of rape, and in contradiction with the requirements of the *Criminal Law Amendment Act*.³⁸²

375 CC v S (A595/14) [2015] ZAWCHC: par. 3.

376 CC v S (A595/14) [2015] ZAWCHC: par. 19.

377 CC v S (A595/14) [2015] ZAWCHC: par. 20.

378 CC v S (A595/14) [2015] ZAWCHC: par. 27.

379 CC v S (A595/14) [2015] ZAWCHC: par. 32.

380 CC v S (A595/14) [2015] ZAWCHC: par. 35.

381 CC v S (A595/14) [2015] ZAWCHC: par. 37.

382 *Criminal Law Amendment Act* 105 of 1997.

3.5.9 S v DD

The following case sparked public outrage in South Africa. A family of three people was killed, and the daughter raped on their family farm in the Northern Cape. This happened in a time when farm attacks were increasing at an alarming rate in South Africa. The only survivor, the son, who was on the farm when the murders took place, was prosecuted, and found guilty of the murders and rape. This case's importance lies in the rape charge, and it will be discussed accordingly.

The incident took place on Good Friday, 6 April 2012, on a farm near Griekwastad. The accused was 15 years and 8 months old at the time. The accused was charged as follows: three charges of murder (killing his mother, father, and sister), one charge of rape (raping his sister who was 14 years old at the time, which is of interest to this dissertation), and one charge of defeating the ends of justice (not applicable to this dissertation).³⁸³ The accused pleaded not guilty and remained silent.³⁸⁴

Dr Fouché, the pathologist who gave evidence with regard to the rape victim's injuries, testified that according to his observations the victim fought like a tigress to defend herself.³⁸⁵ He further stated that there were signs of sexual penetration that showed that she had indeed been raped. These injuries could have been caused by sexual penetration without lubrication because there was no foreplay.³⁸⁶ It was agreed that there was no semen ejaculated into the girl's genitalia and "full sexual intercourse" did not take place.³⁸⁷

The legal definition of penetration is seen in the light of the fact that the least bit of penetration is enough and sufficient to constitute rape. Historically penetration was medically seen as any penetration that moves beyond the *labia majora*. The victim in this matter was penetrated beyond her *labia majora*. The penetration by the accused was thus seen as legal penetration, as the least bit of penetration is enough.³⁸⁸

383 S v DD (K/S 46/2012) [2014] ZANCHC 9; 2015 (1) SACR 165 (NCK): par. 3.

384 S v DD (K/S 46/2012) [2014] ZANCHC 9; 2015 (1) SACR 165 (NCK): par. 5.

385 S v DD (K/S 46/2012) [2014] ZANCHC 9; 2015 (1) SACR 165 (NCK): par. 44.

386 S v DD (K/S 46/2012) [2014] ZANCHC 9; 2015 (1) SACR 165 (NCK): par. 45.

387 S v DD (K/S 46/2012) [2014] ZANCHC 9; 2015 (1) SACR 165 (NCK): par. 47.

388 S v DD (K/S 46/2012) [2014] ZANCHC 9; 2015 (1) SACR 165 (NCK): par. 48.

To confirm this, the Court referred to the matter *S v Johnny Carter*³⁸⁹ where Judge Mamosebo made the following remark:³⁹⁰

...the slightest penetration of an orifice (per vagina or anally) constitutes rape.

Reference was also made to Milton³⁹¹ who has the following to say regarding penetration:

The slightest penetration is sufficient. Once penetration has occurred, the necessary element for liability of the male is established.

Thus, the High Court was satisfied that the victim was raped by the accused and the state's theory that the accused murdered his parents and his sister to conceal the rape was accepted.³⁹² Hence, the accused was found guilty by the High Court in Kimberley on three charges of murder, one charge of rape, and one charge of defeating the ends of justice.³⁹³

The accused was sentenced to 12 years' imprisonment on the rape charge, 20 years' for each of the murder charges, and four years on the defeating the ends of justice charge. All sentences were ordered to run concurrently.³⁹⁴

Judge Kgomo took into consideration the following factors during sentencing: the lack of appropriate emotional response of the accused during trial, the accused's behaviour was in line with an emerging psychopath, the accused was capable of murdering relatives to cover a rape, the accused was not willing to take responsibility for his actions, the accused had tendencies to lie and manipulate, and within 24 hours after the murders the accused asked questions regarding his inheritance.³⁹⁵ The Court also looked at the following substantial circumstances when sentencing the accused: the youthfulness of the accused at the time of committing the offence and furthermore the

389 *S v Johnny Carter* CA&R 37/2013.

390 *S v DD* (K/S 46/2012) [2014] ZANHC 9; 2015 (1) SACR 165 (NCK): par. 49.

391 Milton 1996:448.

392 *S v DD* (K/S 46/2012) [2014] ZANHC 9; 2015 (1) SACR 165 (NCK): par. 50&54.

393 *S v DD* (K/S 46/2012) [2014] ZANHC 9; 2015 (1) SACR 165 (NCK): par. 82.

394 Snyman, "Meet Don Steenkamp, the Griekwastad killer", <https://www.news24.com/you/Archive/meet-don-steenkamp-the-griekwastad-killer-20170728> (accessed on 22 December 2020).

395 Kemp, "Griekwastad Killers sentencing", <https://www.news24.com/news24/southafrica/news/live-griekwastad-killers-sentencing-20140813> (accessed on 18 May 2021).

likely psychological factors (the accused's mental development was not complete at his age)³⁹⁶ at the time of the offence.³⁹⁷

According to section 51 of the *Criminal Law Amendment Act*,³⁹⁸ read with Schedule II Part 1 (Rape)(b)1 of the same Act, the accused had to receive a sentence of life imprisonment for the rape conviction, as the victim was under the age of 16 years. However, minimum sentences are not applicable to offenders younger than 16, whereas in this case the accused was younger than sixteen years at the time of committing the offence.³⁹⁹

The accused was a minor at the time of the incident and was sentenced two days before he turned 18. Judge Kgomo said during sentencing that the accused should face the consequences, as he was a man now.⁴⁰⁰

All the sentences will run concurrently, which means that the accused will be out of jail in no time. It can be argued that the High Court erred in its sentencing in this matter. The accused did not testify and showed no remorse,⁴⁰¹ he got a slap on the back and a hope to rehabilitate⁴⁰² afterthought, even though a selfish act of rape on his side was the main reason that three innocent people lost their lives.⁴⁰³

396 Kemp, "Griekwastad Killers sentencing", <https://www.news24.com/news24/southafrica/news/live-griekwastad-killers-sentencing-20140813> (accessed on 18 May 2021).

397 Independent Online Staff Reporter, "Griquatown Killer turns 18 in jail", <https://www.iol.co.za/news/south-africa/northern-cape/griquatown-killer-turns-18-in-jail-1735742> (accessed on 18 May 2021).

398 *Criminal Law Amendment Act* 105 of 1997.

399 *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (2) SACR 477 (CC); 2009 (6) SA 632 (CC):6 – "only children under the age of 16 at the time of the offence are excluded". Also see *Criminal Law Amendment Act* 105 of 1997:section 51(6):

The provisions of this section shall not be applicable in respect of a child who was under the age of 16 years at the time of the commission of the act which constituted the offence in question.

400 Kemp, "Griekwastad Killers sentencing", <https://www.news24.com/news24/southafrica/news/live-griekwastad-killers-sentencing-20140813> (accessed on 18 May 2021).

401 News 24 Staff Reporter, "Griekwastad teen sentenced", <https://www.news24.com/news24/griekwastad-teen-sentenced-20140813>. See also Gerbi, "Griekwastad teen ordered to take responsibility", <https://ewn.co.za/2014/08/13/Griekwastad-killer-sentenced-to-20-years> (accessed on 18 May 2021).

402 Gerbi, "Griekwastad teen urged to take full responsibility", <https://ewn.co.za/2014/08/13/Griekwastad-teen-ordered-to-take-responsibility> (accessed on 18 May 2021).

403 Kwon Hoo, "Steenkamps killed to cover rape: Judge", <https://www.iol.co.za/news/south-africa/northern-cape/steen-kamps-killed-to-cover-rape-judge-1667418> (accessed on 9 July 2021).

3.5.10 The Swarts case

Swarts, an athletics coach, appeared in the Magistrate's Court on a charge of rape. Swarts allegedly gave the complainant (an athlete whom he coached and was 21 years old at the time) a massage. While giving the massage, he pulled down her underwear and penetrated her vagina with his finger.⁴⁰⁴ The State and the defence reached an agreement in terms of which the accused pleaded guilty to the charge of rape in the Regional Court.⁴⁰⁵

The accused was sentenced to five years' imprisonment, which was fully suspended.⁴⁰⁶ The Court took into consideration, when reducing the sentence, that the accused was a well-known athletic coach, and that the case had damaged his career and status.⁴⁰⁷

In comparison to the *Leeuw*⁴⁰⁸ case, discussed in paragraph 3.5.7 above, this was clearly a very lenient sentence for rape, and in contradiction with the requirements of the *Criminal Law Amendment Act 105 of 1997*.

3.5.11 The 'Dros' rape case

On 24 September 2018, in the restrooms of a Dros restaurant in Pretoria, the accused inserted his penis into a seven-year-old victim's mouth, and he inserted his finger into the victim's vagina.⁴⁰⁹ The accused pleaded guilty on one charge of rape (as he was only charged with one count), the indictment read as follows: "he sexually penetrated the complainant, who is a child under the age of 12 years, more than once".⁴¹⁰ The accused gave details regarding the rape in his plea explanation on 22 September

404 Smit, "Athletics coach arrested on rape charge", <https://www.news24.com/SouthAfrica/News/athletics-coach-arrested-on-rape-charge-20180714> (accessed 25 May 2020).

405 Motse, "Well known athletics coach to appear in BFN court", <https://www.ofm.co.za/article/local-news/266436/well-known-athletics-coach-to-appear-in-bfn-court> (accessed 25 May 2020).

406 Van Rooyen, "Afrigter kry opgekorte vonnis na verkragting", www.netwerk24.com/nuus/hof/afri-gter-kry-opgekorte-vonn-is-na-verkragting-20200305 (accessed on 22 May 2021).

407 Van Rooyen, "Afrigter kry opgekorte vonnis na verkragting", www.netwerk24.com/nuus/hof/afri-gter-kry-opgekorte-vonn-is-na-verkragting-20200305 (accessed on 22 May 2021).

408 *Leeuw v S* (CA&R40/2018) [2019] ZANCHC 32.

409 Bhengu, "Five chilling revelations from the trial of Dros Rapist Nicholas Ninow", <https://www.timeslive.co.za/news/south-africa/2019-09-11-five-chilling-revelations-from-the-trial-of-dros-rapist-nicholas-ninow/> (accessed on 19 April 2021).

410 Judgement and sentence as received from Judge Masopa on 25 August 2021.

2018.⁴¹¹ The state, however rejected the accused's version of events, whereby the matter went to trial.⁴¹²

The Court accepted the version of events put before court by the state, whereby Judge Masopa found the accused guilty on one charge of rape.⁴¹³ The Court sentenced the accused effectively to life imprisonment on the rape count.⁴¹⁴

During the trial, Adv. Alberts, on behalf of the accused, made the following statement: "Previously, this form of penetration would have constituted indecent assault... but now it constitutes rape."⁴¹⁵ The State however made the following statement: "It is currently categorised as rape... the trauma as well as the injuries and the nightmares are the same as that of rape, hence it is now included to be read as rape and the minimum prescribed sentence is life imprisonment".⁴¹⁶

The definition of 'sexual penetration' as stated in section 1 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007* includes a wide range of different acts. One of these acts is when a male inserts his penis in the mouth of the female and/or when he inserts any of his body parts (finger in this case) in the vagina of the female. The two different ways that were used by the accused constitutes two different "sexual penetration" acts; thus, it had to be dealt with as two charges of rape, respectively, as it was correctly done.

411 Mitchley, "Dros rape trial proceeds despite Nicholas Ninow pleading guilty", <https://www.news24.com/news24/southafrica/news/dros-rape-trial-proceeds-despite-nicholas-ninow-pleading-guilty-20190909> (accessed on 8 July 2021).

412 Mitchley, "Nicholas Ninow details rape in Dros bathroom", <https://www.news24.com/news24/SouthAfrica/News/alleged-dros-rapist-nicholas-ninow-details-rape-and-assault-in-bathroom-20190909> (accessed on 19 May 2021).

413 Algoa FM News, Staff Reporter, "Nicholas Ninow found guilty on two counts of rape", <https://www.algoafm.co.za/domestic/nicholas-ninow-found-guilty-on-two-counts-of-rape> (accessed on 8 July 2021).

414 Ntshidi, "Dros rape trial: Victim's mother recounts incident", <https://ewn.co.za/2019/09/11/dros-rape-trial-victim-s-mother-recounts-incident> (accessed on 19 April 2021). See also

Mitchley, "Convicted child rapist Nicholas Ninow sentenced to life", <https://www.youtube.com/watch?v=3lvhw5J6HBA> (accessed on 8 July 2021). Judgement and sentence as received from Judge Mosopa on 25 August 2021.

415 Wicks, "Dros rapist Ninow wants to appeal because sentence too harsh", <https://citizen.co.za/news/south-africa/courts/2251739/dros-rapist-ninow-wants-to-appeal-because-sentence-too-harsh/> (accessed on 19 April 2021).

416 Wicks, "Dros rapist Ninow wants to appeal because sentence too harsh", <https://citizen.co.za/news/south-africa/courts/2251739/dros-rapist-ninow-wants-to-appeal-because-sentence-too-harsh/> (accessed on 19 April 2021).

This case is an excellent example of where the court correctly applied the recent broad scope of rape, and imposed the minimum sentence, as prescribed by law. This case can however be criticised on the following: the accused should have received two life sentences (one life sentence per rape charge), as the victim was younger than 16 years, as stated in the *Criminal Law Amendment Act 105 of 1997* section 51 Part 1 (b)(1).

3.6 Conclusion

From what was said in the Chapter above, it is evident that rape is a continuous and increasing problem in South Africa. Today South Africa has a wide definition of rape and strict minimum sentences to accompany this definition. The advantages that this wide definition holds are as follows: there are different forms of penetration recognised and each form of penetration will constitute its own rape charge; consent is finally codified; and both the perpetrators and the victims of rape can be male or female.

Rape legislation reform is reliant on a government and a community's willingness to make improvements and then to implement these developments. South Africa's rape legislation must reflect the country's constitutional provisions in that the rape victim's rights to equality, dignity, access to justice, and the right to not be subjected to violence must be met. South Africa's legislation is in accordance with the Constitution because of the extremely broad definition, gender equality, and prescribed minimum sentences; the problem however lies with the inconsistent application of the legislation.

From the court cases discussed in the Chapter above, the following was established: the state decides on their own accord how many rape charges they are going to charge an accused with. Thus, the state decides which form of penetration will be charged for and which not. It can also be deduced that courts are inconsistent in interpreting which factors are substantial and compelling circumstances when sentencing the accused.

The court cases in the Chapter above are summarised in brief below, looking in particular at the form of penetration used by the accused, compelling and substantial circumstances that the court accepted when not adhering to the prescribed minimum sentences, and each charge's sentence handed down by the court.

The Thabethe Case.⁴¹⁷

Form of penetration exercised and charged for in court – The accused penetrated the 15-year-old victim's vagina with his penis.⁴¹⁸ One charge of rape.

Penetration exercised but not charged for - Not applicable.

Prescribed minimum sentence – According to section 51(2)(b)(i) of the *Criminal Law Amendment Act* 105 of 1997, the prescribed minimum sentence for a first offender is imprisonment for a period not less than 10 years.

Sentence imposed by court - Ten years' direct imprisonment.⁴¹⁹

Substantial and compelling circumstances accepted by court - The accused was a first offender.⁴²⁰ The accused showed remorse.⁴²¹ The accused pleaded guilty.⁴²² The victim turned 16 years a few days after the rape incident.⁴²³ The accused and the victim's mother stayed together after the incident.⁴²⁴ The victim suffered no physical injury.⁴²⁵ The rape was not one of the worst kinds that were ever reported.⁴²⁶ The accused continued to support the victim and her family.⁴²⁷ The family was financially entirely reliant on the accused.⁴²⁸ The victim did not want the accused to go to prison.⁴²⁹ It is not in the interest of society to create secondary victims.⁴³⁰ The accused

417 *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA).
418 *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA): par. 5.
419 *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA): par. 31.
420 *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA): par. 11(1).
421 *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA): par. 11(2).
422 *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA): par. 11(3).
423 *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA): par. 11(5).
424 *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA): par. 11(11).
425 *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA): par. 11(7).
426 *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA): par. 11(8).
427 *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA): par. 11(10).
428 *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA): par. 11(12).
429 *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA): par. 11(13).
430 *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA): par. 11(21).

holds no threat to the community.⁴³¹ The accused spent four years on bail while waiting for the trial to commence.⁴³²

Matyityi case.⁴³³

Form of penetration exercised and charged for in court – The victim was raped by three men.⁴³⁴ All three accused penetrated the victim’s vagina with their penises.⁴³⁵ Mr Matyityi pleaded guilty.⁴³⁶ Mr Matyityi (the accused in this matter) was charged with one charge of rape.⁴³⁷

Penetration exercised but not charged for - Not applicable.

Prescribed minimum sentence – According to section 51(1) of the *Criminal Law Amendment Act* 105 of 1997, the accused must be sentenced to life imprisonment, as the victim was raped by more than one accused.⁴³⁸

Sentence imposed by court - The accused was sentenced to life imprisonment on appeal.⁴³⁹

Substantial and compelling circumstances accepted by court – The court found that there were no substantial and compelling circumstances to justify a lesser sentence than the prescribed minimum sentence.⁴⁴⁰

Willemse case.⁴⁴¹

Form of penetration exercised and charged for in court – The accused penetrated the victim’s vagina and anus with his penis.⁴⁴² The two penetration acts directly proceeding each other.⁴⁴³ The accused was charged with two counts of rape.⁴⁴⁴

Penetration exercised but not charged for - Not applicable.

431 *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA): par. 11(22).

432 *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA): par. 11(24).

433 *S v Matyityi* 2011 (1) SACR 40 (SCA).

434 *S v Matyityi* 2011 (1) SACR 40 (SCA):44.

435 *S v Matyityi* 2011 (1) SACR 40 (SCA):44.

436 *S v Matyityi* 2011 (1) SACR 40 (SCA):44.

437 *S v Matyityi* 2011 (1) SACR 40 (SCA):44.

438 *S v Matyityi* 2011 (1) SACR 40 (SCA):40.

439 *S v Matyityi* 2011 (1) SACR 40 (SCA):54.

440 *S v Matyityi* 2011 (1) SACR 40 (SCA):54.

441 *S v Willemse* 2011 (2) SACR 531 (ECG).

442 *S v Willemse* 2011 (2) SACR 531 (ECG):532.

443 *S v Willemse* 2011 (2) SACR 531 (ECG):532.

444 *S v Willemse* 2011 (2) SACR 531 (ECG):531.

Prescribed minimum sentence – According to section 51(1) of the *Criminal Law Amendment Act* 105 of 1997, the accused must be sentenced to life imprisonment as the victim was raped more than once.⁴⁴⁵

Sentence imposed by court - The accused was sentenced to 20 years' imprisonment.⁴⁴⁶

Substantial and compelling circumstances accepted by court – The youthfulness of the accused.⁴⁴⁷ The probability of rehabilitation of the accused.⁴⁴⁸ The accused was a first offender.⁴⁴⁹

Ndlovu case:⁴⁵⁰

Form of penetration exercised and charged for in court – The victim was raped by two men; one of the men was not apprehended.⁴⁵¹ The accused penetrated the victim's vagina with his finger and thereafter with his penis.⁴⁵² Charged with one count of rape with regards to the penetration by the accused's penis into the victim's vagina.⁴⁵³

Penetration exercised but not charged for - The accused was not charged for the penetration of the victim's vagina with his finger.⁴⁵⁴

Prescribed minimum sentence – According to section 51(1) of the *Criminal Law Amendment Act* 105 of 1997, the accused must be sentenced to life imprisonment as the victim was raped more than once by the accused (the penetration of the vagina with a finger was not charged for). The victim was however raped by more than one accused; thus, the Act applies.⁴⁵⁵

Sentence imposed by court – Accused was sentenced to one term of life imprisonment.⁴⁵⁶

445 *S v Willemse* 2011 (2) SACR 531 (ECG):531.

446 *S v Willemse* 2011 (2) SACR 531 (ECG):540.

447 *S v Willemse* 2011 (2) SACR 531 (ECG):537.

448 *S v Willemse* 2011 (2) SACR 531 (ECG):537.

449 *S v Willemse* 2011 (2) SACR 531 (ECG):537.

450 *Ndlovu v S* (A005/2013) [2020] ZAGPJHC 95; [2020] 2 ALL 556 (GJ).

451 *Ndlovu v S* (A005/2013) [2020] ZAGPJHC 95; [2020] 2 ALL 556 (GJ): par. 1.

452 *Ndlovu v S* (A005/2013) [2020] ZAGPJHC 95; [2020] 2 ALL 556 (GJ): par. 14.

453 *Ndlovu v S* (A005/2013) [2020] ZAGPJHC 95; [2020] 2 ALL 556 (GJ): par. 1.

454 *Ndlovu v S* (A005/2013) [2020] ZAGPJHC 95; [2020] 2 ALL 556 (GJ): par. 1.

455 *Ndlovu v S* (A005/2013) [2020] ZAGPJHC 95; [2020] 2 ALL 556 (GJ): par. 1 & 4-5.

456 *Ndlovu v S* (A005/2013) [2020] ZAGPJHC 95; [2020] 2 ALL 556 (GJ): par. 1 & 70.

Substantial and compelling circumstances accepted by court – The Court found that there were no substantial circumstances to justify a lesser sentence than the prescribed minimum sentence.⁴⁵⁷

'Sunday Rapist'

Form of penetration exercised and charged for in court – Penetration by the accused's penis into the victims' (between 11 and 18 years old) vaginas.⁴⁵⁸ Penetration by a foreign object (a vibrator and a finger) into victims' vaginas.⁴⁵⁹ Eleven counts of rape (found guilty on nine counts).⁴⁶⁰

Penetration exercised but not charged for - Not applicable.

Prescribed minimum sentence – According to section 51(1) of the *Criminal Law Amendment Act* 105 of 1997, the accused must be sentenced to life imprisonment where the victims were below 16 years of age.

Sentence imposed by court – The accused was sentenced to five life imprisonment terms, plus another 170 years' imprisonment; all sentences to run concurrently.⁴⁶¹ The accused must serve at least half of the 170 years' imprisonment.⁴⁶²

Substantial and compelling circumstances accepted by court – No substantial and compelling circumstances to reduce the sentence. The court stated that accused cannot be rehabilitated and he had no remorse for his actions.⁴⁶³

Kana case.⁴⁶⁴

Form of penetration exercised and charged for in court – Penetration by the accused's penis into the victim's vagina.⁴⁶⁵

Penetration exercised but not charged for - Not applicable.

Prescribed minimum sentence – According to section 51(1) read with Schedule 2 Part 1 (murder) (c)(i) of the *Criminal Law Amendment Act* 105 of 1997, the accused

457 *Ndlovu v S* (A005/2013) [2020] ZAGPJHC 95; [2020] 2 ALL 556 (GJ): par. 59.

458 As per indictment received from the Presiding Officer Judge Kolbe 12 August 2021.

459 As per indictment received from the Presiding Officer Judge Kolbe 12 August 2021.

460 As per written judgement received from the Presiding Officer Judge Kolbe 12 August 2021.

461 Roane, "170 years' jail for Sunday Rapist", <https://www.iol.co.za/news/170-years-jail-for-sunday-rapist-1387292> (accessed on 17 April 2021).

462 Roane, "170 years' jail for Sunday Rapist", <https://www.iol.co.za/news/170-years-jail-for-sunday-rapist-1387292> (accessed on 17 April 2021).

463 Roane, "170 years Jail for Sunday Rapist", <https://www.iol.co.za/news/170-years-jail-for-sunday-rapist-1387292> (accessed on 22 May 2021).

464 *S v Kana* 2014 JDR 0942 (WCC).

465 *S v Kana* 2014 JDR 0942 (WCC):1-2.

must be sentenced to life imprisonment as the death of the victim was caused by the accused in committing the rape of the victim.⁴⁶⁶

Sentence imposed by court – Life imprisonment⁴⁶⁷

Substantial and compelling circumstances accepted by court – No substantial and compelling circumstances to lessen the minimum prescribed sentence.⁴⁶⁸

Leeuw case:⁴⁶⁹

Form of penetration exercised and charged for in court – Penetration by the accused’s penis into the eight-year-old victim’s vagina.⁴⁷⁰ Penetration by finger into anus of eight-year-old victim.⁴⁷¹ Penetration by penis into eight-year-old victim’s mouth.⁴⁷² Two counts of rape⁴⁷³

Penetration exercised but not charged for - Third penetration act of penis into the victim’s mouth not charged for. Should have been another charge of rape, thus ultimately three charges of rape.

Prescribed minimum sentence – According to section 51(1) of the *Criminal Law Amendment Act* 105 of 1997, the accused must be sentenced to life imprisonment as the victim was younger than 16 years old during the incident and the victim was raped more than once by the accused.

Sentence imposed by court – Life imprisonment on each rape count charged for (penetration of penis into vagina and finger into anus).⁴⁷⁴

Substantial and compelling circumstances accepted by court – No substantial and compelling circumstances to lessen the accused’s sentence; the minimum sentence was correctly applied by the court.⁴⁷⁵

466 *Criminal Law Amendment Act* 105 of 1997: Section 51(1) read with Schedule 2 Part 1 - Murder(c)(i).

467 *S v Kana* 2014 JDR 0942 (WCC):100.

468 September “The Anene Booyesen Story”, <https://ewn.co.za/2013/10/31/The-Anene-Booyesen-Story> (accessed on 22 December 2020).

469 *Leeuw v S* (CA&R40/2018) [2019] ZANHC 32.

470 *Leeuw v S* (CA&R40/2018) [2019] ZANHC 32: par. 1.

471 *Leeuw v S* (CA&R40/2018) [2019] ZANHC 32: par. 1.

472 *Leeuw v S* (CA&R40/2018) [2019] ZANHC 32: par. 7.

473 *Leeuw v S* (CA&R40/2018) [2019] ZANHC 32: par. 1.

474 *Leeuw v S* (CA&R40/2018) [2019] ZANHC 32: par. 20.

475 *Leeuw v S* (CA&R40/2018) [2019] ZANHC 32: par. 52.

CC v S:⁴⁷⁶

Form of penetration exercised and charged for in court – Penetration by accused’s penis into the three-year-old victim’s mouth.⁴⁷⁷ Penetration of the accused’s finger into the eight- year-old victim’s vagina.⁴⁷⁸ Two counts of rape⁴⁷⁹

Penetration exercised but not charged for - Not applicable.

Prescribed minimum sentence – According to section 51(1) of the *Criminal Law Amendment Act* 105 of 1997, the accused must be sentenced to life imprisonment as the victims were younger than 16 years old during the incident.

Sentence imposed by court – Penetration of the penis into the mouth – 15 years’ imprisonment, of which five years were suspended.⁴⁸⁰ Penetration of finger into vagina – 12 years’ imprisonment of which three years were suspended.⁴⁸¹

Substantial and compelling circumstances accepted by court – The accused did not ejaculate in the victim’s mouth.⁴⁸² The victim was young at the time of the incident; thus, the victim did not understand.⁴⁸³ No ill effects were suffered by the victim.⁴⁸⁴ It was nothing more than a brief incident.⁴⁸⁵ Life imprisonment would be unjust.⁴⁸⁶

S v DD:⁴⁸⁷

Form of penetration exercised and charged for in court – Penetration of 14-year-old victim’s vagina with penis (full sexual intercourse did not take place).⁴⁸⁸ One count of rape.⁴⁸⁹

Penetration exercised but not charged for - Not applicable.

Prescribed minimum sentence – According to section 51(1) of the *Criminal Law Amendment Act* 105 of 1997, the accused must be sentenced to life imprisonment as the victim was younger than 16 years during the incident.

476 CC v S (A595/14) [2015] ZAWCHC.

477 CC v S (A595/14) [2015] ZAWCHC: par. 1.

478 CC v S (A595/14) [2015] ZAWCHC: par. 1.

479 CC v S (A595/14) [2015] ZAWCHC: par. 1.

480 CC v S (A595/14) [2015] ZAWCHC: par. 37(a).

481 CC v S (A595/14) [2015] ZAWCHC: par. 37(b).

482 CC v S (A595/14) [2015] ZAWCHC:27.

483 CC v S (A595/14) [2015] ZAWCHC: par. 27.

484 CC v S (A595/14) [2015] ZAWCHC: par. 27.

485 CC v S (A595/14) [2015] ZAWCHC: par. 33.

486 CC v S (A595/14) [2015] ZAWCHC: par. 25 & 31.

487 S v DD (K/S 46/2012) [2014] ZANHC 9; 2015 (1) SACR 165 (NCK).

488 S v DD (K/S 46/2012) [2014] ZANHC 9; 2015 (1) SACR 165 (NCK): par. 3 & 45 & 49.

489 S v DD (K/S 46/2012) [2014] ZANHC 9; 2015 (1) SACR 165 (NCK): par. 3.

Sentence imposed by court – Twelve years' imprisonment on the rape charge.⁴⁹⁰

Substantial and compelling circumstances accepted by court – The youthfulness of the accused at the time of committing the offence.⁴⁹¹ The accused's mental development was still not complete at the time of committing the offence.⁴⁹²

Swarts case.⁴⁹³

Form of penetration exercised and charged for in court – Penetration of 21-year-old victim's vagina with accused's finger.⁴⁹⁴ One count of rape⁴⁹⁵

Penetration exercised but not charged for - Not applicable.

Prescribed minimum sentence – According to section 51(2)(b)(i) of the *Criminal Law Amendment Act* 105 of 1997, the accused must be sentenced to imprisonment for a period not less than ten years as the accused was a first offender.

Sentence imposed by court – Five years' imprisonment fully suspended.⁴⁹⁶

Substantial and compelling circumstances accepted by court – The rape charge had a huge impact on the accused's career and status.⁴⁹⁷ The accused was a well-known athletic coach.⁴⁹⁸

490 Snyman, "Meet Don Steenkamp, the Griekwastad killer", <https://www.news24.com/you/Archive/meet-don-steenkamp-the-griekwastad-killer-20170728> (accessed on 22 December 2020).

491 Independent Online, Staff Reporter, "Griquatown Killer turns 18 in jail", <https://www.iol.co.za/news/south-africa/northern-cape/griquatown-killer-turns-18-in-jail-1735742> (accessed on 18 May 2021).

492 Independent Online, Staff Reporter, "Griquatown Killer turns 18 in jail", <https://www.iol.co.za/news/south-africa/northern-cape/griquatown-killer-turns-18-in-jail-1735742> (accessed on 18 May 2021).

493 Smit, "Athletics coach arrested on rape charge", <https://www.news24.com/SouthAfrica/News/athletics-coach-arrested-on-rape-charge-20180714> (accessed 25 May 2020).

494 Smit, "Athletics coach arrested on rape charge", <https://www.news24.com/SouthAfrica/News/athletics-coach-arrested-on-rape-charge-20180714> (accessed 25 May 2020).

495 Smit, "Athletics coach arrested on rape charge", <https://www.news24.com/SouthAfrica/News/athletics-coach-arrested-on-rape-charge-20180714> (accessed 25 May 2020).

496 Van Rooyen, "Afrigter kry opgekorte vonnis na verkragting," www.netwerk24.com/nuus/hof/afri-gter-kry-opgekorte-vonn-is-na-verkragting-20200305 (accessed on 22 May 2021).

497 Van Rooyen, "Afrigter kry opgekorte vonnis na verkragting," www.netwerk24.com/nuus/hof/afri-gter-kry-opgekorte-vonn-is-na-verkragting-20200305 (accessed on 22 May 2021).

498 Van Rooyen, "Afrigter kry opgekorte vonnis na verkragting," www.netwerk24.com/nuus/hof/afri-gter-kry-opgekorte-vonn-is-na-verkragting-20200305 (accessed on 22 May 2021).

The 'Dros' rape case:

Form of penetration exercised and charged for in court – Penetration by the accused's penis into the seven-year-old victim's mouth.⁴⁹⁹ Penetration by the accused's finger into the seven-year-old victim's vagina.⁵⁰⁰ One count of rape⁵⁰¹ reading as follows: "he sexually penetrated the complainant, who is a child under the age of 12 years, more than once".⁵⁰²

Penetration exercised but not charged for - Not applicable.

Prescribed minimum sentence – According to Section 51(1) of the *Criminal Law Amendment Act* 105 of 1997, the accused must be sentenced to life imprisonment on the rape charge as the victim was younger than 16 years old during the incident.

Sentence imposed by court – Sentenced to one life imprisonment sentence.⁵⁰³

Substantial and compelling circumstances accepted by court – No substantial circumstances present to lessen the prescribed minimum sentence.⁵⁰⁴

499 Bhengu, "Five chilling revelations from the trial of Dros Rapist Nicholas Ninow", <https://www.timeslive.co.za/news/south-africa/2019-09-11-five-chilling-revelations-from-the-trial-of-dros-rapist-nicholas-ninow/> (accessed on 19 April 2021).

500 Bhengu, "Five chilling revelations from the trial of Dros Rapist Nicholas Ninow", <https://www.timeslive.co.za/news/south-africa/2019-09-11-five-chilling-revelations-from-the-trial-of-dros-rapist-nicholas-ninow/> (accessed on 19 April 2021).

501 Bhengu, "Five chilling revelations from the trial of Dros Rapist Nicholas Ninow", <https://www.timeslive.co.za/news/south-africa/2019-09-11-five-chilling-revelations-from-the-trial-of-dros-rapist-nicholas-ninow/> (accessed on 19 April 2021).

Judgement and sentence as received from Judge Mosopa on 25 August 2021.

502 Judgement and sentence as received from Judge Masopa on 25 August 2021.

503 Algoa FM News, Staff Reporter, "Nicholas Ninow found guilty on two counts of rape", <https://www.algoafm.co.za/domestic/nicholas-ninow-found-guilty-on-two-counts-of-rape> (accessed on 8 July 2021).

Judgement and sentence as received from Judge Mosopa on 25 August 2021.

504 Algoa FM News, Staff Reporter, "Nicholas Ninow found guilty on two counts of rape", <https://www.algoafm.co.za/domestic/nicholas-ninow-found-guilty-on-two-counts-of-rape> (accessed on 8 July 2021).

Chapter 4

Comparative study

4.1 Introduction

A comparative study will be conducted in this chapter between the rape legislation of South Africa, Canada, and England. As already explained in paragraph 1.3 of Chapter 1, Canada and England were chosen because not only do they share the same Common Law as South Africa, they also have different forms of rape (sexual assault) and each form has its own sentence. The aim of the study is to investigate whether South Africa's rape legislation is in line with international standards and whether any recommendations can be made for South Africa.

4.2 The legal position in England

One of the most quoted passages relating to rape in England's Legal Code is by Lord Chief Justice Sir Matthew Hale from the 17th century:⁵⁰⁵

Rape...is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent.

Three decades ago, 'real rape' (a term proposed by Estrich in 1987)⁵⁰⁶ in England and Wales was when the accused was a stranger, the rape took place in an outdoor environment, force was used, the victim resisted the force and visible injuries could be observed.⁵⁰⁷ Since then, the definition of rape has changed to the accused intentionally penetrating the vagina, anus or mouth of the victim with his penis, and the absence of consent – as will be apparent from the discussion in paragraphs 4.2.2 and 4.2.3 below.

In 2007, 11648 rape cases were reported to the police in England and Wales, 1725 of these rape cases went to court, of which 783 ended in a conviction.⁵⁰⁸ The low number of convictions in rape cases is unsettling; this sends a message to the community that rape is becoming permissible.⁵⁰⁹ In 2019 and 2020, statistics showed that 99% of rape

505 Bain 2010:96.

506 Hohl & Stanko 2015:329.

507 Hohl & Stanko 2015:329.

508 Temkin 2010:713.

509 Shaw, "Rape convictions fall to record low in England and Wales", <https://www.bbc.com/news/uk-53588705> (accessed on 15 January 2021).

cases reported ended in no litigation. This makes one wonder whether rape has not become “the perfect crime” in England and Wales.⁵¹⁰

In the following paragraphs, the development of the legal position of rape in England will be explored.

4.2.1 Rape history in England

Rape was originally a Common Law offence in England and it was classified as a felony. Legal definitions of rape and of sexual violence have been continuously evolving with the changing times. Until at least the Early Modern Period (to c. 1700), rape was regarded as *raptus*, which meant abduction (the theft of another man’s property, as woman were considered property), notwithstanding the fact that intercourse took place.⁵¹¹

Women were expected to stay in their private, safe, domestic realm. There was no reason for a woman to be out of their homes without male protection. If they were to go out, they were putting themselves in the position where they were available for men to rape them. The insinuation that women brought rape upon themselves made it even harder for women to report the rape.⁵¹² The legal system consisted of men; these men were not keen on prosecuting other men on sexual assault charges, unless the woman was a virgin. Nevertheless, presiding officers were seldom persuaded that a sexual assault actually took place.⁵¹³

The first inscribed rape legislation was implemented during King Aethelberht’s reign in the sixth and seventh century. If an accused was caught having had intercourse with another man’s lady servant, the penalty was quite severe. The penalty was payable by the accused to the woman’s owner.⁵¹⁴

510 Moloney, “Off limits, Is rape the perfect crime?”, <https://news.sky.com/story/99-of-rapes-reported-to-police-in-england-and-wales-do-not-result-in-legal-proceedings-why-12104130> (accessed on 15 January 2021).

511 D’Cruze 2011:388.

512 Walker 2018:430.

513 King, “Rape in England 1600-1800: trials, narratives and the question of consent”, http://etheses.dur.ac.uk/4844/1/4844_2313.PDF (accessed on 20 April 2021).

514 King, “Rape in England 1600-1800: trials, narratives and the question of consent”, http://etheses.dur.ac.uk/4844/1/4844_2313.PDF (accessed on 20 April 2021).

During the ninth century, the Law Codes of Alfred⁵¹⁵ was written whereby non-consensual sex was forbidden. This was the very first attempt at formally defining rape, and it read as follows: “If anyone seizes by the breast a young woman”, the compensation was to be five shillings; “if he throws her down but does not lie with her”, ten shillings compensation was due, and forced penetration merited sixty shillings compensation”. This ‘fine’ was to be paid directly to the victim.⁵¹⁶

Codification of the law against sexual violence took place in the form of the *Statutes of Westminster* in 1275 and 1285, respectively. The Statutes accepted sexual violence as a serious crime with the possibility of a death penalty. In England, rape was added (in 1576 and 1612 respectively) to the list of aggravated crimes for which the death penalty was compulsory. In several of England’s colonies, rapists were hanged.⁵¹⁷

Lord Hale’s legal definition was instituted in the seventeenth century and it remained in force for more than two centuries. Hale defined rape as “vaginal penetration without consent but not necessarily involving emission”.⁵¹⁸

Rape consisted of a three-legged approach consisting of “sexual intercourse, defined as penile penetration of the vagina (sometimes stipulating ejaculation too); force (the degree and nature of which varied); and the (automatically female) victim’s non-consent”. The legal categorization for rape depended on the status of the perpetrator and/or victim, the connection between them, and the conditions in which the act happened.⁵¹⁹

During the late seveneenth century the legal requirements for a rape conviction was narrowed down even further and read as follows: the victim should have previously been of good fame; she had to reveal the incident to a third party immediately after the incident; she had to display evidence of physical injury; and she had to be able to prove her attempts to oppose the incident.⁵²⁰ For a victim to have a positive outcome

515 The law-code of King Alfred the Great is one of the largest and most forceful legislative acts. It was also known as the law or judgement book.
Dammery, “The Law-Code of King Alfred the Great”,
file:///C:/Users/User/Downloads/Dammery_phd_16884 (vol_1).pdf (accessed on 11 July 2021).

516 King, “Rape in England 1600-1800: trials, narratives and the question of consent”,
http://theses.dur.ac.uk/4844/1/4844_2313.PDF (accessed on 20 April 2021).

517 Walker 2018:433.

518 D’Cruze 2011:389.

519 Walker 2018:431.

520 D’Cruze 2011:388-389.

in a rape case was exceptionally unusual. The onus was on the victim to prove that she had really been raped. The victim had to report the matter immediately after the rape had taken place and if the victim had shredded or bloody clothing, which showed that violence had taken place, the matter was more likely to reach court.⁵²¹

In 1956, rape was prohibited in the *Sexual Offences Act*. Section 1 of the *Sexual Offences Act 1956* described it as follows:

Rape:

- (i) It is felony for a man to rape a woman.
- (ii) A man who induces a married woman to have sexual intercourse with him by impersonating her husband commits rape.

Although rape was dealt with according to section 1 of the *Sexual Offences Act* of 1956, there was no modern definition for the crime of rape. The traditional Common Law definition derived from the 17th century was still in use, being that rape consists of a man having unlawful sexual intercourse with a woman without her consent, by force or fraud or fear.⁵²²

The essence of a rape charge was the lack of consent, even where no force was used, the act could still constitute rape. The test was thus: “was consent obtained” and “was the act against the victim’s will”.⁵²³ It was wrong to assume automatically the following before a conviction of rape could follow: the victim had to indicate that injury truly took place or that the victim physically withstood the attack.⁵²⁴ The lack of consent would thus be sufficient to constitute a rape conviction.

On 3 November 1994, this definition was substituted by the following definition in terms of section 142 of the *Criminal Justice and Public Order Act 1994*:

- (1) It is an offence for a man to rape a woman or another man; and
- (2) A man commits rape if:

521 King, “The History of rape laws: some might find it hard to believe but the law is a lot better now”, <https://www.legalcheek.com/lc-journal-posts/the-history-of-rape-laws-some-might-find-it-hard-to-believe-but-the-law-is-a-lot-better-now/> (accessed on 21 April 2021).

522 Heilbron Committee, Report of the Advisory Group on the Law of Rape Cmnd. 6352 (1975):3. See <https://www.ojp.gov/pdffiles1/Digitization/37318NCJRS.pdf> (accessed on 11 July 2021).

523 Heilbron Committee, Report of the Advisory Group on the Law of Rape Cmnd. 6352 (1975):3. See <https://www.ojp.gov/pdffiles1/Digitization/37318NCJRS.pdf> (accessed on 11 July 2021).

524 Heilbron Committee, Report of the Advisory Group on the Law of Rape Cmnd. 6352 (1975):3. See <https://www.ojp.gov/pdffiles1/Digitization/37318NCJRS.pdf> (accessed on 11 July 2021).

- (a) he has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it; and
 - (b) at the time he knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it.
- (3) A man also commits rape if he induces a married woman to have sexual intercourse with him by impersonating her husband.

In 2004, the aforementioned section was replaced by section 1 of the *Sexual Offences Act 2003* and left England with an even broader definition of rape. This is the most recent definition of rape and will be discussed in more detail in the next paragraph.

4.2.2 Rape in terms of the *Sexual Offences Act 2003*

At present, rape is a statutory offence in England and Wales. The *Sexual Offences Act 2003*, which creates various sexual offences, was implemented on 1 May 2004. The Act only applies to offences committed on or after 1 May 2004. Its purpose was to strengthen and bring the law on sexual offences up to date, whilst improving the protection of victims of rape. The Act extended the definition of rape further to include oral sex and introduced the offence “assault by penetration” and “causing a person to engage in sexual activity without consent”.⁵²⁵

Section 1 of the *Sexual Offences Act 2003* creates the offence of rape. A person commits rape if “he intentionally penetrates the vagina, anus or mouth of another person with his penis, the complainant does not consent to the penetration, and the accused does not reasonably believe that the complainant consents”.

Section 2 of the *Sexual Offences Act 2003* creates the offence of “assault by penetration”. A person commits assault by penetration if “he intentionally penetrates the vagina or anus of the complainant with a part of his body or anything else, the penetration is sexual, the complainant does not consent to the penetration, and the accused does not reasonably believe that the complainant consents.”

The prescribed maximum sentence for contravening both section 1 and section 2 is life imprisonment.⁵²⁶ Assault by penetration closely mirrors section 1’s definition of rape and prescribes the same maximum sentence of life imprisonment. However, it differs from the definition of rape in that it does not include penetration of the mouth and carries the additional requirement that “the penetration is sexual”. Any other object

⁵²⁵ Warburton 2004:533. Also see *Sexual Offences Act 2003*: section 2 & 4.

⁵²⁶ *Sexual Offences Act 2003*: section 1(4) & 2(4).

or part of the accused's body, instead of the accused's penis, can be used to perform the penetration. "Assault by penetration" can be committed by a male or a female, whereas rape can only be committed by a male, as penetration by a penis is a requirement.⁵²⁷

Section 4 creates the offence of "causing a person to engage in sexual activity without consent". A person commits this offence if "he intentionally causes another person to engage in an activity, the activity is sexual, the other person does not consent to engaging in the activity, and he does not reasonably believe that the other person consents."⁵²⁸

A person is, for example, guilty of an offence under section 4 if his conduct involved causing "penetration of the complainant's anus or vagina, penetration of the complainant's mouth with a person's penis, penetration of a person's anus or vagina with a part of another person's body or with anything else." The prescribed maximum sentence for contravening section 4 is (similar to contravention of sections 1 and 2), life imprisonment.⁵²⁹

4.2.3 Defining "consent"

Section 74 of the *Sexual Offences Act 2003* defines "consent" as follows: "a person consents if he agrees by choice and has the freedom and capacity to make that choice". "Consent" consists of two stages – the first stage being whether the victim had the ability to agree with the particular sexual activity in question and secondly whether the victim made the choice to partake in the sexual activity freely and without being forced.⁵³⁰

527 *Sexual Offences Act 2003*: section 2(1)(b). Also see Hammond "Perceptions of Male Rape and Sexual Assault in a U.K. Male Sample: Barriers to Reporting and the Impacts of Victimisation,"

<https://eprints.hud.ac.uk/id/eprint/29241/7/Perceptions%20of%20Male%20Rape%20and%20Sexual%20Assault.pdf> (accessed on 24 August 2021).

528 *Sexual Offences Act 2003*: section 4(2).

The question whether the belief was reasonable is to be determined by looking at all the circumstances, including any steps the accused has taken to ascertain whether the other person consents.

529 *Sexual Offences Act 2003*: section 4(4) & 4(5).

530 The Crown Prosecutions Service CPS, "Rape and Sexual Offences - Chapter 6: Consent", <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-6-consent> (accessed on 12 July 2021).

4.2.4 What role does the HIV status of the accused play?

According to a study that was conducted on the transmission of HIV, people believe that the transmission of the virus could be seen as an act which might constitute rape, assault by penetration, attempted murder, and even murder.⁵³¹

In 1988, in the matter of *R v Clarence*⁵³² it was held that when a victim consents to intercourse with an accused, the victim automatically also consents to the possibility of contracting an infectious sexually transmitted disease.⁵³³

Since the aforementioned case, the Code for Crown Prosecutors regulates that where an accused does not reveal the fact that they have a sexually transmitted disease and still has consensual sexual intercourse with another person without notifying that person of their disease, he is not guilty of rape.⁵³⁴ However, if an accused knows that he/she has a sexual disease and still commits a sexual offence, this fact can be used as an aggravating factor for sentencing purposes.⁵³⁵ An accused can accordingly also be charged with the offence of recklessly causing serious bodily harm under section 20 of the *Offences Against the Person Act* of 1861.⁵³⁶

The matter of *R v Konzani*⁵³⁷ was seen as a turning point in England's law regarding rape and the HIV status of an accused. It was held in this particular matter that even where valid consent was obtained to pursue sexual intercourse, the intentional and careless transmission of HIV would ensure a charge according to the *Offences Against the Person Act* of 1861 (charges ranging from assault to homicide). A valid defence in this instance would, however, be whether the non-infected victim gave informed consent, while this consent included the party deliberately accepting to run the specific risk that might occur.⁵³⁸

531 Dodds 2009:139.

532 *R v Clarence* (1988) 22 QBD 23.

533 Cowan 2014:140.

534 The Crown Prosecutions Service CPS "Intentional or Reckless Sexual Transmission of Infection", <https://www.cps.gov.uk/legal-guidance/intentional-or-reckless-sexual-transmission-infection> (accessed on 12 July 2021).

535 The Crown Prosecutions Service CPS "Intentional or Reckless Sexual Transmission of Infection", <https://www.cps.gov.uk/legal-guidance/intentional-or-reckless-sexual-transmission-infection> (accessed on 12 July 2021).

536 Dodds 2009:136.

537 *R v. Konzani* [2005] EWCA Crim 706.

538 Cowan 2014:140.

In 2017, Daryll Rowe was convicted on five counts of causing grievous bodily harm after he infected five victims with the HIV virus and on another five counts of attempted grievous bodily harm after he attempted to infect five other victims. This case was reported to be the first case where the accused was convicted for intentionally transmitting HIV.⁵³⁹ At present, only cases where transmission occurred will be pursued (except when the defendant intentionally attempted but failed to transmit the infection).

The Crown Prosecution Guidelines further emphasises that only cases where reliable medical and factual evidence is present, which can testify regarding the reckless transmission and the knowledge of the HIV status of the accused, will be prosecuted.⁵⁴⁰

4.2.5 Sentencing

Historically the courts had wide judicial discretion when it came to sentencing rape perpetrators. The status of the victim and of the accused determined the seriousness/intensity of the sentence which was to be imposed.⁵⁴¹ A good example of this is the case of Colonel Francis Charteris.⁵⁴² During 1730, in Old Bailey, Colonel Charteris was charged with the rape of a poverty-stricken woman, Ann Bond. This case made headlines and was seen as one of the most famous historical rape cases of all time. The accused was an extremely wealthy man with a dubious reputation, whereas the victim was a servant, respectable, and a paragon of virtue. There were no witnesses to the rape, nevertheless the accused was found guilty of raping the victim and the death penalty was imposed. A campaign was launched to change the sentence imposed, and the victim herself participated in this campaign. A meeting was held on 6 April with "several Persons of Distinction and Eminent Lawyers" during which

539 Brammer, "UK man found guilty of knowingly spreading HIV", <https://www.nbcnews.com/feature/nbc-out/uk-man-found-guilty-knowingly-spreading-hiv-n821541> (accessed on 13 July 2021).

540 Cowan 2014:140, See also Crown Prosecution Guidelines, CPS "Intentional or Reckless Sexual Transmission of Infection", <https://www.cps.gov.uk/legal-guidance/intentional-or-reckless-sexual-transmission-infection> (accessed on 12 July 2021).

The Guidelines also state that the "charge can only ever be one of assault, not rape, although the transmission of an infection can be an aggravating factor for sentencing purposes following a sexual assault conviction".

541 Walsh 1986:1126.

542 Simpson 2004:27-70.

mercy was granted for the accused soon afterwards. The sentence of the accused was changed to a sentence whereby the accused had to pay a large amount of money to the victim.⁵⁴³

During 1828, the sentence for rape was contained in the *Offences Against the Person Act 1828*. Section 16 read as follows: “Every person convicted of the Crime of Rape shall suffer Death as a Felon”.

Until 1841, rape was seen as an offence for which the death sentence could be imposed. The death penalty for rape was later declared invalid by section 3 of the *Substitution of Punishments for Death Act 1841* and, even later, the *Criminal Justice Act 1948* substituted the death penalty for life imprisonment.⁵⁴⁴

Sentences, however, were not consistently imposed. For example, an accused who raped a nun or an accused who raped a prostitute would not receive the same sentence. During 1863, a rapist was found not guilty of raping a woman “because she had acted foolishly in going with the prisoner through the gardens”. Another man was found not guilty of raping a woman during 1879 because the woman said the accused could walk her home.⁵⁴⁵

According to the Ministry of Justice’s figures released in 2010, it was estimated that the average sentence for rape was longer than eight years’ imprisonment.⁵⁴⁶

543 Simpson 2004:27-70.

544 Johnson, “Buggery and Parliament, 1533–2017”, <https://onlinelibrary.wiley.com/doi/full/10.1111/1750-0206.12463> (Accessed on 14 July 2021).

545 King, “The History of rape laws: some might find it hard to believe but the law is a lot better now”, <https://www.legalcheek.com/lc-journal-posts/the-history-of-rape-laws-some-might-find-it-hard-to-believe-but-the-law-is-a-lot-better-now/> (accessed on 21 April 2021).

546 Clarke “Rape sentences now average eight years, Ministry of Justice figures show”, <https://www.theguardian.com/society/2011/may/26/rape-sentence-average-eight-years-justice-figures> (accessed on 15 January 2021).

The Sexual Offences Definitive Guideline⁵⁴⁷ came into force on 1 April 2014 and adopted a two-step approach to sentencing. The Sentencing Council⁵⁴⁸ provides offence-specific sentencing guidelines to Magistrates and Crown Courts in England and Wales. In terms of step one, the courts need to determine the offence based on the harm caused (category 1,2 or 3), while in terms of step two, the courts must determine the culpability (group A or B) of the offender based on the prime elements of the case.⁵⁴⁹ The following table indicates the different categories, followed by the prescribed sentence. Step 1 is determining the category of harm as follows:

Harm:

Category 1	Category 2	Category 3
One or more aggravated factors from category 2; ⁵⁵⁰ The grave effect caused by a mixture of category 2 factors. ⁵⁵¹	Severe emotional or bodily harm; ⁵⁵² Pregnancy or a sexual transmitted disease because of the offence; ⁵⁵³	Factors that are not present from category 1 and 2. ⁵⁶⁰

547 Section 120 of the *Coroners and Justice Act 2009* provides that the Sentencing Council issue a definitive guideline. It applies to all offenders aged 18 and older, who are sentenced on or after 1 April 2014.

Section 125(1) of the *Coroners and Justice Act 2009* provides that when sentencing offences committed on or after 6 April 2010:

“Every court –

(a) must, in sentencing an offender, follow any sentencing guideline which is relevant to the offender’s case, and

(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function, unless the court is satisfied that it would be contrary to the interests of justice to do so.”

548 The Sentencing Council for England and Wales was established in April 2010 to promote greater transparency and consistency in sentencing, while maintaining the independence of the judiciary. The primary role of the Sentencing Council is to issue guidelines on sentencing, which the courts must follow unless it is in the interests of justice not to do so. The Sentencing Council is an independent, non-departmental public body.

549 Carline *et al* 2018:3-5.

550 Sentencing Council, “Rape”, <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).

551 Sentencing Council, “Rape”, <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).

552 Sentencing Council, “Rape”, <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).

553 Sentencing Council, “Rape”, <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).

560 Sentencing Council, “Rape”, <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).

	<p>Added unnecessary humiliation;⁵⁵⁴</p> <p>Abduction;⁵⁵⁵</p> <p>Extended confinement;⁵⁵⁶</p> <p>More than the necessary violence or threats of violence required by the offence;⁵⁵⁷</p> <p>Compelled entry into the victim's home;⁵⁵⁸</p> <p>Victim is exceptionally defenceless due to personal circumstances.⁵⁵⁹</p>	
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Step 2 determines the culpability group as follows:

Culpability:

Culpability Group A	Culpability Group B
<p>Considerable planning of the offence;⁵⁶¹</p> <p>Accused works together with other people to commit the offence;⁵⁶²</p>	<p>Factors of Group A not present.⁵⁷²</p>

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- 554 Sentencing Council, "Rape", <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 555 Sentencing Council, "Rape", <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 556 Sentencing Council, "Rape", <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 557 Sentencing Council, "Rape", <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 558 Sentencing Council, "Rape", <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 559 Sentencing Council, "Rape", <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 561 Sentencing Council, "Rape", <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 562 Sentencing Council, "Rape", <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 572 Sentencing Council, "Rape", <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).

<p>Victim uses alcohol/drugs facilitated by the accused;⁵⁶³</p> <p>Abuse of trust;⁵⁶⁴</p> <p>Previous violence against victim;⁵⁶⁵</p> <p>During burglary the offence is committed;⁵⁶⁶</p> <p>Recording of the offence;⁵⁶⁷</p> <p>Commercial exploitation and/or motivation;⁵⁶⁸</p> <p>Offence racially or religiously aggravated;⁵⁶⁹</p> <p>“Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation) or transgender identity (or presumed transgender identity)”;⁵⁷⁰</p> <p>“Offence motivated by, or demonstrating, hostility to the victim based on his or her disability (or presumed disability)”;⁵⁷¹</p>	
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After the offence is categorised as a Category 1/2/3 offence and a Group A/B offence, the sentence is determined as follows:

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- 563 Sentencing Council, “Rape”, <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 564 Sentencing Council, “Rape”, <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 565 Sentencing Council, “Rape”, <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 566 Sentencing Council, “Rape”, <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 567 Sentencing Council, “Rape”, <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 568 Sentencing Council, “Rape”, <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 569 Sentencing Council, “Rape”, <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 570 Sentencing Council, “Rape”, <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 571 Sentencing Council, “Rape”, <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).

	Group A	Group B
Category 1	Starting point 15 years' custody ⁵⁷³ Category range 13-19 years' custody ⁵⁷⁴	Starting point 12 years' custody ⁵⁷⁵ Category range 10-15 years' custody ⁵⁷⁶
Category 2	Starting point 10 years' custody ⁵⁷⁷ Category range 9-13 years' custody ⁵⁷⁸	Starting point 8 years' custody ⁵⁷⁹ Category range 7-9 years' custody ⁵⁸⁰
Category 3	Starting point 7 years' custody ⁵⁸¹ Category range 6-9 years' custody ⁵⁸²	Starting point 5 years' custody ⁵⁸³ Category range 4-7 years' custody ⁵⁸⁴

The starting point of each sentence remains the same irrespective of the accused's plea or previous convictions. The courts then have the option to adjust the starting point sentence upwards or downwards in accordance with appropriate aggravating and mitigating factors.⁵⁸⁵

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- 573 Sentencing Council, "Rape", <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 574 Sentencing Council, "Rape", <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 575 Sentencing Council, "Rape", <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 576 Sentencing Council, "Rape", <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 577 Sentencing Council, "Rape", <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 578 Sentencing Council, "Rape", <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 579 Sentencing Council, "Rape", <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 580 Sentencing Council, "Rape", <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 581 Sentencing Council, "Rape", <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 582 Sentencing Council, "Rape", <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 583 Sentencing Council, "Rape", <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 584 Sentencing Council, "Rape", <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).
- 585 Carline *et al* 2018:5.

The aim of the Sentencing Council Guideline is to reflect the long-term effects of sexual offences on victims.⁵⁸⁶ The Crown Prosecution Service Guideline states the following: “The court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and of the offender, taking into account, so far as the court considers it appropriate, the impact on the victim”. Thus, the victim’s belief on what an appropriate sentence should be is not relevant.⁵⁸⁷

In *R v H and Others*⁵⁸⁸ it was determined that a convicted accused must be sentenced according to present-day rules and guidelines. The only aspect that the court must keep in mind when sentencing the accused is that the sentence is restricted by the maximum amount, as it was at time of the offence.⁵⁸⁹

Today, rape carries a maximum penalty of life imprisonment and a minimum of four years’ imprisonment (although the sentence range is between four and 19 years’ imprisonment),⁵⁹⁰ depending on the facts of each case.⁵⁹¹ Assault by penetration carries a maximum penalty of life imprisonment, although the sentence can range from community service to 19 years’ imprisonment.⁵⁹²

From 2012 until 2017, the number of life sentences imposed on accused has increased steadily from 23 to 42, where the majority (81%, or 34) of these sentences imposed for accused in rape cases.⁵⁹³

586 Carline *et al* 2018:5.

587 Van der Merwe & Skelton 2015:367.

588 *R v H and Others* [2012] 2 CAR(S) 21.

589 The Code for Crown Prosecutions, Rape and Sexual Offences - Chapter 13: Sentencing.

590 Sentencing Council, “Rape”, <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).

591 *Sexual Offences Act* 2003: section 1(4) - “A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life”.

592 *Sexual Offences Act* 2003: section 2(4) – “A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life”.

593 Elkin, “Sexual offending: victimisation and the path through the criminal justice system”, <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffendingvictimisationandthepaththroughthecriminaljusticesystem/2018-12-13#sentencing> (accessed on 14 January 2021).

4.2.6 Case law

4.2.6.1 *Prestbury, R v [2017] EWCA Crim 2495*

The accused in this case was charged with rape in terms of section 1 and assault by penetration in terms of section 2 of the *Sexual Offences Act 2003*.⁵⁹⁴

The incident took place on 30 July 2015 in the complainant's bedroom.⁵⁹⁵ The Recorder⁵⁹⁶ found that the accused digitally penetrated the complainant's vagina (assault by penetration) without her consent and thereafter also penetrated the victim's vagina with his penis (rape).⁵⁹⁷ The accused was convicted before Mr Recorder Featherby QC by a jury on both the rape and assault by penetration charges.⁵⁹⁸

The Recorder conceded that the starting point for sentencing rape in Category 3B⁵⁹⁹ was five years, with a range of between four and seven years. There were no aggravating circumstances and the accused's lack of previous convictions played a part in sentencing. The Recorder imposed the following sentence: with regards to the rape charge a term of two years and nine months' imprisonment, and with regards to the assault by penetration charge a concurrent term of 18 months' imprisonment. The total term was thus two years and nine months' imprisonment.⁶⁰⁰

594 *Prestbury, R v [2017] EWCA Crim 2495:par. 2.*

595 *Prestbury, R v [2017] EWCA Crim 2495:par. 3-6.*

596 The Recorder is the first step on the judicial ladder to appointment to the circuit bench.

597 *Prestbury, R v [2017] EWCA Crim 2495:par. 7.*

598 *Prestbury, R v [2017] EWCA Crim 2495:par. 2.*

599 *Sexual Offences Act 2003, Section 1 Rape.*

Category 3 (degree of harm): the following was not present during the rape offence – “severe psychological or physical harm, pregnancy or STI because of the rape, additional degradation/humiliation, abduction prolonged detention/sustained incident, violence or threats of violence (beyond that which is inherent in the offence), forced/uninvited entry into victim's home and victim is particularly vulnerable due to personal circumstances” (victim being 13 years old) – thus, this rape offence is a Category 3 offence.

Category B (degree of culpability): the following was not present during the rape offence – “significant degree of planning by the accused, accused acted together with others to commit the offence, use of alcohol/drugs on victim to facilitate the offence, abuse of trust, previous violence against victim, offence committed in course of burglary, recording of the offence, commercial exploitation and/or motivation, offence racially or religiously aggravated, offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation) or transgender identity (or presumed transgender identity) and offence motivated by, or demonstrating, hostility to the victim based on his or her disability (or presumed disability)”- thus, this rape offence is a Category B offence.

Sentencing Council, “Rape”,

<https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 14 July 2021).

600 *Prestbury, R v [2017] EWCA Crim 2495:par. 18.*

Her Majesty's Attorney-General appealed against the sentence, under section 36 of the *Criminal Justice Act* 1988, as being excessively lenient.⁶⁰¹ It was argued that the Recorder fell short with regards to imposing an appropriate sentence that sufficiently reflected the seriousness of the offence.⁶⁰² Consequently, the term of two years and nine months on the rape charge was revoked and substituted with a term of five years' imprisonment. The sentence on the assault by penetration charge was left unchanged.⁶⁰³

4.2.6.2 The *Reynhard Tamos Maruli Tua Sinaga* case

The accused in this case committed various offences in Manchester, England, between 2015 and 2017. He was prosecuted in four trials between 2018 and 2020.⁶⁰⁴ He pleaded not guilty,⁶⁰⁵ but was convicted of 136 rape, eight attempted rape, two assault by penetration, and six sexual assault⁶⁰⁶ charges (44 victims were involved).⁶⁰⁷

The accused approached the victims in the street. He gave the men a drugged drink and then assaulted the victims while they were unconscious. He also recorded his attacks with a mobile phone and sometimes with two phones.⁶⁰⁸

The first trial ended on 10 July 2018, whereby the accused was convicted of 31 charges of rape, three charges of attempted rape, and six charges of sexual assault. He was sentenced to 33 life imprisonment sentences.⁶⁰⁹

601 *Prestbury, R v* [2017] EWCA Crim 2495:par. 1.

602 *Prestbury, R v* [2017] EWCA Crim 2495:par. 20.

603 *Prestbury, R v* [2017] EWCA Crim 2495:par. 26.

604 Pidd "Reynhard Sinaga: court to decide on whole-life sentence for rapist", <https://www.theguardian.com/uk-news/2020/jan/16/reynhard-sinaga-court-to-decide-on-whole-life-sentence-for-rapist> (accessed 5 May 2020).

605 Duncan "Reynhard Sinaga: Most prolific rapist in UK history jailed for life over Manchester attacks", <https://www.independent.co.uk/news/uk/crime/reynhard-sinaga-rape-trial-life-sentence-manchester-a9272156.html> (accessed 5 May 2020).

606 Sexual Assault is defined in the *Sexual Offences Act* 2003 Section 3 as follows:

- (1) A person (A) commits an offence (sexual assault) if—
 - (a) he intentionally touches another person (B),
 - (b) the touching is sexual,
 - (c) B does not consent to the touching, and
 - (d) A does not reasonably believe that B consents.

607 *R v McCann, Sinaga, Shah* [2020] EWCA Crim 1676:par21. See also <https://www.judiciary.uk/wp-content/uploads/2020/12/McCann-Sinaga-Shah-judgment-111220.pdf> (accessed on 14 July 2021).

608 Pidd "Reynhard Sinaga: court to decide on whole-life sentence for rapist", <https://www.theguardian.com/uk-news/2020/jan/16/reynhard-sinaga-court-to-decide-on-whole-life-sentence-for-rapist> (accessed 5 May 2020).

609 *R v McCann, Sinaga, Shah* [2020] EWCA Crim 1676:par. 22.

The second trial ended on 7 May 2019. The accused was convicted of a further 49 charges of rape, five charges of attempted rape, and one charge of assault by penetration. He was sentenced for these charges to another life imprisonment sentence with a minimum term of 20 years.⁶¹⁰

The third trial ended on 4 October 2019, whereby the accused was convicted of a further 26 charges of rape and one of assault by penetration.⁶¹¹

The fourth trial ended on 20 December 2019, in terms of which the accused was convicted of a further 30 charges of rape.⁶¹²

The sentences for trial three and four were handed down by the Court on 6 January 2020, whereby the accused received another life imprisonment sentence and the minimum term was increased to 30 years' imprisonment.⁶¹³ The accused was ultimately given 88 concurrent life sentences with a minimum term of 30 years' imprisonment on 136 rape charges of 25 victims.⁶¹⁴

The following aggravating circumstances were accepted by the court when sentencing the accused: the victims were vulnerable (they were intoxicated and alone at night), almost all the victims were repeatedly attacked, the accused used a date rape drug when committing these offences, these date rape drugs posed a risk of serious harm, in some of the incidents the accused forcibly held the victims, the offences were recorded on the accused's cell phone, the accused took 'souvenirs' in some cases, the offences involved a level of planning, the victims were kept at the accused's address for an extended time, the accused did not wear protection during penetration, the accused ejaculated on numerous of the incidents, one victim suffered anal injury, evidenced by the accused wiping blood from his anus while penetrating the victim,

Ridler, "Police now believe one of Britain's worst rapists Reynhard Sinaga targeted 206 men after new evidence emerged since his trial", <https://www.dailymail.co.uk/news/article-9042839/Joseph-McCann-Reynard-Sinaga-minimum-jail-terms-increased.html> (accessed on 25 August 2021).

610 *R v McCann, Sinaga, Shah* [2020] EWCA Crim 1676:par. 23.

611 *R v McCann, Sinaga, Shah* [2020] EWCA Crim 1676:par. 24.

612 *R v McCann, Sinaga, Shah* [2020] EWCA Crim 1676:par. 25.

613 *R v McCann, Sinaga, Shah* [2020] EWCA Crim 1676:par25.

614 Pidd, "Reynhard Sinaga: court to decide on whole-life sentence for rapist", <https://www.theguardian.com/uk-news/2020/jan/16/reynhard-sinaga-court-to-decide-on-whole-life-sentence-for-rapist> (accessed 5 May 2020). See also Pidd, "Reynhard Sinaga jailed for life for raping dozens of men in Manchester" <https://www.theguardian.com/uk-news/2020/jan/06/reynhard-sinaga-jailed-life-drugging-raping-men-manchester> (accessed on 25 August 2021).

“many victims suffered severe psychological harm”, and “at least one victim has experienced thoughts of self-harm and attempted suicide”.⁶¹⁵

In sentencing, Judge Goddard remarked:⁶¹⁶

You have shown not a jot of remorse, indeed, at times during the case seemed to actually be enjoying the trial process. You clearly have given no thought to the deep distress and lasting psychological damage you will have caused these young men.

Geoffrey Cox QC referred Sinaga’s sentence to the Court of Appeal under the excessively lenient strategy, as he thought a “whole-life order” should have been considered. Cox said:⁶¹⁷

After carefully considering the details of this case, I have decided to refer the sentence to the court of appeal. Sinaga carried out a horrifying number of attacks, over a lengthy period of time causing considerable pain and psychological suffering to his victims. It is now for the court to decide whether to increase the sentence.

Whole-life orders are reserved for the most serious murder cases to guarantee the lifelong imprisonment of the recipient.⁶¹⁸

Sinaga’s appeal case was indefinitely postponed due to the outbreak of the Covid-19 pandemic.⁶¹⁹ The Appeal was, however, heard during October 2020 at which time the Court of Appeal in London altered the accused’s minimum imprisonment term to 40 years’ imprisonment stating, “The multiple life sentences remain and whether the accused is in fact ever released will depend upon the assessment of risk by the Parole Board at the end of the minimum terms.”⁶²⁰

615 *R v McCann, Sinaga, Shah* [2020] EWCA Crim 1676:par35.

616 Duncan “Reynhard Sinaga: Most prolific rapist in UK history jailed for life over Manchester attacks”, <https://www.independent.co.uk/news/uk/crime/reynhard-sinaga-rape-trial-life-sentence-manchester-a9272156.html> (accessed 5 May 2020).

617 Pidd “Reynhard Sinaga: court to decide on whole-life sentence for rapist”, <https://www.theguardian.com/uk-news/2020/jan/16/reynhard-sinaga-court-to-decide-on-whole-life-sentence-for-rapist> (accessed 5 May 2020).

618 Pidd “Reynhard Sinaga: court to decide on whole-life sentence for rapist”, <https://www.theguardian.com/uk-news/2020/jan/16/reynhard-sinaga-court-to-decide-on-whole-life-sentence-for-rapist> (accessed 5 May 2020).

619 Abbit “Reynhard Sinaga’s Court of Appeal case postponed”, <https://www.manchestereveningnews.co.uk/news/greater-manchester-news/reynhard-sinagas-court-appeal-case-17978474> (accessed 5 May 2020).

620 *R v McCann, Sinaga, Shah* [2020] EWCA Crim 1676:par. 95.

4.2.7 Conclusion: South Africa and England compared

In the last couple of years, many laws have been enacted to respond to rape. These laws have been modified repeatedly while professionals attempted to reach agreement on this controversial issue.

In England, rape is defined as follows: an accused “intentionally penetrates another’s vagina, anus, or mouth with a penis, without the other person’s consent”.⁶²¹ England has another offence, namely assault by penetration; this is when “a person penetrates another person’s vagina or anus with any part of the body other than a penis, or by using an object, without the person’s consent”.⁶²²

South Africa’s original definition of rape was adopted from English Common Law. In South Africa today, rape is defined as “any person who unlawfully and intentionally commits an act of sexual penetration with a complainant without the consent of the complainant”.⁶²³ Rape in South Africa encompasses penetration with any part of the body of the accused, or any foreign object used in the vagina or anus of the complainant. In South Africa there is one offence, namely rape. England’s assault by penetration will thus also fall under rape if it occurred in South Africa.

In South Africa, the *Criminal Law Amendment Act* 105 of 1997 regulates the minimum sentence for rape, which under certain circumstances is life imprisonment. In England, the Sexual Offences Definitive Guideline sets guidelines for sentencing rape and assault by penetration offenders. The maximum sentence for a rape charge is life imprisonment, with definite imprisonment ranges for different scenarios⁶²⁴ (as discussed in paragraph 4.2.5), and the minimum sentence is four years’ direct imprisonment, whereas the minimum sentence for assault by penetration is community service.⁶²⁵

In South Africa, the courts may depart from the minimum sentence prescribed by law, on condition that the court finds substantial and compelling evidence, which justifies

621 *Sexual Offences Act* 2003: section 1.

622 *Sexual Offences Act* 2003: section 2.

623 *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007: section 3.

624 Sentencing Council, “Rape”, <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).

625 Sentencing Council, “Assault by penetration”, <https://www.sentencingcouncil.org.uk/offences/crown-court/item/assault-by-penetration/> (accessed on 24 August 2021).

the departure from the prescribed minimum sentence. The interpretation of 'substantial and compelling evidence' differs from court to court; hence, the length of sentences differs considerably.

In England, a concrete list of aggravating⁶²⁶ and mitigating⁶²⁷ factors must be considered when the court imposes an appropriate sentence.

There is a big difference between sentencing an assault by penetration accused in England (possibly community service) and a rape accused who committed a similar act (penetration of vagina or anus by any other body part or object) in South Africa (life imprisonment if the victim is under 16 years of age).

626 Aggravating circumstances used by the court when sentencing an accused - (Factors that contribute to higher culpability of the accused): "offence committed whilst on bail for other offences; failure to respond to previous sentences; offence was racially or religiously aggravated; offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation); offence motivated by, or demonstrating, hostility based on the victim's disability (or presumed disability); previous conviction(s), particularly where a pattern of repeat offending is disclosed; planning of an offence; an intention to commit more serious harm than actually resulted from the offence; offenders operating in groups or gangs; 'professional' offending; commission of the offence for financial gain (where this is not inherent in the offence itself); an attempt to conceal or dispose of evidence; failure to respond to warnings or concerns expressed by others about the offender's behaviour; offence motivated by hostility towards a minority group, or a member or members of it; deliberate targeting of vulnerable victim(s); commission of an offence while under the influence of alcohol or drugs; use of a weapon to frighten or injure victim; deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the offence; abuse of power; abuse of a position of trust". (Factors showing more serious degree of harm was used than is usually needed): "multiple victims; an especially serious physical or psychological effect on the victim, even if unintended; a sustained assault or repeated assaults on the same victim; victim is particularly vulnerable; location of the offence (for example, in an isolated place); offence is committed against those working in the public sector or providing a service to the public; presence of others for example, relatives, especially children or partner of the victim and additional degradation of the victim (for example, taking photographs of a victim as part of a sexual offence)". Sentencing Council, "Aggravating and mitigating factors", <https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/aggravating-and-mitigating-factors/> (accessed on 14 July 2021).

627 Mitigating circumstances used by the court when sentencing an accused - (Factors that contribute to lower culpability of the accused): "a greater degree of provocation than normally expected; mental illness or disability; youth or age, where it affects the responsibility of the individual defendant; the fact that the offender played only a minor role in the offence". (The accused's personal mitigating factors): "genuine remorse; admissions to police in interview; ready co-operation with authorities". Sentencing Council, "Aggravating and mitigating factors", <https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/aggravating-and-mitigating-factors/> (accessed on 14 July 2021).

4.3 The legal position in Canada

During the last few years, there has been an increase in the interest shown by communities in rape legislation in Canada. According to statistics released in 2009, the incidence of sexual assault per 100 000 people in Canada was 1,4 victims for every 100 000 people (ranked 76th on the list of most rape offences per country).⁶²⁸ During 2017, 24 672 sexual assault cases were reported and 42% of the sexual assault case decisions ended in a guilty verdict. It is also worth to mention that an estimated 83% of sexual assault cases in Canada are never reported to the police.⁶²⁹

In a Supreme Court judgment *R v Seaboyer; R v Gayme*⁶³⁰ the following was said:⁶³¹

Sexual assault is not like any other crime. In most cases, the target is a woman, and the perpetrator is a man (98.7 percent of those charged with sexual assault are men....). Unlike other crimes of a violent nature, it is for the most part unreported. Yet, by all accounts, women are victimized at an alarming rate and there is some evidence that an already frighteningly high rate of sexual assault is on the increase. The prosecution and conviction rates for sexual assault are among the lowest for all violent crimes. Perhaps more than any other crime, the fear and constant reality of sexual assault affects how women conduct their lives and how they define their relationship with the larger society. Sexual assault is not like any other crime.

4.3.1 Rape history in Canada

Canadian Rape Law in the early 1800s consisted of the view that raping a woman was a crime against a male's property. The view that was taken was that "the carrying off of a woman was of greater offence to her husband or father than to herself".⁶³² Rape was criminalised if a woman's reproductive function was damaged and it was defined as sexual intercourse with ejaculation.⁶³³

In the 18th century, the definition of rape by Sir William Blackstone included the use of force and the phrase "against her will". The definition read as follows: "unlawful and carnal knowledge of a woman by force, and against her will". However, this definition was not legally defined.⁶³⁴ This definition insinuated that the victim's opposition of the

628 NationMaster, "Crime Stats: compare key data on Canada & South Africa", <https://www.nationmaster.com/country-info/compare/Canada/South-Africa/Crime#2009> (accessed on 25 January 2021). Also see NationMaster, "Crime > Rape rate: Countries Compared", <https://www.nationmaster.com/country-info/stats/Crime/Rape-rate#2009> (accessed on 25 January 2021).

629 Department of Justice, "Just Facts, Sexual Assault", <https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2019/apr01.html> (Accessed on 25 August 2021).

630 *R v Seaboyer; R v Gayme* [1991] 2 S.C.R. 577.

631 *R v Seaboyer; R v Gayme* [1991] 2 S.C.R. 577:648-649.

632 Tang 1998:259.

633 Flaherty 1983:212.

634 Backhouse & Schpenroth 1983:59.

act was required. The clear opposition of the act by the victim was necessary, not solely a lack of approval by the victim.⁶³⁵ Proof was required “that a man had sexual intercourse with a woman (other than his wife) without the woman's consent”.⁶³⁶ The man's act was punishable by up to life imprisonment.⁶³⁷

Rape was not formally defined until 1892, even though rape was seen as a felony for more than 50 years before the codification of the crime.⁶³⁸ The definition in 1892 read as follows:⁶³⁹

rape is the act of a man having “carnal knowledge”⁶⁴⁰ with a woman who is not his wife without her consent.

This definition remained mostly unchanged until 1983. More specifically, on 4 August 1982, the Bill C-127 was passed in the House of Commons and on 1 January 1983 the Bill became law; thus, rape was codified in the *Criminal Code* C-127.⁶⁴¹ These amendments reflect the recent position. They will be discussed in the next paragraph.⁶⁴²

4.3.2 Rape in terms of current legislation

In terms of the *Criminal Code* (C-127), the term ‘sexual assault’ replaced ‘rape, attempted rape and indecent assault’, while a whole range of other sexual offences were also created.⁶⁴³

Canada's law regarding rape thus expanded in 1983.⁶⁴⁴ The idea that only men could commit rape ended (sexual assault is a crime which either gender can commit), proof of vaginal penetration by the penis was no longer required for a conviction, and the

635 Backhouse & Schpenroth 1983:58.

636 Somerville & Gall 2013:1.

637 Somerville & Gall 2013:1.

638 Backhouse & Schpenroth 1983:59.

639 Backhouse & Schpenroth 1983:59.

640 “Carnal knowledge” – meaning today: sexual intercourse.

641 Statistics Canada, “Legislative Influences”, https://www.statcan.gc.ca/eng/statistical-programs/document/3306_D6_V12 (accessed on 15 July 2021). Also see Roberts, “Sexual Assault Legislation in Canada, an evaluation”, <https://www.ojp.gov/pdffiles1/Digitization/130401NCJRS.pdf> (accessed on 15 July 2021).

642 Backhouse & Schpenroth 1983:59.

643 Tang 1998:260-261.

644 Tang 1998:262. See also Statistics Canada, “Legislative Influences”, https://www.statcan.gc.ca/eng/statistical-programs/document/3306_D6_V12 (accessed on 18 July 2021).

doctrine of recent complaint (in terms of which women had to report the incident at the first reasonable opportunity) was rejected.⁶⁴⁵

The offences of rape, attempted rape and indecent assault were all removed from the *Criminal Code* and replaced by the following offences: sexual assault, sexual assault with a weapon, threats, or bodily harm to a third party and aggravated sexual assault.

The term “rape” was removed to concede that sexual violence is not about sex, but about acts of emotional and physical violence. Sexual assault provides a wider definition and criminalises undesirable conduct such as touching, kissing, oral sex, and vaginal and anal intercourse.⁶⁴⁶

Sexual assault⁶⁴⁷ is defined as “any unwanted sexual act done by one person to another or sexual activity without one person’s consent or voluntary agreement”.

The *Criminal Code* defines the various forms of sexual assault as follows:

Simple Sexual Assault according to section 271 of the *Code*:⁶⁴⁸

Simple Sexual Assault occurs if a person is touched in any way that interferes with his/her sexual integrity: this includes kissing, touching, intercourse and any other sexual activity without his/her consent.

The sentence for Simple Sexual Assault is a maximum of ten years’ imprisonment.⁶⁴⁹

Sexual Assault with a weapon, threats to a third party or causing bodily harm, according to section 272 of the *Code* reads as follows:

Sexual assault with a weapon, threats to a third party or causing bodily harm occurs if a person is sexually assaulted by someone who:

- 1 carries, uses or threatens to use a weapon or an imitation of a weapon (imitation or real);
- 2 threatens to cause bodily harm to a person other than the victim (friend, family member or children);
- 3 causes bodily harm to the victim (chokes, suffocates or strangles the complainant); or
- 4 commits the assault with any other person – multiple assailants.

645 Somerville & Gall 2013:1.

646 Tang 1998:260.

647 *Criminal Code* R.S.C., 1985, c. C-46: section 271.

648 Voices for women, “Sexual assault and law”, <https://www.voicesforwomen.ca/Resources/Sexual-Assault-Law> (accessed 20 June 2020). See also *Criminal Code* R.S.C., 1985, c. C-46: section 271.

649 Voices for women, “Sexual assault and law”, <https://www.voicesforwomen.ca/Resources/Sexual-Assault-Law> (accessed 20 June 2020). See also *Criminal Code* R.S.C., 1985, c. C-46: section 271.

The prescribed sentence for this kind of offence is a maximum of 14 years' imprisonment.⁶⁵⁰

Aggravated Sexual Assault according to section 273 of the *Code* is the most severe form of sexual assault. It is defined as follows:

Aggravated Sexual Assault occurs if the person assaulted is wounded, maimed, disfigured and beaten, or in danger of losing her/his life while being sexually assaulted.

The maximum sentence for Aggravated Sexual Assault is life imprisonment.⁶⁵¹

The specific sentencing ranges for these offences are as follows:

	Sexual assault ⁶⁵²	Sexual assault with a weapon, threats to a third party, or causing bodily harm ⁶⁵³	Aggravated sexual assault ⁶⁵⁴
Criminal offence with indictment ⁶⁵⁵	Maximum of 10 years imprisonment. If the victim is younger than 16 years old, maximum of 14 years and minimum of one year imprisonment. ⁶⁵⁶	Maximum of 14 years imprisonment and a minimum – for a first offender, five years, and for a second or successive offender, seven years imprisonment. ⁶⁵⁷ If the victim is younger than 16	Maximum imprisonment for life and minimum for a first offender, five years, and for a second or successive offender, seven years imprisonment. ⁶⁵⁹ If the victim is younger than 16 years, to a

650 *Criminal Code* R.S.C., 1985, c. C-46: section 272.

651 *Criminal Code* R.S.C., 1985, c. C-46: section 273.

652 Biesenthal 1991:1 See also *Criminal Code* R.S.C., 1985, c. C-46: section 271.

653 Biesenthal 1991:1 See also *Criminal Code* R.S.C., 1985, c. C-46: section 272.

654 *Criminal Code* R.S.C., 1985, c. C-46: section 273.

655 Indictment meaning: If an accused is indicted on a sexual assault offence, the accused is given formal notice that it is believed that he/she committed the particular sexual offence. The indictment contains the primary information, which informs the accused of the charge/s against him/her.

656 *Criminal Code* R.S.C., 1985, c. C-46: section 271.

657 *Criminal Code* R.S.C., 1985, c. C-46: section 272(2).

659 *Criminal Code* R.S.C., 1985, c. C-46: section 273(2).

		years old, maximum sentence is life imprisonment and minimum sentence is five years imprisonment. ⁶⁵⁸	maximum of imprisonment for life and to a minimum of five years imprisonment. ⁶⁶⁰
Criminal offence for which no indictment ⁶⁶¹ is required	Maximum of 18 months imprisonment. If the victim is younger than 16 years old, to maximum imprisonment for not more than two years less a day and to a minimum of six months imprisonment. ⁶⁶²	Not applicable.	Not applicable.

To acquire a conviction the state must prove that the sexual assault had two elements – a conduct element and a mental element – the conduct element being *actus reus* and the mental act being *mens rea*. To prove the conduct element in the offence, the evidence must disclose that the accused touched the victim, the contact was sexual, and that the victim did not consent to the act.⁶⁶³

658 *Criminal Code* (R.S.C., 1985, c. C-46): section 272(2).

660 *Criminal Code* (R.S.C., 1985, c. C-46): section 273(2).

661 Indictment meaning: If an accused is indicted on a sexual assault offence, the accused is given formal notice that it is believed that he/she committed the particular sexual offence. The indictment contains the primary information, which informs the accused of the charge/s against him/her.

662 *Criminal Code* R.S.C., 1985, c. C-46: section 271.

663 Canadian Intergovernmental Conference Secretariat, "Reporting, Investigating and Prosecuting Sexual Assaults Committed Against Adults – Challenges and Promising Practices in Enhancing Access to Justice for Victims", <https://scics.ca/en/product-produit/reporting-investigating-and-prosecuting-sexual-assaults-committed-against-adults->

4.3.3 Defining “consent”

Section 273.1(1) of Canada’s *Criminal Code* defines consent as “the voluntary agreement to engage in the sexual activity in question”. Sexual activity will only be lawful when both parties’ consent to the activity. Parties must communicate their consent, whether through words or conduct. Silence or passivity is not equal to consent.⁶⁶⁴

Subsection 273.1(2) sets out a range of specific situations where there will be no valid consent, according to the law. These situations include scenarios where:⁶⁶⁵

- the agreement is expressed by the words or conduct of a person other than the complainant;
- the complainant is incapable of consenting to the activity;
- the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
- the complainant expresses, by words or conduct, a lack of agreement to engage in the activity, or
- the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

The person who initiates the sexual activity is responsible to ensure that valid consent is present. When the complainant said no to sexual relations, the accused cannot rely on the fact that time had elapsed, or that the complainant did not repeat her unwillingness. No one can legally consent in advance to sexual activity in the future (when he/she will be unconscious), or to sexual activity where he/she will suffer bodily harm.⁶⁶⁶

4.3.4 What role does the HIV status of the accused play?

Canada has no particular legislation that regulates HIV transmission in sexual assault cases. In most cases, where an accused has HIV, the accused will be charged with aggravated sexual assault, attempted murder, or murder.⁶⁶⁷ In the matter *R. v.*

challenges-and-promising-practices-in-enhancing-access-to-justice-for-victims/#a32 (accessed on 25 January 2021).

664 LEAF, “The law of consent in sexual assault”, <https://www.leaf.ca/the-law-of-consent-in-sexual-assault/> (accessed on 28 May 2020).

665 *Criminal Code* R.S.C., 1985, c. C-46: Section 273.1.

666 LEAF, “The law of consent in sexual assault”, <https://www.leaf.ca/the-law-of-consent-in-sexual-assault/> (accessed on 28 May 2020).

667 HIV Justice Network, “Canada”,

*Cuerrier*⁶⁶⁸ it was established that there rests a legal duty on an accused to disclose his HIV-positive status before having unprotected sex because it poses a “significant risk of serious bodily harm”.⁶⁶⁹ However, in the matter *R. v. Mabior*⁶⁷⁰ it was determined that the mandatory disclosure that rests on an accused to disclose his HIV status only applies when the sex poses a “realistic possibility of transmission of HIV”.⁶⁷¹

Accordingly, there rests no duty on an accused to disclose his HIV status if the accused uses a condom and the accused has a “low” viral load (under 1500 copies per ml of blood).⁶⁷² A more detailed discussion will follow in paragraph 4.3.6.1 (in the *R. v. Mabior*⁶⁷³ case) below.

4.3.5 Sentencing

The prescribed minimum sentence for sexual assault in Canada differs, depending on the facts of each case. There is only a mandatory minimum sentence of one year imprisonment for sexual assault if the victim was younger than 16 years. Where the victim was older than 16, no minimum sentence is prescribed. For the more serious forms of sexual violence, namely sexual assault with a weapon and aggravated sexual assault, the minimum sentence is five years’ imprisonment (even when the victim is younger than 16 years of age; if it is the second or subsequent offence of the accused, the minimum sentence is seven years’ imprisonment).

The minimum sentence for a sexual assault charge can be increased by specific factors. These aggravating factors include the accused’s sexual behaviour, the age of the victim, the level of vulnerability of the victim (whether victim is disabled), the liaison of trust, the degree of violence or force used; whether a weapon was involved, the demeanour of intrusion, whether penetration took place (digital or penile), effect of the

668 <https://www.hivjustice.net/country/ca/> (accessed on 18 July 2021).
R. v. Cuerrier [1998] 2 S.C.R. 371.
669 *R. v. Cuerrier* [1998] 2 S.C.R. 371.
670 *R. v. Mabior* 2012 SCC 47, [2012] 2 S.C.R. 584.
671 *R. v. Mabior* 2012 SCC 47, [2012] 2 S.C.R. 584.
672 HIV Justice Network, “Canada”,
<https://www.hivjustice.net/country/ca/> (accessed on 18 July 2021).
673 *R. v. Mabior* 2012 SCC 47, [2012] 2 S.C.R. 584.

intrusion on the victim, the attitude of the accused, and the probability of rehabilitation of the accused.⁶⁷⁴

There are also factors which could serve to lessen the sentence being imposed or reduce the charge being brought before court. These mitigating factors include the age of the accused, a guilty plea, and the accused's prior record (related or not).⁶⁷⁵

However, the Court will be bound, according to section 271 of the *Criminal Code* of Canada (as broadly explained in the paragraph 4.3.2), by the prescribed minimum sentence of one year imprisonment for sexual assault where the victim is younger than 16 years. The maximum sentence to be imposed if the victim is younger than 16 years is 14 years' imprisonment.⁶⁷⁶ If the victim is 16 years or older, there is no mandatory minimum sentence; there, is however a maximum sentence for a term of not more than ten years' imprisonment.⁶⁷⁷

According to section 272 of the *Criminal Code* of Canada (as broadly explained in the paragraph 4.3.2), the prescribed minimum sentence for sexual assault with a weapon is five years' imprisonment if the victim is younger than 16 years. The maximum sentence to be imposed if the victim is younger than 16 years old is life imprisonment.⁶⁷⁸ If the victim is 16 years or older, the minimum sentence is five years' imprisonment for a first offence, and seven years for a second or subsequent offence; there is however a maximum sentence for a term of not exceeding 14 years' imprisonment.⁶⁷⁹

674 Kruse Law Firm, "Minimum Sentence Sexual Assault Canada", <https://www.kruselaw.ca/sexual-assault/minimum-sentence-sexual-assault-canada/> (accessed on 19 January 2021).

675 Kruse Law Firm, "Minimum Sentence Sexual Assault Canada", <https://www.kruselaw.ca/sexual-assault/minimum-sentence-sexual-assault-canada/> (accessed on 19 January 2021).

See also *Criminal Code* R.S.C., 1985, c. C-46: section 271.

676 *Criminal Code* R.S.C., 1985, c. C-46: section 271.

677 Lakin Afolabi Law Professional Corporation, "What is the Minimum Sentence for Sexual Assault in Canada?", <https://lakinafolabilaw.com/what-is-the-minimum-sentence-for-sexual-assault-in-canada/> (accessed on 18 July 2021) Also see *Criminal Code* R.S.C., 1985, c. C-46: Section 271.

678 *Criminal Code* R.S.C., 1985, c. C-46: section 272.

679 Lakin Afolabi Law Professional Corporation, "What is the Minimum Sentence for Sexual Assault in Canada?", <https://lakinafolabilaw.com/what-is-the-minimum-sentence-for-sexual-assault-in-canada/> (accessed on 18 July 2021) Also see *Criminal Code* R.S.C., 1985, c. C-46: section 272.

Section 273 of the *Criminal Code* of Canada (as broadly explained in the paragraph 4.3.2) describes aggravated sexual assault. The prescribed minimum sentence for this offence is five years' imprisonment if the victim is younger than 16 years. The maximum sentence to be imposed if the victim is younger than 16 years is life imprisonment.⁶⁸⁰ If the victim is 16 years or older, the minimum sentence is five years' imprisonment for a first offence, and seven years for a second or subsequent offence. There is however a maximum sentence for a term of not exceeding 14 years' imprisonment.⁶⁸¹ Section 272 and 273 offences' maximum and minimum sentences are the same.

4.3.6 Case Law

4.3.6.1 *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584

The accused had sex with various women who came to his house, including the nine complainants in this case. He did not inform them of his HIV-positive status before having sex with them. Eight of the nine complainants testified that they would not have consented to have sex with the accused if they were aware of his HIV-status.⁶⁸² None of the complainants contracted HIV. The accused was charged with nine counts of aggravated sexual assault because of his failure to disclose his HIV-positive status to the complainants.⁶⁸³

The question in this matter was whether the conduct of an HIV-positive person who engages in sexual activities with others, without informing them of his/her HIV-positive status, amounts to aggravated sexual assault.⁶⁸⁴ The court referred to various authorities in addressing this matter.

In the case of *R. v. Cuerrier* [1998] 2 S.C.R. 371 the court stated the following:⁶⁸⁵

Failure to advise a partner of one's HIV status may constitute fraud-vitiating consent. Because HIV poses a risk of serious bodily harm, the operative offence is one of aggravated sexual assault, attracting a maximum sentence of life imprisonment. The court concludes that a person may be found guilty of aggravated sexual assault under s. 273 of the *Criminal Code* if he fails

680 *Criminal Code* R.S.C., 1985, c. C-46: section 273.

681 Lakin Afolabi Law Professional Corporation, "What is the Minimum Sentence for Sexual Assault in Canada?", <https://lakinafolabilaw.com/what-is-the-minimum-sentence-for-sexual-assault-in-canada/> (accessed on 18 July 2021) Also see *Criminal Code* R.S.C., 1985, c. C-46: Section 273.

682 *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R.584:par. 6.

683 *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584:par. 5-7.

684 *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584:par. 10.

685 *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584:par. 2.

to disclose HIV-positive status before intercourse and there is a realistic possibility that HIV will be transmitted. If the HIV-positive person has a low viral count because of treatment and there is condom protection, the threshold of a realistic possibility of transmission is not met...

The court also referred to *R. v. Sinclair* (1867), 13 Cox C.C. 28, where the Central Criminal Court stated:⁶⁸⁶

If the complainant would not have consented if she had known the fact, then her consent is vitiated by the deceit practised upon her, and the accused would be guilty of an assault.

The trial judge convicted the accused on six of the nine counts of aggravated sexual assault and acquitted him on the other three charges. The acquittal of the three charges was based on the viewpoint that “sexual intercourse, using a condom when viral loads are undetectable, does not place the complainant at significant risk of serious bodily harm”.⁶⁸⁷

The accused appealed these six convictions. The Court of Appeal held that “either low viral loads or condom use could negate the significant risk” and thus acquitted the accused of four more counts, leaving only two counts for which the accused could be convicted. However, in an attempt to get legal certainty on the matter, the Crown appealed these four acquittals to the Supreme Court of Canada.⁶⁸⁸

The Supreme Court convicted the accused on three of the four counts “because, although he had a low viral load when he had intercourse with three sexual partners, he did not use a condom”.⁶⁸⁹ The Supreme Court concluded that a low viral load combined with no condom use, meets the test for “a realistic possibility of transmission of HIV” and thus the accused’s initial conviction on the first three counts was upheld. In the case of the fourth complainant, the accused’s viral load was low at the time of intercourse, and he used a condom. Thus, the victim was not exposed to significant bodily harm and the Court was of the opinion that the trial judge’s conviction on this count had to be overturned.⁶⁹⁰

686 *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584;par. 30.

687 *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584;par. 8-10.

688 *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584;par. 9.

689 *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584;par. 109.

690 *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584;par. 103 & 109.

4.3.6.2 *R. v. P.*, 2004 NSCA 27

On 9 August 2002, the complainant, a 14-year-old girl, consumed a large amount of alcohol. She performed oral sex on a boy when the accused entered the bedroom. The accused was 24 years old and the complainant did not know him. The accused had sexual intercourse with the complainant. He testified that he had asked the complainant's permission to have sex with her.⁶⁹¹

The trial judge found that the accused committed sexual assault by way of sexually touching the complainant without her consent. The trial judge also found, "The accused not only had failed to secure the complainant's consent, but that he did not maintain an honest, even if mistaken, belief in her consent".⁶⁹²

The accused's testimony that he had asked the complainant for permission to have sex with her was thus rejected. The accused was sentenced to 18 months' imprisonment plus two years' probation.⁶⁹³ He appealed against the conviction.

On appeal, the issue was whether the complainant was incapable of consenting to the sexual activity.⁶⁹⁴ The Court of Appeal referred to Wright J. in *R. V. v Dennison* (2002) 208 N.S.R. that stated the following:⁶⁹⁵

The subjective question therefore becomes whether the Crown can establish beyond a reasonable doubt that the complainant's actual state of mind, at the relevant time, amounted to non-consent according to law. The Crown can establish the *actus reus* of non-consent by proving beyond a reasonable doubt either that the complainant did not agree to the sexual contact in question, or by proving beyond a reasonable doubt that any agreement by the complainant was involuntary. Even where the existence of agreement cannot be disproved beyond a reasonable doubt, there will be no consent unless that agreement is voluntary in nature. As referred to earlier, an agreement will be involuntary where any of the circumstances identified in s. 273.1(2) exist. The question becomes - is it enough that the intoxication deprives the complainant of the ability to make sound decisions or must it go so far as to prevent the exercise of choice? The answer to that, according to the legal authorities, is that in order to be found to have lacked the capability of consenting, the complainant must have been intoxicated to the point where she could not understand the sexual nature of the act or realize that she could choose to decline to participate.

The Appeal Court stated that the test for consent is a subjective test and that the accused took no reasonable steps to ascertain that the complainant was

691 *R. v. P.*, 2004 NSCA 27:3-6.

692 *R. v. P.*, 2004 NSCA 27:par. 8-9.

693 *R. v. P.*, 2004 NSCA 27:par. 11

694 *R. v. P.*, 2004 NSCA 27:par. 14.

695 *R. v. P.*, 2004 NSCA 27:par. 15.

consenting.⁶⁹⁶ The Appeal Court was content that the complainant's incapacity to consent emerged "from her failure to appreciate the difference between right and wrong, the nature, quality and import of what she was doing and that she did not, at the material time, have an operating mind".⁶⁹⁷ The Nova Scotia Court of Appeal dismissed the appeal.⁶⁹⁸

4.3.6.3 R. v. Lamy [2002] 1 S.C.R. 860, 2002 SCC 25

The victim, a 20-year-old woman, met the accused in a bar. The accused offered to give the victim a lift to another destination, but en route the accused stopped at his place of residence and took the victim inside. The accused undressed the victim, whereby he penetrated her vagina with his penis, turned her around and penetrated her anus with his penis and then he inserted an object (a decorated bamboo dildo) into her vagina.⁶⁹⁹

The trial court found the accused guilty of sexual assault with a weapon (section 272, penetrating the victim's vagina with an object)⁷⁰⁰ and of anal intercourse (penetrating the victim's anus with his penis, section 159, which was however abolished in 2019).⁷⁰¹ He was found not guilty of sexual assault causing bodily harm (section 272(1)(c) penetrating the victim's vagina with his penis) and the state did not appeal this acquittal.⁷⁰²

The Court of Appeal held that "the trial judge erred in concluding that the forced introduction of an object into the vagina of the complainant was sufficient to constitute sexual assault with a weapon".⁷⁰³

696 *R. v. P.*, 2004 NSCA 27:par. 38.

697 *R. v. P.*, 2004 NSCA 27:par. 39.

698 *R. v. P.*, 2004 NSCA 27:par. 40.

699 *R. v. Lamy* [2002] 1 S.C.R. 860, 2002 SCC 25:par. 4.

700 *Criminal Code* R.S.C 1985 c.C-46: section 272.

701 *Criminal Code* R.S.C 1985 c.C-46: section 159(1).

R. v. Lamy [2002] 1 S.C.R. 860, 2002 SCC 25:par. 2 & 6.

"Anal intercourse" according to Section 159 of the Criminal Code, reads as follows:

"Every person who engages in an act of anal intercourse is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction".

However, the Section was abolished in 2019, whereby anal intercourse was included as a simple sexual assault charge.

702 *Criminal Code* R.S.C 1985 c.C-46: section 272(1)(c). Also see *R. v. P.*, 2004 NSCA 27:par. 9.

703 *R. v. Lamy*, [2002] 1 S.C.R. 860, 2002 SCC 25:par. 7.

The case appeared before the Supreme Court of Appeal to decide if a dildo constitutes a weapon and if injury took place.⁷⁰⁴ The Court looked at the following Sections in the *Criminal Code*.⁷⁰⁵

The definition of “weapon” –

anything used, designed to be used or intended for use

(a) in causing death or injury to any person, or

(b) for the purpose of threatening or intimidating any person

and, without restricting the generality of the foregoing, includes a firearm and, for the purposes of sections 88, 267 and 272, anything used, designed to be used or intended for use in binding or tying up a person against their will;

Section 272(1) -

- (1) Every person commits an offence who, in committing a sexual assault,
- (a) carries, uses or threatens to use a weapon or an imitation of a weapon;
 - (b) threatens to cause bodily harm to a person other than the complainant;
 - (c) causes bodily harm to the complainant; or
 - (d) is a party to the offence with any other person.

The Supreme Court of Appeal concluded that the victim was injured by the sexual assault and the dildo that was used on her was the cause of the injuries. This means that the dildo used in committing the assault was a “weapon”, as defined in section 2 of the *Criminal Code*.⁷⁰⁶ The Supreme Court of Appeal reinstated the trial court’s sentence⁷⁰⁷ which was as follows: on the sexual assault with a weapon charge, 32 months’ imprisonment and on the anal penetration charge, 20 months’ imprisonment. These two sentences were ordered to run concurrently.⁷⁰⁸

4.3.7 Conclusion: South Africa and Canada compared

The definition of rape in South Africa entails unwanted sexual penetration of another person without his or her consent. Sexual activities in Canada are also only legal when

704 *R. v. Lamy*, [2002] 1 S.C.R. 860, 2002 SCC 25:par. 1.

705 *Criminal Code* R.S.C., 1985, c. C-46. Also see *R. v. Lamy*, [2002] 1 S.C.R. 860, 2002 SCC 25:par. 8.

706 *R. v. Lamy*, [2002] 1 S.C.R. 860, 2002 SCC 25:par. 14.

707 *R. v. Lamy*, [2002] 1 S.C.R. 860, 2002 SCC 25:par. 18.

708 The Globe and Mail Canada, “SCOC rules that giant dildo used in assault is a weapon”, <https://www.theglobeandmail.com/news/national/scoc-rules-that-giant-dildo-used-in-assault-is-a-weapon/article25291493/> (accessed on 16 September 2021). Also see Supreme Court of Canada, “Supreme Court of Canada - Appeals Heard”, <https://decisions.scc-csc.ca/scc-csc/news/en/item/1495/index.do> (accessed on 17 September).

both parties' consent. The definition of sexual assault in Canada entails the following:⁷⁰⁹ “any unwanted sexual act done by one person to another or sexual activity without one person’s consent or voluntary agreement”. Furthermore, “sexual assault occurs if a person is touched in any way that interferes with their sexual integrity: this includes kissing, touching, intercourse and any other sexual activity without his/her consent”. The definition of sexual assault in Canada is extremely broad and encompasses both South Africa’s rape and sexual assault definition.⁷¹⁰

In South Africa, life imprisonment is a mandatory minimum sentence for rape, for example where the rapist knew he or she was HIV-positive or if the victim was under the age of 16 years and/or mentally disabled.⁷¹¹

The minimum sentence for sexual assault in Canada differs, depending on the facts of each case. Mitigating and aggravating circumstances can also affect a sentence imposed by the court. Judges have the discretion to impose a sentence as they deem fit above the minimum sentence, but they may not impose sentences below the minimum prescribed sentence. There is only a mandatory minimum sentence of one year imprisonment for sexual assault if the victim is younger than 16 years. Where the victim is older than 16, no minimum sentence is prescribed. The maximum sentence for (more serious) aggravated sexual assault cases is 14 years’ imprisonment and the minimum is five years’ imprisonment.⁷¹² This is far less than the prescribed minimum sentences of South Africa.

In South Africa, if the accused in a rape charge is HIV-positive, he or she can be charged with attempted murder, while in Canada, depending on the circumstances, the charge will be one of aggravating sexual assault.

709 *Criminal Code* R.S.C., 1985, c. C-46: Section 271. Also see University of Lethbridge, “The criminal code of Canada and sexual assault”, https://www.ulethbridge.ca/sites/default/files/2018/07/the_criminal_code_of_canada_and_sexual_assault.pdf (accessed on 15 September 2021).

710 Vetten 2014:2.

711 *Criminal Law Amendment Act* 105 of 1997: section 51(1).

712 Vilkhov Law, “What is the minimum sentence for sexual assault in Canada”, <https://vilkhovlaw.ca/what-is-the-minimum-sentence-for-sexual-assault-in-canada/> (accessed on 20 July 2021). Also see *Criminal Code* R.S.C., 1985, c. C-46: section 271.

The next chapter will provide a summary of South Africa, England and Canada's legislation governing rape, compared to each other, as well as recommendations for South Africa's future in this regard.

Chapter 5

Conclusion and recommendations

5.1 Introduction

In this chapter, the legal position regarding rape and the sentencing thereof in South Africa, England and Canada will be briefly summarised and compared with one another. The advantages of the legal position in both England and Canada will be pointed out and recommendations for future developments in South Africa will be made.

5.2 Brief summary of the legal position in South Africa

For a country that is not actively at war, South Africa has the greatest number of rape cases in the world. It is said that one in every three women in South Africa will be raped in her lifetime.⁷¹³ In August 2021, Minister Bheki Cele (the Minister of Police in South Africa) released the annual crime report, which showed that 10 006 people were raped between April and June 2021. This indicated an increase of 72.4%, compared to the previous assessment period.⁷¹⁴

Although rape in South Africa can be committed against both men and women, Judges Ackermann and Goldstone made the following statement in the *Carmichele v Minister of Safety and Security* case:⁷¹⁵

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.

The retaliation to rape crimes is mostly determined by the communal viewpoint of a specific country at the time. One example of this is the Holocaust where women were mercilessly and constantly raped. These mass rapes went unheard because there was no legislation during this time, which governed these crimes. Where there is no

713 Moffet 2006:129.

714 South African Government, "Minister Bheki Cele: Quarter One Crime Statistics 2021/2022", <https://www.gov.za/speeches/minister-bheki-cele-quarter-one-crime-statistics-20212022-20-aug-2021-0000> (accessed on 1 September 2021).

715 *Carmichele v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC);par. 62.

legislation for a specific crime, ultimately, no crime is being committed and thus no remedy is available.⁷¹⁶

In South Africa, a rape culture exists among the different ethnic groups. This rape culture in South Africa is explained as:⁷¹⁷

a complex set of beliefs that encourage male sexual aggression and supports violence against women. A rape culture condones physical and emotional terrorism against women as the norm ... In a rape culture both men and women assume that sexual violence is a fact of life, inevitable.

Since the Common Law and the apartheid era, South Africa has greatly reformed its sexual offences laws. These reforms broadened the definition of rape and prescribed minimum sentences for rape, depending on the circumstances and facts surrounding each case.

According to the new, broader definition of rape, the following facts no longer play a role: whether the vagina or the anus is penetrated; whether the perpetrator is a male or a female; whether the victim is a female or a male; whether the penetration of the vagina or anus is by a penis or a finger or another part of the perpetrator's body, or by some object or part of an animal's body. In some incidents (where a penis is used), non-consensual penetration of the victim's mouth may also amount to the commission of the crime rape.⁷¹⁸

Snyman⁷¹⁹ stated that the new broader definition of rape "holds the promise of offering greater protection for victims of sexual violence, which has reached pandemic proportions in South Africa".

The current prescribed minimum sentence for rape, according to section 51 of the *Criminal Law Amendment Act*,⁷²⁰ is as follows: if an accused is charged with a Part I rape offence, he will be sentenced to life imprisonment, while an accused charged with

716 Havryshko, "Sexual Violence in the Holocaust: Perspectives from Ghettos and Camps in Ukraine", <https://www.boell.de/en/2020/05/18/sexual-violence-holocaust-perspectives-ghettos-and-camps-ukraine> (accessed on 22 July 2021).

717 Nagtegaal, "The Cost of Rape: Seeking Justice in South Africa" <https://www.dailymaverick.co.za/opinionista/2018-09-07-the-cost-of-rape-seeking-justice-in-south-africa/> (accessed on 28 January 2021).

718 Snyman 2014:345.

719 Snyman 2014:308.

720 *Criminal Law Amendment Act* 105 of 1997.

a Part III rape offence will be sentenced to ten, fifteen or twenty years' imprisonment for a first, second and third offence.⁷²¹

Presiding officers can only impose a lesser sentence than the prescribed sentence where there are substantial and compelling circumstances justifying a lesser sentence. The courts did not receive any legislative guidance when sentencing rape offenders; however, they have a duty to determine if substantial or compelling circumstances exist when sentencing rape offenders.⁷²² Nevertheless, presiding officers become familiar with the way they normally adjudicate rape matters, which is either in an unbiased or clinical way.⁷²³ The concern with the approach currently followed in South Africa is that the legislator deliberately leaves it to the courts to decide whether the circumstances of a case call for a deviation from the prescribed minimum sentence. This leaves the courts with broad discretion to depart from the minimum sentences, as they deem fit, as there are no specific guidelines that state which circumstances are compelling and substantial.⁷²⁴ Rape offenders cannot be all dealt with uniformly; they do not all deserve the same sentence. As Judge Davis stated in the *Swartz*-case,⁷²⁵ "Even in the heart of darkness" offenders must be dealt with according to each case's own merits;⁷²⁶ in other words, to each his own. However, in the *Malgas*-case⁷²⁷ the court stated that the prescribed sentences were "generally appropriate"; thus, the courts must not depart from these minimum sentences unless the courts are satisfied that there is significant justification to depart from them.

Another factor to consider is whether the *Criminal Law Amendment Act*,⁷²⁸ with its prescribed minimum sentences, is still in accordance with the much broader definition of rape, which was implemented in 2007?

5.3 Brief summary of the legal position in England

721 *Criminal Law Amendment Act* 105 of 1997: section 51.

722 Van der Merwe 2019:142.

723 Van der Merwe 2019:142.

724 De Smet & Hubbard, "Substantial and compelling circumstances in rape cases", <https://www.lac.org.za/projects/grap/Pdf/rape-memo-substantial.pdf> (accessed on 1 September 2021).

725 *S v Swartz* 199 2 SACR 380 (C).

726 *S v Swartz* 199 2 SACR 380 (C):par. 386. Also see Van der Merwe & Mitchell 2020:4.

727 *S v Malgas* 2001 (2) SA 1222 (SCA):par. 18.

728 *Criminal Law Amendment Act* 105 of 1997.

During the crime statistical assessment year (April 2020 until March 2021), the number of rape offences in England and Wales declined by 6%, which amounted to 55 696 recorded rape offences for the year.⁷²⁹ In England, rape constitutes 38% of all sexual offences. It is the second year in a row that the number of rape cases has decreased.⁷³⁰

In England, rape is defined by section 1 of the *Sexual Offences Act 2003*. A person commits rape if “he intentionally penetrates the vagina, anus or mouth of another person with his penis; the complainant does not consent to the penetration, and the accused does not reasonably believe that the complainant consents”. The sentence for a rape offender can be a maximum penalty of life imprisonment and a minimum of four years’ imprisonment (although the sentence range is four to 19 years’ imprisonment), depending on the facts of each case.⁷³¹

If a victim’s vagina or anus is penetrated by an object, the offence constitutes “assault by penetration”. Section 2 of the *Sexual Offences Act 2003* defines assault by penetration as follows: “A person who intentionally penetrates the vagina or anus of the complainant with a part of his body or anything else; the penetration is sexual; the complainant does not consent to the penetration, and the accused does not reasonably believe that the complainant consents”.⁷³² The prescribed maximum sentence for contravening section 2 is life imprisonment and the minimum is community service (although the sentence range is community service to 19 years’ imprisonment), depending on the facts of each case.⁷³³

5.4 Brief summary of the legal position in Canada

729 Office for National Statistics, “Crime in England and Wales: Appendix tables – year ending March 2021 edition of this dataset (Excel spreadsheet)”, <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/crimeinenglandandwalesappendixtables> (accessed on 21 September 2021).

730 Office for National Statistics, “Crime in England and Wales: year ending March 2021”, <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingmarch2021> (accessed on 2 September 2021).

731 *Sexual Offences Act 2003*: section 1. Also see Sentencing Council, “Rape”, <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 2 September 2021).

732 *Sexual Offences Act 2003*:sec, 2(4).

733 *Sexual Offences Act 2003*: section 1. Also see Sentencing Council, “Assault by penetration”, <https://www.sentencingcouncil.org.uk/offences/crown-court/item/assault-by-penetration/> (accessed on 2 September 2021).

During the crime statistical assessment year (April 2019 until March 2020), the number of sexual offences in Canada declined by 9%. There were 28 639 sexual assault offences, which amounted to 75 offences per 100 000 people.⁷³⁴

The offences of rape, attempted rape and indecent assault were all removed from the *Criminal Code* in 1983. They were replaced by the following offences: sexual assault, sexual assault with a weapon, threats, or bodily harm to a third party and aggravated sexual assault.

The *Criminal Code* defines Simple Sexual Assault, according to section 271, as follows:⁷³⁵

Simple Sexual Assault occurs if a person is touched in any way that interferes with his/her sexual integrity: this includes kissing, touching, intercourse and any other sexual activity without his/her consent.

Sexual Assault with a weapon, threats to a third party or causing bodily harm is defined according to section 272 of the *Code* as follows:⁷³⁶

Sexual assault with a weapon, threats to a third party or causing bodily harm occurs if a person is sexually assaulted by someone who:

- 1 Uses a weapon or threatens to use a weapon (imitation or real);
- 2 Threatens to cause harm to a third person (friend, family member or children);
- 3 Causes bodily harm to a third party, or;
- 4 Commits the assault with any other person – multiple assailants.

Aggravated Sexual Assault is defined according to section 273 of the *Code* as follows:⁷³⁷

Aggravated Sexual Assault occurs if the person assaulted is wounded, maimed, disfigured and beaten, or in danger of losing her/his life while being sexually assaulted.

The minimum sentence for sexual assault in Canada differs, depending on the facts of each case. There is a mandatory minimum sentence of one year imprisonment for sexual assault if the victim is younger than 16 years. If the victim is older than 16 years, no minimum sentence is prescribed. The minimum sentence for aggravated sexual

734 Moreau, "Police-reported crime statistics in Canada, 2020", <https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00013-eng.htm> (accessed on 2 September 2021).

735 Voices of women, Acting Vice President, "Sexual assault and law", <https://www.voicesforwomen.ca/Resources/Sexual-Assault-Law> (accessed 20 June 2020). Also see *Criminal Code* (R.S.C., 1985, c. C-46): section 271.

736 *Criminal Code* (R.S.C., 1985, c. C-46): section 272.

737 *Criminal Code* (R.S.C., 1985, c. C-46): section 273.

assault is five years' imprisonment for a first offender and seven years for subsequent offences. If the victim is younger than 16 years the minimum sentence is five years' imprisonment.⁷³⁸ The minimum sentence for a sexual assault charge could however be increased depending on specific factors, as fully explained in paragraph 4.3.2 and 4.3.5 above.

The various definitions and sentences will be discussed below in table form.

5.5 Comparison between South Africa, England and Canada

The table below clearly indicates the differences between South Africa, England and Canada with regards to their sexual offences legislation; more specifically the definition of rape, the meaning of "consent", the effects of the accused's HIV status on his criminal liability, and the sentencing of rape offenders.

Country	South Africa	England	Canada
Definition of rape	<p><u>Rape:</u> If an accused unlawfully and intentionally commits an act of sexual penetration without the victim's consent.⁷³⁹</p> <p>Sexual penetration is defined as follows: "any act which causes penetration to any extent whatsoever by—</p>	<p><u>Rape:</u> If an accused intentionally penetrates, with his penis, the vagina, anus or mouth of the victim, the victim does not consent, and the accused does not reasonably believe that the victim consents.⁷⁴¹</p>	<p><u>No specific definition of rape.</u></p> <p><u>Rape prosecuted under different forms of sexual assault:</u></p> <p><u>1. Simple Sexual Assault:</u> If a victim is touched in any way that interferes with the victim's sexual integrity, this includes kissing, touching,</p>

738 *Criminal Code* (R.S.C., 1985, c. C-46): section 273(2).

739 *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007: section 3.

741 *Sexual Offences Act* 2003: section 1.

	<p>(a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;</p> <p>(b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or</p> <p>(c) the genital organs of an animal, into or beyond the mouth of another person.”⁷⁴⁰</p>	<p><u>Assault by penetration:</u> If the accused intentionally penetrates the vagina or anus of the victim with a part of his body or anything else, the penetration is sexual, the victim does not consent, and the accused does not reasonably believe that the victim consents.⁷⁴²</p> <p><u>Causing a person to engage in sexual activity without consent:</u> If the accused “intentionally causes another person to engage in an activity, the activity is sexual, the other person does not consent</p>	<p>intercourse and sexual activities without consent.⁷⁴⁴</p> <p><u>2. Sexual Assault with a weapon, threats to a third party or causing bodily harm:</u> The accused will be guilty of the above-mentioned offence if, in a sexual assault, the accused “carries, uses or threatens to use a weapon or an imitation of a weapon, threatens to cause bodily harm to a person other than the victim, causes bodily harm to the victim, or is a party to the offence”.⁷⁴⁵</p> <p><u>3. Aggravated Sexual Assault:</u></p>
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740 *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007: section 1.*
742 *Sexual Offences Act 2003: section 2.*
744 *Criminal Code R.S., Cc-34: section 265(1) & 271.*
745 *Criminal Code R.S., Cc-34: section 272.*

		to engaging in the activity and the accused does not reasonably believe that the other person consents”. ⁷⁴³	If the accused in committing the sexual assault, he/she wounds, maims, disfigures, or endangers the life of the victim. ⁷⁴⁶
“Consent” defined	Voluntary or uncoerced agreement. ⁷⁴⁷	A person consents if he “agrees by choice and has the freedom and capacity to make that choice”. ⁷⁴⁸	The voluntary agreement to engage in the sexual activity in question. ⁷⁴⁹
Effect of the HIV-positive status of the accused	If the accused is HIV-positive and found guilty of rape, the accused will be sentenced to life imprisonment as prescribed minimum sentence. ⁷⁵⁰ If the sexual penetration took place with the consent of the	Similar to South Africa, if an accused is HIV-positive, this aspect will be used as an aggravating factor during sentencing. ⁷⁵¹ Transmission of HIV can be seen as an act, which might constitute rape, assault by penetration,	No sentencing legislation regulating the HIV status of an accused in sexual assault cases. There rests no duty on an accused to disclose his HIV status if the accused used a condom and the

743 *Sexual Offences Act 2003*: section 4.

746 *Criminal Code R.S.*, Cc-34: section 273.

747 *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*: section 1.

748 *Sexual Offences Act 2003*: section 74.

749 *Criminal Code R.S.*, Cc-34: section 273.1(1).

750 *Criminal Law Amendment Act 105 of 1997*: section 51 read with Part 1(a)(iv) of Schedule 2.

751 *Sexual Offences Act 2003*: Sexual Offences Definitive Guideline.

	victim (without being aware of the HIV status of the accused), the charge will be attempted murder.	attempted murder and even murder. ⁷⁵² Daryll Rowe was the first accused to be convicted in England of grievous bodily harm (five charges) for infecting his victims with HIV. He was sentenced to life imprisonment. ⁷⁵³	accused has a “low” viral load. ⁷⁵⁴ If an accused has HIV, the accused will be charged with aggravated sexual assault, attempted murder or murder. ⁷⁵⁵
Prescribed sentence	<u>Rape</u> : Minimum of life imprisonment in certain circumstances. ⁷⁵⁶	<u>Rape</u> : Maximum sentence of life imprisonment and a minimum of four	<u>Sexual Assault</u> : If the victim is younger than 16 years – a minimum

752 Dodds 2009:139.

753 Rawlinson, “Man jailed for life after deliberately infecting men with HIV”, <https://www.theguardian.com/uk-news/2018/apr/18/hairdresser-daryll-rowe-given-life-sentence-for-deliberately-infecting-men-with-hiv> (accessed on 21 September 2021).

754 Government of Canada, “Fact Sheet – HIV Non-Disclosure and the Criminal Law”, https://www.canada.ca/en/departement-justice/news/2017/12/fact_sheet_hiv_non-disclosureandthecriminallaw.html (accessed on 21 September 2021).

755 HIV Justice Network, “Canada”, <https://www.hivjustice.net/country/ca/> (accessed on 18 July 2021).

756 *Criminal Law Amendment Act 105 of 1997*: section 51(1) –

Rape as contemplated in Part 1 of Schedule 2:

(a) “When committed –

- (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 or compelled rape, but has not yet been sentenced in respect of such convictions; or
- (iv) By a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(b) Where the victim –

- (i) Is a person under the age of 16 years;

	<p>Imprisonment for periods not less than 10, 15, and 20 years according to the accused being a first-, second- or third-time offender.⁷⁵⁷</p>	<p>years' imprisonment.⁷⁵⁸</p> <p><u>Assault by penetration:</u> A maximum sentence of life imprisonment and a minimum sentence, which can be in the form of community service.⁷⁵⁹</p> <p><u>Causing a person to engage in sexual activity without consent:</u> A maximum sentence of life</p>	<p>of one year and a maximum of 14 years' imprisonment.⁷⁶¹</p> <p>If the victim is older than 16 years, to a maximum of 10 years' imprisonment, no minimum sentence prescribed.</p> <p><u>Sexual Assault with a weapon, threats to a third party or causing bodily harm:</u></p>
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(ii) Is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or

(iii) Is a person who is mentally disabled; or

(c) Involving the infliction of grievous bodily harm".

757 *Criminal Law Amendment Act* 105 of 1997: section 51 2(b) – Rape as contemplated in Part 3 of Schedule 2: "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;

Provided that the maximum sentence that a Regional Court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose in terms of this subsection".

758 *Sexual Offences Act* 2003: section 1. Also see Sentencing Council, "Rape", <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> (accessed on 24 August 2021).

759 *Sexual Offences Act* 2003: section 2. Also see Sentencing Council, "Assault by penetration", <https://www.sentencingcouncil.org.uk/offences/crown-court/item/assault-by-penetration/> (accessed on 6 September 2021).

761 *Criminal Code R.S.*, Cc-34: section 271.

		<p>imprisonment and a minimum sentence of community service.⁷⁶⁰</p>	<p>If the accused used a restricted firearm or prohibited firearm: a maximum of 14 years’ imprisonment and a minimum of five years’ imprisonment for a first offence and seven years’ imprisonment for a second or subsequent offence.</p> <p>If the victim is younger than 16 years, the maximum sentence is life imprisonment, and the minimum is five years’ imprisonment.⁷⁶²</p> <p><u>Aggravated Sexual Assault:</u></p> <p>If the accused used a restricted</p>
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760 *Sexual Offences Act 2003*: section 4. Also see Sentencing Council, “Causing a person to engage in sexual activity without consent”, <https://www.sentencingcouncil.org.uk/offences/crown-court/item/causing-a-person-to-engage-in-sexual-activity-without-consent/> (accessed on 16 October 2021).

762 *Criminal Code R.S.*, Cc-34: section 272.

			<p>firearm or prohibited firearm: a maximum of life imprisonment and a minimum of five years'</p> <p>imprisonment for a first offence and seven years'</p> <p>imprisonment for a second or subsequent offence.</p> <p>If the victim is younger than 16 years, the maximum sentence is life imprisonment, and the minimum is five years' imprisonment.⁷⁶³</p>
Aggravating and Mitigating circumstances	If the court is satisfied that substantial and compelling circumstances exists, the court may impose a lesser sentence	The court has the discretion to adjust a sentence upwards or downwards in accordance with aggravating and	There is no comprehensive list of aggravating and mitigating circumstances. The list below shows the most important factors

⁷⁶³ Criminal Code R.S., Cc-34: section 273.

	<p>than the prescribed sentence.⁷⁶⁴</p> <p>There are no list of specific circumstances, which can be relied upon by the court.</p>	<p>mitigating circumstances.</p> <p><u>Aggravating circumstances:</u>⁷⁶⁵</p> <p><u>Factors indicating higher culpability</u> –</p> <p>The accused was out on bail for another offence, the offence was motivated by race or religion, the offence was motivated by the victim’s sexual orientation, and the offence was motivated by the victim’s disability, The accused has previous convictions, the accused planned the offence, the</p>	<p>that have been used by the courts during sentencing.</p> <p><u>Aggravating circumstances:</u>⁷⁶⁸</p> <p>Prior sexual conduct, the victim was forcefully detained, the age and knowledge of age of the victim, how defenceless the victim was, a trust relationship between the victim and accused, how invasive the sexual act was, how violent the attack was, was the violence repeated, was a weapon used, the form of penetration used, public observance</p>
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764 *Criminal Law Amendment Act* 105 of 1997: section 51(3)(a) – “If any court referred to in subsection (1) or (2) 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”.

765 Sentencing Council, “Aggravating and Mitigating Factors”, <https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/aggravating-and-mitigating-factors/> (accessed on 21 July 2021).

768 Kruse Law Firm, “Minimum Sentence Sexual Assault Canada”, <https://www.kruselaw.ca/sexual-assault/minimum-sentence-sexual-assault-canada/> (accessed on 19 January 2021).

		<p>accused planned to do more harm than was necessary, the accused was part of a group or gang, A 'professional' act, the accused received financial gain from committing the offence, the evidence was destroyed or the accused tried to destroy evidence, the accused was warned by other about his/her actions, the accused was still on licence,⁷⁶⁶ the accused showed hostility towards a certain group of people, the accused targeted a specific vulnerable victim,</p>	<p>of the offence, the accused's attitude, rehabilitation possible, will the accused re-offend in future, and the impact on the victim and the family of the victim.</p> <p><u>Mitigating circumstances</u>.⁷⁶⁹</p> <p>The accused's age when committing the offence, a plea of guilty, and no previous convictions.</p>
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766 On licence meaning: if the accused is charged with a criminal offence (2) while he/she is out on the other offence (1), the accused will go to court for that offence (2). If the accused is then found guilty (2), the new sentence (2) will be added on to the accused's old sentence (1).

769 Kruse Law Firm, "Minimum Sentence Sexual Assault Canada", <https://www.kruselaw.ca/sexual-assault/minimum-sentence-sexual-assault-canada/> (accessed on 19 January 2021).

		<p>the accused was intoxicated by drugs or alcohol, a weapon was used/threatened to use in committing the offence, and the accused misused his power or trust towards the victim.</p> <p><u>Factors indicating more than usual harm –</u></p> <p>More than one victim, the victim suffered serious physical or psychological damage, the victim suffered repeated assaults, the victim was especially vulnerable, the place where offence took place, the offence committed against people working in the public sector,</p>	
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		<p>the offence took place in front of other people specifically children or the partner of the victim, and more than the normal humiliation of the victim.</p> <p><u>Mitigating circumstances</u>.⁷⁶⁷</p> <p><u>Factors indicating lower culpability –</u></p> <p>The victim was exceptionally provoked, mental illness, disability, youth, or age.</p> <p><u>Factors indicating mitigating circumstances in terms of the accused –</u></p>	
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767 Sentencing Council, “Aggravating and Mitigating Factors”, <https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/aggravating-and-mitigating-factors/> (accessed on 21 July 2021).

		The accused showed remorse, admissions by the accused, the accused co-operated with the authorities.	
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5.6 Conclusion and recommendations

From the comparative study, it is clear that rape remains a serious, global problem, and that South Africa is not the only country that grappled with the development of defining and sentencing rape.

South Africa’s crime statistics (as mentioned above) showed that 10 006 people were raped in the three-month period between April and June 2021. This is an increase of 72.4% or 4 201 victims of rape compared to the previous reporting interval.⁷⁷⁰ The rape statistics of South Africa, England and Canada can however not be compared to each other because the definition of rape in these three countries differ from one another.

In South Africa, as in most other countries, rape is the crime with the lowest conviction rate among all the serious crimes.⁷⁷¹ The courts are inconsistent in sentencing rape perpetrators, and a high number of rape cases are not reported to the SAPS. These two factors tell a potential rapist that rape is a “high reward, low risk” crime.⁷⁷² Rape in South Africa remains a scourge because there are no consistent legal consequences involved in committing the crime.⁷⁷³

Although all three countries share the same Common Law, in most instances, each country’s definition of rape or sexual assault expanded in its own way. In both England

770 South African Government, “Minister Bheki Cele: Quarter One Crime Statistics 2021/2022”, <https://www.gov.za/speeches/minister-bheki-cele-quarter-one-crime-statistics-20212022-20-aug-2021-0000> (accessed on 6 September 2021).

771 Orkin 2000:24.

772 Vetten 1997:9.

773 National Alliance to end Sexual Violence, “Cost, Consequences and Solutions”, https://endsexualviolence.org/where_we_stand/costs-consequences-and-solutions/ (accessed on 7 September 2021).

and Canada there are different crimes for different forms of penetration (for example when an object is used), which is not the case in South Africa. This leaves South Africa with the widest and most clumsy definition of rape among the three countries.

The advantage of Canada and England's specific crimes for the different forms of penetration is that there are specific prescribed sentences for each form of sexual violence or penetration. These sentences were created for specific conduct. Moreover, they suit each crime better.

South Africa's legislation regulating the sentencing of rape is also the strictest of the three countries. While the more harsh sentencing approach may be justified by the high crime statistics in South Africa, it makes one wonder whether the prescribed minimum sentences still fit the different forms of penetration, for example, when using a foreign object to penetrate a victim. At present, the approach to sentencing rape offenders lacks a substantial element, as described by Terblanche:⁷⁷⁴ "the likelihood that offenders will be apprehended, convicted and punished".

In South Africa, if a victim is penetrated by a foreign object, the accused will be charged with rape. An example of this is the Sunday rapist case where the accused was charged with rape for penetrating the victim with a foreign object. The accused was sentenced to life imprisonment.⁷⁷⁵

In England, if the victim is penetrated by a foreign object, the accused will be charged with section 2 of the *Sexual Offences Act* 2003 (assault by penetration) and not with rape. The sentence for such an offence ranges from community service to 19 years' imprisonment.⁷⁷⁶

In Canada, if a victim is penetrated with a foreign object the accused will be charged with sexual assault with a weapon (section 272).⁷⁷⁷ The minimum sentence in Canada for penetrating the victim with a foreign object (sexual assault with a weapon charge)

774 Terblanche 2005:4.

775 Telephonic interview with Judge Kolbe on 12 August 2021 and email correspondence on 24 August 2021.

776 Sentencing Council, "Assault by penetration", <https://www.sentencingcouncil.org.uk/offences/crown-court/item/assault-by-penetration/> (accessed on 6 September 2021).

777 *Criminal Code* R.S., Cc-34(1993): section 272.

is five years' imprisonment, and the maximum sentence is life imprisonment (if the victim is younger than 16 years).

The mitigating and aggravating factors used for sentencing in England and Canada are also better formulated. South Africa does not have a concrete list of aggravating and mitigating factors, as England and Canada have. South African courts can decide in each case which factors constitute substantial and compelling factors, which in turn will justify a deviation from the prescribed minimum sentence when sentencing a rape offender. As Terblanche⁷⁷⁸ has pointed out: the lack of consistency in sentencing is a major problem in South Africa. Supporting this statement, with specific reference to the sentences imposed in child rape cases, Van der Merwe⁷⁷⁹ rightfully opined as follows:

“judicial discretion has also given rise to unacceptable and unjustified disparity in the sentencing process, as well as in the actual sentences imposed in child rape cases. This disparity has been caused by diverse judicial approaches to the seriousness of these offences, to the recognition and interpretation of mitigating and aggravating factors, to the relevant circumstances of the offender and the victim, and to the relative weight given to each of these factors”.

Van der Merwe's emphasis on the need to have a concrete list of mitigating and aggravating factors is strongly supported.⁷⁸⁰

778 Terblanche 2003:858.

779 Van der Merwe 2008:590.

789 See Van der Merwe 2008: 595 – 601 where an attempt was made to categorise the mitigating and aggravating factors to be considered in child rape cases:

Victim (Aggravating factors): Aggravating circumstances include physical injuries obtained by the victim during the rape incident; the psychological effect of the rape on the victim; the victim does not complete school as a result of the rape; the victim is rejected by the community because of the rape incident; the victim and her family had to move their primary residence because of the rape incident; the victim fell pregnant as a result of the rape; the victim was a virgin prior to the rape; the victim was pregnant or menstruating when she was raped; the victim was very young, physically disabled or mentally-ill when the rape incident took place.

Victim (Mitigating factors): The fact that the victim has overcome or made good progress after the rape incident will serve as a mitigating factor.

Accused (Aggravating factors): Aggravating circumstances include scenarios where the accused was in a position of trust and abused this position when raping the victim; the accused sees young girls as objects to use in fulfilling his sexual desires; the accused raped the victim more than once; the accused overpowered the victim by using his predominant strength; related previous convictions; where the accused was awaiting trial for a similar offence when he raped the victim; the displaying of certain character traits by the accused for example another rape committed only 6 weeks prior to the incident; the youthful accused consumed alcohol with adults before raping the victim; a degree of planning was involved by the accused in committing the offence.

Accused (Mitigating factors): Mitigating circumstances include scenarios where the accused is still young, immature or has deficient personality traits; where the judgment of the accused

England and Canada interpret “consent” the same as South Africa does. However, they all differ in their approach towards rape offenders who are HIV positive.

South Africa has a minimum prescribed sentence of life imprisonment if the rape was committed by a “person knowing he has the acquired immune deficiency syndrome or the human immunodeficiency virus”.⁷⁸¹

In England, if the accused knows he/she has a sexual disease and commits a sexual offence, this fact can be used as an aggravating factor when sentencing the accused for rape,⁷⁸² but will not necessarily lead to life imprisonment.

In Canada, an accused who is HIV-positive and commits “rape” may be charged with aggravated sexual assault.⁷⁸³ The different subsections of rape in Canada give the country the opportunity to charge an accused, who is HIV-positive and has unprotected sexual intercourse with a victim, with aggravated sexual assault. This charge has its own prescribed sentence.

This comparative study thus showed that South Africa is not in line with England or Canada regarding the definition of rape and the sentencing of rape offenders. South Africa’s current definition of rape could be improved, as well as the legislation that regulates the sentencing of rape offenders. The following recommendations are made for the way forward.

- South Africa needs to reconsider its definition of rape.
- England’s definition of rape: penetration of the victim’s vagina, anus and mouth with a penis without consent, should replace section 3 of South Africa’s *Criminal Law (Sexual Offences and Related Matters) Amendment Act*.⁷⁸⁴ The existing

was diminished because of the effect of alcohol; where the accused was influenced by an older person; where the accused has an unfavourable background; where the possibility of rehabilitation looks promising; where the accused shows remorse and where the accused has no previous convictions.

781 *Criminal Law Amendment Act 105 of 1997*: Schedule 2, Part 1 and *Criminal Law Amendment Act 105 of 1997*: section 51.

782 The Crown Prosecutions Service CPS “Intentional or Reckless Sexual Transmission of Infection”, <https://www.cps.gov.uk/legal-guidance/intentional-or-reckless-sexual-transmission-infection> (accessed on 12 July 2021).

783 HIV Justice Network, “Canada”, <https://www.hivjustice.net/country/ca/> (accessed on 18 July 2021).

784 *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*.

prescribed sentences in terms of the *Criminal Law Amendment Act*⁷⁸⁵ should remain in place for the commission of rape.

- Where penetration of the vagina or anus took place by any other object, to prosecute the accused of a different crime, for example “assault by penetration” with its own prescribed sentence. The minimum prescribed sentence here, depending on the circumstances, could differ from the harsher prescribed sentence for rape offenders in South Africa. This “conduct-specific sanction” could also guide the South African courts, which currently differ in sentencing these accused.
- The implementation of better and clearer guidelines in determining which factors qualify as substantial and compelling circumstances in order to deviate from the prescribed minimum sentence is necessary. A set list of specific factors (as set out and followed in England) would benefit South Africa’s courts when sentencing rape accused, provide legal clarity, and result in less inconsistencies in sentencing rape offenders.

According to Spies⁷⁸⁶ the *Criminal Law Amendment Act*⁷⁸⁷ should be amended to focus on the crime of rape itself, rather than focusing on the substantial and compelling factors that the courts use to deviate from prescribed minimum sentences. Spies⁷⁸⁸ is also of the opinion that all presiding officers in rape cases should participate in further training for them to better understand rape victims and sentence rape offenders. Today, with the wide discretion given to presiding officers, each presiding officer applies their own disposition and ideology to the sentencing of the offender in front of them.⁷⁸⁹

Ultimately, South Africa’s rape legislation and judiciary should justify the ethos and purpose of the constitutional right to dignity, equality, human rights, freedom, and the right to a fair trial for everyone.

785 *Criminal Law Amendment Act* 105 of 1997:section 51.

786 Spies 2016:408.

787 *Criminal Law Amendment Act* 105 of 1997.

788 Spies 2016:408.

789 Terblanche 2013:95.

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