

**SECONDARY VICTIMISATION IN THE COURT
PROCEDURES OF RAPE CASES:
AN ANALYSIS OF FOUR COURT CASES.**

by

CHARMELL S. VILJOEN



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Study Leader: Prof. A. Gouws

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DECLARATION

I, the undersigned, hereby declare that the work contained in the assignment is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

ABSTRACT

Violence against women is a serious offence. Emotional and physical abuse can happen to our daughters, sisters and wives. Rape is a form of violence against women. It violates a woman's privacy, dignity and it makes her feel as if she has lost control. The criminal justice system is there to protect the citizens of a country and this protection should extend to women when they have been violated. The criminal justice system has different structures, for example the courts, medical services and police services. The staff of the criminal justice process do not have an inherent duty to care about rape survivors but they can be trained to treat survivors with consideration and sympathy to counteract the effects of the rape and secondary victimization experienced by rape survivors. It is important that there are guidelines for the staff of the criminal justice system to assist them in rape cases.

This thesis explores whether women experience secondary victimisation during court proceedings. To assess whether it occurs, court transcripts were analysed with a focus placed on the background of the court case and the verdicts of the judges. Findings indicate that secondary victimisation do occur during court cases. Rape survivors feel as if they are on trial and not the rapist. Survivors furthermore believe that they will have to live with the label that they had been raped and humiliated.

The thesis recommends that officials of the criminal justice process should receive extensive training, and looks at the Sexual Offences Court in Wynberg as an example of an improved system for rape survivors. It is recommended that the procedures of the Sexual Offences Court should be evaluated on a regular basis to address secondary victimisation problems that may persist. Communication is very important during the rape trial. The rape survivor has to be informed about her case and about the location of the rapist at all times.

OPSOMMING

Geweld teen vroue is 'n ernstige oortreding wat plaasvind in ons samelewing. Emosionele en fisiese geweld kan gebeur met ons dogters, vroue en susters. Hierdie vorm van geweld laat vroue voel asof hulle beheer verloor oor hulle lewens en dit het ook 'n impak op hul self respek en selfbeeld.

Die Kriminele Sisteem van Suid Afrika is daar om die belange van sy inwoners te beskerm. Dit het verskillende afdelings byvoorbeeld, die mediese dienste, die polisie en die hof verrigtinge. Die lede van die Kriminele Sisteem werk met verskillende individue wat voel dat die hof die uitweg sal wees wat geregtigheid sal laat geskied. Die lede van die Kriminele Sisteem het nie 'n persoonlike verantwoordelikheid teenoor die verkragtings oorlewendes nie, maar hulle moet sensitiwiteit en empatie betoon teenoor die dames wat verkrag was. Die gedrag van die personeel speel 'n groot rol in terme van hoe die vrou wat verkrag was die aangeleentheid verwerk.

Die fokus van die studie is om te kyk of vroue wel sekondêre viktimisering ervaar wanneer hulle besluit om voort te gaan met die hofsake. Hof transkripsies was gebruik om te kyk of vroue wel benadeel word. Daar was gekyk na die uitsprake van die regters sowel as die agtergrond van die hof saak.

Daar was bevind dat sekondêre viktimisering wel plaasvind gedurende die hof verrigtinge. Vroue voel asof hulle verantwoordelik is vir die verkragting wat met hulle gebeur het. Die verkragter word nie gesien as die persoon wat oortree het nie. Hierdie gevoelens van self blamering vorm deel van sekondêre viktimisering wat veroorsaak dat vroue sommige kere voel om nie verder te gaan met die hof saak nie.

Die verskillende lede van die Kriminele Sisteem moet gedurig opleiding verkry wat hulle in staat sal stel om die gevoelens van die slagoffers in ag te neem. Die houe wat spesiaal opgerig is om verkragting sake te verhoor moet geëvalueer word sodat dit 'n sukses kan wees. Kommunikasie moet bevorder word tussen die verskillende

departemente en nie -regerings organisasies wat 'n rol speel gedurende die hof sake.

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Chapter 1

1.1 Introduction

Violence against women is a common phenomenon in South African society. Women are beaten and raped in the privacy of their own homes by their husbands and boyfriends. The violence that women have to endure can take many different forms, namely sexual, physical and emotional. Whereas acts of physical violence, such as biting, kicking or burning, usually leave scars on the woman's body or face, the psychological scars left by emotional abuse are invisible but manifest in feelings of distress, lack of self-worth and a lack of self-respect. These feelings are exacerbated when the abuser tells the survivor that she is worthless and stupid. Rape is a form of sexual violence that leaves the woman feeling helpless and defenceless.¹ According to the police, rape statistics in South Africa have risen from 15 342 in 1983 to 52 160 in 1997 (Smith, 1999: 6). The number of rapes reported to Rape Crisis in Cape Town during 1989 and 1991 ranged from 2.8% to as high as 65% (Stanton, 1993). Violence against women, especially rape, is also becoming more violent. For example, a woman died after being raped because of the severity of the assault. Forensic tests showed that a broken bottle had been inserted into her vagina and an avocado pip was found in her rectum (Smith, 1999:6).

According to an article in the *Mail and Guardian*, rape can be seen as a risk-free activity for perpetrators because the conviction rate in rape cases is very low, and a court case can take up to 18 months to be finalized in a South African court (2002: 50). The criminal justice system is there to protect the citizens of South Africa in accordance with the law. Violent acts against women, such as rape, have to be brought before the courts so that perpetrators can receive the appropriate sentence. It has however been revealed by an interdepartmental management team that only 7.7% of reported rapes during the year 2000 resulted in convictions. The conviction rate in rape cases increased from 3% between 1996 and 1998 to 4% between 1999 and 2000.

¹ The *Sexual Offences Act* (1957, No 23) defines rape as unlawful, intentional sexual intercourse with a woman without her consent.

1.2 The Research Problem

This thesis attempts to identify the rape survivor's² needs and her experience of the criminal justice process. Complainants feel that the processing of sexual offence cases does not alleviate the effects of the crime, but it rather compounds and intensifies the distress of the crime. When this occurs we have secondary victimisation, which refers to victimisation that occurs not as a direct result of the criminal act (in this instance rape) but because of the reaction of the different institutions and the individuals that the rape survivor encounters after the rape has occurred (*International Victim Assistance Handbook*, 1998: 12). These individuals may be the prosecutors or even the judge. I have gained most of my information about secondary victimisation from community organisations that work directly with survivors of sexual assault and rape.

Myths are widely held, but fallacious, beliefs that shape general perceptions of rape and that have a negative effect on the rape survivor's credibility. Stanton and Lochrenberg argue that, according to these myths, the "true rape" incident is assumed to involve the use of weapons, the infliction of serious injuries and, that it always occurs late at night. The "true rapist" is seen as an over-sexed, sexually frustrated or mentally ill individual and he is a stranger to the rape survivor. The "true rape survivor" is usually a virgin (or has no-extramarital affairs), is usually middle class, was not voluntarily in the place where she was raped, and she rejected the act of rape both verbally and physically and therefore has physical injuries to show for it (Stanton and Lochrenberg, 1996:2). These three myths suggest that only certain types of women are raped and that rape occurs in certain places only. For instance, it is often argued that a woman was raped because of the clothes she wore or because she was walking alone at night. Rape is more common in societies where people believe and accept these myths.

Secondary victimisation and the impact of rape myths need to be addressed because both have a negative impact on the rape survivor's experience of the trial.

² "The term 'survivor' is used to emphasize the adaptive capacities of women who have faced a life threatening situation rather than the term 'victim' which portrays women as helpless and passive targets of male violence" (Stanton and Lochrenberg, 1996: 2).

Rape myths shape the perceptions of civil society and in turn influence the perceptions and attitudes of the people who work with rape survivors. There is a clear link between perceptions based on rape myths and the way in which officials respond to the rape situation and their level of sensitivity towards survivors.

1.3 Literature Review

Rape creates fear in the mind of a woman because it violates her privacy and integrity. She may experience severe trauma after the rape and she may blame herself for what had happened. The rape survivor may also find it impossible to stop crying and she may not want to talk to anybody. These emotions are reinforced if she does not receive the necessary help (Smith, 2000).

Women do not want to live in constant fear of being raped. They would like to walk alone wherever and whenever they want to. Feminists (women who have a political commitment to eradicate the oppression of women) and activists emphasize that women who have been raped have to be seen as survivors and not as victims. A rape survivor is a woman who was raped and who has recovered from her sense of helplessness. She is no longer a victim because a "victim" is a target for male dominance (Stanton, Lochrenberg and Mukusa, 1999:8). Activists believe that it is essential that private troubles have to be made public. Women's organisations have organised speak outs, rallies, marches and conferences. One of the major achievements of these groups is the establishment of rape centres. These centres focus on women helping women (Karmen, 1984).

Socialisation teaches gender appropriate behaviour to boys and girls from a young age. In a patriarchal society, a "sexual system of power in which the male possesses superior power and economic privilege" (Schwartz and Dekeserey, 1997), males are socialised to be aggressive. Socialisation is seen as one of the reasons why men rape. Burgess (1988) for instance believes that men rape because of how they learn to interact with others.

Inaccurate perceptions about sexual violence are prevalent in patriarchal societies. These attitudes trivialise sexual violence by implying that it is merely sex. Even

though age and education play a role in the acceptance of these myths, Ward (1995) for example argues that education plays an important role when it comes to accepting or rejecting patriarchal values and the rape myths that exist in society, rape survivors live in communities where patriarchal values and perceptions are largely unquestioned. Whereas the criminal justice system is seen to represent a safe and just space for the rape survivor, it however adds to her trauma rather than provide relief (Jagwanth, Schwikkasd and Grant, 1994) because it is not immune to the influence of rape myths.

The *International Victim Assistance Handbook* addresses the needs of victims by focusing on secondary victimisation in the criminal justice system and society. It is emphasised that secondary victimisation does not start at the courts, but that it in fact already starts during the investigation process. One of the reasons why secondary victimisation can occur in the criminal justice system is because it is difficult to reconcile the rights of the victim with the rights of the offender, who is considered innocent until proven guilty (*International Victim Assistance Handbook*, 1998).

Some women who have gone through a rape trial have described it as “200 times worse than the rape . . . This thing is really weighing me down. It just hangs there over my head” (18-year-old rape victim quoted in Holmstrom and Burgess, 1978: 221). Whereas some rape survivors find the trial emotionally devastating, others find the court experience therapeutic. The women’s different reactions to the court experience may be linked to their pre-rape personality because their attitudes and social experiences influence their emotional state. The absence or presence of support also plays a role in how the rape survivor views court proceedings, and it is thus essential that she should have family and friends to comfort her because cross-examination by defence attorneys often exacerbates the sense of isolation experienced by survivors in court. Support from other women is especially important (Fischamn, McCahill and Meyer, 1981).

The accused in a rape case is considered innocent until proven guilty, and the focus is therefore on the law of evidence when the rape survivor is cross-examined. However, the law of procedure is also emphasised in the protection of the

complainant's identity, which is very important because it shields her from the judgment and criticism of ordinary citizens (*South African Law Commission*, 1985).

Court procedures focus on the feelings and emotions of the rape survivor. The victim is expected to tell her story to strangers in the courtroom where she has to give intimate details about herself. It is thus crucial for the rape survivor that not only the judge believes her, but also the people in the courtroom. Most defence lawyers use the blame-the-victim strategy where the victim is humiliated on the stand during cross-examination. The issue of consent is thus central to finding the accused guilty or innocent. For instance, the way in which the victim was dressed is often used to define her as conservative or provocative in the eyes of the law (Holmstrom and Burgess, 1978).

When a judge has to decide upon the fate of the rapist he/she had to consider certain rules of the criminal justice process. These rules are used to determine whether rape survivors are telling the truth or not. It is clear from the historical origin of these rules how fundamentally prejudicial against women they were. For instance, the *Cautionary Rule*, which has been abolished, had its origin in England where male members of the aristocracy raped women (Keyser, 1993) and it was argued that the stories of the women had to be approached with caution and disbelief. The *Cautionary Rule* was thus based on the belief that women are inclined to lie and make false sexual accusations (*South African Law Commission*, 2002: lxix). The judge had to keep this rule in mind when he/she sentenced the rapist at the end of the court trial.

The *Hue and Cry Rule* originated from an historical practice that compelled a woman who had been raped to run around the city or town where she lived and to tell everyone she encountered of her raped. She also had to show her bruises and torn clothes as evidence in her defence. She had to be consistent in her narration of the assault because it was used to evaluate her trustworthiness (Keyser, 1993).

The final part of the court procedures depends on the verdict of the judge, who decides whether the rapist is acquitted or convicted based on the evidence that had been given during the court case. If the evidence is not adequate to prove the

seriousness of crime, the accused can be found guilty of a less serious crime, such as indecent assault or attempted rape. If the accused is found guilty, he can lodge an appeal against the court's judgement, and the judge will have to re-open the case to re-evaluate the case and the judgement (Lochrenberg and Stanton, 1995).

The Wynberg Sexual Offences Court was established to deal with secondary victimisation during the court process and to achieve higher conviction rates for sexual offences. The aim is to work towards the recovery of the rape survivors and court staff is therefore trained to treat survivors with compassion. Part of the survivor-centred approach adopted by the Wynberg court was to conduct interviews with the different role players, for example, the prosecutors and the rape survivors. However, even though magistrates are important role players in court procedures, they were not interviewed. Wynberg Sexual Offences Court improved the situation of rape survivors (Lochrenberg and Stanton, 1995). A number of rape courts operate in Wynberg, Soweto, Johannesburg and Durban, and others will be established in areas where the statistics of sexual violence are very high (Haffajee, 2000).

In terms of sentencing rape can be seen as one of the most controversial crimes. The rape survivor has to be protected, the rapist has to receive the appropriate sentence, and the elements of retribution and deterrence have to be kept in mind (Van Der Merwe, 1991). Mandatory sentencing was introduced to ensure that rapists could serve a realistic portion of their sentence in prison (*Mandatory Sentencing*, 1997).

The sexual offender can be released on bail before he has spent time in prison. It is also easy for a sexual offender to get bail, and the release of sexual offenders on bail has elicited much public debate. The rape survivor is put at risk because the perpetrator can be violent towards her and he can also intimidate her while he is out on bail. If the rape survivor is part of the bail proceedings and adequately informed of her rights, it will be easier for her to know what she can do when there is a breach of the bail conditions (South African Law Commission, 2002: xxxix).

The role of the judge is important because his/her judgements have a far-reaching impact on the lives of the different parties involved in the rape trial. There are two

sides of the conflict and the judge has to resolve this conflict where only one side can be the winner. He/she must argue the case according to the law as well as according to a personal system of values. Because judges have such enormous power it is crucial for them to scrupulously consider all the evidence brought before them (Solan, 1993).

Statistics have shown that rape is a violent act that has to receive serious attention. The perceptions in society concerning rape have to be addressed in a manner that challenges prevailing rape myths in our communities. These myths have a negative effect on how the rape survivor sees herself as well as how she is seen by the public. The criminal justice system plays a crucial role because it decides whether the offender will be punished or freed. The secondary victimisation that occurs during the criminal procedure is being addressed by the different Sexual Offences Courts in South Africa.

My concern with the rights and equality of women inform this thesis, which argues that domestic violence, child abuse and rape should receive the necessary attention that they deserve.

1.4 Research Methodology

This project will focus on an analysis of the arguments presented in the transcripts of four court cases. The court cases were chosen randomly from court archives in the Western Cape to establish whether secondary victimisation occurs in the courtrooms during rape trials.

The aim of the analysis is to establish whether the judgments that were handed down by the courts can be viewed as appropriate by attempting to confirm whether the rapist received the most suitable sentence and whether the rape survivor had suffered victimisation at any stage. The judges' gender sensitivity, awareness of the needs of the rape survivor and his/her neutrality in the decisions that they make are key concerns here. The aim is to establish whether rape myths do play a role in the judge's evaluation of the case.

Chapter 2 identifies and discusses the rape myths that exist in society. It also deals with what is perceived to be the characteristics of a “true” rapist and rape survivor. These myths hide the fact that rape is a violent act that is committed by ordinary men who act according to different political and social cues (Moffett, 2002:2).

Chapter 3 deals with the definition of rape according to the South African law and the different rules of evidence during rape trials. The literature defines what rape is and identifies revisions in the rape law. Prior to the democratic elections of 1994 there were certain rules that the judges had to take into consideration when they decided upon a specific sentence, for example, the *Cautionary Rule* and the *Hue and Cry Rule*. The *Cautionary Rule* does not form part of the court procedures anymore because the testimony of the woman had to be treated with caution.

The four rape cases are analysed in chapter 4, to identify whether secondary victimisation occurs when the judge hands down his/her sentence on the rapist.

In chapter 5 recommendations are made based on the analysis of the court cases. Recommendations will be made on how the judges can improve the manner in which they deliver the sentence (the type of language that they use) and what they can do to improve the situation of the rape survivor.

1.5 Conclusion

Rape is a crime. It is a violent act that needs to be addressed. There are misperceptions and rape myths in society that influence the manner in which women and rape survivors are treated. These false perceptions may have an influence on how rape survivors are viewed by prosecutors, judges and the public. The criminal justice system is the place where justice should occur; the place where the rights of the victim should take preference and where the rapist ought to receive a fitting sentence. The criminal justice process can thus be seen as the place where the rape survivor should get back her dignity and self respect.

Chapter 2: Myths and Misconceptions

Myths can be seen as widely held but false beliefs. Misconceptions and myths about rape have to be made explicit and challenged because sexual violence against women is rife in South African society. These rape myths influence the manner in which rape survivors are treated in the different spheres of the criminal justice system (Van der Merwe, 1995:2). Different factors influence how people perceive the act of rape. The broader public may place emphasis on the misconceptions that exist or they may focus on the high rape statistics.

2.1 The statistics on rape reported for the period January to June 1998.

The following statistics were gathered from the South African Police Central Information Management Centre (CIMC) (*South African Law Commission Project*, 1999:67).

Statistics reflect only a small percentage of the actual incidence of rape.

Cases reported to the police	2 898
Cases that went to court	1 690
Cases that were prosecuted	640
The number of accused found guilty	334
The number of accused found not guilty	306

Table 2.1

According to NICRO (National Institute for Crime Prevention and Rehabilitation of Offenders) 1 out of 20 rapes are reported, and according to the police 1 out of 35 rapes

are reported. If the estimated calculations of NICRO and the police are correct; then for the period of January to June 1998, 934 960 rapes took place according to NICRO and 1 636 180 rapes took place according to the police. A rape occurs every 7 to 8 seconds and if the calculations of NICRO and the police are true; far more rapes in fact occur (Smith, 2001:1).

A large number of cases are being withdrawn either before the victim goes to court or while she is already in court. An interdepartmental report reveals that 43% of the rape cases that were reported were withdrawn. In 46% of the incidents, the victim herself withdrew the cases and in 36% of the cases they were withdrawn on the request of the director of public prosecutions (*Mail and Guardian*, 2002:50). Gray and Sathiparsad (in Pokroy, 2001) believe that the reasons why rape survivors do not report their rape experiences is because they fear being blamed for the incident and that the rapist may be set free if prosecuted. It was also further found by the interdepartmental report that in 15% of the cases contradictory or inconclusive evidence led to the withdrawal or dismissal of the rape cases (*Mail and Guardian*, 2002:50).

It is important to identify the different rape myths that are associated with the rape survivor and the rapist to establish their influence during rape investigations and trials.

2.2 Myths about the Rape Survivor

Women who have been raped are often stigmatised. The rape survivor is treated differently by members of the community because they believe she somehow brought it upon herself. This belief in the culpability of the rape survivor derives from the many rape myths that continue to exist unchallenged in most communities.

2.2.1 A Woman's Appearance and Behaviour

Myth 1: The woman gives the rapist the right to rape her because of the way she dresses or behaves.

The rape survivor is blamed for the rape because of the type of clothes she wore and the rapist is thus excused on these grounds. Ackerman (1995) states that women can be divided into two categories according to the way they dress: 'whores' or 'virgins'. 'Whores' wear clothes with low necklines and they also wear very short skirts. 'Virgins', however, wear long skirts and tops (1995:161). Women tend to wear clothes that they feel comfortable in, whether it is a short skirt or tight pants. Looking like a 'virgin' or a 'whore' may be the furthest from their mind. The assumption of this myth is that women have to wear clothes that make them look like virgins if they do not want to be raped.

Myth 2: Rape is impossible

It is a frequently held belief that rape cannot occur if the woman is not physically ready for intercourse. This myth shifts the blame for the rape from the rapist to the survivor. Rape is always an act of violence, coercion and force and this myth ignores the fact that rape takes place against the will of the woman. The rapist is the individual who is ready to rape and the woman is in most cases caught by surprise.

According to this myth rape did not occur if there is no evidence, such as marks of violence around the genitalia, the presence of a weapon to show force and the torn clothes of the survivor, to support the claim (Van Der Merwe, 1995:79). Women react differently to rape: whereas one woman might fight fiercely against the rapist, another might respond by dissociating from her body. Rape can also have a paralysing effect on the survivor, which makes it impossible for her to resist the rapist in any way. The rapist does not even need to use a weapon because the threat of violence will terrify most women into doing what they are told to do (Van der Merwe, 1995:78).

What would happen if an act of rape were resisted? Swendinger provides an example of a 19-year old Japanese exchange student in San Francisco who was attacked by a rapist with a knife. She was a strong woman and struck back by biting the rapist's tongue when he tried to kiss her. This reaction infuriated the rapist and he stabbed her fifteen times (1983: 20). This example illustrates that resistance can potentially worsen the situation for the woman.

It is also believed that unwanted sexual intercourse can be easily avoided. Fischman, McCahill and Meyer (1981:26) for instance argue that a vagina that is hostile and aggressive will not admit a penis. In other words, they argue that rape is impossible when a woman fights back; and when she does everything in her power to protect herself against the man who tries to rape her. Most women fear for their life during the act of rape and the decision to be passive, rather than actively fight the rapist, constitutes an act of survival rather than consent. If women had the desire to be raped then they would not experience the negative effects as a result of the rape (Van der Merwe, 1995:73).

Myth 3: Women who drink or use drugs ask to be raped

This myth creates the impression that women are at fault. It makes her responsible for the act of rape because she cannot look after herself when is intoxicated.

2.2.2 The 'nature' of women

Myth 1: Only a certain type of woman can be raped

According to Berger (1977), a "real rape survivor" is generally viewed as follows:

The true victim of rape exercises due care and caution for her own safety. She possesses a reputation for her chastity in her community and additionally she copes well with aggression usually meeting force with force. Should she fail to overpower her

aggression and rape occurs, she will make an immediate complaint in a hysterical state. (In Fischman, McCahill and Meyer, 1981:32).

The image of a 'real' rape survivor is also shaped by the media. Newspapers frequently portray women who are sexually experienced as manipulative liars and as unlikely 'victims'. Sex workers are often seen in this light because they defy conventional sexual standards and values. They are therefore extremely vulnerable to rape whilst their reports of rape are generally disbelieved (Wilson, 1978:8).

Myth 2: Myth: Women secretly desire to be raped

The belief that women secretly desire to be raped is frequently used to justify rape. Van der Merwe points out that the trauma suffered by rape survivors disproves this belief (Van der Merwe, 1995:73).

Myth 3: Rape cannot and will not occur if the woman stays at home

Ackerman (1995) argues that this myth is based on the assumption that the home is a place of safety and that nothing wrong or violent can occur in the privacy of a woman's own home. When women are therefore raped outside the boundaries of their own home, they are to blame because they did not stay at home. A woman's freedom is severely restricted because she cannot be as free as she wants to be (1995:164).

The fact that women are frequently raped in their own homes also discredits this myth. Hirsch (1977, in Ackerman, 1995) concluded that 47% of rapes take place in the privacy of a woman's home, and the study by Williams and Holmes (1981) concluded that 36% of rapes occur in a woman's home. The University of South Africa concluded during 1999 that 60% of rapes in South Africa take place in the privacy of a rape survivor's home. The study does not make it clear whether these rapes are committed by the rape survivor's husband, boyfriend or a stranger (Ackerman, 1995:200). The *Mail and Guardian* (1999:7) revealed that 31% of rapes take place in the home environment.

Women are raped in the places where they are supposed to feel safe and in most of these instances the rape survivor is not believed.

Myth 4: Most accusations of rape are false

When people support this myth it undermines the survivor's effort to secure justice. Ehrhart and Sandler (1985) believe that only 2% of rape and sexual assault charges were false and Viljoen (1992:745) states that "the incidence of false reports of rape is exactly the same as that for other felonies, that is about 2%" (Ackerman, 1995:171). The statistical analysis on the other hand indicates that 98% of women are telling the truth when they say that they have been raped (*People Opposing Women Abuse*, 1996). However, an interdepartmental report showed that 7% of rape charges that were made by rape survivors was withdrawn as a result of false complaints (*Mail and Guardian* 2002:50).

Myth 5: The longer a woman takes to report the rape, the less credible her story is

This myth originates from the time when the rape survivor was compelled by the *Hue and Cry Rule* to publicly proclaim her rape and show her torn clothes and injuries to prove she had been raped. This public display of grief and anger served to persuade the community of her innocence, and made her accusation more credible and trustworthy (Keyser, 1993:14-17).

The reality is that many women do not report the crime of rape immediately for a number of reasons. Some rape survivors might still be in shock, or they may not have transport to the police station or to the courts. Many fear that they will not be believed because they are aware of the rape myths that exist in society. They frequently find it difficult to name their experience as rape, especially when the rape is committed by a husband or boyfriend (Burgess, 1988:200).

This myth suggests that women use false accusations to protect their reputation because they regret having had sex with a man or they want revenge. When women say no to men who want to have sex with them, they actually mean yes. According to the myth, charges of rape can be made very easily by women but it is very difficult for a man to defend himself against these charges (Fischman, McCahill and Meyer, 1981:231). The myth stereotypes the woman as vindictive and untruthful.

Myth 6: The woman will be less desirable after the rape

The misperception that women who have been raped are less sexually desirable prevents many rape survivors from reporting their sexual violation. According to Burgess, a woman who believes in this myth fears stigmatisation on three levels: she will be seen as a loser and a victim; she will be seen in a negative light because an act of sexual intercourse with a stranger has become public knowledge; and intimate details of the rape survivor will be discussed openly (1988: 210). She may also fear that people will treat her differently and that men will see her as damaged. According to Borges (in Burgess, 1988:210), men do not want to have intimate relationships with women who have been raped. They fear social stigma and a loss of self-esteem because they have settled for what they consider to be an inferior woman.

2.3 Myths and Misconceptions about the Rapist

The blame for rape is usually shifted from the rapist to the rape survivor by attempting to discredit her. Questions are usually asked about the type of clothing the rape survivor wore, the people she socialises with, where she was when the rape occurred, her moral character and how she behaved during the rape. Questions of this nature should rather be asked about the rapist and his actions (Buckenham, 1998:3).

Society has been structured in such a way that men are socialised to be aggressors and women are socialised to be passive. Feminists have argued that violence against women is an aspect of patriarchy and that rape can be seen as a tradition of male

domination and female exploitation. The woman belongs to the man, she is his property and "female sexuality is recognised as a commodity to be used and enjoyed by men" (Fischman, McCahill and Meyer, 1981:22).

2.3.1 The 'nature' of the rapist

Myth 1: The correct definition of rape: It is a crime of passion

Rape is not a crime of passion but it is "a crime of violence, where sex is used as the weapon of control" (Buckenham, 1998:3). Passion can be used in the same breath as love and a romantic relationship but passion has got nothing to do with rape. This myth suggests that the incident of rape is unplanned and impulsive, whereas the rapist in most cases plans the rape. It is thus premeditated, and the act of rape is committed because of the desire to rape and not because of passion. Any woman can be raped whether a rapist finds her to be 'attractive' or 'unattractive'. It also has to be kept in mind that men can also be raped (Jagwanth, Schwikkasd and Grant, 1994:163).

Myth 2: Rapists are mentally ill people or psychopaths

This myth suggests that the rapist is not responsible for the act of violence he committed because he has no control over his actions, and it may even create sympathy for the rapist (Ackerman, 1995:184).

Studies have been conducted to test the 'normality' of the rapist. Verwey and Louw (in Ackerman, 1995) found that the majority of rapists fall in the 'normal' category of IQ Scores. A rapist can be any individual. He may be a normal individual in terms of IQ scores but he may be more aggressive, impulsive and violent (Ackerman, 1995). Martin (*Mail and Guardian* 1999:6) states that the majority of the sex offenders that she has treated were not mentally ill.

Myth 3: Rape is an expression of a man's sexual urges

This myth implies that men have uncontrollable sexual urges. In other words, they cannot control their desires and it is difficult for them to judge when it is appropriate to have sex with a woman and when it is inappropriate. This myth, like all other rape myths, implies that rape is primarily a sexual act and not a violent act. The woman is once again held responsible because her behaviour and way of dressing excites the uncontrollable sexual urges of the man. It is thus her fault that the act of rape has occurred, whereas the man should be excused because his sexual urges are uncontrollable (Ackerman, 1995). This myth can be regarded as an insult to men because it implies that men have no control over their sexual urges.

2.3.2 The relationship between the rapist and the rape survivor

Myth 1: Rapists are usually unknown to the rape survivor

Myth 2: A family member cannot commit rape

These myths imply that only strangers rape women and that women should therefore be on their guard only with men they do not know. Sexual intercourse between family members (for example a young girl and her uncle) may not be seen as rape (although it is illegal) because it is believed that the male family member fulfils a position of authority and protection in the family. These myths may affect women differently, but they play a crucial role in inhibiting the woman's ability to report the rape. Since they deny the possibility of rape by family members, the rape survivor is convinced that she will not be believed when she reports the rape.

When it is acknowledged that husbands and boyfriends rape, the assumption is still that rape committed by a boyfriend or a husband is less traumatic than when a stranger commits it (Ackerman, 1995:200). In a patriarchal society the man believes he is entitled to have sex and the woman is obliged to submit to his demand. When two people date,

it is believed that the woman has to keep her part of the hypothetical bargain in which the man pays for the date and the woman compensates with sexual intercourse. If she does not do so, it is believed that the man has the right to use force to get what he wants. It is furthermore assumed that the longer a relationship lasts, the more power men are given to decide when and where sex will take place and to enforce this power through the use of physical force (Schwartz and Dekeseredy, 1997:63).

Statistics show that 5% of rape survivors knew their rapists (Ackerman 1995). According to Wilson (1978), 10% of rapists were the survivors' fathers and 16% were the survivors' friends. Studies by Faul and Muller (1990) and Collings (1987) came to the same conclusions, and it was found that 21% of the rapists were friends and 59% were acquaintances. These findings were further substantiated by Louw's (1990) study that showed that 10% were friends of the rape survivor and 7% formed part of their family (1995:189). According to the interdepartmental report in the *Mail and Guardian*, in more than 70% of rape cases the parties were known to each other (2002:50).

It is now acknowledged that rape can be committed in a marriage and it is a legally punishable offence in South Africa (*Family Violence Act* of 1998). The heart of the legal argument is that one instance of consent does not give consent for other occasions. A woman has the right to say no to sex with her husband.

2.3 The consequences of rape myths

Rape myths endorse and enforce sexist stereotypes and thus restrict the freedom of women, who do not have the freedom to go where they want to go and to do what they want to do because they may be raped (Wilson, 1987:9). Misconceptions and ignorance about rape encourage and condone sexual violence. Rape is seen as merely sex and neither the rapist nor members of the public recognise it as an act of violence (Ward, 1995:24) because rape myths are widely accepted and ingrained in our society. False beliefs are not challenged by the ordinary citizen, but accepted.

2.5 Conclusion

Feminist theorists maintain that rape myths directly affect how other people perceive and treat rape survivors (Ward, 1995: 37). These myths inscribe sexist stereotypes that judge men and women according to different sets of criteria. Women are often held responsible for the fact that men rape, and as a result they are often reluctant to report the rape because they fear that the legal system will confirm these myths.

The next chapter discusses the law and the rules of evidence concerning rape.

Chapter 3: The Law and Rules of Evidence in Rape Trials

Rape is a sexual crime that dehumanises women. The crime of rape stigmatises the rape survivor, invades her privacy and causes profound psychological trauma. Serious attention has to be paid to this crime because it has a long-term effect on the rape survivor. Jagwanth, Schiwikkasd and Grant (1994:157-159) analysed the substantive and procedural laws of rape and they concluded that these laws do not protect women, but that their effects are instead adverse.

The South African rape law comprises various sections and clauses, which the judge has to take into account when he/she makes a decision. The focus during court procedures is on the definition of what constitutes an act of rape according to the law. If the survivor's testimony does not correspond to what the law defines as rape the survivor's testimony will be treated with caution.

3.1 The definition of rape according to the South African Law Commission

The Sexual Offences Act has been part of South African criminal law since 1957, but it originated during the colonial times. The Sexual Offences Act was first known as the Immorality Act, 23 of 1957, but the name changed to the Immorality Amendment Act, 2 of 1988. The Sexual Offences Act deals with a wide range of issues concerning sexual activity, and its main purpose was to establish what constitutes moral and immoral behaviour (South African Law Commission, 1999).

The South African Law Commission is in the process of revising the Sexual Offences Act of 1957. The term 'rape' was scrutinised because it was felt that it belonged in the past with the Sexual Offences Act of 1957. The term 'rape' evokes emotional responses and is considered more serious than sexual violation or even sexual assault (South African Law Commission, 1999:123).

The Commission proposed that the statutory provision for rape should read as follows:

- any person who commits an act of sexual penetration with another person intentionally and unlawfully is guilty of an offence. If one person causes another person to commit this unlawful act then this person will also be guilty of an offence;
- an act of sexual penetration is unlawful if it takes place under any form of coercive circumstances;
- a husband can be found guilty of the rape of his wife. A marriage cannot be used as a defence against this charge (South African Law Commission, 1999: 125).

The following aspects of the common law regarding rape are receiving attention and being revised:

- sexual intercourse and sexual penetration
- unlawfulness, consent and coercive circumstances
- intention

3.1.1 Sexual intercourse and sexual penetration

The concept, sexual intercourse, forms an important part of the definition of rape. Sexual intercourse usually implies conventional sexual relations between a man and a woman where there is penetration by the penis of the vagina. The South African Law Commission (1985, in Ackerman, 1995: 209) defines 'normal' sexual intercourse as the penetration of the sexual organs that takes place between a man and a woman, whereas 'unnatural' sexual intercourse is penetration that occurs when bottles, sticks or other objects are used, as well as oral and anal penetration. Both so-called 'unnatural' and 'natural' rape profoundly traumatise women (Hall, 1988:77 – 78 in Ackerman, 1995:209).

The term 'sexual penetration' is also included in the discussion report of the South African Law Commission because sexual penetration can be viewed as any act that

causes penetration. Examples of acts that can cause penetration are acts that involve the penis of one person into another person's ear, anus, mouth and vagina. Sexual penetration also includes the use of objects that are inserted into the vagina or the anus. The different acts can take any form that simulates sexual intercourse (South African Law Commission, 1999: 125).

Brownmiller (1975, in Jagwanth, Schiwikkasd and Grant, 1994:160) states that the penis is usually the weapon of the rapist. He may also use other instruments, for example his fingers, sticks or even bottles. Rape is a violation of a woman's body, and it is very difficult to distinguish what kind of penetration is less injurious to the rape survivor's mind and sense of self.

Hall (1988, in Jagwanth, Schwikkasd and Grant, 1994:162) argues that perceptions of what so-called normal heterosexual intercourse entails inform the way men think and behave. Traditionally male sexuality is seen as aggressive, forceful and active. A woman's sexuality is, on the contrary, seen as passive and receptive. In a so-called 'normal' sexual relationship the man is the aggressor and the woman passively submits to his needs. Rape can be seen as an extreme expression of the heterosexual sex act.

The definition of rape discussed above is based on the assumption that rape can only occur between a man and a woman. It is assumed that a man cannot be raped and that a woman can never be a rapist. However, a woman who acts as an accomplice of a man who commits rape can also be found guilty of rape (South African Law Commission, 1999:72). The South African Law Commission proposes that men can also be victims of rape. According to the new provisions regarding rape a neutral term, 'person', will be used to describe the rape survivor to make the rape definition more gender neutral.

3.1.2 Unlawfulness, consent and coercive circumstances

The concept of 'unlawfulness' was challenged by the example of rape occurring between a husband and wife. Previously, a married woman could not accuse her husband of rape. It was believed that a wife would lie about her husband raping her because wives were seen as spiteful and malicious, especially when the couple was busy with divorce proceedings (Jagwanth, Scwikkasd and Grant, 1994:166). The Prevention of Family Violence Act, 133 of 1993, repealed the rule of the South African Law that allowed husbands to rape their wives, and a husband can now be convicted if he rapes his wife. This was changed on the grounds that a woman's consent to sexual intercourse in one instance does not imply blanket consent to sexual intercourse for the rest of her life.

The question should also be asked whether a client can rape a sex worker. In the case of *R. V. Sibande* (1958) it was stated that "rape upon a prostitute . . . though it is a crime of rape, would not ordinarily call for a penalty of equal severity to that imposed upon a woman of refinement and good character" (Burchell and Milton, 1991:441, in Ackerman, 1995:205). The law is supposed to protect women equally, and the same definition of rape holds true for sex workers: when a man forces a woman to have sex with him against her will, it is rape. The woman sexual history should not be used as a means to shift the blame from rapist to rape survivor. The perception that sex workers cannot be raped also has a significant impact on the conclusions of police investigations in cases where sex workers report rapes. They frequently conclude that the case was unfounded or that the accusations were false.

Any person can be convicted of rape if he/she does not disclose the fact that they have been infected with a sexually transmittable disease to their partner before they have sexual intercourse. The failure to disclose this information amounts to false pretences and constitutes rape (*Cape Times*, 2003:1).

'Consent and coercive circumstances' refer to a situation where A agrees voluntarily to the actions of B, and the emphasis is thus placed on 'voluntarily' and 'agrees'. There must be no misunderstanding about what A wants, and a mutual agreement

must exist between the participating parties. The notion of 'consent' is crucial in rape trials where the most accepted proof of non-consent is the rape survivor's physical scars to show that rape had occurred or that she had physically resisted the rapist. When it is clear that a complainant had not consented to sexual intercourse, the shift of inquiry shifts from the behaviour of the accused to that of the survivor.

Consent does not have to be verbalised and a woman may show through her actions that she consents or does not consent. A clear distinction needs to be drawn between consent and submission: consent implies submission but submission does not necessarily imply consent. Rape occurs when a man intimidates a woman to submit to intercourse against her will. The question that needs to be asked is whether passivity is proof of implied consent or whether it is merely the abandonment of outward resistance (South African Law Commission, 1999:75). According to an article in the *Cape Times*, the Commission recommends that the state should not have to prove a lack of consent, but that the state should prove that penetration occurred under coercive circumstances (2003:1). The South African Law Commission provides the following examples of circumstances where consent might also be absent:

- Absence of physical force: Rapists induce fear by means of threats of violence. An abuse of authority is a frequent feature in cases of rape.
- Lack of opportunity to consent: Consensual intercourse cannot occur if, for example, the woman is asleep. It can however be accepted if the woman agreed to sexual intercourse while she was awake.
- Intoxication: Consent cannot be valid when the woman is in a state of intoxication, or when she is under the influence of drugs.
- Lack of mental capacity: When a woman is mentally unstable or impaired she is unable to consent to sexual intercourse. She must have sufficient mental capacity to understand what she consented to. She is incapable of giving or even withholding consent in terms of intercourse if she does not have sufficient mental capacity. The mental capacity to consent is very content specific. In an example

given by the South African Law Commission, it was shown that in the case of a woman, whose mental age was that of an eight-year-old, there was no evidence to show that she lacked mental capacity. The evidence has to prove beyond reasonable doubt that a person lacks mental capacity.

- Girls under 16 (statutory rape): Consent is only possible between two adults. It is against the law to have sex with a girl under the age of sixteen and consent is not at issue. Even though the girl may be completely aware of the implications of the act, the rule is justified on the grounds of public policy, which emphasises the physical age of the girl (South African Law Commission, 1999:77).

3.1.3 Intention

The notion of 'intent' coincides with the notion of 'consent'. It must be shown that the rapist consciously intended to have sexual intercourse with the victim, whilst aware of the fact that she did not consent to the act. *Mens rea*, or the presence of 'criminal intent', must be proven to convict a man accused of rape. However, if the perpetrator can show that he was convinced of the woman's consent to the act, even though she had not consented, then his mistaken interpretation can be attributed to the woman's passive conduct (Ackerman, 1995: 206). Since it is difficult to prove that the accused believed that the rape survivor consented to the act of rape, the perpetrator's mistaken belief must initially be assumed reasonable. If the perpetrator's false interpretation of consent can be attributed to his social status or ethnic group, where it may be believed that when a woman says no she actually means yes, then his actions may be thus contextualised.

According to an article in the *South African Journal of Criminal Justice*, the proposed revision of the Sexual Offences Act is commendable. Whether the rape statistics will decrease because of the new provisions will have to be seen, but the new provisions will at least restore the dignity of the rape survivor when she seeks help from the Criminal Justice process (Milton, 1999:369). The rape law is there to protect women, but rape survivors are also scrutinised and humiliated by the law that is supposed to

protect them. Their testimonies are usually treated with caution, suspicion and disbelief. The rape survivor has to prove that she is a credible witness during court proceedings that she experiences as hostile because they her feel as if she is on trial and not the rapist. When a rape survivor feels that the law does not protect her, and if her account of the rape is not believed, she will experience secondary victimisation.

3.2 Rules of evidence relevant to rape trials

There are two rules that play an important role in a rape trial, namely the Cautionary Rule and the Hue and Cry Rule. These rules create the impression that women intentionally lay fictional rape charges.

3.2.1 The Cautionary Rule

Even though the Cautionary Rule has been scrapped by the legislature of South Africa, I discuss it here to show the reader how women were degraded by the rules of law in the past.

As been stated earlier rape mainly occurs in private and there are usually no witnesses. The Cautionary Rule is a rule of practice that was invoked because it was believed that women are hysterical and imagine they had been raped. The credibility of the complainant can accordingly only be determined when she has evidence, such as bruises or torn clothes, to corroborate her accusation. Women are thus treated as unreliable witnesses and their evidence is regarded with severe suspicion. The Cautionary Rule features in cases where the evidence suggests a high risk of false incrimination, for instance where there is evidence that the rape survivor has ulterior motives for laying a rape charge. The Cautionary Rule can however be used to safeguard the rapist because the focus of the court proceedings will be on identifying discrepancies in the rape survivor's account of the rape. It is therefore inherently discriminatory against women because it invalidates women's accounts of their experiences as untrustworthy and devious. The rapist and the rape survivor are thus not equal before the law. The accused has already received sufficient protection in terms of the law because guilt has to be proven beyond

reasonable doubt, and he has the option of an appeal and review procedures. I think that the view that the accused is innocent until proven guilty contributes to women's belief that they, and not the defendant, are on trial.

The South African Law Commission Report of 1985 states that research abroad has shown that when a high degree of caution operates during rape cases the conviction and the conviction rate will be influenced. To ensure that men are not wrongfully imprisoned, women are considered deceitful (1985:60).

The Appeal Court abolished the Cautionary Rule in 1998 because of criticism of women's rights activists (Keyser, 1993:111). The repeal of the rule thus improves the position of the rape survivor.

3.2.2 The "Hue and Cry" Rule

This rule originates from an historical practice, which compelled women to proclaim the fact of their rape in the public areas of the town or city where they lived and to prove the rape by displaying their wounds and torn clothes. Even though women are far more independent today than they were in the past, speaking publicly about rape continues to be a harrowing ordeal. Many women do not report rape because the criminal justice system does not adequately protect them, and men continue to commit rape without suffering any severe consequences. The offender may, for instance, evade conviction and intimidate the rape survivor (Robertson, 1998:1). In most cases the rape survivor wants to forget the incident and go on with her life, but what she has to keep in mind is that her trauma will not disappear (Burgess, 1988:201).

3.3 The procedure of courts in South Africa

In South Africa, rape cases can be heard in the Supreme Courts and the Regional Courts. It is essential that rape cases are heard by these two courts because they

can hand down severe sentences to perpetrators. The Supreme Court can impose a life sentence on a rapist and the Regional Court can hand down a sentence of up to ten years imprisonment or a R200 000 fine (Lochrenberg and Stanton, 1995:33-34).

According to an interdepartmental management team, 7.7% of reported rape cases in the year 2000 resulted in convictions. In South Africa, it can take up to 18 months to finalise a rape case (*Mail and Guardian*, 2002:50). Many factors contribute to the low conviction rates, not least of which is the fact that rape survivors feel scared to report what had happened to them and they also fear the process of the trial.

3.3.1 Principles of Evidence: The character of the complainant

During any court case the complainant has to testify about her experiences and she has to be cross-examined. The general rule in all criminal cases is that the cross-examiner asks questions to establish the credibility of the witness. The character of the complainant is not relevant to her credibility during her court case. Evidence that is aimed solely at establishing that the rape survivor has a bad character is prohibited (Schiwikkard, Skeen, Van der Merwe, 1997: 60). The cross-examiner has the right in terms of the Common Law to question the complainant about her sexual relations with the defendant. The accused on the other hand is prohibited from giving evidence about the sexual relations that the complainant had with other men. The focus is therefore restricted to the sexual relationship between the accused and the complainant if such a relationship existed before the rape.

Evidence about previous sexual relationships can be allowed if the courts feel that it is necessary, but the relevance of previous sexual relations has to be established. There is an enormous risk of attacks on the complainant's character, which accounts for women's reluctance to report rape (South African Law Commission, 2002:487).

The credibility of the complainant is deemed important in a sexual offences case because it is difficult to establish consent, and the complainant's testimony has to be

weighed against that of the accused. If a record of her sexual history is made available as evidence, the rape survivor may be characterised as sexually promiscuous. The focus of the trial is thus shifted away from the misconduct of the rapist to the presumed promiscuity of the rape survivor (South African Law Commission, 2002:500).

3.3.2 Cross-examination of the complainant

South African law is based on the principle that an individual accused of an offence is presumed innocent until the state can prove that he/she is guilty of the offence. Cross-examination is a thorough procedure to establish whether witnesses are truthful in their testimonies.

Rape survivors frequently experience court proceedings as hostile because they have to submit to aggressive cross-examination, during which they have to defend themselves as if they were the guilty party. Even though the defendant is accused of the crime, the rape survivor is put on trial and not the rapist. This is counterproductive because the rape survivor has to feel protected and validated during the trial (Holmstrom and Burgess, 1978:157-221). Cross-examination that places the survivor in a defensive position where she feels like a criminal should be prohibited. The blame-the-victim strategy used by the defence is very upsetting to the rape survivor, who may unwittingly reveal irrelevant but damaging information about herself during cross-examination.

Cross-examination is often used to discredit a witness. The South African Law Commission proposed that the courts should prohibit any questioning that can be seen as scandalous and insulting. Repetitive questioning can portray the rape survivor as confused and undermines the victim's credibility. The rape survivor thus suffers further trauma during the trial (South African Law Commission, 2002: lxxxiv).

3.3.3 Protection of the complainant's identity

It is often argued that the public has the right to information and that press freedom should not be curbed. The question therefore is whether the identities of the accused and the complainant in a rape case should be revealed to the public. The accused predictably prefers anonymity to protect his status in the community, and the complainant may not feel emotionally ready to be identified in public (South African Law Commission, 1985:67).

An article in the *Sunday Times* (3 July 1994) questioned whether the accused and the complainant in a rape case should be publicly identified. Legally the identity of the accused cannot be revealed if he/she is under the age of 18. However, the press is not legally bound to withhold the identity of the complainant when he/she is older than 18. Stigmatisation has a major impact on both parties in a rape trial. There is an obvious tension between the belief that criminal cases, where the state is exercising power, should be in the open, and the belief that the state should protect the citizens of the country, i.e. that it should not expose the rape survivor.

It can also be argued that the rape survivor may decide for herself whether she wants her identity to be made public. She may create public awareness and mobilisation if she decides to reveal her identity. If the rape survivor decides not to reveal her identity, she may still feel ashamed and stigmatised because she has to deal with her ordeal alone. The South African Law Commission recommends that the rape survivor has to choose for herself whether she would like to reveal her identity to the public (2002:54 – 55).

3.3.4 The role of the judge

The judge has to make an objective, independent, precise and fair decision based on the available evidence and the stipulations of the law. The decision has to be conveyed in a way that makes it appear fair to the different parties involved and to the public. Judges have enormous power because they decide whether the offender will be set free or whether he will spend time in prison. It must be noted that judges do not receive any training in gender sensitivity.

In rape cases, the judge's responsibilities include the following:

- he/she must issue court orders to the defendant to instruct him not to communicate with the victims except through their attorneys;
- when there is evidence of intimidation (the rapist vs. the rape survivor) the judge can revoke the pre-trial release of the defendant;
- when the complainant and other witnesses fail to appear in court, the court must investigate the possibility of foul play (Karmen, 1984:147).

3.3.5 Sentencing

In rape cases the judicial officer first has to determine which sentence may be imposed according to the relevant penalty clauses. The court collects relevant information that will determine the appropriate sentence. Only convicted offenders can be sentenced and sentencing can be described "as the order of the court which finalises the criminal case against the offender" (Terblanche, 1999:5).

The following guidelines inform the decision making process during sentencing:

- The sentence is based on the circumstances of the case . The sentence should not be too light or too severe.
- Aggravating and mitigating factors have to be considered. The sentence should reflect the severity of the sexual offence.
- Society has to be taken into consideration in terms of the prevention of further criminal behaviour and the possible rehabilitation of the offender.
- Deterrence is an important factor because punishment has to deter the offender from re-offending, and it should deter other would-be offenders.

In spite of these guidelines, "it is still often believed that the judge or magistrate who imposes the sentence has a free discretion to do as he thinks fit" (Terblanche, 1999:1). The use of a weapon and the degree of physical violence used during the rape are also considered when deciding on an appropriate sentence.

3.3.6 Mandatory Minimum Sentences

A 'Mandatory Minimum Sentence' is a "minimum sentence that is specified by the state and that may be applied for all convictions of a particular crime with special circumstances" (South African Law Commission, 1997:27). Mandatory Minimum Sentences were established because of the criticism levelled at existing sentencing system.

3.3.7 Criticism levelled at the existing sentencing system

- Offenders are not treated equally before the law (for instance social status plays a role in sentencing) and hence justice does not prevail.
- When light sentences are imposed for certain offences (for instance rape cases), it is believed by those concerned (the public, human rights organisations) that these offences are not receiving the attention they deserve.
- The most important criticism is that offenders are released from prison before their full sentence has been served (South African Law Commission, 2000:4).

3.3.8 Responses to the criticism

Mandatory Sentencing was introduced in 1997, and serious offences such as murder, rape and robbery were listed as requiring mandatory sentencing. Mandatory Sentencing can be seen an important improvement on traditional sentencing because it is aimed at clearly defined offences demanding harsh punishment.

The Supreme Court and the Constitutional Court found it appropriate to hand down sentences of life imprisonment for the following categories of rape:

- the survivor was younger than 16;
- the same accused or co-accused raped the survivor more than once;
- the survivor was raped by more than one person in the execution of a common purpose or a conspiracy;

- the rapist had been convicted of two or more offences of rape, but had not yet been sentenced in terms of the convictions;
- the rapist knew that he had HIV/AIDS (Cape Argus, 2001:18).

3.3.9 Specialised Sexual Offences Courts

Special courts were established in 1993 to deal with the prosecution of sexual offences, with the important aim to improve the conviction rate of sexual offence cases and to ensure that cases are dealt with quickly and efficiently. Cases have to be completed as soon as possible to ensure that the rape survivor does not have to return to court to tell her story a year after the incident had occurred. Lengthy delays also work against the conviction of the perpetrator. Secondary victimisation has to be eliminated and court officials should treat rape survivors with compassion to avoid contributing to the trauma suffered by the rape survivor.

3.3.10 The Wynberg Sexual Offences Court

According to Frank Kahn, the Western Cape can be seen as “the rape capital of the country: it has approximately 6 000 rapes a year, 180 of which were dealt with last year by the Wynberg Court which provides facilities for rape victims whose trauma is usually ignored or compounded by the judicial system” (2001:1). The Court was established in Cape Town on 2 March 1993 in response to protests by women’s organisations about the manner in which the courts dealt with two rape cases. One such case was that of an eight-year-old girl where the rapist was acquitted because the district surgeon had ignored the subpoenas by the courts to give evidence. Another case was one where the magistrate commented in his sentencing that the rape survivor could not have suffered psychological damages because she was not a virgin. The verdicts given by the judges led to the establishment of the sexual offences court (Stanton and Lochrenberg, 1995:13).

3.3.11 The Wynberg Sexual Offences Court as a pilot project

During 1993, the Department of Justice viewed this court as an experimental project, the success of which would lead to the establishment of other sexual offence courts throughout the country. The procedures and the activities of the Wynberg Sexual Offences Court had to be monitored and evaluated. A pilot study was done by the Institute of Criminology of the University of Cape Town, together with Rape Crisis and Lawyers for Human Rights. An assessment was made of state role players and the improvements that the court made in the processing and treatment of sexual offence cases. The study also looked at the areas that still needed to be addressed and made recommendations for improvement (Lochrenberg and Stanton, 1995: 5). When the Wynberg Sexual Offences Court was evaluated, emphasis was placed on the experiences of adult women. The research project focussed on the expectations, experiences and perceptions of sexual assault survivors that reported the sexual offences in the Wynberg district as well as other magisterial districts. The pilot project led to the establishment of 29 other sexual offence courts in the country.

There are 20 police stations that fall under the Wynberg Sexual Offences jurisdiction. These stations range from Simonstown, Muizenberg, Rondebosch to Athlone, Philippi and Manenberg. Statistics that were gathered from these police stations showed that in 1993 a total of 1203 rapes and attempted rapes were reported. Only half of these cases made it to the court. In the court's first year, 342 cases were completed out of 626 cases that went to court. The conviction rate for the cases that had been heard since the opening of the Sexual Offences Court before 1996 was 69%. According to the prosecutor, cases were withdrawn because the complainants decided not to continue, or because the prosecutor felt that the victim was not telling a coherent story. In the last instance, the complainant often disappeared and there were no witnesses. The number of cases that were withdrawn for 1996 totalled 37,2% (Stanton and Lochrenberg, 1995: 17).

3.3.12 The Prosecutors of the Wynberg Sexual Offences Court

The Sexual Offences Court prosecutors deal with cases from particular police stations, and their first contact with a case is when they receive the police docket.

The prosecutors then monitor the case and decide whether it can be defined as a sexual offence case or not. When the police docket has been established as a sexual offence case then the police are instructed to proceed with the case. The sexual offences court has to hear all sexual offence cases but in practice it does not occur because the prosecutors cannot cope with the extreme number of cases.

The Directives of the National Director of Public Prosecutions released the guidelines below for dealing with sexual offence cases:

- The prosecutors must have a multidisciplinary approach with regards to the investigation and prosecution of sexual offence cases.
- The different agencies that provide services to the rape survivors must be consulted so that the rape survivors can be more comfortable with the court proceedings.
- Consultations with the rape survivor must occur prior to the bail hearing. There must be proper consultation between the rape survivor and the prosecutor and one prosecutor must deal with a rape case (South African Law Commission, 2002: 68).

The guidelines that prosecutors have to adhere to are clearly stipulated but there are still allegations that rape survivors receive little or no prior warning about the court date. Consultation between the rape survivor and the prosecutor has to be arranged in advance so that specific court procedures can be explained to the complainant and to adequately prepare her for the trial. The prosecutors are generally overworked and prosecutors who deal with sexual offences have to be selected, which may not be a practical solution because of a shortage of personnel (South African Law Commission, 2002:69).

3.3.13 The Magistrates at the Wynberg Sexual Offences Court

The Minister of Justice appoints magistrates for a specific district or region. When the Sexual Offences Court was opened, a woman magistrate was appointed at the court. This immediately raised concerns in some quarters where it was felt that the

appointment of a woman would create an illusion of unfairness, an argument that disregards the fact that male magistrates may be seen to be more sympathetic to male rapists. A rotation system was introduced in the Wynberg Sexual Offences Court where different magistrates preside for one month before they returning to their usual Regional Court.

3.3.14 Problems experienced by the magistrates and recommendations made in terms of these problems

The magistrates preside in the Wynberg Sexual Offences Court for one month only, and if the case is not completed in this period it has to be completed in another court, which has a negative effect on the rape survivor because that particular court might not have the entire infrastructure that the Wynberg Sexual Offences Court has. The solution to this problem was that the trial had to be postponed until the same magistrate returned to the Wynberg Sexual Offences Court according to the rotation system (Lochrenberg and Stanton, 1995: 55). It is not clear how long it takes for a magistrate to return to the Wynberg Sexual Offences Court.

The magistrates sometimes have to handle cases that do not fall under the Wynberg Sexual Offences Court's jurisdiction. This creates problems because cases are frequently delayed and the complainant in many cases has to travel long distances to reach the court.

3.3.15 Recommendations for the different officials at the Wynberg Sexual Offences Court

Training is essential and the different officials have to receive training as often as possible to ensure that they up to date with changes in the law and support agencies. The training should focus on the specific role each official plays and how that role links with the roles played by other officials. Gender and race sensitivity training should also be included in the training. Officials have to be monitored to see whether they have implemented any initiatives to improve the situation of rape survivors (Stanton and Lochrenberg, 1995: 59).

3.3.16 Conclusion

The South African rape law is receiving the attention that it deserves. It has to be kept in mind that the process of revision of the law of rape takes a long time. The aim is that women who have been raped should trust the criminal justice process to treat them with respect and fairness. The officials of the criminal justice process, namely the prosecutors and judges, have to be sensitive to the needs of the rape survivors. The sensitivity of the personnel of the criminal justice process will reduce the feelings of distrust and shame that the rape survivors experience.

In chapter 4, the analysis of four court cases will focus on the treatment of rape survivors' testimonies during rape trials in an attempt to ascertain whether rape myths influence the attitudes of court officials.

Chapter 4: An Analysis of Four Rape Trials

This aim of this chapter is to investigate secondary victimisation during court proceedings. The way in which rape survivors are treated by the different members of the criminal justice system will be evaluated and discussed.

4.1 Court Case: State v A SS.9/99 CPD

All information was gathered from the Supreme Court of Appeal of South Africa. The reason for the inclusion of this case is to show how the verdict of the judge gives the impression that rape is not a serious crime.

4.1.1 Background

A 54-year-old father from Cape Town was convicted of raping his 14-year-old biological daughter. The complainant, who is the youngest daughter of the family, was alone at home when the incident occurred. The rape survivor was busy washing dishes when her father pulled her from behind to the bedroom. She defended herself with a knife; but he was too strong. The father removed the young girl's tracksuit pants without her consent. The rape incident was the young girl's first sexual encounter. A friend of the girl came to visit while the rape was in progress, but the father reacted instantly by saying that his daughter was busy and that he was trying to sleep. The rapist kept his hand over the young girl's mouth. After the rape, the defendant returned to the shebeen as if nothing had happened. The rape survivor reported the incident to her mother. Her mother in turn contacted the police (The Supreme Court of Appeal, 2000: 4).

4.1.2 The reaction of the respondent

When the father denied guilt when he was confronted. He tried to defend himself by saying that he had a wet dream on the complainant's bed and she had witnessed it. He further fabricated a story that his 14-year-old biological daughter and son had a relationship. During the trial, the respondent showed himself to be an inveterate liar about the alleged relationship between his daughter and his son.

4.1.3 The negative effects of the rape on the complainant

Before the incident the rape survivor could be described as a happy, friendly and outgoing girl. After the rape, the rape survivor's work and behaviour at school deteriorated. Her mind kept drifting back to the rape incident. She also became withdrawn, aggressive and she shunned all her friends. She is not easy to communicate with and she is also scared of being alone at home. After the incident, she had to sleep in her mother's bedroom (The Supreme Court of Appeal, 2000:5).

4.1.4 The history of the father

The marriage between the respondent and the mother of the complainant has been characterised by alcohol abuse and extra marital affairs, and the mother described their sexual relationship as being violent and aggressive. The respondent had been aggressive towards his wife and his children. He expected his wife and daughter to earn the family's income.

4.1.5 The sentence

Judge Foxcroft formally found the respondent guilty in the Cape Provincial Division of the Court of South Africa. According to the Criminal Law Amendment Act, 1997 (Act No.105 of 1997), in terms of section 51(1) any person convicted of rape, where the victim is a girl under the age of 16 years, shall be sentenced to life imprisonment. The only requirements necessary for life imprisonment are proof of the act of rape and the young age of the victim; no additional elements, such as injuries sustained or excessive force used, are necessary. In terms of section 51 (3) (a) of Act 105/1997, the court is assured that if there are substantial and compelling circumstances that justify the imposition of a lesser sentence; then the court may impose a lesser sentence.

4.1.6 Factors taken into account by the court to justify a lesser sentence

The judge based his decision to imprison the father of the rape survivor for 7 years on the following three considerations: the age of the defendant; the criminal record of

the defendant; and the absence of danger to the public. The father is 54 years old and according to the judge, life imprisonment is an inappropriate sentence because he is an old man and he may not have long to live. The defendant had no criminal record but he could not be regarded as a model citizen because of his regular visits to the local shebeen. His wife was the sole breadwinner. It was not necessary for the community to be protected from the father because he raped his own daughter and the judge believed the father would not repeat the same offence (The Supreme Court of Appeal, 2000:17).

4.1.7 Analysis of the case

The secondary victimisation of rape survivors is caused by unsympathetic and inappropriate behaviour by court officials who treat rape testimonies with scepticism (Stanton and Lochrenberg, 1999: 8).

In this case, the judge was indifferent to the emotional consequences of the rape that will affect the rape survivor for the rest of her life. He stated that the prosecution did provide enough psychiatric evidence, which suggests that the prosecutors did not fulfil their duty to prove that the rape had a negative effect on the rape survivor (Cape of Good Hope Provincial Department, 1999:61). However, the judge had the power to instruct the prosecution to gather more information regarding the effects of rape, but he did not. He was unsympathetic to the needs of the rape survivor because he did not consider her age and neither did he consider the fact that the rape had been her first sexual experience. The judge did not treat this incident of rape as a serious violation, and he therefore confirmed the rape survivor's sense of not being believed, which in turn intensified the psychological trauma she suffered. According to the judge, a father's rape of his daughter is not as serious as an act of rape that occurs between strangers, thus confirming the conventional belief that a rape committed by a husband or father is less traumatic for the survivor than a rape committed by a stranger (Ackerman, 1995:200).

A comparison with a similar case, *S. v. Madondo* (an unreported judgement by Squires, J. Case no. CC 22/99, Natal Provincial Division), reveals the severe limitations in Judge Foxcroft's evaluation of the case. A 43-year-old rapist was

sentenced to life imprisonment when he was found guilty of raping the 15-year-old daughter of his girlfriend. The complainant did not show any signs of physical injury but she did harbour negative feelings of resentment and anger towards the rapist (South African Law Commission, 2002:714).

Judge Foxcroft, in contrast, found that substantial and compelling circumstances did exist for him to impose a shorter than the prescribed life imprisonment sentence. It is important to consider what he meant by “substantial and compelling”, terms that originated in the *Minnesota Sentencing Guidelines* (South African Law Commission Report, 2000:29).

The *Minnesota Guidelines* state that when substantial and compelling circumstances exist the judge may depart from the prescribed sentence and he/she may impose a sentence that is authorised by law. When this is the case, the judge may impose a sentence that is proportional to the severity of the offence. The criminal history of the offender is also important. What makes the *Minnesota Sentencing Guidelines* interesting is that when a judge departs from the presumptive sentence, he/she must provide written reasons for his/her judgement where he/she must stipulate why the selected sentence may be more appropriate.

The following reasons can be given by a judge to justify a lesser sentence in a rape case:

- the victim was the aggressor;
- the offender played a minor role during the crime, or he/she might have participated under circumstances of coercion;
- the offender might have a physical or mental impairment, where he lacks the capacity to make a clear judgement.

In this case, the judge considered the rape of a 14-year-old girl by her 54-year-old father to be a minor crime. This was an inappropriate judgement because, even though the rapist was a first time offender, he was an aggressive man judging by the fights he had with his wife. The rape survivor was also at a very vulnerable age.

Sharita Samuel (Agenda, 2000:23), in her commentary on this case, argues that the attitudes and beliefs of those who administer justice should be changed. She quotes the 1997 Criminal Law Amendment Act, which stipulates that the rape of a girl under the age of 16 deserves a life sentence.

4.2 Court Case: Carmichele v Minister of Safety and Security and another party

All information was gathered from the Supreme Court of Appeal. The Carmichele case is included to show the insensitivity that she and others have experienced at the hands of the agents of the state. The case is still pending but it can already be regarded as a step in the right direction concerning the rights of women.

4.2.1 Background

Alix Carmichele made a case against the Minister of Safety and Security and another party because of their negligence to provide protection against a convicted criminal who had been released pending trial. The police did not provide enough information to the prosecutors to enable them to detain the offender and to oppose bail. The accused was referred for psychiatric observation but the results of the observation did not show that he was a danger to society, nor did it recommend that he should be detained. The Attorney General was in possession of documents that reflected the seriousness of the rape as well as the accused sexual deviance, but he did not recommend that the prosecutors should oppose bail.

4.2.2 History of the offender

Coetzee was born in 1973. His history of sexual offences began in his early teens, when he molested his niece, and his behaviour at that stage caused his mother concern. He was first charged on the 6th of September 1993 when he was 20 years old for an indecent act on one of his acquaintances, 25-year-old Beverley Claasen. She was asleep when Coetzee climbed through her bedroom window, climbed into bed with her and fondled her. When she woke, he escaped through the window. Coetzee was convicted of house breaking and indecent assault. He was sentenced

to 18 months imprisonment on the house breaking charge, but it was suspended for 4 years. The indecent assault charge gave him the choice of paying a fine of R600 or 6 months imprisonment, and a sentence of 12 months imprisonment that was conditionally suspended for 4 years (The Supreme Court of Appeal, 2001:947).

On the 4th of March 1995, less than 6 months later, Coetzee attempted to rape and murder Eurona Terblanche an old school friend. Coetzee offered to take Terblanche home after a dance at the Hornlee Hotel, Knysna. She accepted his offer, but on the way home he persuaded her to take a detour from the normal path. When they reached a deserted spot, he attempted to kiss her. When Terblanche resisted, Coetzee answered her resistance by throwing her to ground where he repeatedly punched and kicked her. He dragged her into tall grass and ripped off her clothes. Coetzee became violent and threatened to kill her. He sat on top of Terblanche while he punched and bit her. She eventually lost consciousness. When he was on trial, Coetzee admitted that he wanted to rape her but he denied that he had done so. It could not be established whether Terblanche had been raped.

After the attack, Coetzee left Terblanche to die and ran back to the Hornlee Hotel, where he told the management that he had killed a girl. The police were summoned and Coetzee was arrested for being drunk in a public place. After a while Terblanche regained consciousness, she gathered her clothes and walked to a friend's house. She reported the attack immediately to her friend and her mother who informed the police. Terblanche was taken to hospital where the doctor noted that extensive injuries had been inflicted on her (The Supreme Court of Appeal, 200:946).

Sergeant Beulah Jantjies was the officer on duty when Terblanche and her mother reported the incident to the Knysna charge office. The investigating officer, Detective Sergeant David Klein, took the matter over from Jantjies. Terblanche was accompanied by the detective sergeant to the scene of the attack, where they found a sandal and underwear that belonged to her. Jantjies, the duty officer did make a note in the investigating diary that she had been informed of Coetzee's previous conviction of rape.

Coetzee appeared in court two days after he was charged by Terblanche. The prosecutor, Mr. G Olivier, did not place any information before the magistrate about Coetzee's previous convictions. Coetzee was released but he was informed that he had to appear before the court again on the 17th of April 1995.

When Coetzee was released, he returned to Noetzie to live with his mother. She worked as a domestic and general worker for Mrs. Gosling. Terblanche's mother visited Gosling to inform her about Coetzee's crimes and the attack on her daughter. Gosling, when she testified, revealed that she felt scared and believed that Coetzee would repeat his crime. Carmichele was a friend of Gosling.

4.2.3 Gosling, Carmichele and the criminal justice system

Gosling went to Captain Lawrence Oliver, a police officer at the Knysna police station, and informed him that she was scared that Coetzee might hurt her or one of her friends. She enquired whether Coetzee could be detained pending his trial. Gosling was referred to Ms Dian Louw who informed her that there was no law that could protect her. Coetzee first had to commit another offence (The Supreme Court of Appeal, 2001:948).

Carmichele told Gosling that she had found Coetzee snooping around the house. He tried to open a window and Carmichele confronted him. He replied that he was looking for Gosling, even though he knew that she had left earlier that morning. Carmichele reported the incident to Louw, but she too was informed that nothing could be done to protect her.

4.2.4 Coetzee's attack on Carmichele

The applicant (Carmichele) arrived at Gosling's home on the 6th of August 1995. She had an appointment with Gosling, who was running late. Coetzee was in the house (he had broken in) where he attacked Carmichele with a pick handle. His blows were directed at her head and her face. She tried to protect herself by lifting her arms and a blow broke her arm. Coetzee became even more violent and dragged her around the house, where he eventually stabbed her left breast. The blade of the knife

buckled as it hit her breastbone. She escaped by kicking him when he tried to lunge at her again. Carmichele ran along the beach where she someone helped her.

Coetzee was apprehended and sentenced to 7 years imprisonment on the 11th of September 1995 for the attempted rape on Terblanche. The attempted murder attack on Carmichele and the housebreaking charge led Coetzee to be further sentenced to 12 years imprisonment (The Supreme Court of Appeal, 2000:949).

4.2.5 The applicant's cause for legal action

Carmichele made a case because she believed that the different individuals, namely Klein (the police officer), Louw (the prosecutor) and Olivier, were liable because they had acted wrongfully and they had not conveyed important information. She directed her case against the Minister of Safety and Security because they were employed by the state and had acted within that capacity (The Supreme Court of Appeal, 2001:950).

4.2.6 The argument in court

Carmichele felt that it was the duty of the South African Police Services and the prosecutors to "ensure that she enjoyed her constitutional rights of inter alia the right to life, the right to respect for and protection of her dignity, the right to freedom and security, the right to personal privacy and the right to freedom of movement" (The Supreme Court of Appeal, 2001:951).

4.2.7 The facts of the case

It was the duty of the investigating officer in the Terblanche case to make all information known to the prosecutors. He had interviewed both Terblanche and Coetzee, and he was aware of previous allegations of rape against Coetzee. He was thus guilty of omission. Coetzee admitted openly that he was responsible for the attack on Terblanche. In the light of Coetzee's admission and the suspended sentence for sexual assault, it is believed that bail should have been denied or placed under consideration (The Supreme Court of Appeal, 2001:965). The

investigating officer knew that Coetzee habitually attacked women he knew, and that there was thus a risk of Coetzee repeating the pattern. Klein's advice to the prosecutor that Coetzee could be released on his own recognisance was clearly unlawful.

The magistrate has the final say in deciding whether an offender can be released on bail or not. It is the duty of the police to provide sufficient information to the prosecutors, and the prosecutors have the responsibility to provide this information to the courts. The prosecutors have to carry out their public functions independently and in the interest of the public. They are also responsible for making information available to the presiding judicial officer. The prosecutor relies on the information gathered from the different police officers to make an objective judgement. The prosecutors cannot benefit from keeping information from the courts. If the prosecutors do withhold information then a prosecutor could be held liable for damages suffered by a complainant (The Supreme Court of Appeal, 2001:968).

4.2.8 The decision of the court

The court was satisfied that the appellant had sufficient merit for her case, and that careful consideration of the various legal issues that arose from this case is warranted. According to the *Cape Argus*, the case of Carmichele against the Minister of Safety and Security stands as a landmark case about the practical implications of the duty of prosecutors and the police to inform the public of dangerous criminals on bail (2001:8).

4.2.9 Analysis of the case

As stated earlier, secondary victimisation is caused by the inappropriate responses of state agents towards a rape survivor. In this case, the police and the prosecutors treated Carmichele in an unsympathetic manner. The prosecutor neglected his duty to inform the court of Coetzee's history, and the judge's decision during bail proceedings was therefore not an adequately informed decision. Carmichele was thus treated unfairly by the police and the prosecutors because they withheld information that could have prevented Coetzee's attack on her.

4.3 State v Jackson

All information was gathered from the South African Criminal Law Reports, 1998. This case of the State v Jackson illustrates how the Cautionary Rule influences a rape trial. The Cautionary Rule was abolished in 1998.

4.3.1 Background

The complainant, a 17-year-old schoolgirl, accompanied by her sister R. and some friends, went to a park in Bishop Lavis, Cape Town. The girls had a case of beer with them. The complainant had one beer when the appellant, a 24-year-old policeman, joined them. The complainant knew the accused. The 24-year-old policeman offered to take some of the girls for a drive in his car and he offered to give them driving lessons. The complainant, her sister and a friend accepted the offer. After a while, the accused dropped R and the friend back at the park, but the complainant was still busy with her driving lessons (South African Criminal Law Report, 1998:471).

The accused asked the complainant to stop the car because he wanted to drink a beer. He tried to kiss the complainant but she resisted. The accused grabbed both of the complainant's hands with his one hand, he raised her hands above her head, took off her shoes, and lowered her jeans and panties to her ankles. He heaved himself on top of her after he had pulled her jeans off her one leg. He had also lowered the driving of the car.

The slightly built 17-year-old girl tried to fight back but could not prevent herself from being pulled into the back seat of the car. The complainant started to scream and shout; she scratched the accused on the forehead. Although she showed the accused that she was not interested in having sex, he inserted his fingers into her vagina. The rapist revealed his penis and he tried to force himself into her while lying on top of her. The complainant fought back, jumped up and pulled up her jeans and ran away. She left her shoes in the car (South African Criminal Law Report, 1998: 472).

4.3.2 The complainant's reaction

The complainant's first reaction was to get help, and she ran to the nearest house but it was empty. She came across two young men but she ran away from them because she was afraid. Eventually, the complainant arrived at the park where her sister and friends were still sitting. She immediately told her sister that she had been raped. After a while the accused arrived at the park. The complainant accused him of the rape but he denied it. The complainant's sister tried to assault the accused with a beer bottle. A friend removed the plimsolls of the rape survivor from the car (South African Criminal Law Report, 1998:472).

4.3.3 The accused's version of the rape

According to the accused, he and the rape survivor were talking about intimate affairs after they dropped R and the friend. He kissed her and she returned his attentions. The complainant allowed the accused to lie upon her when they moved to the passenger seat. She allowed the accused to pet her breasts and private parts while she was fully dressed. The accused denied taking off her jeans, exposing his penis and he denied putting his fingers into her vagina. He denied trying to have non-consensual intercourse with the complainant (South African Criminal Law Report, 1998:472).

4.3.4 The evidence in court

According to the district surgeon, the rape survivor found the examination painful, she was in a state of shock, and she was withdrawn. The district surgeon could not confirm that full penetration did take place but there were abrasions on the complainant's buttocks and vaginal tissue. The abrasions are reconcilable with unlubricated sexual intercourse.

The complainant's behaviour deteriorated. She lost interest in her school work and she dropped out of school (South African Criminal Law Report, 1998: 473).

4.3.5 Sentence and appeal

The complainant's version of the incident was accepted and the evidence of the accused was regarded as false. The accused was convicted of attempted rape and he was sentenced to eighteen months in prison conditionally suspended for five years.

According to the defence of the accused, the complainant told the police in her statement that he had penetrated her, although she had later made the statement that she was unsure whether penetration had occurred and to what extent. In the complainant's statement to the prosecutors, she stated that she had been raped. The defense argued that there were contradictions in her statements and they questioned the complainant's credibility (South African Criminal Law Report, 1998:473). In the Court of Appeal it was argued that the Cautionary Rule did not receive the necessary attention during the trial.

There appears to be no reason why the complainant would lie to her sister, her friends, the district surgeon and the trial court. However, the accused's evidence contradicted the complainant's evidence. He claimed that he did not use any force when he touched the complainant's private parts and breasts. According to him, she was fully clad. However, the district surgeon testified that the complainant had abrasions on her buttocks and vaginal tissue. The accused testified that his wife had scratched him on his forehead when she found out about the incident. The complainant testified that she had made the scratch. The accused also regarded the sexual intercourse as consensual, however, the complainant was in a hysterical state after the incident had occurred and her behaviour is incompatible with consensual intercourse (South African Criminal Law Report, 1998:474).

The complainant knew the rapist. He was a friend of her brother. The complainant had no ulterior motive to lie about the rape incident and she had no reason to humiliate and bring shame on herself. There were thus no grounds for an appeal (South African Criminal Report, 1998:477).

4.3.6 Analysis of the case

The Cautionary Rule was re-examined shortly after this court case. The Cautionary Rule was abolished during 1998. However, it is believed that caution is needed in cases where there is a single witness and where the quality of the evidence is not satisfactory (South African Law Commission, 2002:472).

In this case, the complainant's evidence was treated with caution by the defence. The rape survivor experienced secondary victimisation at the hands of the court officials. Her version of the incident was treated with suspicion because she had been drinking beer and could not specify whether the accused had penetrated her vagina or not. Blame was thus shifted from the accused to the complainant.

4.4 State v Hendrik Jansen CC 8/99

All information was gathered from the Cape of Good Hope Provincial Division (The High Court of South Africa). This case is included in the study because the rapist received a sentence that was less than the required sentence. The judge felt it necessary to make reference to substantial and compelling circumstances.

4.4.1 Background

The complainant in this case was a nine-year old girl who lives in Malmesbury. She is the only daughter of the Cupido family, she has three brothers, and lives with her mother and her mother's boyfriend. The complainant's father was killed five years earlier. The accused in the murder case of the father was the complainant's mother. The mother received a suspended sentence because the complainant was still a baby and her mother was breast-feeding. The three brothers have left the family home and are all living with their girlfriends.

The complainant was in grade four when the incident occurred. She repeated grades one and two. According to the complainant, the reason why she failed these grades was that her home is far from the road where she is supposed to get the school bus and it is difficult to get to the school bus in rainy weather. The nine-year-old girl's

teacher described her as quiet and an average student. After the rape, the complainant became even more withdrawn and her grades started to deteriorate (Cape of Good Hope Provincial Division, 1998:3).

It was a Sunday afternoon when the complainant was on her way home from a visit with S, one of her brother's girlfriends. She was walking home when she saw her brother and the accused walking behind her. After a while she looked behind her again, her brother was not behind her anymore but the accused was running towards her. The complainant started to run but the accused caught up with her near a railway line. He tripped her with his foot and he forced her to the ground. The accused was on top of the complainant while she was lying on her back. The complainant tried to fight back by shouting and calling her mother. The accused in turn threatened the complainant that he would kill her if she shouted again. He revealed a knife that he had with him and he said he would hurt her if she made another noise. The accused lifted the complainant's skirt and he removed her underwear while he was threatening her to keep quiet. He unzipped his pants and raped the nine-year-old complainant. Although the complainant knew that the accused was busy with sexual intercourse, she did not see his penis.

Two onlookers who were known to both the complainant and the accused interrupted this forced sexual intercourse. The accused removed his penis from the complainant's vagina before he threatened the onlookers. The onlookers turned around and walked away. The accused then forced his penis into the vagina of the complainant for the second time. After the rape the accused instructed the complainant to get dressed and not to tell her mother because he will give her money and sweets (Cape of Good Hope Provincial Division, 1998:4).

4.4.2 The complainant's reaction

The complainant went home after the rape and took off her clothes. She did not tell anybody what happened to her. According to the complainant, the reason why she did not tell anybody was because it was her first sexual experience and she was afraid to tell her mother. She was also afraid that the rapist would come back and hurt her.

A girl who knew the complainant witnessed the rape and she reported the incident to a schoolteacher on the Monday morning. The schoolteacher confronted the complainant who came forward with the details of the incident. After this confrontation, the complainant confided in her brother's girlfriend who told the complainant's mother.

4.4.3 Sentence

The case was referred to the High Court of South Africa because the perpetrator raped a girl under the age of sixteen and he used force when he committed the crime. The Regional Court does not have the jurisdiction to give the rapist the most appropriate sentence. The court case was divided into two parts namely the conviction stage and the sentencing stage (Cape of Good Hope Provincial Division, 1998:6).

The 26-year-old accused was first brought before the regional Magistrate Court of Malmesbury. He pleaded guilty to the charge of rape. This was his first offence. The rape survivor was under the age of sixteen and the Regional Court not sentence the rapist. The minimum sentence for such a crime according to the Mandatory Minimum Sentencing Guidelines was that of life imprisonment. This sentence can be altered if there are circumstances that could justify a lesser sentence.

The High Court judge took the age of the defendant and the age of the complainant into account. The previous record of the accused and the manner in which the act of rape occurred were also considered. It was however found that the medical examination of the 9-year-old survivor did not reveal much evidence of violence during the rape. The accused was thus sentenced to 18 years imprisonment (South African Law Commission Report, 2002:712).

4.4.4 Analysis of the case

The court case was divided into two parts namely the conviction stage and the sentencing stage because the Cape High Court has much more power and can

impose a severe sentence on a rapist. However, the High Court judge said that he found it difficult to gain sufficient understanding of the rape case in its entirety because he did not was not part of the trial proceedings (Cape High Court, 1998 :6).

A girl under the age of 16 cannot consent to sexual intercourse. The rapist pleaded guilty to the charge of rape and he was sentenced to 18 years in prison. Even though the medical report revealed that sexual intercourse had taken place, it was not clear whether it had been violent. Based on insufficient medical evidence, the judge deviated from the mandatory life sentence to impose an 18-year prison sentence regardless of the rapist's acknowledgement of guilt and the girl's extreme youth.

4.5 Conclusion

Even though the law is there to protect the rights of all people, including persons accused of rape, it is however essential that rape survivors are treated with respect and compassion and not suspicion and scepticism as is so often the case. To approach the rape survivor's statement with caution and disbelief will affect the manner in which she will handle the court proceedings (cross-examination and sentencing). Rape survivors should be adequately informed about and prepared for the trial because it will strengthen the case.

The four cases that were analysed showed that secondary victimisation does occur during court procedures, whether as a result of lenient sentencing or the manner in which prosecutors speak to rape survivors.

Chapter 5: Conclusion and Recommendations

Sex offenders cannot be seen as a homogeneous group of criminals. Men who gang rape a 14-year-old girl and a paedophile who rapes his niece have to be approached and sentenced differently. Sentencing has to take the history of the offender and his potential danger to society into account. It is however crucial that a convicted rapist receives and serves a sentence that is severe enough for the crime he committed (South African Law Commission Report, 2002:690-691).

The sentencing of sexual offenders is generally lenient in South Africa. The leniency towards rapists can be seen both in the limited time they actually spend in prison and in the sentences that judges consider to be appropriate for the sexual offenders. Sexual offenders can receive bail instantly, as can be seen from the Carmichele case where the offender was released on bail although he had a criminal record. The framework of punishment established by the legislature restricts judges and magistrates, but judges are allowed greater independence in sentencing. Judges of the High Court can intervene in the sentencing of the trial court if they believe that the sentence of the trial court induces a sense of shock or if the sentence is inappropriate (South African Law Commission Report, 2002:701).

5.1 The sentencing officials of the criminal justice system

The State President appoints judges who preside over the Supreme Courts. A judge can be appointed until he reaches the age of 70. There are currently more than 150 judges in South Africa. During 1992, there were only one female judge and two black judges. A Supreme Court can impose much harsher sentences on rapists than a Magistrates Court can. The Appeal Court judge can revise the sentence of the Magistrates Court (Sarkin -Hughes and Kahanovitz, 1992: 5-6).

5.2 The role of the sentencing official

The judicial officer of the court has to be independent, detached and impartial. This means that a judge must be impartial to inquiries of a political nature. He/she may

not accept an appointment to a government committee or commission that is concerned with issues regarding policy matters. However, a judge can form part of a debate that concerns issues about fundamental rights. According to Goldstone, a judge can speak freely of a topic that is before him in court. When the judge is off the bench, he/she may speak freely about any topic that relates to the law and the administration of justice. When an area of discussion is controversial, the judge must be careful not to embroil the courts in the controversy because the courts are subject to public criticism (Goldstone, 1993: 27).

A judge must restrict his off-bench speeches to issues that concern academic and legal issues. He/she must not appear to form part of a specific political party or policy. The judiciary thus must be seen as fair and as a body of the government that has integrity. The public has to be educated about areas where judges have expertise and a healthy relationship has to be formed between the public and the judiciary. The role of the judges is important. Sentencing officials such as judges and magistrates have to keep in mind that they are there to protect the victims of crime, they have the duty to punish the offenders and they have to conduct themselves in an appropriate manner on and off the bench (Goldstone, 1993:29).

5.3 The training of the officials of the court

The sentencing officials of the criminal justice process start off as advocates, prosecutors and lawyers before they are appointed as judges and magistrates. They have the official academic training of a degree in law, and the practical court room experience gathered through the years. It can be debated whether the personal background of a judge plays a role when he/she has to make a decision about giving the most appropriate sentence. Judges receive training from the Gender Desk concerning gender sensitivity and issues that concern the effects of rape. Although it is the prosecutors' responsibility to inform the judge of the necessary facts concerning a rape case; it is crucial for a judge to have a good understanding of the effects of rape and the concern of rape survivors during a rape trial. All court officials, not only judges, should receive on-going training in dealing with rape survivors.

5.4 The credibility of the verdicts of judges

It is not clear how many women judges there currently are and whether the gender of the judge plays a role when a judgement has to be given in a court case. Reference can be made to the pilot Sexual Offences Court in Wynberg where the first judge was a woman. Some of the officials of the court felt that a female judge could seem to suggest that the Wynberg Sexual Offences Court is biased and that rapists would be treated unfairly. This position clearly suggests bias against women judges. It is important to have clarity about the factors that play a role when a judge makes a decision in a rape trial,

5.5 The Mandatory Minimum Sentencing Framework

This sentencing framework was discussed in Chapter 3 under 'Sentencing'. Although the framework was established to provide stricter sentencing guidelines than the guidelines that were used in the past, it still allows much room for individual interpretation and discretion to judges. In spite of the fact that judges have to argue their reasons for allowing a lesser sentence, they frequently rely on the use of "substantial and compelling" circumstances to give a rapist a lesser sentence than he deserves.

5.6 Secondary victimisation and the criminal justice system

Rape survivors may feel helpless and humiliated when they appear in court because the rest of the public will know about the act that was committed against them. The four rape cases that were randomly chosen to see whether secondary victimisation does occur reveal that the verdicts of judges are too lenient and inappropriate. Judges use caution when they decide upon a specific verdict because they are usually placed under public scrutiny, especially in rape cases.

5.7 The Wynberg Sexual Offences Court

The Wynberg Sexual Offences Court was established to ensure that the plight of women could be addressed. The court started out with positive initiatives and aims but it does have some areas that need serious attention. A study by Stanton and Lochrenberg evaluated ongoing improvements and ongoing problems in the treatment of sexual assault survivors. They tried to establish what these problems were by conducting interviews with different rape survivors who had gone through the criminal justice process. It was found that secondary victimisation is an ongoing problem that needs to be addressed by informing court officials and ensuring that effective guidelines can be established to eradicate the problems associated with secondary victimisation (1999: 36).

Access to rape survivors' testimonies had been gained through Rape Crisis records and articles that had been placed in local community newspapers. Nine adult women were interviewed, two thirds of the rape survivors knew their rapist and one third did not. One of the problems of the Wynberg Sexual Offences Court was the long Court Roll. One third of the women who had been interviewed had to wait up to six months before their case appeared before the judge. These delays place more stress on the rape survivor because of the long time lapse between the rape and the trial (Stanton and Lochrenberg, 1999:103).

There was a concern about the manner in which women were informed about the bail of the accused. According to the research participants, there was no official mechanism to inform them whether the accused was out on bail or not. The rape survivors usually found out by chance or actively sought information about the whereabouts of the rapist. Women recommended that they would like to be the first to know whether their case would be prosecuted or not, when the sentencing of the defendant would be, what the reasons were for the delays if there were any and what the outcome of the trial was. If the accused was acquitted, the rape survivors wanted a written statement explaining why the rapist was acquitted.

The rape survivor must be informed about the role of the prosecutor. In most cases the rape survivor believes that the prosecutor is there to act as her lawyer, but the prosecutor is there to act in an impartial manner to secure justice. In two thirds of the cases the rape survivor dealt with more than one prosecutor and only one rape survivor had the same prosecutor during the trial. Seven of the research participants only met their prosecutors on the actual day of the trial. This was very stressful and the rape survivors recommended that it would be best for one prosecutor to deal with a rape survivor, that there should be more female prosecutors and that it should be essential for them to have met the prosecutors before the day of the trial (Stanton and Lochrenberg, 1999: 144).

Consultation between the different court officials, such as the prosecutor, the Victim Support Service Co-ordinator, and the rape survivor is important because it would prepare the rape survivor for the difficulties that could unfold in court, for example, insensitive cross-examination and an atmosphere of disbelief on the part of the judge and the spectators. Three of the nine women were never consulted, and consultations were also arranged between three of the research participants and the prosecutors but it never took place. Only two of the women felt that their consultations with the prosecutors were adequate because they believed that they were more prepared, confident and they did not have any more fears regarding the trial. Women that were never consulted by the prosecutors felt that they were unprepared for the proceedings of the court (Stanton and Lochrenberg, 1999: 443-444).

The trial was the process that each woman had to attend and complete to achieve her objective, to punish the rapist for his crime. The judge, the prosecutors and the offender are present, and the rape survivor usually has an overwhelming fear to testify in front of the rapist. Only three of the nine women had the choice of having a case held in-camera. The women were not sure what the in-camera procedure entailed. They were under the impression that it meant that they would only give evidence before the judge and the prosecutors. The rape survivors were further terrified when they had to give evidence in front of strangers although they used the in-camera process. The presence of the accused in the courtroom made the rape

survivors feel unsettled and nervous while giving evidence (Stanton and Lochrenberg, 1999:128). The rape survivor may have felt more self-confident if she had been better prepared.

Rape is a crime that leaves a woman emotionally vulnerable, and it is essential that officials of the court behave with empathy and understanding when working with rape survivors. The overwhelming feeling amongst the nine participants was that their emotional state was not understood. One participant explained that the prosecutor became irritated with her because she took such a long time before she answered the questions. Four of the women however spoke positively of the attitude of the judge. The reason why they felt that the judge treated them fairly was because he/she would intervene when the prosecution cross examined the rape survivor. On the other hand, another woman felt that the judge had been unapproachable and that he made her feel uncomfortable (Stanton and Lochrenberg, 1999: 135). The different court officials that come into contact with rape survivors have to undergo training to be more sensitive to the needs of the rape survivor. This training has to be provided by non-governmental organisations that provide support to sexual violence survivors and this training has to include communication and listening skills (Stanton and Lochrenberg, 1999:444).

5.8 The success or failure of the Wynberg Sexual Offences Court

The experiences of the nine women reveal that the Wynberg Sexual Offences Court has not successfully reduced secondary victimisation. Complainants were not treated with dignity and respect. The reason for this may be that the court officials were over worked. The length of the court roll makes it impossible for all the cases to be heard in the Wynberg Sexual Offences Court. There are no formal guidelines that can be used to decide whether cases should be heard in the Sexual Offences Court or the Regional Court. The rape survivors continued to be intimidated by the rapists, and the Wynberg Court failed to protect the complainants against the accused. Rape survivors were often not informed about the special waiting room and they had to wait with the rapist in the corridor (Stanton and Lochrenberg, 1999: 151).

5.9 Further recommendation and research

- Secondary victimisation results from and reinforces rape myths that are prevalent in society. The intricacies of secondary victimisation and strategies to rid the criminal justice system of it have to be researched.
- Communication between the different levels of government that come into contact with rape survivors has to be improved. Information has to travel effectively between these different levels and they have to work as one (Stanton and Lochrenberg, 1999: 155).
- The support of family and friends is crucial when the rape survivor is going through the ordeal. Their support should form part of the healing process and friends have the right to be present whenever the rape survivor wants them there.
- The officials of the court should be representative of the community in which the court is situated. In most of the cases, the personnel consist of white Afrikaans and English speaking people and the black staff usually form part of the police force (Stanton and Lochrenberg, 1999:157).
- The staff of the criminal justice system need to receive training when they work with rape survivors, and they also need a support structure to help them deal with the emotions that they may have.
- Survivors should be more involved during their rape case so that they can take control of their lives. There should be appropriate channels for rape survivors to contact officials when they want to. They should not be afraid to contact officials to ask questions, and officials should inform survivors about the structures that are in place to protect them. Survivors must be kept up to date about the perpetrator's whereabouts at all times.
- The core of the problem is that women often have feelings of uncertainty when they report their case. The officials of the court and the police must be sympathetic and circumspect when they discuss the rape case with the rape survivor. They must choose their words and answers very careful and they must not give any false impressions (Stanton and Lochrenberg, 1999:160).

- The Wynberg Sexual Offences Court was not an undiluted success. The problems of the court have to be identified and addressed because, regardless of its shortcomings, it fulfils an indispensable function. The court must receive more resources to deal with the large number of cases, or else the police stations that fall under the Wynberg court's jurisdiction must be reduced with careful deliberation about which police stations should be excluded (Stanton and Lochrenberg, 1999:167).

5.10 Recommendations

Rape survivors who seek help from the criminal justice system must make sure that their case appears in a Sexual Offences Court. The Sexual Offences Courts have the facilities to address the different aspects of secondary victimisation, such as private waiting rooms for the rape survivor, the in camera hearing facilities and counsellors that can assist the rape survivor when she might need them. Although other courts may have some of these facilities, it is important for a sexual offences case to be heard in a Sexual Offences Court because the officials at these courts may also be more sensitive to the needs of the rape survivor.

Rape survivors have to be educated to know what their rights are and how the legal system and process work in a rape case. This education has to take into account that many women are illiterate and that different strategies must be used to ensure that women receive and understand all the information necessary. It is important that rape survivors have adequate access to facilities to assist them through the process of their trial.

5.11 Conclusion

The new law establishes that any individual can be convicted of rape. It does not matter whether the rape survivor is a man or a woman. Even though the revision of the Sexual Offences Law may improve the rape survivor's situation, there is no overwhelming evidence yet of its success. The officials of the criminal justice system should show empathy and compassion towards the rape survivor and in this way the

prevalence of secondary victimisation that the rape survivors experience would be addressed in a humane manner. The sensitivity of the court officials and the new Sexual Offences Law can have a positive effect on the outcome of a sexual offences case.

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