



DECISION MAKING AND CASE ATTRITION IN RAPE CASES: A FEMINIST JURISPRUDENCE PERSPECTIVE

A THESIS SUBMITTED BY

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DECLARATION

By submitting this dissertation, I declare that the entirety of the work contained therein is my original work that has not been submitted for any degree or examination in any institution or published in any journal, textbook or media.

.....

P. Lebitse

.....

Date

DEDICATION

In memory of my darling grandmother Nodatini Evelyn Tsuela (Mama).

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ABSTRACT

This study is an empirical study of prosecutorial attrition in rape cases. The study uses mixed methods (quantitative and qualitative) to examine data derived from Umlazi Police Station in KwaZulu Natal. This thesis is approached from a feminist jurisprudence perspective to analyse legal texts that critically identify gender inequalities. Feminist critical theorists predict that external factors in the legal system that go beyond the actual legal burden influence the outcome of cases. This study tests the hypothesis, among others, that many of the decisions to decline prosecution in cases of rape are based on extra-judicial factors such as the complainant-perpetrator relationship; the complainant's character; and/or their credibility that contributes to or causes case attrition. In cases of rape, extra-legal variables are believed to have a significant influence on the decisions and actions of the key players within the criminal justice system. The results of this study make it possible to examine any correlation between procedural obstacles and outcomes in South Africa. With these findings, we can gain insight into the impact of rape law reform on the prosecution of cases in South Africa, taking into account the subcultural theory and downstream theory of rape.

TABLE OF CONTENTS

ABSTRACT	5
TABLE OF CONTENTS	6
CHAPTER 1: INTRODUCTION	10
1. BACKGROUND	10
2. THE PROBLEM AND PURPOSE STATEMENTS	14
2.1 THE RESEARCH PROBLEM	14
2.2 THE PRACTICAL PROBLEM	17
2.3 THE LIMITATIONS OF PRIOR STUDIES	19
3. SIGNIFICANCE OF THE STUDY	23
4. LITERATURE REVIEW	24
4.1 PROSECUTORIAL ATTRITION	24
4.2 PROSECUTORIAL DISCRETION	27
4.3 PROSECUTORS AND VARIABLES	29
5. RESEARCH QUESTIONS	37
6. THEORETICAL FRAMEWORK	38
7. METHODOLOGY	43
7.1 SAMPLE	43
7.2 METHOD	43
7.2 HYPOTHESES	45
7.2.1 Hypotheses 1	46
7.2.2 Hypothesis 2	47
7.2.3 Hypothesis 3	49
7.3 LIMITATIONS	52
8. CHAPTERISATION	53
CHAPTER 2: FEMINIST THEORIES ON RAPE AND THE CRIMINAL JUSTICE SYSTEM	54
1. INTRODUCTION	54
2. GENERAL RAPE THEORIES	54
3. KEY VARIABLES IN CASES OF RAPE: INSIGHTS FROM EXISTING STUDIES	64
4. RAPE MYTHS THEORY	70
4.1 THE PERFECT VICTIM	70
5. FEMINIST THEORY ON VICTIM ATTRIBUTION	79
6. RAPE CRIME REFORMS	83
7. CONCLUSION	95
CHAPTER 3: METHOD AND DATA RESULTS	98
1. INTRODUCTION	98
2. STUDY SAMPLE	99
3. METHOD	106
4. RESULTS	110

4.1 BACKGROUND CHARACTERISTICS	112
4.2 BACKGROUND CHARACTERISTICS: PROSECUTED CASES.....	114
4.2.1 <i>Quantitative Outcomes: Prosecuted Cases</i>	116
4.2.1 <i>Qualitative Outcomes: Prosecuted Cases</i>	118
4.3 BACKGROUND CHARACTERISTICS: NOLLE CASES	119
4.3.1 <i>Quantitative Outcomes: Nolle Cases</i>	121
4.3.2 <i>Qualitative Results: Nolle Cases</i>	123
4.4 ASSOCIATION BETWEEN CASE STATUS AND PREDICTOR VARIABLES.....	127
4.4.1 <i>Association Between Case Status and Predictor Variables: Prosecuted Cases</i>	129
4.4.2 <i>Association Between Case Status and Predictor Variables: Nolle Cases</i>	130
4.5 ASSOCIATION (NOLLE CASES)	133
4.6 ASSOCIATION (PROSECUTED CASES).....	135
4.7 FACTORS ASSOCIATED WITH CASE OUTCOMES	136
5. CONCLUSION.....	138
CHAPTER 4: ANALYSIS OF DATA AND CLAIMS	139
1. INTRODUCTION	139
2. EMERGING THEMES	139
2.1 CHILD RAPE.....	139
2.1.2 <i>Prosecutorial decisions and child cases</i>	142
2.1.3 <i>Discriminatory views</i>	145
2.1.4 <i>Summary of Findings on Child rape</i>	148
2.2 ACQUAINTANCE RAPE	150
2.2.1 <i>The Challenges of Acquaintance rape</i>	151
2.2.2 <i>Summary of Findings on Acquaintance Rape</i>	153
2.3 RAPE IS ECOLOGICALLY BOUND	155
2.3.1 <i>Comparison to Amir, Rabkin</i>	157
2.3.2 <i>Summary of Findings on Subculture Theory on Rape</i>	159
3. LEGAL VARIABLES.....	160
3.1 PENETRATION	161
3.1 <i>Definition</i>	161
3.1.2 <i>Summary of Findings on Penetration</i>	161
3.2 CONSENT AND COERCION	164
3.2.1 <i>Definition</i>	164
3.2.2 <i>Summary of findings on Consent</i>	165
3.3 SUMMARY CONCLUSION ON ALL LEGAL VARIABLES	168
4. EXTRA-LEGAL VARIABLES.....	169
4.1 CATEGORY ONE EXTRA VARIABLES	170
4.2 CATEGORY TWO EXTRA-LEGAL VARIABLES	172
4.3 CATEGORY THREE EXTRA VARIABLES	175
5. CLAIM ONE.....	179
5.1 EXTRA-LEGAL VARIABLES AND CORROBORATION.....	179
5.2 CORROBORATION REQUIREMENT.....	180
5.3 CORROBORATION HURDLES	184
5.4 RAPE REFORM LAWS AND THE CRIMINAL JUSTICE SYSTEM	191
6. CLAIM TWO.....	195
6.1 CORROBORATION AND PRIOR STATEMENTS	195

6.2 PRIOR STATEMENT.....	196
6.3 PURPOSE OF PRIOR STATEMENTS.....	199
6.4 THE ANOMALIES CONCERNING PRIOR STATEMENT.....	202
6.5 RULES OF ADMISSIBILITY	207
6.6 A FEMINIST APPROACH TO PRIOR STATEMENTS.....	211
7. CONCLUSION.....	213
CHAPTER 5: CONCLUSION	216
1. INTRODUCTION.....	216
2. EXTRA LEGAL VARIABLES: A FEMINIST PERSPECTIVE	217
3. MAIN OUTCOMES	217
3.1 OUTCOME ONE.....	217
3.2 OUTCOME TWO	218
3.3 OUTCOME THREE	219
3.4 OUTCOME FOUR	219
3.5 OUTCOME FIVE.....	221
3.6 OUTCOME SIX.....	224
4. RECOMMENDATIONS	224
3. SUMMARY OF RECOMMENDATIONS	226
4. BIBLIOGRAPHY	228
4.1 JOURNAL ARTICLES	228
4.2 CHAPTERS IN BOOKS	234
4.3 BOOKS	235
4.4 SOUTH AFRICAN LEGISLATION	236
4.5 TREATIES, INTERNATIONAL AND REGIONAL INSTRUMENTS, DOCUMENTS RESOLUTIONS.....	237
4.6 SOUTH AFRICAN CASE LAW	237
4.7 FOREIGN CASE LAW	238
4.8 MISCELLANEOUS REPORTS AND STUDIES.....	239
4.9 ANNEXURES	240
4.9.1 <i>Ethics Clearance Certificate</i>	241
4.9.2 <i>SAPS Permission Letter</i>	242
4.9.3 <i>Codebook</i>	235

CHAPTER 1: INTRODUCTION

A female definition of rape can be contained in a single sentence. If a woman chooses not to have intercourse with a specific man and the man chooses to against her will, that is a criminal act of rape. Through no fault of women, this is not and has never been the legal definition. The ancient patriarchs who came together to write their early convents had used the rape of women to forge their male power—how then could they see rape as a crime of man against women? Women were wholly owned subsidies and not independent beings. Rape could not be envisioned as a matter of female consent or refusal; nor could a definition acceptable to males be based on a male-female understanding of a female's right to her bodily integrity. Rape entered the law through the back door, as it were, as a property crime of a man against a woman. Women, of course, were viewed as the property.

— Susan Brownmiller

1. BACKGROUND

This study is a socio-legal project that builds on the author's LLM dissertation project.¹ That project examined the consequences of unfettered prosecutorial discretion as it relates to rape case attrition in South Africa. The crime of rape is set out in s 3 of the Sexual Offences and Related Matters Act (Sexual Offences Act).² The Sexual Offences Act prohibits the crime of rape. Section 3 decrees that: 'Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape'.³ The crime of rape has been expanded to include penetrative force that a person may exert by using not only genitalia but fingers/hands/toes; and any other objects into

¹ P Lebitse 'Prosecutorial attrition: Its implication for South Africa's domestic and international obligations to uphold women's human rights' (2021).

² Sexual Offences and Related Matters Amendment Act 32 of 2007 (hereafter referred to as "the Sexual Offences Act").

³ Ibid.

the vagina, the anus, and the mouth of another person.⁴ Case attrition refers to ‘the process by which alleged offences never come to the attention of the criminal justice system through non-reporting – or because they are ‘lost’ or dropped as they go through the various stages from reporting to conviction’.⁵

The narrow focus of the author’s LLM was limited to attrition during the prosecution stage. The limitation of that study indicated a significant percentage of rape cases fail to reach judicial resolution at this stage, but existing data did not focus on prosecutorial attrition.⁶ This doctoral project will continue to focus on the National Prosecuting Authority (NPA).⁷ However, it will examine case dockets to explore the reasons behind prosecutorial attrition based on data extracted from the South Africa Police Services (SAPS).

A key finding of the author’s LLM project revealed that high attrition rates in cases of rape occur due to unfettered prosecutorial discretion that is also exercised in a manner that is

⁴ Section 1 of the Sexual Offences Act.

⁵ S Grace, C Lloyd & L Smith *Rape: From Recording to Conviction* (1992) 1.

⁶ L Artz & D Smythe ‘Case Attrition in Rape cases: A Comparative Analysis’ (2007) 20 (2) *South African Journal of Criminal Justice* 158, 172. See L Vetten; R Jewkes, R Sigsworth, N Christofides, L Loots & O Dunseith ‘Tracking Rape Case Attrition in Gauteng: The Police Investigation Stage’ 2008 *Tshwaranang Legal Advocacy Centre, Medical Research Council, Centre for the Study of Violence and Reconciliation: Johannesburg*, 1. <http://www.csvr.org.za/docs/tracking_justice.pdf>

⁷ The South African Constitution of 1996 (hereinafter referred to as “the Constitution”). The National Prosecuting Authority Act 32 of 1998 (hereinafter referred to as the “NPA Act”). The South African Constitution and the National Prosecuting Act established the NPA in South Africa. Prosecutors have the right to prosecute any crime in terms of section 179 (2) of the Constitution and section 20 (1)(a) of the NPA Act. However, their right to decline prosecution is derived from section 20 (1)(c) of the NPA Act and not the Constitution. The NPA must act diligently and competently to enhance the constitutional rights of citizens in the country.

inconsistent with the Constitution and international human rights law (IHRL).⁸ Several factors formed the basis of this conclusion. In the main, the literature showed that some prosecutors are often influenced by rape myths and gender stereotypes when required to exercise discretion to either prosecute or refuse to prosecute cases.⁹ The impact of these myths and stereotypes remain essential to this current project. They will be explicated later in this Introduction chapter, and in more detail in chapter 2.

The argument put forth in the LLM dissertation was that prosecutorial discretion that is exercised in a deficient manner (by failing to prosecute based on the ‘real rape’ stereotype) amounts to unfair discrimination against women whose versions do not fit into the category of

⁸ To be sure, the UN General Assembly, Convention on the Elimination of All forms of Discrimination against Women, 18 December 1979, A /RES/34/180, <<https://www.refworld.org/docid/3b00f2244.html>> requires nation states to comply with international human rights law (IHRL) by adopting ‘appropriate legislation and measures’ that prohibits all forms of discrimination against women, through ‘competent’ public institutions. Also see United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995, <<https://www.refworld.org/docid/3dde04324.html>> The meaning of discrimination against women under Article 1 of CEDAW includes GBV, despite this not being explicitly stated in the Article 1. Prosecutors must act with due diligence in order to comply with international law. The CEDAW General Recommendation No. 28 noted that states parties have a due diligence obligation ‘to prevent, investigate, prosecute and punish acts of gender-based violence.’

⁹ L Frohmann ‘Discrediting victims’ allegations of sexual assault: Prosecutorial accounts of case rejections’ (1991) 38(2) *Social Problems* 213, 235. For example, Frohmann found that prosecutors rely on stereotypes about what constitutes ‘genuine victims’ and appropriate behavior. See E Stanko ‘The Impact of Victim Assessment on Prosecutor’s Screening Decisions: The Case of the New York Country District Attorney’s Office’ (1988) 16 *Criminal Justice Law and Politics* 225, 170. Stanko similarly found that the character and credibility of the victim were a key factor in determining prosecutorial strategies.

‘real rape’.¹⁰ The argument went that such conduct amounts to a ‘serious violation’ of women’s human rights in South Africa. Discriminatory procedural barriers/obstacles also influence prosecutor decision-making. These include a rape complainant’s sexual history, application of corroboration and cautionary rules concerning a single witness, which is disproportionately applied or applicable against women and children.¹¹ The problem was, therefore, found to be circular. Thus, prosecutors in South Africa are not only influenced by gender stereotypes and rape myths. They also face challenges of discriminatory procedural obstacles that continue to persist despite extensive rape law reform in South Africa. Those were the main arguments in the LLM project.

This study aims to empirically test the hypothesis that the decision to decline prosecution in cases of rape in South Africa is based on extra-judicial factors such as the complainant-perpetrator relationship; the complainant’s character; and/or that the complainant’s credibility contributes to or causes case attrition. It further examines any correlation between procedural obstacles and case outcomes in South Africa. This approach will also enable this researcher to determine the impact of rape law reform on the prosecution of cases.¹² Throughout this thesis, the researcher will use the phrase ‘prosecutorial attrition’ to

¹⁰ JW Spears & CC Spohn ‘The Effect of Evidence Factors and Victim Characteristics on Prosecutors’ Charging Decisions in Sexual Assault Cases’ (1997) 14(3) *Justice Quarterly* 501, 521. Spears and Spohn found that prosecutors’ decision-making is based on ‘attempts to avoid uncertainty and by predictions of convictability’.

¹¹ M Motsei *The kanga and the kangaroo court: Reflections on the rape trial of Jacob Zuma* (2007).

¹² *Tshabalala v S; Ntuli v S* 2020 (5) SA 1 (CC) para 83 (hereafter referred to as *Tshabalala case*). Victor AJ held that ‘the development of the common law and legislation in relation to cases of rape remains imperative to ‘overcome reliance on existing rules of evidence and procedure.’ The learned judge held furthermore that continuous ‘vigilance within a constitutional context remained necessary in relation to any remaining (procedural rules) obstacles.’

refer to the decision-making process of the NPA (their discretion), which results in the high number of rape cases dropping out of the system (attrition).

2. THE PROBLEM AND PURPOSE STATEMENTS

2.1 THE RESEARCH PROBLEM

Little research has been conducted on rape case attrition in South Africa. There is no research that focuses on prosecutorial attrition. There is only one national study on attrition conducted in South Africa. This was the 2022 South African Medical Research Council (the MRC report).

¹³ This study is not theoretically framed. It is merely a summary of the data collected. However, over and above that, scholarship on whether prosecutors are complying with laws, rules and policies brought about by reforms is missing in South Africa. Put differently, there is no research that shows whether prosecution of rape has improved following massive rape reform. There has been no research undertaken that highlights the changing nature of rape cases in South Africa. The changing nature of rape includes the definition of rape and the types of rape such as rape by force by strangers to coercive sex (which is defined by law as rape) by acquaintances.

Furthermore, there has neither been any comprehensive research undertaken to compare data across other offences with cases of rape, such as the crime of murder or housebreaking. No research compares attrition trends following rape law reform compared to those trends before the reform of the laws. There has also been no study that is concerned with the effect of race composition on criminal processing decisions or victimology studies related

¹³ M Machisa, R Jina, G Labuschagne, L Vetten, L Loots, & R Jewkes 'Factors Associated with Rape Case Attrition in the South African Criminal Justice System: A National Cross-Sectional Study' (2022) 22 (1) *The British Journal of Criminology* 1 (hereinafter referred to as the "MRC report").

to rape and case attrition. No study has focused on correlations that influence prosecutorial decision-making in cases of rape that lead to attrition, nor is there a comprehensive study on the reasons behind acquittals in rape cases, even though this accounts for massive attrition. In other words, no studies have been conducted in South Africa that go beyond the study of attrition rates and the handling of cases by the police.

This research project does not seek to address all these lacune. The point of departure of this thesis is that it is impossible to understand problems related to rape case attrition when we do not know the changing nature of rape cases or the impact of rape law reform on case attrition, or the correlating factors that influence prosecutors or their attitudes towards complainants. By conducting empirical research, this doctoral study aims to address and narrow the knowledge gap by studying the variables that influence prosecutors, for example, either by the character of the victim/accused or the age or the nature of rape. The data will inform us whether there is a changing nature in rape depending on the outcomes of the sample that will be random. As stated above, previous studies have focused on the police stage in South Africa, so it is vital to conduct this research that focuses on prosecutors.

Thus, the primary purpose of this dissertation, building on the author's previous research, is to analyse variables that predict the outcome of cases in rape cases. More specifically, this dissertation will *empirically* analyse factors taken into consideration by prosecutors based on hypotheses derived from (i) feminist-conflict theory, (ii) Frohmann's downstream theory, and (iii) the subcultural theory of violence. These theories will be explicated in more detail later. For now, a brief outline of each will suffice:

- (i) Feminist conflict theorists posit that extra-legal variables such as physical assault, verbal assault and use of a weapon, influence the decisions of the prosecutors¹⁴

¹⁴ S Brownmiller *Against Our Will: Men, Women, and Rape* (1975).

- (ii) Frohmann's downstream orientation theory describes concern with convictability that creates a 'downstream orientation' in prosecutorial decision-making: anticipation and consideration of how others (i.e., jury and defence) will interpret and respond to a case'.¹⁵
- (iii) The subculture of violence theory suggests that forcible rape is an 'intra-racial event between victims and offenders who were at same age level and who were ecologically bound, that is, victims and offenders lived in the same area, which tended to be also the area of the offence'.¹⁶

The outcomes will support or disprove the author's claims, contributing to feminist jurisprudence. The author's first claim is that category two extra-legal factors usually serve as corroborative evidence in court proceedings. The second claim is that there is an overreliance on corroboration in cases of rape which is an incorrect interpretation of the law and undermines rape reform laws. It should be interpreted as an effort to lessen the state's burden of proof — by allowing the court to consider the complainant's previous consistent statements. As explained above, feminist legal theory underpins this study. The criminal justice system is recognised to accept male sexual dominance as the standard model of sexuality while dismissing women's individual and cultural experiences of rape, and the authors intend to determine if this is the situation in South Africa through this scientific research.¹⁷ Furthermore, this research aims to narrow the knowledge gap identified as the primary research problem. Indeed, the yawning knowledge gap hampers the battle against the problem of case attrition in South Africa.

¹⁵ L Frohmann 'Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking' (1997) 3(1) *Law & Society Review* 531, 535.

¹⁶ M Amir *Patterns in Forcible Rape* (1971) 339-340.

¹⁷ C Smart *Feminism and the power of the Law* (1989) 296.

2.2 THE PRACTICAL PROBLEM

The practical problem here is that rising attrition rates are a huge concern because they undermine constitutional rights and reform efforts intended to improve the handling of sexual offence cases. SAPS annual statistics over the years compared with those of the NPA show a rise in attrition. The NPA prosecute less than 10% of reported sexual offence cases, averaging between 42 000 - 43 000 per annum. For example, the South African Police Services (SAPS) annual statistics recorded 41,583 in 2018/2019, 40,035 in 2017/2018 and 39,828 in 2016/2017. For the same period, the NPA recorded 3 499 cases finalised in 2018/19, 5 004 cases in 2017/18 and 4 780 cases in 2016/17.¹⁸ Of these cases, the NPA boasted conviction rates of 74%, 72.7% and 71.1% respectively.¹⁹ Latest statistics are no different revealing that in 2022/23 the conviction rate was 74.8%; 74.2% in 2021/22 and in 2020/21 it stood at 75.2% in 2 539 out of 3 349 cases; and in 2019/20 the conviction rate was 75.2% based on 4 098 out of 5 451 cases; 2018/19, the conviction rate allegedly stood at 74% of the 3 499 cases finalized, 72.7% in 2017/18 out of 5 004 cases. The NPA continue to consistently boast remarkably high rape conviction rates — giving a false or misleading impression that there is effective prosecution of cases of rape in South Africa. Besides confirming a clear attrition pattern in cases in South Africa, it also exposes what appears to be the state's attempt to conceal its failure.

Furthermore, rising attrition rates do not only undermine the Constitution. As the author's LLM project demonstrated, rising attrition also violates international law and may constitute a systemic gross violation of human rights.²⁰ That was the nucleus of that research. It is also worth noting that there is no authoritative definition for the term 'gross violation of

¹⁸ See <www.npa.org.za>

¹⁹ See <www.saps.org.za>

²⁰ Lebitse (note 1 above) 114.

human rights'.²¹ The term 'gross violation' of human rights is used interchangeably with 'grave', 'serious', 'systematic', 'flagrant', and 'massive' to refer to a violation of the same gravity. The researcher must add that there is no attempt to establish whether prosecutorial discrimination has attained the status of *jus cogens* as set out in Article 53 of the Vienna Convention on the Law of Treaties of 1969.²² Article 53 states that a peremptory norm of general international law is a norm accepted and recognized by the global community of states as a whole as a norm from which no derogation is permitted. It may be prudent to determine whether state practice and *opinio juris* prove that the norms, such as failure to prosecute based on discriminatory grounds referred to in this thesis, have attained *jus cogens* status. However, this falls outside the scope of this thesis. The author only embarks on prosecutorial research, factoring in feminist critical theorists' claims that different variables are likely to be influential depending upon what stage the investigation is. There has been significant research on police attrition but not prosecutorial attrition, which is the leading research problem. The author discusses this just further below.

Next is a discussion on the limitations of previous studies to connect the research problem with the rationale for the methods undertaken for this study.

²¹ M Quiroga *The Battle of Human Rights, Gross, Systematic Violations, and the Inter-American System* (1988) 10. For example, a violation is considered serious or as gross when systematically committed by the state through its actors. Also see, T Karimova 'What amounts to 'a serious violation of international human rights law'? An analysis of practice and expert opinion for the purpose of the 2013 Arms Trade Treaty' 2014 *Geneva Academy of International Humanitarian Law and Human Rights* 1, 11. Chairman's Draft Paper, Second Preparatory Committee, 28 February 2011; Chairman's Draft Paper, 3 March 2011; Chairman's Draft Arms Trade Treaty, Third Preparatory Committee, 14 July 2011.' <<http://armstradetreaty.blogspot.ch/>>.

²² Article 53 of the Vienna Convention on the Law of Treaties of 1969.

2.3 THE LIMITATIONS OF PRIOR STUDIES

CIETafrica conducted the very first study on rape case attrition in South Africa.²³ It found that for every 394 women raped, 69% reported the rape to the police, only five (5) cases were prosecuted, and a single suspect would be convicted.²⁴ That study was conducted in 2003 which is old and focused on a single province. Another provincial study by Vetten et al. found that of all rape complaints, there were 50.5% of suspects arrested and 33.4% of cases filed for prosecution, but eventually, only 17.3% faced trial and the conviction rate stood at 6.2%.²⁵ That study was limited to a single province. The MRC report (which is the latest and most comprehensive national research conducted on this issue) reveals that of all reported cases of rape, there were 57.7% of the suspects arrested, 34.5% of the cases were filed for prosecution, and 18.5% of the suspects eventually faced trial and the conviction rate stood at 8.6%.²⁶ That study took place after the most significant reforms but does not consider the impact of reforms on the study outcomes. The MRC report data is also outdated. All these studies lack a theoretical framework rendering them as unstructured and narrow.

There is recently published scholarly research by Machisa et al. that is, however, based on outdated MRC report data.²⁷ Both studies give us a glimpse of patterns of rape case attrition and the factors associated with it in South Africa.²⁸ Furthermore, both studies apply the same method. Research by Machisa et al. is essentially a summary of the MRC report, in the author's

²³ N Andersson & S Mhatre 'Do Unto Others – and Pay the Price: Combating Sexual Violence in the South of Johannesburg' (2003) 3 *SA Crime Quarterly* 5, 6.

²⁴ Ibid.

²⁵ Vetten et al (note 6 above) 1.

²⁶ The MRC report (note 13 above) 29.

²⁷ M Machisa, R Jina, G Labuschagne, L Vetten, L Loots & R Jewkes 'Factors Associated with Rape Case Attrition in the South African Criminal Justice System: A National Cross-Sectional Study' (2022) 22 (1) *The British Journal of Criminology* 1, 14.

²⁸ Ibid 1.

opinion, and so does not advance our understanding or take us any further.²⁹ For example, both studies found that case attrition rates in South Africa reflected ‘small shifts in attrition and conviction rates’ compared to the study by Vetten et al..³⁰ As stated above, the Machisa et al. study data derives from MRC report samples, so both studies’ results are anticipatively similar.

The MRC report found that prosecutors concluded that 52 of the cases were false reports. There is no further information on this outcome; it is unclear on which facts such an outcome is based, i.e., whether the complainant confessed or admitted to such a false report. The report is also silent regarding cases where prosecutors believed that the complainant was an incompetent witness in 32 cases. It is unclear which facts or standards prosecutors relied on to declare a witness incompetent. Or what is meant by incompetent? Unfortunately, both studies use the same sample since the results (in both studies) are unreliable as they relate to the prosecutorial stage. For example, the MRC report reveals that prosecutors did not decide 67.6% of cases referred to them.³¹ These cases (referred to prosecutors) did not progress due to complainants preferring to ‘move on with their lives’.³² If one has regard to this, it makes it plain that only 32.4% of the sample would provide direct insight into prosecutor decision-making and their approach and attitudes towards cases and complainants.

Consequently, in the author's opinion, the sample cannot reliably determine any relationship between prosecutor decisions and extra-legal factors, such as victim characteristics, relationships with perpetrators, and complainant behaviour. Thus, the MRC study may have methodological weaknesses, which are highlighted further by its use of a

²⁹ Ibid 4. See the MRC report (note 13 above) 23.

³⁰ Ibid 21. See the MRC report (note 13 above) 31. Both these studies also record police investigation stage as the ‘greatest single point of case attrition’.

³¹ The MRC report (note 13 above) 84.

³² Ibid.

limited number of variables tested. The MRC report notes that the unavailability or incompleteness of data sources limited the depth of information abstracted and, therefore, ‘cannot be certain if this would have impacted on the findings overall and their generalizability’.³³ Machisa et al. similarly note that the information presented and analysed in their study is based on data ‘available for the study’ and confirm that ‘there may be many dynamics driving behaviour of the complainant, police, judicial officers and prosecutors that were not visible to the research team’.³⁴

The authors of the Machisa et al. study admit that their research presents ‘several limitations’ because the study ‘used a retrospective data review design’, the same method used in the MRC report.³⁵ The authors state that ‘due to the retrospective design, [their] study findings reflect on case-management dynamics of the past (2012) and may not accurately paint the truest picture on the CJS presently’.³⁶ Considering the above, the author is more inclined to accept the MRC report as authoritative than the Machisa et al. report and, as a result, inclined to rely on and refer much more to the former. In any event, the MRC and Machisa et al. reports contain the same information as stated above. Machisa et al. missed an opportunity to replicate the correlations reported in the MRC study and/or, at the very least, cross-validate the outcomes in the MRC study with their research.

Equally importantly, both the MRC and Machisa et al. reports do not at all focus on prosecutorial attrition but allude to ‘extra-legal factors including victim characteristics and the details about the victim-perpetrator relationships continue to affect police and prosecutor decision-making and impact on case attrition within the South African CJS as has been

³³ The MRC report (note 13 above) 26.

³⁴ Machisa et al (note 28 above) 23.

³⁵ Ibid.

³⁶ Ibid.

demonstrated elsewhere in the world'.³⁷ Both reports also do not conclusively find that the reason for the malaise (failure to prosecute) links to gender stereotypes and rape myths in South Africa. The finding by Machisa et al. do not conclude conclusively that prosecutorial attrition occurs because of biased decision-making based on rape myths and stereotypes (extra-judicial factors) but accept that it is probable and states this as follows

it is plausible that police detectives and prosecutors within the South African CJS continue to dismiss cases based on biased decisions informed by their perceptions about the victims' alcohol consumption as risk-taking and problematic assumptions about the potential negative impacts of the victims' intoxication on the credibility and inconsistencies of the testimonial evidence they provide.³⁸

The MRC report similarly found evidence that some cases 'were more often taken forward by the prosecutor where the accused persons used physical violence, and weapons displayed,' and more likely to decline cases where the victim was intoxicated but twice as likely to proceed with cases involving strangers compared to cases involving relatives.'³⁹ The MRC report alluded to this as possibly reflecting 'prosecutorial biases about 'real rape' or convictability in a trial, which may reflect bias in the court. It may also have impacted the victim's willingness to pursue the case (67.7% of cases)'.⁴⁰ The MRC report also found that prosecutors declined a higher proportion of cases where there was no abduction (51%), no weapons (51.2%), no physical force used (55.7%) and where the perpetrator did not threaten to kill the victim (50.6%).⁴¹ The report stated that such results might suggest that

³⁷ Ibid 21-22.

³⁸ Ibid 22.

³⁹ The MRC report (note 13 above) 88.

⁴⁰ Ibid.

⁴¹ Ibid 87.

the availability of less evidence or prosecutors' biases and rape myths acceptance may be influencing decisions for rape cases to proceed to court, as shown in other research. There was a need for further research to understand the influence of gender attitudes in prosecution.⁴²

Indeed, further research on prosecutorial attrition is required to understand the factors that influence/create this problem, which this doctoral project intends to embark on best. Again, this is the unique contribution of this study on rape case attrition in South Africa. This unique focus will bring us closer to finding solutions to this massive problem that impacts women and children disproportionately.

3. SIGNIFICANCE OF THE STUDY

This research is a unique and essential contribution because none of the studies mentioned above demonstrate conclusively and empirically that prosecutors exercise their discretion in a deficient manner that is discriminatory against women in South Africa despite our knowledge and evidence of high rape case attrition — and none have claimed to have proven this empirically. It is crucial to narrow the knowledge gap to understand this massive systemic problem better. A study on prosecutorial attrition is vital to delineate the type of variables that matter. This study will assist in determining whether there is an exercise of prosecutorial discretion that is deficient and that is discriminatory towards women and children in cases of rape despite rape law reform. The reasons behind this malaise are essential if South Africa is to find a lasting solution to the practical problem of rape.

This doctoral study uses qualitative and quantitative data to understand better attitudes and rationales behind prosecutors' decisions. This empirical approach will be analysed through the lens of feminist jurisprudence. Moreover, notwithstanding that prosecutorial attrition based

⁴² Ibid.

on discretion that is exercised in a deficient manner has not yet been scientifically proven thus far, South African scholars are of the view that this deficiency occurs.⁴³ In a nutshell, this project will attempt to narrow the gap in the literature concerning data on rape case attrition in South Africa. Fellow researchers will be able to use this data to do further research. Additionally, the findings of this research may contribute towards feminist legal theory, which debunks the assumption that law is objective, neutral, and just in its nature and structure. To summarise, the contribution to the existing body of knowledge that this research aims to make is to narrow the gap in the literature concerning the attrition of rape cases in South Africa.

4. LITERATURE REVIEW

4.1 PROSECUTORIAL ATTRITION

Rape cases simply ‘drop out of the system’ at various stages within the criminal justice process. This is described as case attrition.⁴⁴ Case attrition is not unique to South Africa. This problem

⁴³ S Swemmer ‘Justice denied? Prosecutors and presiding officers’ reliance on evidence of previous sexual history in South African rape trials’ (2020) 69 *South African Crime Quarterly* 45, 44. Swemmer states: ‘They [scholars] argue that these beliefs [stereotypes] have become scripted into criminal justice practice, with the result that the cases filtered out of the system are not those that are intrinsically weak, but rather those that offend the normative assumptions of decision-makers’. Artz & Smythe (note 6 above) 170-171. Artz and Smythe found that rape myths continue to pervade the criminal justice system in sexual offences cases. Artz and Smythe said that ‘both investigating officers and prosecutors inevitably approach a rape complaint from a cost-benefit perspective that is ultimately focused on the ‘convictability’ of the case and an evaluation of whether the case has evidential difficulties.’ The MRC report found, comparably, that prosecutors in Gauteng Province, for example, were inclined to prosecute cases following a rigorous selection based on convictability. Also see, MRC report (note 13 above) 30. The MRC report found, comparably, that prosecutors in Gauteng Province, for example, were inclined to prosecute cases following a rigorous selection based on convictability.

⁴⁴ See R Wright ‘A Note on the Attrition of Rape’ (1984) 24 *British Journal of Criminology* 399, 399. G LaFree ‘The Effect of Sexual Stratification by Race on Official Reactions to Rape’ (1980) 45

also occurs in other jurisdictions, such as the United States of America (“the US”), the United Kingdom (“the UK”), Canada, Australia, and New Zealand, among others.⁴⁵ Various studies in foreign jurisdictions usefully lay out the various points or stages of case attrition. This is important because it allows researchers to measure the criminal justice system’s efficiency and determine the underlying causes. More importantly, case attrition also occurs in all criminal

American Sociological Review 842; WD Loh ‘The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study’ (1980) 55 (51) *Wash. Law. Review* 543; SM Chandler & M Torney ‘The Decisions and Processing of Rape Victims Throughout the Criminal Justice System’ (1981) 4 (2) *California Sociologist* 155-168; J Galvin & K Polk ‘Attrition in case processing: is rape unique?’ (1983) 20 (1) *Journal of Research and Delinquency* 126-154; Galvin and Polk’ study in the previous year in 1983 that found that only 38% of cases referred by the police were prosecuted at 132; K Polk ‘A Comparative Analysis of Attrition of Rape Cases’ (1985) 25(3) *The British Journal of Criminology* 280; G Chambers & A Millar ‘Proving sexual assault: Prosecuting the offender or persecuting the victim?’ in P Carlen and A Worrall (eds) *Gender, Crime & Justice* (1987); Chambers and Millar found similar trends that noted that only 21% of the reported cases in their study reached the final stage at 58; G LaFree *Rape and Criminal Justice: The Social Construction of Sexual Assault* (1989); W Kersetter ‘Gateway to justice: Police and prosecutorial response to sexual assaults against women’ (1990) 81 *Journal of Criminal Law and Criminology* 267; S Lees & J Gregory *Rape and Sexual Assault: A Study of Attrition* (1993); Lees and Gregory confirm the trends again and found that 17 out of 88 cases were referred to the prosecutor, and no further action was taken. The authors found: ‘Of the 71 cases that did proceed, 41 resulted in a conviction and a further three, the offender was detained under the Mental Health Act. The remaining 27 cases fell away at various stages of the court proceed’; J Harris & S Grace *A Question of Evidence?: Investigating and Prosecuting rape in the 1990s* (1999); (2003) 43(3) *British Journal of Criminology* 583; J Fitzgerald ‘The Attrition of Sexual Offences from the New South Wales Criminal Justice System’ (2006) 92 *Crime and Justice Bulletin* 11; Grace et al (note 11 above) 13. Grace, Lloyd, and Smith sampled 335 cases of which 165 cases were sieved through the criminal justice system with only 40% of 165 reaching the final stage with a conviction. (Bryden and Lengnick (1997), Du Mont and White (2007); Kelly (2000, 2001); Koss (2006), and Lievore (2003) I will focus on common law foreign jurisdictions because South Africa has a mixed legal system, a hybrid of Roman Dutch civilian law and English common law.

⁴⁵ K Daly & B Bouhours ‘Rape and attrition in the legal process: A comparative analysis of five countries’ (2010) 39(1) *Crime and justice* 565-650.

cases and not only in cases of rape. Here, the focus is on the crime of rape and the third point of attrition, namely, prosecutorial attrition. The author will now explain the stages of attrition in cases next.

The first stage is cases not reported by complainants.⁴⁶ The second stage is police attrition, where reported cases are dismissed by the police.⁴⁷ The third attrition stage is prosecutorial attrition. As stated above, this stage is the focus of this study. It may be argued that the final stage of attrition is courtroom attrition, wherein the court dismisses a case in terms of s 172 of the CPA, or the court finds the accused not guilty.

As stated above, there is no comprehensive South African-based study on the third stage of attrition, which is prosecutorial attrition. The MRC report is the most comprehensive in South Africa but does not explicitly deal with the underlying factors relating to prosecutorial

⁴⁶ S Geoghegan-Fittall, T Skinner & B Stanko 'Feminism, power and politics in policing rape research: time for a paradigm shift' *Journal of Gender-Based Violence* (2022) vol XX, no XX, 1, 2 citing ONS (Office for National Statistics) (2021) Nature of sexual assault by rape or penetration, England and Wales: year ending March 2020, <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/natureofsexualassaultbyrapeorpenetrationenglandandwales/yearendingmarch2020>. Of more than 1 000 rapes that occur each day in South Africa, only about 10% of cases are reported to the police, according to the President of South Africa - Address by President Cyril Ramaphosa at the Joint Sitting of Parliament on the crisis of violence in South Africa National Assembly: <<https://www.gov.za/speeches/address-president-cyril-ramaphosa-joint-sitting-parliament-crisis-violence-south-africa>> See Vetten et al. (note 6 above) 34. Vetten et al. estimate that the South African Medical Research Council had estimated that reported cases in South Africa is nine times the actual number reported by SAPS statistics.

⁴⁷ Geoghegan-Fittall et al (note 46 above) 2. Also see, The MRC Report (note 13 above) 84; Swemmer S (note 43 above) 49. The author found: '... approaches to rape cases by the police are often dominated by prevalent rape myths and stereotypes, and in particular, the notions that women easily lie about rape and that where there are no signs of violence it is unlikely that a rape has occurred'.

attrition. However, in its sample of 3952 cases, the MRC report found that 2579 cases were referred to the NPA to be processed.⁴⁸ Furthermore, of the 2579 cases, prosecutors declined 1217 and proceeded only with 1362.⁴⁹ The prosecutors' filing rate of 52.8%, as stated in the MRC report, is a slight improvement from the rate reported by researchers Artz and Smythe, who noted that prosecutors filed a *nolle prosequi* in 61% of cases in their sample.⁵⁰ On the other hand, a 2008 study by Vetten et al. recorded a filing rate of 33.4% of cases ripe for prosecution but found that eventually, only 17.3% of the perpetrators faced trial. The MRC report compared to that study indicates an improvement overall in the attrition of cases.

4.2 PROSECUTORIAL DISCRETION

Prosecutors generally enjoy and exercise vast discretion. This is described as the central malaise affecting the NPA.⁵¹ This discretion in South Africa appears unfettered.⁵² Prosecutors provide the path or gateway to justice.⁵³ The clear nexus between criminal justice agent discretion and attrition in cases of rape must be borne in mind.⁵⁴

⁴⁸ MRC Report (note 13 above) 84.

⁴⁹ Ibid.

⁵⁰ Artz & Smythe (note 6 above) 172.

⁵¹ J Redpath 'Failing to prosecute? Assessing the state of the National Prosecuting Authority in South Africa' *Institute for Security Studies* (2012) 1, 108. Also see, C Spohn, D Beichner & E Davis-Frenzel Prosecutorial justifications for sexual assault case rejection: Guarding the "gateway to justice" (2001) 48(2) *Social problems* 206.

⁵² L Artz & D Smythe (ed) *Should we consent? Rape Law Reform in South Africa* (2008)16.

⁵³ Spohn (note 51 above) 206 citing Kerstetter 1990 at 182.

⁵⁴ Spears & Spohn (note 10 above) 519. See PA Frazier & B Haney 'Sexual assault cases in the legal system: Police, prosecutor, and victim perspectives' (1996) 20(6) *Law and human behavior* 607, 611. Galvin & Polk (note 44 above) 132.

Rape case attrition in South Africa tends to occur at two points, namely mainly, (i) the police stage and (ii) the prosecutorial stage.⁵⁵ It is important to also distinguish between the NPAs discretionary powers to prosecute and the power *not* to prosecute. The corollary being the NPA's ability to decline to prosecute rape cases is one of the significant causes of attrition that undermines the rights of women in South Africa.⁵⁶ It is a deficiency that impedes women's and children's constitutional and human rights.⁵⁷ More concerning, there is no obligation on a prosecutor to furnish reasons for his/her decision to decline prosecution.

This research will determine whether prosecutors give insufficient reasons for the decisions in *nolle prosequi* cases. By *nolle prosequi*, it is meant cases that were declined for prosecution. The literature shows that prosecutors use the standard of convictability to account for their case filing decisions. For example, studies show that convictability assessment by prosecutors includes consideration of the race of the suspect and victim, the characteristics of the victim and suspect, the behaviour of the victim, the relationship between the parties and credibility of the victim, the corroboratory evidence; which are all extra-legal factors.⁵⁸ Extra-legal variables are most influential in prosecutor decision-making, which the author now turns to next.⁵⁹ In the latest study in South Africa shows that extra-legal variables such as the

⁵⁵ Artz & Smythe (note 6 above) 169.

⁵⁶ P Lebitse (note 1 above) 72.

⁵⁷ Lebitse (note 1 above) 115.

⁵⁸ Spohn (note 51 above) 207; Frohmann (note 9 above) 217.

⁵⁹ Artz & Smythe (note 6 above) 169. M Hindelang & B Davis 'Forcible Rape in The United States - A Statistical Profile from Forcible Rape- the Crime, the Victim, and the Offender' Duncan Chappell, Robley Geis, And Gilbert' (1997). Also see, Spohn (note 51 above) 208. The authors found that prosecutors consider, not only the legally relevant indicators of case seriousness and offender culpability, but also the background, character, and behaviour of the victim, the relationship between the suspect and the victim, and the willingness of the victim to cooperate as the case moves forward.

relationship between the parties and the victims characteristics in particular are factors that dominate decision-making by police and prosecutors much like ‘elsewhere in the world’.⁶⁰

4.3 PROSECUTORS AND VARIABLES

A study by Spohn tested Frohmann’s contentions regarding prosecutorial justifications for case rejections.⁶¹ As stated in the Problem Statement, Frohmann’s downstream orientation theory is concern with convictability that creates a ‘downstream orientation’ in prosecutorial decision-making: anticipation and consideration of how others (for example, jury and defence) will interpret and respond to a case’.⁶² Such considerations by prosecutors is not grounded on proving the key elements of the crime of rape. Spohn et al. explain that prosecutors’ charging decisions are guided by a set of ‘focal concerns’ similar to presiding officers’ decisions. The authors explain the ‘focal concerns perspective’ as

judges' sentencing decisions reflect their assessment of the blameworthiness or culpability of the offender, their desire to protect the community by incapacitating dangerous offenders or deterring potential offenders, and their concerns about the practical consequences, or social costs, of sentencing decisions.

In South Africa, the MRC report highlights some of similar factors revealed by a study on the factors that influence prosecutors in cases of rape conducted by Hindelang & Davies.⁶³ These factors similarly go beyond the required lawful elements to prove the crime of rape as

⁶⁰ M Machisa, R Jina, G Labuschagne, L Vetten, L Loots & R Jewkes ‘Factors Associated with Rape Case Attrition in the South African Criminal Justice System: A National Cross-Sectional Study’ (2022) 22 (1) *The British Journal of Criminology* 1, 14.

⁶¹ Frohmann (note 9 above) 214.

⁶² Frohmann (note 15 above) 535.

⁶³ Hindelang & Davies (note 59 above).

contemplated in the Sexual Offences Act.⁶⁴ Section 3 of the Sexual Offences Act decrees that: ‘Any person (‘A’) who unlawfully and intentionally commits an act of sexual penetration with a complainant (‘B’), without the consent of ‘B’, is guilty of the offence of rape’.⁶⁵ The South African lawmakers have adopted several amendments to the rape laws to eliminate procedural barriers. Striking provisions of the statute include the fact that the Court may draw no adverse or negative inference from the late reporting of cases.⁶⁶ The complainant’s previous statement is admissible.⁶⁷ The complainant’s sexual history is irrelevant unless a party brings an application before the Court to adduce the relevance of such history.⁶⁸ An accused person who does not sexually penetrate the complainant but is present during the commission of such an offence - the accused person is guilty in terms of the common purpose rule.⁶⁹

However, like any other criminal case, the burden of proof rests on the shoulders of the state, which is required to prove its case against a defendant beyond a reasonable doubt. The state is encumbered to prove key elements of the crime of rape that include lack of consent, mens rea (intention), unlawfulness and proof of sexual penetration. However, as noted above, extra-legal variables significantly influence prosecutor decision-making, and this is where the problem arises.⁷⁰ It appears that extra-legal factors are important to prosecutors in order to

⁶⁴ Section 3 of the Sexual Offences Act requires the state to prove sexual penetration, unlawfulness as well as *mens rea*.

⁶⁵ Section 1 of the Sexual Offences Act.

⁶⁶ Section 59 of the Sexual Offences Act: ‘In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.’

⁶⁷ Section 59 of the Sexual Offences Act:

⁶⁸ Section 277 of the Criminal Procedure Act.

⁶⁹ Tshabalala case (note 10 above) para 66.

⁷⁰ Hindelang & Davies (note 59 above) 18; JG Rabkin ‘The epidemiology of forcible rape’ *American Journal of Orthopsychiatry* (1979) 49(4) 641, 638; GD LaFree Rape and Criminal Justice: The Social Construction of Sexual Assault (1989) 582, 586. Also see GD LaFree ‘Official Reactions

successfully process cases; for instance, prosecutors were more likely to enrol cases where there were factors such as the use of physical force in 82% of cases, followed closely by the medical evidence of proof of penetration in 78% of cases.⁷¹ However, the author disagrees that certain extra-legal factors, including certain legal factors, such as proof of penetration, are important in certain circumstances. Despite the importance of proof of penetration, the author contends that proof of penetration does not prove rape, and similarly, lack of penetration does not prove that rape did not occur. The court in *M S v S* held the following

complainant claim[ed] non-consensual sexual intercourse while the appellant claims consensual sexual intercourse. The J88 reflects no injuries, either physical or gynaecological and renders the medical evidence neutral. The medical evidence, therefore, does not assist either the state or the appellant. The central question is whether the evidence of the complainant, bearing in mind the onus on the state, is such that it renders non-consensual sexual intercourse more probable than the appellant's version of consensual sexual intercourse.⁷²

Also, consider a case where the accused cites consent as a defence. In that case, medical evidence such as DNA (semen) may become redundant. Such evidence may be more useful in cases of stranger rapes because an accused is unlikely to claim consent from a stranger. Under

to Social Problems: Police Decisions in Sexual Assault Cases' (1981) 28 (5) Social Problems 582–594.

⁷¹ Hindelang & Davies (note 59 above) 18.

⁷² *M S v State* (CA40/2017) [2019] ZANWHC 2 para 12. Also see; *State v Gentle* (317/2003) [2005] ZASCA 26 para 18 (hereafter referred to as *Gentle* case). The court held that: 'But the fact that the complainant's evidence accords with the evidence of other State witnesses on issues not in dispute does not provide corroboration. Thus, in the present matter, for example, evidence that the appellant had sexual intercourse with the complainant does not provide corroboration of her version that she was raped, as the fact of sexual intercourse is common cause. What is required is credible evidence which renders the complainant's version more likely that the sexual intercourse took place without her consent, and the appellant's version less likely that it did not.'

those circumstances, DNA may serve as corroboration for that complainant. It has been shown, for example, that medical evidence such as DNA or physical injury (to the hymen and so forth) may be critical in cases where the complainant is a minor.⁷³ That said, other extra-legal factors reported by scholars include the promptness of reporting. This is noted in 71.3% of cases. However, it is important to note that it is common for victims not to report timeously.⁷⁴ Most rapists commit this crime with impunity due to nonreporting of the crime to the police or refusal to cooperate as a prosecution witness.⁷⁵ As indicated above, South African legislators

⁷³ In *R M v State* (A158/2018) [2019] ZAGPJHC paras 31, 36 (hereafter referred to as *R M v State*). In this case, the complainant was an eleven-year-old minor who was raped by her biological father. The court held that ‘...the undisputed evidence of Dr V is that there was an injury to the hymen. That constitutes clear corroboration of the testimony by the complainant that a penis penetrated her. The penis is the cause of the injury to her hymen. Dr V is qualified to make such a finding and the evidence has not been gainsaid,’ furthermore, ‘...the Doctor’s findings that there was an insult to the hymen which is consistent with sexual intercourse not only corroborates the complainant’s testimony that there was penetration, but also that she felt pain. The complainant was infected with a sexually transmitted disease. Such factors are clearly proven beyond reasonable doubt.’ Also See; *M v State* 2020 (1) SACR 241 (WCC) para 31. The complainant in this case was also an eleven-year-old raped by her biological father. The court said that the uncontroverted evidence confirmed that the appellant’s DNA was found in the complainant’s undergarment. This fact, coupled with the complainant’s injuries which established that she had been recently sexually assaulted, required an explanation. The appellant’s failure to challenge the evidence of the first reporter or of the medical expert and his decision to remain silent in the face of the *prima facie* evidence of the assault having been committed by him, gives rise to the consequences enunciated by the judgments referred to above.’

⁷⁴ LaFree (note 70 above) 590. Also see, MRC Report (note 13 above) 14; Frohmann (note 9 above) 217; Spohn et al (note 51 above) 218; SJ Lea & US Steve ‘Attrition in rape cases: Developing a profile and identifying relevant factors’ (2007) 43(3) *British Journal of Criminology* 583, 590. 13% were reported within two weeks, with the remaining 21% being reported some time after the crime. In 6% of cases, the crime was reported more than six months after the crime, sometimes many years later.

⁷⁵ The MRC report (note 13 above) 84.

implemented law reform that addresses this specific problem.⁷⁶

The extent to which the complainant is able to identify the suspect is noted in 67.3% of cases tailing prompt reporting.⁷⁷ Put differently, the inability of the victim to identify the suspect is more likely to lead to cases dropping out of the system.⁷⁸ Vetten et al. found that: ‘Half of the cases were closed because an arrest was never made, either because of failure to identify a suspect (47%) or to locate a suspect and retain contact with him (17%)’.⁷⁹ The MRC report contains similar findings.⁸⁰ The MRC report findings reveal that ‘some investigators, in collusion with prosecutors, take cases with *no perpetrator identified* for a decision to prosecute to obtain a nolle prosequi, reflected as a success in the SAPS statistics’.⁸¹

The author highlighted above that misleading statistic success reported by the state appears to be common. The NPA consistently reveals very high conviction rates, giving a false or misleading impression that the prosecution of rape cases is carried out effectively. For example, in 2022/23 the conviction rate was 74.8%; 74.2% in 2021/22 and in 2020/21 it stood at 75.2% in 2 539 out of 3 349 cases; and in 2019/20 the conviction rate was 75.2% based on 4 098 out of 5 451 cases; 2018/19, the conviction rate allegedly stood at 74% of the 3 499 cases finalized, 72.7% in 2017/18 out of 5 004 cases, and 71.7% in 2016/17 out of 4 780 cases, according to the NPA but the truth is that SAPS refer 40 000 cases annually on average whereas the NPA finalise less than 5000 on average. This implies that 35 000 cases, on average, do not

⁷⁶ Section 59 of the Sexual Offences Act.

⁷⁷ Ibid.

⁷⁸ DP Bryden & S Lengnick ‘Rape and the Criminal Justice System’ (1997) 87(4) *Journal of Criminal Law and Criminology* 1194, 1214; Andersson et al (note 23 above) 7; Vetten et al (note 6 above) 35. Andersson et al (note 139 above) 7; Vetten et al. (note 6 above) 35.

⁷⁹ Vetten et al. (note 6 above) 48.

⁸⁰ The MRC Report (note 13 above) 54.

⁸¹ Ibid 85.

make it to court for finalisation. The circumstances of the initial contact between the parties are also significant, and so is the relationship between the victim and the accused.⁸² These are interlinked and connected to acquaintance rape. Role players in the criminal justice system reject these cases, describing prior relationship cases as ‘truly private’ disputes which are not the business of the public prosecution system’.⁸³

There has long been an impractical reality that rapes by intimates must cause more physical injury to result in convictions than rapes by strangers precisely because the problems of proof are more challenging in such cases.⁸⁴ In a study by Weninger, the probability of indictment was much higher in stranger rape cases (58%) than in acquaintance rape cases (29%).⁸⁵ Chandler & Torney show that of the cases dismissed, 50% involved acquaintances and of those cases in which felonies were filed for prosecution, only 28% involved acquaintances.⁸⁶ According to Lea & Shaw, ‘the closer the relationship between the victim and the perpetrator, the longer the time taken to report the crime’.⁸⁷ This is concerning since the failure to report promptly leads to the case being thrown out. A study by Harris & Grace noted a significant change in the nature of rape which revealed a sharp increase in acquaintance and intimate rapes.⁸⁸ The authors were of the view that a particular problem with intimate and

⁸² Hindelang (note 59 above) 18.

⁸³ S Estrich ‘Rape’ (1986) 95(6) *The Yale Law Journal* 1087, 1177.

⁸⁴ Ibid 1143.

⁸⁵ RA Weninger ‘Factors affecting the prosecution of rape: A case study of Travis County, Texas’ (1978) *Virginia Law Review* 357, 379-82.

⁸⁶ S Chandler & M Torney. ‘The decisions and the processing of rape victims through the criminal justice system’ (1981) 4(2) *California Sociologist* 155-168.

⁸⁷ Lea (note 74 above) 590.

⁸⁸ J Harris & S Grace *A Question of Evidence?: Investigating and Prosecuting rape in the 1990s* (1999) 5. The authors compared their findings to Grace et al (note 3 above).

acquaintance rapes and case attrition in those circumstances required attention.⁸⁹ The MRC report found that cases involving ‘relative and acquaintance perpetrators were much more likely to go to trial, and more often resulted in a guilty verdict’.⁹⁰ Prosecutors in South Africa were twice as likely to proceed with cases involving strangers compared to cases involving relatives or acquaintances.⁹¹ The report noted that prosecutors were more likely to prosecute stranger rapes where the accused stranger was arrested by the police, as compared to any other relationship group.⁹²

The complainants age was another significant indicator of whether a case is convictable.⁹³ The rape of younger children and older women resulted in a higher conviction rate.⁹⁴ Earlier studies indicated this finding regarding the victim’s age.⁹⁵ Cases involving complainants below 18 or elderly victims over 60 years of age — were most likely to be proceeded with.⁹⁶ However, criminal justice officials consider the victim’s age and other factors.⁹⁷ The MRC report revealed that of the 295 cases (minors 0-11), 148 withdrawn after enrolment, and 147 went to trial. For example, in those cases:⁹⁸

- 3.9% of the victims disappeared. It is unclear how a child can disappear.
- 2.6% of the families resolved the matters. The author argues that this practice should be legally impermissible.

⁸⁹ Ibid xiv.

⁹⁰ MRC Report (note 13 above) 31.

⁹¹ Ibid.

⁹² Ibid 31.

⁹³ Grace et al. (note 5 above) 25.

⁹⁴ Ibid.

⁹⁵ Harris et al. (note 88 above) 27.

⁹⁶ Ibid.

⁹⁷ Spears & Spohn (note 8 above) 506.

⁹⁸ The MRC Report (note 13 above) 84.

- 4.6% of the guardians refused to cooperate.
- On minors aged between (12-17 years): 403 cases noted, and of those, 160 withdrawn after enrolment:
- 4.4% of the victims disappeared.
- 3.4% of the victims and perpetrators resolved the matter.
- 5.1% of families resolved the matter.
- 2.5% unwilling to co-operate.
- 1.1% of the guardians were unwilling to co-operate.

Prosecutorial attrition is, however, not solely the result of prosecutors. The police stage, it is not always the result of incompetence or ineptness: women sometimes withdraw their complaints before the police refer the matter to the NPA for a decision and when the matter is enrolled for prosecution or still under consideration. The MRC report found that 67.6% of cases in its sample failed to proceed due to victims preferring to ‘move on with their lives’.⁹⁹ This is very common, and for instance, the most recent report found that only 17.5% of victim-survivors choose to ‘enter the system’ in the United Kingdom.¹⁰⁰

⁹⁹ Ibid.

¹⁰⁰ ONS (Office for National Statistics) (2021) Nature of sexual assault by rape or penetration, England and Wales: year ending March 2020, <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/natureofsexualassaultbyrapeorpenetrationenglandandwales/yearendingmarch2020>. Lea et al (note 164 above) 593. A study by Lea et al found that a total of 191 cases (38%) were closed when the victim refused to cooperate with the investigation.

Finally, a suspect's previous criminal record influenced prosecutors too.¹⁰¹ Nevertheless, interestingly, 21.1% of the 1217 cases were declined against perpetrators who had previous rape convictions and were not prosecuted.¹⁰² According to Hindelang & Davies, the use of alcohol or drugs is insignificant.¹⁰³ However, the MRC report indicates a contrasting finding. Intoxication plays a less significant role in decision-making: 'Prosecutors were 22% more likely to decline cases where the victim was intoxicated'.¹⁰⁴ Neither was there a clear bias in prosecuting cases where there is disability compared to cases where there is no disability.¹⁰⁵ Some declined cases were due to a lack of DNA match and in instances where the perpetrator raised consent as a defence.¹⁰⁶ Finally, the MRC report sample shows that prosecutors found that 52 of the cases were false reports.¹⁰⁷ There is no further information on this outcome; it is unclear on which facts this outcome rested, e.g., whether a complainant admitted such a false report. The report is also silent regarding cases where prosecutors believed the victims were incompetent witnesses in 32 cases. It is unclear which facts or standards are used to have a witness declared incompetent by prosecutors. These are the pronounced shortcomings of the MRC report.

5. RESEARCH QUESTIONS

Main question:

¹⁰¹ Hindelang (note 59 above) 18; LL Holmstrom & AW Burgess *The Victim of Rape: Institutional Reactions* (1978) 138. However, in their study found that prosecutors were more likely to proceed with a case if the accused had a prior criminal record.

¹⁰² MRC Report (note 13 above) 87.

¹⁰³ Hindelang (note 59 above) 18.

¹⁰⁴ MRC Report (note 13 above) 88.

¹⁰⁵ *Ibid* 34.

¹⁰⁶ *Ibid* 88

¹⁰⁷ *Ibid* 84.

- i. In spite of rape law reform, is prosecutorial discretion in cases of rape still *generally* exercised in a deficient manner that is discriminatory towards women and children based on extra-legal variables, as suggested by feminist critical theorists?

Sub questions:

- ii. Why has the prosecution of rape in South Africa not improved despite progressive legal reforms - does the problem occur due to what Frohmann describes as the downstream orientation theory?
- iii. What is the impact of the relationship between prosecutorial discrimination, reformed laws, and gender disparities within the criminal justice system?

6. THEORETICAL FRAMEWORK

Feminist legal theory has transformed the legal system and offers valuable insights into various aspects of the law. By examining different feminist legal theories, we can gain a deeper understanding of the complexities of the legal system and its impact on women's lives. This dissertation deploys a feminist lens. This theory will be explicated in more details in the next chapters. For now, it suffices to point out that dominance theory underpins this study.

The dominance theory suggests that inadequate responses to violence against women are an example of ways in which the law contributes to the oppression of women.¹⁰⁸ It is a type of 'domination that does not only occur in individual relationships but is legitimised by the major institutions in society', such as the prosecuting authority.¹⁰⁹ Feminist theorists suggest that male violence against women is legitimised through the criminal justice system —

¹⁰⁸ C Mackinnon *Sexual harassment of working women* (1979).

¹⁰⁹ N Levit & RR Verchick *Feminist legal theory: A primer* (2016) 21.

whereby the state fails to intervene against sexual violence.¹¹⁰ Critics of feminist jurisprudence decry feminist legal theory as ignorant of the intersections of sex, wealth, race and sexual orientation that influence how people treat others.¹¹¹ This critique may be mistaken. After all, ‘intersectionality’ is one of the main lenses/analytical tools deployed by feminists. However, despite diversity among feminist theorists, feminist jurisprudence is a concept that is generally and mainly accepted as the use of the law to attain gender equality despite the difficulties found in the existing law. For liberal feminism legal reforms are the main prize and for black feminism and African feminism, structural violence and the impacts of extra-legal variables. These are set out in more detail throughout this study.

The author’s view is that the law is not rigid, and throughout this thesis, it will be argued that substantive equality in the criminal justice system is necessary to attain justice for women and children. The author is mindful that feminist jurisprudence would go beyond advocating for reforms within the criminal justice system. Bartlett and Kennedy describe feminist jurisprudence as a ‘powerful analysis of the relationship between law and gender, and new understandings of the limits of, and opportunities for, legal reform’.¹¹² This approach has resulted in many successful reforms, such as women’s suffrage and reproductive and labour rights.¹¹³ The voice of feminist jurisprudence is equally loud in the problem of rape. It is prudent to define feminist legal theory on rape from the outset because this thesis investigates the problem of prosecutorial attrition through the lens of feminism. There is no definitive or

¹¹⁰ Z Adler *Rape on Trial* (1987).

¹¹¹ Levit & Verchick (note 109 above) 24.

¹¹² K Bartlett & R Kennedy *Feminist Legal Theory: Reading in Law and Gender* (2018) 1.

¹¹³ Ibid. Also see, CA Littleton ‘Equality and Feminist Legal Theory’ 1986 (46) *U. Pitt. L. Rev.* 1043; L Frohman & Mertz ‘Legal Reform and Social Construction: Violence, Gender, and the Law.’ (1994) 19(4) *Law and Social Inquiry* 829-852; MA Fineman ‘Feminist Legal Theory’ (2005) 13 *AM. UJ Gender Soc. Pol’y & L.* 13, 18.

correct feminist theory because the concept differs with respect to approach and objective.¹¹⁴ Rape law reform in South Africa came as a result of feminist advocacy, including feminist scholarship on jurisprudence that advocated for better responsive treatment practices for rape survivors, given the high levels of rape and the adoption of laws that will punish sexual offenders.¹¹⁵ There is, nonetheless, still no solution to the problem of sexual violence in South Africa as defined above despite the measures that were put firmly in place more than twenty-seven years ago.¹¹⁶ Therefore, South Africa's failure to find a lasting solution begs the question why?

Perhaps the answer lies beyond 'using the law to attain gender equality'. Feminist jurisprudence scholarship in South Africa may need to examine legal methods and a feminist critique of methods.¹¹⁷ This can be recognised as homogenising this scholarship. Feminist methodology suggests a more profound look 'beneath the surface of law to identify the gender implications of the rules'.¹¹⁸ Feminist methodology, therefore, challenges the assumption that the law is objective and just in its nature and structure.¹¹⁹ Thus, applying feminist methods is crucial to seemingly neutral legal standards to expose those hidden biases. It is crucial because it goes to the adequacy of legal reforms. This method is known as 'unmasking patriarchy'.¹²⁰

¹¹⁴ E Bonthuys & C Albertyn *Gender, law and justice* (2007) 15; Ibid (Fineman) 13; Levit & Verchick (note 109 above) 9.

¹¹⁵ L Artz & D Smythe (ed) *Should we consent? Rape Law Reform in South Africa* (2008) 1,1.

¹¹⁶ B Pithey, L Artz, H Combrinck & N Naylor 'Discussion Document on the Legal Aspects of Rape in South Africa' *Department of Justice* (1999).

¹¹⁷ K Bartlett 'Feminist Legal Methods' *Harvard Law Review* (1990) 836-7; K van Marle 'We Exist, but Who Are We?' *Feminism and the Power of Sociological Law* (2012) 20 *Feminist Legal Studies* 149-159. Also see, K van Marle 'Hold onto critical jurisprudence' (2019) 23(1) *Law, Democracy & Development* 202-218.

¹¹⁸ Levit & Verchick (note 109 above) 46.

¹¹⁹ Bartlett (note 117 above) 829.

¹²⁰ Levit & Verchick (note 109 above) 41.

Another method is ‘asking the woman the question’, designed to expose how the ‘substance of law may silently and without justification submerge the perspective of women’ and other marginalised persons.¹²¹ It exposes the failure to consider women’s experiences. Bartlett describes the third method as ‘feminist practical reasoning’, which ‘expands traditional notions of legal relevance to make legal decision-making more sensitive to the features of a case not already reflected in the legal doctrine’.¹²² Finally, ‘consciousness-raising’ offers feminists ‘a means of testing the validity of accepted legal principles through the lens of personal experience of those directly affected by those principles’.¹²³

Methods matter because without the ‘understanding of feminist methods’, feminist legal claims will not be accepted as ‘legitimate or correct’, according to Bartlett.¹²⁴ Methods matter because they assist feminists in recreating ‘illegitimate power structures’ and inequalities in ‘new forms’ that feminists are attempting to overcome.¹²⁵ Critics of legal methods challenge and seek to develop ‘alternatives’ to these known ‘traditional’ legal methods.¹²⁶ MacKinnon describes these traditional methods as organising ‘the apprehension of truth, as it determines what counts as evidence and defines what is acceptable as verification’.¹²⁷ Feminist critique of methods in its quest to determine any problems associated with prosecutorial discretion in South Africa precisely guides this thesis. Another important aspect of feminist jurisprudence is its importance in research, data collection, and analysis as a

¹²¹ Bartlett (note 117 above) 829.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Bartlett (note 117 above) 831.

¹²⁵ JW Singer *Should Lawyers care about Philosophy* (1989) 1753.

¹²⁶ Bartlett (117 above) 829.

¹²⁷ C MacKinnon *Feminism, Marxism, Method, and the State: An Agenda for Theory* (1982) 7*SIGNS: J. Women Culture and SOC Y* 515 -535.

vital tool for advocacy, policy formulation, legal reform, and institutional development.¹²⁸ The author outlined above that one of the leading research problems identified here is the yawning gap in knowledge that hampers the battle against the problem of case attrition in South Africa. The author argues that without reliable data, it is impossible to achieve the intended results by merely using the reformed law to attain gender parity in the criminal justice system.

Finally, the feminist theory perspective assumes that violence against women results from gender inequality on a social level also guides this thesis.¹²⁹ South African society is characterised by racial and gendered inequality.¹³⁰ The more unequal women are to men, the more violent men are to be prone to become against women. The feminist theory perspective on GBV is critical to understanding and examining the situation in South Africa, considering this within the dominance theory suggestions that the criminal justice system fails to operate as a gender-neutral institution but as a socially structured and gendered component of patriarchy and considering further that conflict theorists argue that extra-legal variables influence the decisions of the role players in the criminal justice system despite the legislated legal burden to prove the crime of rape.¹³¹

Feminist conflict theory underpins this thesis, which is noticeable throughout this thesis. The author uses feminist textual analysis to test the variables that predict prosecution decisions in cases of rape cases based on hypotheses derived from feminist critical theory, subcultural theory, and Frohmann's downstream theory. Feminist conflict theory provides a

¹²⁸ PA Cain 'Feminist Legal Scholarship' (1991) 77 *Iowa L. Rev.* 19, 21.

¹²⁹ T Bogard *Contour in time: the plays of Eugene O'Neil* (1998).

¹³⁰ Bonthys & Albertyn (note 114 above) 7-8. Buiten D & Naidoo K 'Framing the problem of rape in South Africa: Gender, Race, Class and State Histories' (2016) 64 (4) *Current Sociology* 535-550.

¹³¹ M Petrocelli, AR Piquero & MR Smith 'Conflict Theory and Racial Profiling: An Empirical analysis of police traffic stop data' (2003) *Journal of Criminal Justice* 31(1) 1-11. Also see, GD LaFree *Rape and Criminal Justice: The Social Construction of Sexual Assault* (1989); R Quinney *the Social Reality of Crime* (1974).

unique lens to analyse the intricate relationship between gender, power, and the law. Through feminist critical theorist teachings, we can gain a deeper understanding of the complexities of the legal system and its impact on women's lives. As feminist legal scholarship continues to evolve, it is crucial to remain open to new ideas and approaches, ensuring that the legal system remains responsive to all individuals' needs, regardless of gender.

Next, the author outlines the chosen method of this thesis.

7. METHODOLOGY

7.1 SAMPLE

The sample of this study is randomly selected case dockets in reported cases of rape ($N=25$ nolle cases by prosecutors and $N=25$ prosecuted cases) in Umlazi Police Station, KwaZulu Natal (KZN). The author tests their hypotheses that the decision to decline prosecution in cases of rape is based on (1) the victim-perpetrator relationship; (2) a victim's character; and (3) extra-legal factors as outlined below.

7.2 METHOD

There are three primary hypotheses that will be tested in this study. The author intends to use quantitative and qualitative data collection and analysis methods to obtain results. The author uses a convergent parallel design, a process in which quantitative and qualitative data is collected simultaneously but analysed separately. The author mainly uses the quantitative research method to obtain scientific results. The aim is to determine the patterns and, ultimately, the reasons behind case rejection, comparing it to prosecuted cases. Document analysis (the chosen qualitative method) are combined along with the quantitative outcomes as

a means of triangulation.¹³² It, therefore, means that once the analysis of both methods is complete, comparing the results allows the researcher to draw overall conclusions. The author further created category-based variables based on the categories of extra-judicial factors in all the samples. The author uses descriptive statistics to analyse the link between the different categories of extra-judicial factors and the analysis of the complainant's credibility by prosecutors.

The intention is also to measure the role of valid judicial factors such as penetration, lack of consent, unlawfulness, and *mens rea*. The author intends to use in-depth coding (the grouping and assigning values to responses from dockets based on the variables) to gain insight into the patterns and frequency related to case rejection. In other words, the author uses these descriptive statistics (also known as descriptive analysis) as my first level of analysis to summarise the data and find patterns. Thereafter, the author measures the frequencies to show how often (1) the extra-judicial factors influence the way prosecutors assess a victim's character and (2) the victim-perpetrator relationship plays a role in nolle cases compared to enrolled cases. Finally, the author will measure the variables in all samples and compare the results.

N = 50 nolle cases	
(A)	(B)
1. Cases rejected.	1. Cases proceeded
2. Create variables.	2. Create variables.
3. Use codes to determine frequencies/patterns — data analysis.	3. Use codes to determine frequencies/patterns — data analysis.
4. Compare and contrast the results between A and B.	

¹³² GA Bowen 'Document Analysis as a Qualitative Research Method' (2009) 9(2) *Qualitative Research Journal* 27, 28.

In a nutshell, the author intends to quantify the problem and answer what types of cases are rejected and the reasons for this type of rejection. The aim is to ultimately seek to answer how often cases are rejected based on discriminatory views (rejected based on extra-judicial factors). This is the chosen method, mindful that generic reasons inside dockets may be found, so it is essential to create variables/codes/descriptive stats to assess frequency related to statements and case rejection. Once the patterns and frequencies are clear, the author then uses complex analysis, namely, (1) correlation, which describes, for instance, the relationship between the two variables and (2) regression, which shows or can predict the relationship between the two variables. The following section briefly outlines the three primary hypotheses of this study and the limitations.

7.2 HYPOTHESES

- There is a significant relationship between victim-defendant relationship and prosecutor decision-making in nolle cases.
- Acquaintance rape cases are most prevalent, and these are generally plagued by rape myths and stereotypes and often raise issues of consent unlike in stranger rape cases.
- A prosecutor cannot pour energy into what they deem a ‘hopeless case’ when their initial assessment is that the witness (victim) is not credible. Matters are prosecuted based on (1) discriminatory views influenced by (2) the ‘downstream orientation’, which means that ‘downstream orientation’ is (3) influenced by courtroom procedural obstacles.
- The internal NPA appeal process (representations) serves perpetrators rather than complainants and this, too, is a form of discrimination by prosecutors.

7.2.1 HYPOTHESES 1

The author hypothesises that there is a significant relationship between victim-defendant relationship and prosecutor decision-making in nolle cases: (a) acquaintance rape cases are most prevalent and (b) generally plagued by rape myths and stereotypes, and (c) often raise issues of consent unlike in stranger rape cases. For instance, where an accused is unlikely to claim consensual sex – decided based on extra-judicial factors. The author hypothesises that these cases are the most difficult to prosecute and are often rejected by prosecutors. Further, there is a significant relationship between the complainant's character (age, background, social standing) and prosecutor decision-making in nolle cases. The author hypothesises that a prosecutor cannot pour energy into what they deem a 'hopeless case' when their initial assessment is that the witness (victim) is not credible. Matters are prosecuted based on (1) discriminatory views influenced by (2) the 'downstream orientation', which means that 'downstream orientation' is (3) influenced by courtroom procedural obstacles. Finally, the author hypothesises that there is a significant relationship between extra-judicial factors and prosecutor decision-making in nolle cases.

The author points out that extra-judicial factors vary in degree. The first category includes the age of the victim, race, disability, education, socioeconomic standing, and marital status of the victim. The second category of extra-judicial factors includes medical evidence such as DNA, proof of penetration, visible cuts and bruises, and physical violence such as the use of a weapon, force, and threats. The author regards these as semi-extra-judicial factors. The third category is excessive extrajudicial factors or extra-legal factors, including prior sexual activity with the accused or a victim's prior criminal record. This includes factors that involve any preceptory behaviour, which is the most arbitrary, as described by Spohn et al. as 'risk-taking' behaviour as recorded in the docket that indicates that at the time of the assault, the victim was 'walking alone late at night, was hitchhiking, was in a bar alone, was using alcohol

or drugs, willingly accompanied the suspect to his residence; or invited the suspect to her residence'.¹³³ LaFree similarly identifies five types of 'victim misconduct' from the records that include: hitchhiking, drinking at the time of the offence, being at a tavern or bar without a male escort, allegedly engaging in sex outside of marriage, and willingly entering the suspect's car.¹³⁴

7.2.2 HYPOTHESIS 2

The second hypothesis is that attrition of cases occurs due to state prosecutors throwing out cases they regard as 'hopeless' as indicated above, driven by procedural obstacles. Put differently, the author hypothesises prosecutors refuse to take hopeless cases to court aware of procedural obstacles. This process is known as the 'downstream orientation'.¹³⁵ Therefore, a prosecutor will refuse to prosecute based on (1) discriminatory views influenced by (2) the 'downstream orientation', which 'downstream orientation' is (3) influenced by courtroom procedural obstacles. In a prosecutor's view, a 'hopeless case' cannot be enrolled for prosecution. For example, such a case may include instances where the complainant was attacked going to the bar, where the incident occurred at or from the bar. In circumstances where a complainant was drinking, their credibility becomes an easy target for the defence. This includes instances where their character can be assassinated simply because they drink alcohol. However, it is unknown what prosecutors in South Africa regard as a 'hopeless case' and their views on procedural obstacles.

¹³³ C Spohn, D Beichner, E Davis Frenzel & D Holleran 'Prosecutors' charging decisions in sexual assault cases: A multi-site study, final report' (2002) *Washington DC: National Institute of Justice* 201.

¹³⁴ G LaFree *Rape and Criminal Justice: The Social Construction of Sexual Assault* (1989).

¹³⁵ Frohmann (note 15 above) 543.

The ‘downstream orientation’ is likely linked to prosecutor performance targets. Procedural rules further continue to present difficulties, and these have a circular effect insofar as rape myths and stereotypes and the prosecution of rape cases are concerned. Notwithstanding this, it may be essential to note that the Constitutional Court have, over the years, heralded the movement of rape jurisprudence away from its patriarchal roots to a constitutional rights-based approach by infusing procedural rules with constitutional values. For example, the Constitutional Court in *State v Jackson* led to the abolition of the cautionary rule in cases of rape.¹³⁶ Moreover, despite the success of the Constitutional Court that amended procedural rules, such as the cautionary rule, corroboration and resistance requirements that were recognised as a hindrance to the prosecution of rape cases — the problems related to procedural obstacles continue to persist unabated.¹³⁷ These amendments to legislation and the infusion of procedural rules with constitutional values have not resulted in combating the problem of rape or the better prosecution of perpetrators, or the achievement of higher conviction rates.

The author intended to use a qualitative method for this type of exploratory research to generate a theory. The intention was to collect data from interviews with prosecutors, followed by a questionnaire for specialist sexual offences prosecutors that deal with rape cases to complete. The aim was to determine prosecutors’ views on (1) the prosecution of rape cases; (2) what they regard as a ‘hopeless case’; (3) their views on procedural obstacles, and (4) their

¹³⁶ *State v Jackson* 1998 (1) SACR 470 (SCA) 21. The court held that the ‘magistrate was not obliged to apply such a rule. The origin of the cautionary rule is a warning to judicial officers that the evidence of certain witnesses, such as complainants in sexual cases could not be safely relied upon without corroboration. Section 60 of the Sexual offences Act reads: ‘Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.’

¹³⁷ Artz & Smythe (note 6 above) 16; Swemmer (note 43 above) 52.

views on the minimum required elements of the crime of rape for enrolling a case. It sought to determine their views on procedural obstacles and/or which procedural rules they regard as obstacles and views on minimum requirements, for example, their views on whether there was more than one degree of rape. The aim was also to determine their level of knowledge on the nature of cases (different types of rape) and specifically on cases of acquaintance rape. This was to determine whether a link exists between their knowledge (or lack thereof) and prosecuting decisions in cases and the impact of this on rape law reform. Finally, the aim was to determine other issues, such as fatigue and pressure because of performance targets.

7.2.3 HYPOTHESIS 3

The hypothesis is that the internal NPA appeal process (representations) serves perpetrators rather than complainants and this, too, is a form of discrimination by prosecutors. As it currently stands, rape complainants have minimal recourse following a prosecutor's decision to decline prosecution. There are two points of recourse available to complainants following a negative outcome. The first option is to make a representation.¹³⁸ Written representations are similar an appeal process. The NPA policy directives describe the process of representations as follows

¹³⁸ See s 22(2)(c), which is the counterpart of s 179(5)(d) of the Constitution and deals with the NDPP's review function. In terms of s 179(5)(d) of the Constitution:

‘The National Director of Public Prosecutions —

...

(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:

(i) The accused person.

(ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant.’

Where a decision of a lower court prosecutor to prosecute or not to prosecute is the subject matter of a representation, the prosecutor must refer the representor to his or her immediate superior. If still dissatisfied, they should be directed to the DPP, before a final appeal is made to the National Director. Potential representors should, where possible, be advised accordingly.¹³⁹

The author hypothesises that this recourse does not benefit complainants because complainants are unaware that this process exists or is available and at their disposal since prosecutors do not inform them. This internal appeal is inaccessible to many complainants because complainants are treated as mere witnesses, and state prosecutors do not fully protect their rights. It is trite to say that complainants are also unable to access this internal appeal due to, for instance, their socio-economic standing in our society. This contrasts with perpetrators who have legal representation and are advised accordingly. The author's second hypothesis related to this problem is that prosecutors would not advise complainants about this internal appeal since prosecutors discriminate against complainants in the first place when exercising their discretion. Therefore, a prosecutor would not readily advise a complainant of any recourse available (complainants) who may challenge their (prosecutors) decisions. In other words, there may be a bias.

Finally, a prosecutor may fail to advise a complainant because prosecutors often do not furnish reasons for their decisions. The failure to furnish a complainant with reasons is irrational and arbitrary. It is also irrational for a complainant to make a representation or approach the court without the decision-maker's reasons. For example, without adequate reasons, a complainant will have inadequate grounds to make sound representations to the Senior Public Prosecutor (SPP) or the Director of Public Prosecutor (DPP). Equally so, without

¹³⁹ NPA Prosecution Policy (Revision Date: June 2013) 6 <[TABLE OF CONTENTS \(npa.gov.za\)](#)>
NPA 2014 <http://www.npa.gov.za/ReadContent504.aspx> 5 (hereafter referred to as NPA policy)
18.

the reasons of the DPP, a complainant remains disadvantaged when approaching the National Director of Public Prosecutions (NDPP) with representations.

It was intended by the author to use a quantitative method to collect and analyse data. The intention was to collect representations made to the NPA in 2020-21 in Gauteng Province. The intention was to collect data from all representations made to the SPP in one district court, the DPP of the province and the NDPP in Gauteng Province. The aim was to test the theory that the NPA representation process benefits and is accessible to perpetrators in cases of rape. The attempt here was to determine the number of representations made and by whom and compare the results. Further, to determine whether the representations made were based on valid reasons that the prosecutor furnished. The point was also to determine whether prosecutors indeed furnish adequate reasons and, thereafter, compare the results with the outcomes of this particular case study.

Finally, the aim was to discover whether there is a significant difference in the outcome of the representations made between complainants and those made by complaints, i.e., which is usually more successful versus unsuccessful. This would have enabled the researcher to consider the benefit of complainants accessing their dockets. For example, the author's LLM dissertation concluded that the NPA must furnish detailed reasons to complainants when declining to prosecute a case. The results would have further enabled the researcher to determine whether there is a necessity and/or feasibility of a complainant legal representative by the state when reporting cases of rape or whether prosecutors are best to take statements from complainants instead of the police. This was no longer possible because the NPA declined my request to access their documents, however, docket analysis leads to valid outcomes of the study.

7.3 LIMITATIONS

The sample of this study is small ($N=50$) and focused on locale derived from a single police station. It is, therefore, not a national study. However, the sample is sufficient to make findings and obtain scientific results. It must be borne in mind that even if there were 1200 cases reported each year, many of the cases would be active cases, the author was not granted permission to access active cases. Other cases would not meet my requirements, because many cases for example, are closed and filed by the SAPS without any decision from the NPA. I required dockets that were finalised, by a prosecutor. That alone limits the number of dockets available to the author. The author was unable to burden SAPS that had unsophisticated filing systems, who had to redact the copies first before making those copies available to the author. Many dockets were also damaged due to floods in Kwa-Zulu Natal (KZN). Furthermore, SAPS was reluctant to give me any dockets, to a point the author had to engage SAPS Legal Department at the Head Office, where the author reached a compromise for 50 and no more. SAPS cited privacy laws per the POPI Act a limited time as well and resources. SAPS will not allow me further access to their dockets.

As stated, the NPA declined the author's request to interview their prosecutors, citing outdated methodology and that this study relied on the MRC report's outdated findings of 2018. This is inaccurate, however, and the failure to conduct interviews with prosecutors does not limit the chosen method because the sample (case dockets) contains sufficient data, such as comments and instructions by prosecutors in the diary. The document analysis of the sample is not limited. The NPA also rejected the author's request to access representations citing confidentiality, which is inappropriate considering the purpose of the request to conduct academic research. The POPI Act allows for access to confidential records for research purposes. It must be borne in mind that this study obtained clearance from the Witwatersrand

Ethics Committee successfully, which should have allayed any concerns. The third hypothesis will, therefore, not be tested due to this limitation.

8. CHAPTERISATION

This thesis is delineated into five (5) chapters. The second chapter is a review of the literature. This review will concentrate on the following areas: Rape theories, the rape myth theory, key variables in cases, feminist critical theory on rape attribution and rape reform. In the third chapter, the chosen method and the results of the dataset are respectively outlined. This is then followed in chapter four by a discussion of the outcomes and the author's main theses. The final chapter concludes this study, including the author's recommendations.

CHAPTER 2: FEMINIST THEORIES ON RAPE AND THE CRIMINAL JUSTICE SYSTEM

1. INTRODUCTION

Chapter two reviews the literature on feminist theories on rape and how it is treated by the criminal justice system. Put more pointedly, the author focuses on critical feminist theory on rape, ecological theory on rape, and the relationship between prosecutorial discretion and rape outcomes. Theories on rape myths and their influence on prosecutors are reviewed in this chapter, followed by a review of key variables, the rape myth theory, and victim attribution, and concluded with a review of the role and impact of rape reforms in South Africa. The reader is reminded that this thesis aims to analyse this topic from a feminist legal perspective recognising the various categories within this legal scholarship field. Most importantly, it must be kept in mind that feminist legal theory critiques remain capable of transforming the legal system, which makes it relevant. That said, feminist legal theory also encompasses diverse perspectives and approaches, each offering a unique perspective on gender, power, and equality within our societies.

2. GENERAL RAPE THEORIES

The crime of rape was first conceptualised as a significant social problem – as opposed to an individualised matter — by feminist scholars in the 1950s.¹ Feminist perspective on rape

¹ MA Largen 'History of women's movement in changing attitudes, laws, and treatment toward rape victims' in M Walker and S Brodsky (eds.) *Sexual Assault: The Victim and the Rapist* (1976) 69, 79; V Rose 'Rape as a social problem: a byproduct of the feminist movement' 1977 (25) 1 *Social Problems* 75, 78; G Geis 'Forcible rape: an introduction' in D Chappell, R Geis & G Geis (eds.) *Forcible Rape: The Crime, the Victim, and the Offender* (1977) 1 – 44; MD Freeman "'But If You Can't Rape Your Wife, Who[m] Can You Rape?" The Marital Rape Exemption Re-examined' (1981) *Family Law Quarterly* 1-29; V Berger 'Man's trial, woman's tribulation: Rape

suggests that the crime of rape ‘is a direct result of our culture’s differential sex role socialization and stratification’.² For instance, traditional notions about sex roles are the basis of stereotyped attitudes about rape.³ Feminist theory challenges traditional perspectives which claim that men are superior, and women subjugation is justified. It does so by exploring the complexities of power, gender, and societal structures that contribute to rape culture. Initially, rape was recognised as an act of sexual conduct and not violence.⁴ Feminist critical theorists shortly thereafter recognised the crime of rape as a tool that functions to control women in a patriarchal society.⁵ Brownmiller describes rape as ‘nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear’.⁶ All rape is an exercise of power.⁷ Rape is also considered as representation of men’s sexuality.⁸ MacKinnon’s view on rape is most interesting, linking rape to the compulsive nature of men’s heterosexuality and that rape cannot be merely distinguished from coercion and force or even

cases in the courtroom’ (1977) *Colum. L. Rev* 77; NA Matthews *Confronting rape: The feminist anti-rape movement and the state* (2005); N Connell & C Wilson *Rape: The first sourcebook for women by New York radical feminists* (1974) 27-28.

² Rose (note 1 above) 78.

³ Ibid.

⁴ S Brownmiller *Against Our Will: Men, Women, and Rape* (1975) 1, 18; P Donat & J d’Emilio ‘A feminist redefinition of rape and sexual assault: Historical foundations and change’ (1997) *The Legal Response to Violence Against Women* 259-272.

⁵ Ibid (Brownmiller) 18; C Houston ‘How feminist theory became (criminal) law: Tracing the path to mandatory criminal intervention in domestic violence cases’ (2014) 21 *Mich. J. Gender & L* 217, 232.

⁶ Ibid (Brownmiller) 234; T Castle *Clarissa's Ciphers: Meaning and Disruption in Richardson's Clarissa* (2016) 204, 1172; AJ Cahill *Rethinking rape* (2001) 2.

⁷ Ibid (Brownmiller) 256.

⁸ DE Russell *The politics of rape: The victim's perspective* (1975).

violence.⁹ Continuing, MacKinnon puts it as follows

Like heterosexuality, the crime of rape is centred on penetration. The law to protect women's sexuality from forceable violation/expropriation defines the protection in male genital terms. Women do resent forced penetration. But penile invasion of the vagina may be less pivotal to women's sexuality, pleasure, or violation than it is to male sexuality. This definitive element of rape centres upon a male-defined loss, not coincidentally also upon the way men define the loss of exclusive access. In this light, rape, as legally defined, appears more like a crime against female monogamy than against female sexuality. Property concepts fail fully to comprehend this, however, not because a woman's sexuality is not, finally a thing, but because it was never ours.¹⁰

Rape is also closely linked to social structures, research in sociology and psychology, as well as the law.¹¹ These theories outside the school of feminism are particularly relevant and vital to this study due to the tested variables in those studies, such as the influence of alcohol and rape. Ecological theories on rape are fundamental and, in particular, the subculture theory on rape. The subculture theory on rape is a sociological perspective that attempts to understand and address rape crimes within specific social contexts. By examining the cultural factors that influence rape behaviour, the subculture theory aims to shed light on the root causes of rape and develop effective strategies to prevent and combat it. Interestingly, the subculture theory is similar to feminist critical theorists' suggestions that rape is general acceptance of violence in our society. Feminist critical theorists further highlight the inferior status of women in

⁹ CA MacKinnon 'Feminism, Marxism, method, and the state: Toward feminist jurisprudence' (1983) 8(4) *Signs: Journal of women in culture and society* 635, 646. MacKinnon puts it as follows: 'The point of defining rape as 'violence and not sex' and 'violence against women' has been to separate sexuality from gender in order to affirm the sex (heterosexuality) while rejecting violence (rape). The problem is what it has always been: telling the difference.'

¹⁰ Ibid.

¹¹ LB Bourque *Defining rape* (1989).

society, which further aggravates this.¹²

Criminology and sociology are the two disciplines that shape the subculture theory on rape. Like feminism, this theory posits that rape is not solely driven by individual characteristics but rather by the cultural norms, values, and beliefs of the subcultures within which individuals reside. For example, some theorists argue that rape rates are significantly higher in neighbourhoods that are predominantly black and characterised by high unemployment and poverty.¹³ Subculture theorists suggest that aggressive behaviours or conduct are often expected in certain situations and some scholars have shown that some subcultural theories of violence typecast certain communities, veering on the racist.¹⁴ Furthermore, certain situations within this system of beliefs call for such violent behaviour or conduct, including the forceful sexual exploitation of women.¹⁵ The cycle of violence is, therefore, challenging to break in some neighbourhoods because this type of behaviour is not only accepted but actively encouraged.¹⁶ A study conducted in South Africa found that rape culture drives rape in many communities.¹⁷ Volman holds the following views

A 'rape culture' exists in which rape is often not acknowledged as a crime and its victims are frequently blamed and held responsible for their own violation. Rape is seen as a component of the 'war culture' that dominates South Africa. This war culture involves a

¹² Brownmiller (note 4 above) 311.

¹³ M Amir *Patterns in Forcible Rape* (1971) 330; JG Rabkin 'The epidemiology of forcible rape' (1979) 49(4) *American Journal of Orthopsychiatry* 634; MJ Hindelang & BL Davies 'Forcible rape in the United States: a statistical profile' (1977) in D Chappell, R Geis & G Geis (eds.) *Forcible Rape: The Crime, the Victim, and the Offender* 87-114.

¹⁴ Ibid (Amir) 330.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ L Vogelman *The sexual face of violence: Rapists on rape* (1990) 2.

set of meanings and practices that accept violence as a legitimate solution to conflict. Men rape primarily to bolster their masculine pride and feed their desire for power.¹⁸

The subcultural theory mainly suggests that ‘forcible rape’ is an ‘intra-racial event between victims and offenders who were at same age level and who were ecologically bound, that is, victims and offenders lived in the same area, which tended to be also the area of the offence’.¹⁹ Nevertheless, interest among subculture theorists on rape at the time related to the possible correlation between race and decisions in cases was abundant at the time because of the long history of black-white social and sexual segregation in the US.²⁰ Prior research in that area reveals that black men accused of sexually assaulting white women receive more severe sanctions than other sexual assault suspects.²¹ Instead of incarceration, white men were diagnosed with mental illness when accused of rape, while black men were jailed, executed or castrated.²² Another study similarly pointed toward discriminatory treatment by jurors based on a defendant’s race.²³ However, both these studies by LaFree and Fields, confirm early findings that showed that black male defendants in rape cases arouse negative sentiments before jurors.²⁴ Equally, these findings support the subcultural theory. In this thesis, hypotheses

¹⁸ Ibid.

¹⁹ Amir (note 13 above) 339-340. Also see, LA Curtis ‘Rape, race, and culture: some speculations in search of theory’ in MJ Walker & SL Brodsky (eds.) *Sexual Assault: The Victim and the Rapist* (1979).

²⁰ GD LaFree ‘The effect of sexual stratification by race on official reactions to rape’ (1980) *American Sociological Review* 842-854; HS Field ‘Attitudes toward rape: A comparative analysis of police, rapists, crisis counselors, and citizens’ (1978) 36(2) *Journal of personality and social psychology* 156; H Kalven & H Zeisel *The American Jury* (1966) 249-54; SJ South & RB Felson ‘The racial patterning of rape’ (1990) 69(1) *Social Forces* 71-93.

²¹ Ibid (LaFree) 852.

²² Donat & d’Emilio (note 4 above) 262.

²³ Field (note 20 above) 280-281.

²⁴ Kalven & Zeisel (note 20 above) 210.

derived from the subcultural theory of violence are explored in order to analyse the variables that predict the interpersonal relations between victim and offender and the outcome in a rape case. From the onset, it is essential to note that this study is not concerned with race. It must be borne in mind that the subculture study undertook to mainly examine ‘the characteristics of the offence, the offenders, and the victims separately, but also as mutually interacting participants’.²⁵ The same specific variables are also tested here since most subcultural theory variables are essential for this study.

Feminism holds that rape is a mechanism of gender inequality.²⁶ This is especially relevant to the situation in South Africa because research shows that South African society is characterised by gross racial and gendered inequality.²⁷ It is also trite to say that the more unequal women are to men, the more violent men are to be prone to become against women.²⁸ The feminist theory assumes that violence against women (VAW) results from gender inequality on a social level perpetuated by men to maintain power and control over women. It argues that rape is a manifestation of patriarchal norms and values.²⁹ This theory suggests that rape is closely linked to socioeconomic inequality and the exploitation of women. It argues that addressing rape requires challenging the underlying social and economic structures that perpetuate it.

²⁵ Amir (note 13 above) 330.

²⁶ JR Schwendinger & H Schwendinger *Rape and inequality* (1983) 178-179; CJ Bogard ‘The rhetoric of domination and its strategic use by homeless mothers’ (1998) 18(3) *Sociological Spectrum* 229-262.

²⁷ E Bonthuys & C Albertyn *Gender, law and justice* (2007) 7-8.

²⁸ GD LaFree *Rape and Criminal Justice: The Social Construction of Sexual Assault* (1989).

²⁹ Bogard (note 26 above) 230; Brownmiller (note 4 above) 312. Brownmiller puts it as follows: ‘...to make a woman a willing participant in her own defeat is half the battle.’

It is crucial to consider this further from a dominance theory perspective suggestion that the criminal justice system fails to operate as a gender-neutral institution but as a socially structured and gendered component of patriarchy.³⁰ The dominance theory suggests that inadequate responses to violence against women are an example of ways in which the law contributes to the oppression of women.³¹ It is a type of ‘domination that does not only occur in individual relationships but is supported by the major institutions in society’, such as the [prosecuting authority].³² For example, feminist theorist suggests that male violence against women is legitimised through the criminal justice system — whereby the state fails to intervene against sexual violence.³³ Therefore, legal reforms, for example, may always be doomed to fail when one bears in mind the dominance theory and the situation in South Africa. It is trite to say that legislative reform has not yielded the desired results, and this unfortunate outcome is not isolated to South Africa. This is under discussion further in section 4 below.

On the other hand, feminist conflict theorists on rape mainly argue that extra-legal variables influence the decisions of the critical role players within the criminal justice system beyond the actual legislated legal burden to prove the crime of rape.³⁴ Conflict theorists further support the feminist perspective on GBV, arguing that power inequality between men and women results in people (men) being able to dictate how the law is enforced and will, therefore,

³⁰ Brownmiller (note 4 above) 256. Also see, C Smart *Feminism and the power of the Law* (1989).

³¹ C Mackinnon *Sexual harassment of working women* (1979); Vogelmann (note 17 above) 2; Donat & d’Emilio (note 4 above) 259.

³² N Levit & RR Verchick *Feminist legal theory: A primer* (2016) 21.

³³ Z Adler *Rape on Trial* (1987) 7.

³⁴ G LaFree ‘Rape and Criminal Justice: The Social Construction of Sexual Assault’ (1989); R Quinney *The Social Reality of Crime* (1974); Petrocelli, MA Piquero & M Smith ‘Conflict Theory and Racial Profiling: An Empirical analysis of police traffic stop data’ (2003) 31(1) *Journal of Criminal Justice* 1-11.

be prone to protect their interests.³⁵ It subjugates women and dominates.³⁶ To put it differently, conflict theorists recognise that rape is not only a physical act but also a form of power, control, and oppression. This theory acknowledges the ways in which race, class, and sexuality intersect to shape experiences of rape. Mackinnon explains it as follows: 'Raped women are compelled to go to the state, men make the laws and decide if they will enforce them'.³⁷ Dominant groups, in this context, men, use the law to maintain power by subjugating women.³⁸

Other suggestions say that men who rape women treat them (women) as mere property, which is condoned by the criminal justice system.³⁹ An example of this can be found, for instance, in past laws that held that a man could not be held liable in law for having relations with his wife as a result of intercourse with her.⁴⁰ Moreover, the status quo remains even when such laws have been repealed. For example, a High Court in South Africa held that the crime

³⁵ C MacKinnon 'Rape, Genocide, and Women's Human Rights' (2017) 17 *Genocide and Human Rights*, 133, 144; R Quinney *The Social Reality of Crime* (1974).

³⁶ Vogelman (note 17 above) 2. Vogelman found that rape emerges from a culture that involves the domination and objectification of women. As an act of sexual violence, rape reflects the masculine role as dominant and controlling.

³⁷ MacKinnon (note 35 above) 144.

³⁸ Brownmiller (note 4 above) 257; G Robin 'Forcible Rape: Institutionalized Sexism in the Criminal Justice System' (1977) 23(2) *Crime & Delinquency* 136-153; Estrich S *Real Rape: How the legal System Victimizes Women who say No* (1987); M Burt 'Cultural Myths and Supports for Rape' (1980) 38(2) *Journal of Personality and Social Psychology* 230; K Miller *Sexual Politics* (1970).

³⁹ Rose (note 1 above) 78; LaFree et al (note 34) 390; Petrocelli et al (note 34 above) 11; Schwendinger & Schwendinger (note 26 above) 20; HC Barnett 'The political economy of rape and prostitution' (1976) *Review of Radical Political Economics* 59, 68.

⁴⁰ Berger (note 1 above) 9; Freeman (note 1 above) 8-10; Mackinnon (note 9 above) 649. MacKinnon holds that 'it was a crime to force sexual intercourse on a woman, *unless that woman was your wife*. In the 1970s, most states granted immunity to husbands for the crime of rape against their wives, either by statute or using a common law exception.' Also see, VRG Barshis 'The question of marital rape' (1983) 6(4) *Women's Studies International Forum* 383-393.

of rape by a husband did not inflict as much pain and trauma on a wife.⁴¹ This was a finding made by a judicial officer who later became the Chief Justice in South Africa, Justice Mogoeng Mogoeng, to much criticism at the time.⁴² In that case, Mogoeng J (as he was then) held that ‘this rape [rape of a wife by her husband] should... be treated differently from the rape of one stranger by another between whom consensual intercourse was almost unthinkable’.⁴³

Finally, in concluding this section, the feminist theory on rape, as put forth by Rose is the most convincing, but the subcultural theory on rape and, more so, the critical theory on rape and the processing of cases are most applicable to this study. Generally, feminist legal theory, as indicated above, provides a unique lens through which to analyse the intricate relationship between gender, power, and the law. By examining the various categories of feminist legal theory, we can gain a deeper understanding of the complexities of the legal system and its impact on women’s lives. As feminist legal scholarship continues to evolve, it is crucial to remain open to new ideas and approaches, ensuring that the legal system remains responsive to all individuals’ needs, regardless of gender.

At the core, however, this project mainly seeks to unpack whether the criminal justice system unfairly treats women, as suggested by feminist conflict theorists, and the reason behind this. It will do so through a more profound look ‘beneath the surface of law to identify the gender implications of the rules’ as feminist methodology teaches.⁴⁴ Feminist methodology challenges the assumption that the law is objective and just in its nature and structure.⁴⁵ This is to expose those hidden biases that appear as neutral legal standards in order to ‘unmask

⁴¹ *State v Moipolai* (CA 53/2004) [2004] ZANWHC 19 para 24 (hereafter referred to as *Moipolai case*).

⁴² Ilham Rawoot ‘Mogoeng’s assault on women’s rights’ *The Mail and Guardian* 26 August 2011 <<https://mg.co.za/article/2011-08-26-mogoengs-marital-rape-judgments-raise-hackles/>>

⁴³ *Moipolai case* (note 41 above) para 24.

⁴⁴ Levit & Verchick (note 32 above) 46.

⁴⁵ K Bartlett & R Kennedy *Feminist Legal Theory: Reading in Law and Gender* (1991) 829.

patriarchy'.⁴⁶ These methods matter because without the 'understanding of feminist methods', feminist claims in law will not be accepted as 'legitimate or correct', according to Bartlett.⁴⁷ Methods matter because they assist feminists in recreating 'illegitimate power structures' and inequalities in 'new forms' that feminists are attempting to overcome.⁴⁸ MacKinnon describes these traditional methods as organising 'the apprehension of truth, as it determines what counts as evidence and defines what is acceptable as verification'.⁴⁹ It is part of the domination described by feminists as not only occurring in individual relationships but is supported by the major institutions in society. This is the theoretical approach of this law dissertation, and the main contribution of this study is a feminist perspective on prosecutorial discretion. It must be kept in mind that unlike other crimes, rape is also known as an exercise of power that is protected by the institution meant to punish it, Brownmiller puts it as follows: 'All rape is an exercise in power, but some rapists have an edge that is more than physical. They operate within an institutionalised setting that works to their advantage and in which a victim has little chance to redress her grievance'. This is the core of the dissertation that brings into view the complicity of the CJS.

This brings us to a discussion of the key variables that influence prosecutors, as suggested by feminist conflict theorists, among others.

⁴⁶ Levit & Verchick (note 32 above) 41.

⁴⁷ Bartlett (note 45 above) 831.

⁴⁸ JW Singer *Should Lawyers care about Philosophy* (1989) 1753.

⁴⁹ MacKinnon C 'Feminism, Marxism, Method, and the State: An Agenda for Theory' (1982) *7SIGNS: J. Women Culture and SOC Y* 515, 535.

3. KEY VARIABLES IN CASES OF RAPE: INSIGHTS FROM EXISTING STUDIES

The relationship between the victim and offender is a key variable in cases of rape.⁵⁰ Alcohol use is a strong indicator of the outcome of cases.⁵¹ However, Amir interestingly found that there were various misconceptions, such as ‘rape is associated with drinking’ two-thirds of their cases revealed that ‘alcohol was absent from the rape situation’.⁵² The study revealed that the use of alcohol or drugs was an insignificant factor in charging decisions.⁵³ In direct contrast, the MRC report states that prosecutors in South Africa were 22% more likely to decline cases where the victim was intoxicated.⁵⁴ However, the veracity of this outcome is not convincing since the bears many methodological weaknesses, as explained in the previous chapter. As stated in the Problem Statement sample records show that prosecutors did not consider 67.6% of cases referred to prosecutors for a decision.⁵⁵ These cases (referred to prosecutors) did not progress due to complainants preferring to ‘move on with their lives’.⁵⁶ If one has regard to

⁵⁰ Hindelang (note 13 above) 18; C Spohn, D Beichner & E Davis-Frenzel ‘Prosecutorial justifications for sexual assault case rejection: Guarding the “gateway to justice”’ (2001) 48(2) *Social problems* 206-235; RA Weninger ‘Factors affecting the prosecution of rape: A case study of Travis County, Texas (1978) *Virginia Law Review* 357, 379-82; S Chandler & M Torney ‘The decisions and the processing of rape victims through the criminal justice system’ (1981) 4(2) *California Sociologist* 155-168.

⁵¹ Hindelang (note 13 above) 18; C Spohn, D Beichner, E Davis Frenzel & D Holleran ‘Prosecutors’ charging decisions in sexual assault cases: A multi-site study, final report’ 2002 *Washington DC: National Institute of Justice* 14.

⁵² Amir (note 13 above) 340.

⁵³ Hindelang (note 13 above) 18.

⁵⁴ M Machisa, R Jina, G Labuschagne, L Vetten, L Loots, S Swemmer, B Meyersfeld & R Jewkes ‘Rape Justice in South Africa: A Retrospective Study of The Investigation, Prosecution and Adjudication of Reported Rape Cases From 2012’ 2017 *Gender and Health Research Unit, South African Medical Research Council* 88 (hereafter referred to as ‘the MRC report’).

⁵⁵ Ibid 84.

⁵⁶ Ibid.

this, it makes it plain that only 32.4% of the sample would provide direct insight into prosecutor decision-making and their approach and attitudes towards cases and complainants.

Notwithstanding this, alcohol use as a variable is also significant from a procedural perspective. This author argues that such cases should be more straightforward to prosecute. It is because a complainant must be capable of consenting, and alcohol use may diminish a complainant's ability to consent.⁵⁷ The amended Sexual Offences Act wholly redefined the definition of consent. It introduced a list of coercive circumstances that vitiate consent. For example, there can never be consent in situations in which the complainant is 'incapable in law of appreciating the nature of the sexual act' as a result of ... 'drug, *alcohol* or other substance' own emphasis.⁵⁸ It must be kept in mind that the use of alcohol and the defence of consent is likely to rise if there is typically an existing relationship, for instance, between the accused and the complainant. It reveals the importance of the complainant and accused relationship variable.

Several studies have shown that victim-suspect relationships similarly influence the attribution of rape responsibility.⁵⁹ The literature shows that state agents in the criminal justice system also generally dichotomise what constitutes the crime of rape versus what is not —

⁵⁷ Section 1 (3)(d) of the Sexual Offences Act.

⁵⁸ Section 1(3)(d)(iii) of the Sexual Offences Act.

⁵⁹ BS Fisher; FT Cullen & MG Turner 'The sexual victimization of college women. Research report' 2000 *Washington, DC: Department of Justice* 1, 9; J Du Mont; KL Miller & TL Myhr 'The role of 'real rape' and 'real victim' stereotypes in the police reporting practices of sexually assaulted women' (2003) 9(4) *Violence Against Women* 466, 467; JW Spears & CC Spohn 'The Effect of Evidence Factors and Victim Characteristics on Prosecutors' Charging Decisions in Sexual Assault Cases' (1997) 14(3) *Justice Quarterly* 501, 503; PA Frazier & B Haney 'Sexual assault cases in the legal system: Police, prosecutor, and victim perspectives' (1996) 20(6) *Law and human behavior* 607, 611; P Tetreault & M Barnett 'Reactions to Stranger and Acquaintance Rape' (1987) 11(3) *Psychology of Women Quarterly* 353-358.

based on the victim's perceived character and victim-suspect relationship.⁶⁰ This anomaly occurs this way: State agents in the criminal justice system tend to shift attention to the complainant's behaviour instead of the accused's. For instance, the prosecutor's decisions reflect notions about typical male/female interactions when reflecting on what constitutes rape or not.⁶¹ A survey reveals that judges are neither immune to this type of dichotomisation of the crime of rape.⁶²

Another aspect of this is that research from other jurisdictions reveals a sharp increase in acquaintance and intimate rape.⁶³ In contrast, prosecutors in South Africa were twice as likely to process cases involving strangers compared to cases involving relatives or acquaintances.⁶⁴ The MRC report concluded that cases involving relatives and acquaintance perpetrators more often resulted in a guilty verdict.⁶⁵ However, despite the contrasting outcome

⁶⁰ Brownmiller (note 4 above) 351; Miller (note 59 above) 467; Robin (note 36 above) 138; Estrich (note 38 above) 230; Field (note 20 above) 179; J Williams & K Holmes *The Second Assault: Rape and Public Attitudes* (1981); GD LaFree, BF Reskin & CA Visher 'Jurors' responses to victims behavior and legal issues in sexual assault trials' (1985) 32(4) *Social Problems* 389-407; E Borgida & P White 'Social perception of rape victims' (1978) 2(4) *Law and Human Behavior* 339-351. The authors found that jurors' close scrutiny of the victim's credibility and moral character was directly related to the conviction rate. Also see, HS Field 'Juror background characteristics and attitudes toward rape' (1978) 2(2) *Law and Human Behavior* 73-93; J Horney & C Spohn 'The Influence of Blame and Believability Factors on the Processing of Simple versus Aggravated Rape Cases' (1996) 34(2) *Criminology* 135-162; J Temkin & B Krahé *Sexual assault and the justice gap: A question of attitude* (2008) 1.

⁶¹ Estrich (note 38 above) 230.

⁶² C Bohmer 'Judicial attitudes toward rape victims' (1974) 57(7) *Judicature* 303, 304.

⁶³ J Harris & S Grace *A Question of Evidence?: Investigating and Prosecuting rape in the 1990s* (1999) 5. The authors compared their findings to S Grace, C Lloyd & L Smith *Rape: From Recording to Conviction* (1992) 1.

⁶⁴ The MRC report (note 54 above) 84.

⁶⁵ Ibid 31.

of the MRC study, the literature shows that the victim/suspect relationship is nonetheless laden with complexities. For example, ‘the closer the relationship between the victim and the perpetrator, the longer it takes to report the crime’.⁶⁶ When there is a victim/suspect relationship, the complainants are unlikely to report and incident and may question any attribution when there is a prior relationship between the parties.⁶⁷ However, failing to report promptly leads to case attrition.⁶⁸ In cases that do not progress, it is common for victims not to report timeously.⁶⁹ Research in South Africa further found that victims internalise the violence they experience so much that they do not consider it necessary to report the rape.⁷⁰ Acceptance of interpersonal violence refers to the notion that force and coercion are legitimate ways to gain compliance and, specifically, that they are legitimate in intimate and sexual relationships.⁷¹

⁶⁶ SJ Lea & US Steve ‘Attrition in rape cases: Developing a profile and identifying relevant factors’ (2007) 43(3) *British Journal of Criminology* 583, 590; Du Mont et al (note 59 above) 467.

⁶⁷ Rabkin (note 13 above) 635-636.

⁶⁸ Ibid. Rabkin puts it as follows: ‘Willingness of victims to report rape to officials is believed to be influenced by characteristics of the offender, of the act, of the victim, and of the victim offender relationship. Probability of reporting seems enhanced when there is a greater age disparity between offender and victim, when the victim is injured, when there are witnesses, when the offense is inter-racial, and when the offender is not previously known to the victim.’ Also see, J Bouffard ‘Predicting Type of Sexual Assault Case Closure from Victim, Suspect, and Case Characteristics’ (2000) 28(6) *Journal of Criminal Justice* 527-542.

⁶⁹ Lea & Steve (note 66 above) 590. The authors found: ‘Thirteen per cent were reported within two weeks, with the remaining 21 percent being reported some time after the crime. In 6 percent of cases, the crime was reported more than six months after the crime, sometimes many years later.’

⁷⁰ L Vetten, R Jewkes, R Sigsworth, N Christofides, L Loots & O Dunseith ‘Tracking Rape Case Attrition in Gauteng: The Police Investigation Stage’ 2008 *Tshwaranang Legal Advocacy Centre, Medical Research Council, Centre for the Study of Violence and Reconciliation: Johannesburg* 34. <http://www.csvr.org.za/docs/tracking_justice.pdf>

⁷¹ Burt (note 38 above) 218.

South African courts have acknowledged this issue.⁷² South African legislators implemented law reform that addresses this problem under s 59 of the Sexual Offences Act, between the alleged commission of such offence and the reporting thereof in criminal proceedings involving the alleged commission of a sexual offence.⁷³ It attempted to alleviate the stigma associated with incidents reported after their occurrence. The acceptance of interpersonal violence is predictable in an excessively violent society, and rape is only one of its modes of expression.⁷⁴ The acceptance of interpersonal violence, further, was the strongest predictor of rape myth acceptance in a study conducted by Burt.⁷⁵ Rape myths are discussed in detail further below under section 3 of this chapter.

It is essential to remind the reader that one of the primary purposes of this research is to assess whether prosecutors cite ‘credibility problems’ when exercising their discretion in cases and whether this is based on rape myths and/or gender stereotypes. The existing literature demonstrates that this problem is circular and based on: (i) the dichotomisation of rape and (ii) concern with the character/credibility of the complainant. The MRC report does not conclusively find that any characterisation impacts decisions or that there is a dichotomisation of rape.⁷⁶ But as stated above, the NPA policy *does* require prosecutors to take into

⁷² See *B C v S* (A8/2020) [2020] ZAFSHC 180 para 25. The court held: ‘Reporting of a rape is not an exact science. One of the accepted principles in sexual offences cases is that the complainant is expected to make a report at the earliest convenience. This, however, does not mean that failure to report “timeously” or even not at all, means a person was not raped. The circumstances surrounding the fiasco must dictate the meaning of “timeously”.’ Also see, MRC Report (note 54 above) 14.

⁷³ Section 59 of Sexual Offences Act.

⁷⁴ Burt (note 38 above) 218.

⁷⁵ Ibid.

⁷⁶ The MRC Report (note 54 above) 88.

consideration specific questions that relate to the credibility of the complainant) when evaluating a case, given the very nature of the crime of rape.⁷⁷ These considerations include:

- a. Are the state witnesses (complainant) credible?
- b. What sort of impression is the witness (complainant) likely to make?
- c. Are there any matters the defence might properly put to attack the witness's credibility (complainant)?

The lack of credibility of a witness can be fatal to a case.⁷⁸ Even in instances where prosecutors were without a doubt that a rape occurred, credibility concerns raised may not always be circumvented.⁷⁹ This is due to prosecutor ulterior motives as an organisational concern with defence arguments and convictability, which is reinforced by citing conflicting accounts between other witnesses and the victim.⁸⁰ This problem generally occurs because there is an acceptance of what constitutes 'traditional rape', 'real rape' or 'classic rape'. An example of a 'traditional rape', 'real rape' or 'classic rape' is where a stranger places a gun to his victim's head, violently threatens her with death, beats and bruises her, and then engages in sexual relations with her.⁸¹ Fisher, Cullen & Turner explain 'real rape' as an idea that the alleged victim has never had sex with the assailant before, is preferably a virgin, was not intoxicated, was not wearing seductive clothing, and has a good reputation.⁸² The phrase 'traditional rape',

⁷⁷ NPA Prosecution Policy (Revision Date: June 2013) 6. <[TABLE OF CONTENTS \(npa.gov.za\)](http://npa.gov.za)>

⁷⁸ L Frohmann 'Discrediting victims' allegations of sexual assault: Prosecutorial accounts of case rejections' (1991) 38(2) *Social Problems* 213, 222-3; Schwikkard & van der Merwe *Principles of Evidence* (2016) 574 citing *Hees v Nel* para 32.

⁷⁹ Ibid (Frohmann) 222.

⁸⁰ Ibid.

⁸¹ S Estrich 'Rape' (1986) 95(6) *The Yale Law Journal* 1087, 1092; Fisher et al (note 59) 9; Du Mont (note 59 above) 467.

⁸² Ibid (Fisher et al.) 9.

‘classic rape’ or ‘real rape’ refers to the same phenomenon. This notion of ‘traditional rape’ is a direct result of rape myths and gender stereotypes.⁸³ Those beliefs are what constitute the rape myth theory under discussion next.

4. RAPE MYTHS THEORY

The rape myth theory is a form of feminist analysis of rape.⁸⁴ A rape myth is a ‘prejudicial, stereotypical, or false belief about rape, rape victims, or rapists’.⁸⁵ Rape myths create a climate hostile to rape complainants.⁸⁶ A typical example of a rape myth is that women generally lie about rape.⁸⁷ Another common myth is that ‘women could easily resist rapists if they really wanted to’ and its cousins: “She was asking for it”; “No female (or more magnanimously-no healthy adult female) can ever be taken against her will”; and “It does not matter since she was not a virgin”.⁸⁸ There is, however, criticism related to the failure of researchers to develop a ‘thorough, theoretically based definition of rape myths’ that is ‘consistently’ used.⁸⁹ However, the author accepts that rape myths best describe ‘stereotypes’ as posited by Burt.⁹⁰

4.1 THE PERFECT VICTIM

Previous studies indicate that the assessment of the complainant’s characteristics and behaviour

⁸³ Fisher et al (note 59 above) 13.

⁸⁴ Brownmiller (note 4 above) 181.

⁸⁵ Burt (note 38 above) 217.

⁸⁶ Ibid 218.

⁸⁷ Burt (note 38 above) 218; Berger (note 1 above) 25.

⁸⁸ Berger (note 1 above) 25; K Drieschner & A Lange ‘A review of cognitive factors in the etiology of rape: Theories, empirical studies, and implications’ (1999) *19(1) Clinical Psychology Review* 57, 60.

⁸⁹ K Lonsway & L Fitzgerald ‘Rape Myths’ (1994) *18(2) Psychology of Women Quarterly* 133, 134

⁹⁰ Burt (note 38 above) 218.

led to crucial role players in the criminal justice system creating the concept of what constitutes a ‘genuine rape victim’ — based on rape myths acceptance.⁹¹ The problem is, therefore, circular, as stated previously. The criminal justice system is a ‘highly selective process that involves the use of a wide range of discretion’, and this discretion creates a ‘systematic bias in law enforcement’.⁹² Hence, the prominence of institutionalisation of rape myths in law and the legal process.⁹³ For example, rape myths and stereotypes are easily exploitable by state agents in the criminal justice system, wherein ‘classic rape’ is still the most likely to be prosecuted and reach a conviction.⁹⁴ Although there is no empirical data that shows that prosecutors in South Africa indeed exercise their discretion based on convictability at trial tested on discriminatory grounds, Swemmer states that scholars argue that these beliefs [stereotypes and the perfect witness] have indeed become scripted into criminal justice practice.⁹⁵ The cases filtered out of the system are not ‘intrinsically weak but rather those that offend the normative assumptions of decision-makers’.⁹⁶

Artz & Smythe similarly argue that ‘both investigating officers and prosecutors inevitably approach a rape complaint from a cost-benefit perspective that ultimately focuses on

⁹¹ Bohmer (note 62 above) 304; Berger (note 1 above) 25; Estrich (note 81 above) 1092; LaFree (note 34 above) 17; Frohmann (note 78 above) 230; Schwendinger & Schwendinger (note 26 above) 26.

⁹² W Chambliss *Crime and the Legal Process* (1969) 856; S Katz & MA Mazur *Understanding the rape victim: A synthesis of research findings* (1979) 181; WD Loh ‘The impact of common law and reform rape statutes on prosecution: An empirical study’ (1979) 55 *Wash. L. Rev.* 543.

⁹³ Berger (note 1 above) 11; S Swemmer ‘Justice denied? Prosecutors and presiding officers’ reliance on evidence of previous sexual history in South African rape trials’ (2020) 69 *South African Crime Quarterly* 45.

⁹⁴ S Grace, C Lloyd & L Smith *Rape: From Recording to Conviction* (1992) 1. The authors said that rape myths and stereotypes are easily exploited; Lonsway & Fitzgerald (note 89 above) 135.

⁹⁵ Swemmer (note 93 above) 4; L Artz & D Smythe ‘Case Attrition in Rape cases: A Comparative Analysis’ (2007) 20 (2) *South African Journal of Criminal Justice* 158, 161.

⁹⁶ Swemmer (note 93 above) 4.

the ‘convictability’ of the case and an evaluation of whether the case has evidential difficulties.⁹⁷ Prosecutors in Gauteng Province were similarly inclined to prosecute cases following a rigorous selection based on convictability.⁹⁸ Both these study outcomes may be a confirmation of Frohmann’s downstream orientation theory, which is described as the concern with convictability that creates a ‘downstream orientation’ in prosecutorial decision-making, that is, anticipation and consideration of how others (i.e., jury and defence) will interpret and respond to a case’.⁹⁹

Notwithstanding, the MRC report does not conclusively find that rape myths impact prosecutor charging decisions because that was not the focus of the research.¹⁰⁰ The MRC report does, however, allude to extra-legal factors having a bearing on decisions in other foreign jurisdictions.¹⁰¹ Notwithstanding, the MRC report failing to link gender stereotypes and rape myths in South Africa to decisions, the report accepts that the application of rape myths is probable and puts it as follows

It is plausible that police detectives and prosecutors within the South African CJS [criminal justice system] continue to dismiss cases based on biased decisions informed by their perceptions about the victims’ alcohol consumption as risk-taking and problematic assumptions about the potential negative impacts of the victims’ intoxication on the credibility and inconsistencies of the testimonial evidence they provide.¹⁰²

⁹⁷ Artz & Smythe (note 95 above) 170-171.

⁹⁸ The MRC Report (note 54 above) 30.

⁹⁹ L. Frohmann ‘Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decision-making’ (1997) 3(1) *Law & Society Review* 531, 535.

¹⁰⁰ The MRC Report (note 54 above) 88.

¹⁰¹ Ibid 21-22.

¹⁰² Ibid 22.

In summary, research on rape myth theory in South Africa is limited. This study aims to narrow this gap. To return to the main argument, although South African research fails to conclusively find that rape myths and gender stereotypes influence prosecutor decision-making in South Africa, recent literature from other jurisdictions specific to prosecutor rejection of rape cases confirms the rape myth theory.¹⁰³ The literature demonstrates that prosecutors rely on rape myths and gender stereotypes to determine what constitutes ‘genuine victims’ and appropriate behaviour when assessing the credibility of a rape witness.¹⁰⁴ The legal system’s treatment of rape victims has been described as humiliating, often leading to the dismissal or downgrading of rape charges.¹⁰⁵

Again, a victim’s credibility is central to the issues of convictability at trial based on prosecutors’ views on what constitutes a ‘genuine rape victim’ based on rape myths.¹⁰⁶ ‘The organisational policies and procedures of the prosecutor’s office and the courts shaped this standard’.¹⁰⁷ The hypothesis of a ‘genuine rape’ victim is explained as follows

decision-makers, including prosecutors, use a set of victim characteristics to create an image, not of a typical rape victim, but of a genuine rape victim. They argue that complainants whose backgrounds and behavior conform to this image will be taken more

¹⁰³ Frohmann (note 78 above) 235. For example, Frohmann found that prosecutors rely on stereotypes about what constitutes ‘genuine victims’ and appropriate behavior. Also see, E Stanko ‘The Impact of Victim Assessment on Prosecutor’s Screening Decisions: The Case of the New York Country District Attorney’s Office’ (1988) 16 *Criminal Justice Law and Politics* 170. Stanko similarly found that the character and credibility of the victim were a key factor in determining prosecutorial strategies.

¹⁰⁴ Frohmann (note 78 above) 235; Spears & Spohn (note 59 above) 520.

¹⁰⁵ L Frohmann ‘Constituting Power in Sexual Assault Cases: Prosecutorial Strategies for Victim Management’ (1998) 45(3) *Social Problems* 393.

¹⁰⁶ Frohmann (note 78 above) 235; Spears & Spohn (note 59 above) 520.

¹⁰⁷ Frohmann (note 99 above) 535.

seriously, and their allegations treated more seriously, than complainants whose backgrounds and behavior are at odds with this image.¹⁰⁸

However, in addition to this, prosecutors actively seek holes or problems with the victim's version as unbelievable or not convincing beyond a reasonable doubt during this assessment.¹⁰⁹ This is also known as prosecutorial strategies.¹¹⁰ The credibility of a witness in cases of rape, unlike in any other crime, is based on an unfair assessment based on stereotypes, for example, whether that witness is a 'good witness'.¹¹¹ Or a 'stand-up witness' as described by Stanko.¹¹²

This perfect witness is 'someone who, through her appearance and demeanour, can convince a jury to accept her account of 'what happened''.¹¹³ Her testimony is consistent, and her behaviour is sincere.¹¹⁴ This unfair assessment is comparable to the considerations identified above in the NPA Policy assessment. The witness who does not fit this particular image is the 'deserving' victim.¹¹⁵ Alternatively, the victim who engages in 'preceptory behaviour' is deemed less credible.¹¹⁶ Spohn et al. describe preceptory behaviour as 'risk-taking' behaviour similar to LaFree, who identified five types of victim 'misconduct' from the records (1) hitchhiking, (2) drinking at the time of the offence, (3) being at a tavern or bar

¹⁰⁸ JW Spears and CC Spohn 'The genuine victim and prosecutors' charging decisions in sexual assault cases' (1996) 20(2) *American Journal of Criminal Justice* 183, 188.

¹⁰⁹ Spears & Spohn (note 59 above) 611.

¹¹⁰ Stanko (note 103 above) 170.

¹¹¹ Frohmann (note 78 above) 213. The notion that decisions in rape cases are affected by the 'typifications of rape held by processing agents' (LaFree, 1989) plays a central role in the research conducted by Frohmann (1991, 1997).

¹¹² Stanko (note 103 above) 170.

¹¹³ Brownmiller (note 4 above) 333; Frohmann (note 78) 213.

¹¹⁴ Ibid.

¹¹⁵ Berger (note 1 above) 26.

¹¹⁶ Amir (note 13 above) 336.

without a male escort, (4) allegedly engaging in sex outside of marriage, and (5) willingly entering the suspect's car'.¹¹⁷

The author is mindful that 'the credibility of a witness can be decisive to the outcome of a case'.¹¹⁸ In sexual offence cases, however, the complainant's character is relevant to credibility and is allowed under s 277 of the Criminal Procedure Act.¹¹⁹ A common-law rule permits the accused to adduce evidence that points to the complainants 'bad reputation for lack of chastity' in cases of rape or indecent assault.¹²⁰ Research shows that presiding officers and prosecutors in South Africa also continue to rely on evidence that is prejudicial to complainants despite the prohibition of such practices by the Sexual Offences Act, such as previous sexual history.¹²¹ Furthermore, although a double amendment to s 277 of the CPA, it remains a provision that is prejudicial to rape complainants despite those amendments.¹²² As said before, while the NPA Policy remains general policy, consideration of credibility in cases of rape may be fatal. Generally, the point of departure should be that the character or disposition of the

¹¹⁷ Berger (note 1 above) 46; C Spohn & J Horney *Rape law reform: A grassroots revolution and its impact* (1992) 209; Kalven & Zeisel (note 20 above) 250; G LaFree 'Official reactions to social problems: Police decisions in sexual assault cases' (1981) 28(5) *Social problems* 582; TW McCahill, LC Meyer & AM Fischman *The aftermath of rape* (1979) 12.

¹¹⁸ Schwikkard & van der Merwe (note 78 above) citing *Hees v Nel* para 32.

¹¹⁹ Ibid 71 'Evidence to contradict any denials may be led only if such evidence is relevant to consent.' Citing *R v Cockcroft* 1870 11 Cox CC 410; *R v Cargill* 1913 2 KB 271. Also see, section 277 of the Criminal Procedure Act 51 of 1977 (hereafter referred to as the "CPA").

¹²⁰ Schwikkard & van der Merwe (note 78 above) 71; T Zeffert & AP Paizes *The South African law of evidence* (2009) 237.

¹²¹ Swemmer (note 93 above) 49.

¹²² Ibid 72. Swemmer explains this as follows 'on the basis that the very purpose for which they were enacted was undermined by the very wide discretion conferred to judicial officers. The same judicial officers who in the past failed to exercise their discretion to exclude irrelevant previous sexual history evidence were now being asked to exclude the very same discretion, albeit preceded by an application held in camera.'

complainant is irrelevant to credibility.¹²³ This is because adducing the bad character of the accused might ‘have a disproportionately prejudicial effect upon the jury’ and a practice that violates equal protection or the equality clause as described in South Africa.¹²⁴ It includes the thorny issues of the cautionary approach — which is not allowed to be applied — simply because the complainant is a woman — but allowed to apply in instances of a single witness. What the cautionary rule does not take into consideration is that in cases of rape, the complainant is usually a woman. So, it amounts only to lip service for reform.

The assessment of a single witness’s credibility is determined by applying the cautionary rule and evidence of the witness’s character, which are inherently discriminatory. The origins of these rules lie in the practice of warning the court against ‘facile acceptance’ of evidence by certain witnesses, such as rape complainants and children.¹²⁵ By the 1950s, the rationale behind the cautionary rule was questioned and challenged.¹²⁶ The rule advanced discriminatory views against women.¹²⁷ Remarkably, the problem of rape myths only occurs

¹²³ Schwikkard & van der Merwe (note 78 above) 71. ‘The general rule is that the accused may adduce evidence of his own good character, but the prosecution is prohibited from adducing evidence of his bad character, subject to specified exceptions.’ Also see, Zeffert & Paizes (note 120 above) 237. The authors state that relevance is a criterion of admissibility of evidence.

¹²⁴ Schwikkard & van der Merwe (note 78 above) 65 citing *Criminal Evidence* 3 ed (1995) 118; Berger (note 1 above) 46.

¹²⁵ Schwikkard & van der Merwe (note 78 above) 588; F Viljoen ‘Removing Insult from Injury: Reviewing the Cautionary Rule in Rape Trials’ 1992 *JS Afr. L* 743, 744. Viljoen cited *State v D* 1951 4 SA 450 (A) 455G) 744. ‘Such a cautionary rule also applies to the testimony of accomplices, agents provocateurs, children, prostitutes and the complainants in sexual offences, whether they are single witnesses or not.’

¹²⁶ *R v J* (1958 (3) SA 699 (SR) para 90. The court held that although there may be circumstances that necessitate special caution, ‘the exercise of caution must not be allowed to displace the exercise of common sense’. Also see, *State v D* 1992 (1) SA 513, 1992 (1) SACR 143 (Nm).

¹²⁷ South African Law Reform Commission Project 45 *Women and Sexual Offences in South Africa* (1985) para 3.55. ‘A cautionary rule is applied to evidence in rape ... because experience has shown

in cases of rape and no other criminal offence.¹²⁸ In direct contrast to other criminal offences, the crime of rape is the only crime that closely links to broader social attitudes.¹²⁹

Bearing in mind the uncertainty of this situation in South Africa, one of the unique contributions of this study is to show that it is unhelpful that the NPA Policy requires prosecutors to take into consideration specific questions when evaluating a case, given the very nature of the crime of rape.¹³⁰ The NPA Policy framing on the credibility of a witness is problematic given the uniqueness of the crime of rape. One of those is that prosecutors must consider the kind of ‘impression’ the witness will likely make.¹³¹ Such a consideration is at the heart of prosecutorial strategies described by Stanko, which the author argues are harmful.

The author argues that considering a witness’s impression(s) can be another means of encouraging prosecutors to unwittingly take rape myths and gender stereotypes into account — because of the very nature of rape. For instance, the NPA Policy also requires prosecutors to question whether the state witness will be credible and ‘whether there are any matters that the defence could use to attack the witness’s credibility’.¹³² It is entirely unhelpful. For a sex worker in South Africa, this will be fatal. The NPA Policy, the author argues, is inconsistent

that it is dangerous to rely on the uncorroborated evidence of the complainant in such circumstances.’

¹²⁸ Temkin & Krahé (note 60 above) 31.

¹²⁹ Ibid 33.

¹³⁰ NPA Prosecution Policy (Revision Date: June 2013) 6. See <[TABLE OF CONTENTS \(npa.gov.za\)](#)>

These include:

- Whether the state witnesses be credible?
- What sort of impression is the witness likely to make?
- Are there any matters, which might properly be put by the defence to attack the credibility of the witness?

¹³¹ Stanko (note 103 above) 170.

¹³² NPA Policy (note 130 above) 6.

with the Constitution and is therefore unlawful. The NPA Policy undermines the credibility of the criminal justice system. Moreover, when the criminal justice system is ineffective, Sachs J in *Baloyi* reminded us that such ineffectiveness ‘intensifies the subordination and helplessness of victims . . . [and] sends an unmistakable message to the whole society that the daily trauma of vast numbers of women counts for little’.¹³³ The Constitutional Court in *Carmichele* reminded us further that ‘... the IC [Interim Constitution] imposed a particular duty on the state to protect women against violent crime in general and sexual abuse in particular.’¹³⁴

Constitutional obligations are thus firmly placed on the state to respect, protect, promote and fulfil the rights in the Bill of Rights and, in particular, the right of women to have their safety and security protected. Such consideration (the credibility of a witness) can be fatal even in instances where prosecutors were without a doubt that the witness was indeed violated, and this is linked to prosecutor ulterior motives as an organisational concern with defence arguments and convictability, which is reinforced by citing conflicting accounts between other witnesses and the victim.¹³⁵ For example, the prosecutor’s notes in Frohmann’s study stated the following: ‘There is no doubt in my mind she was raped’; rather, the case isn’t convictable — ‘she has a credibility problem’ and ‘the defence is going to rip her up.’¹³⁶

That said, one of the aims of this dissertations is to examine the variables that predict prosecutorial decision-making in rape cases based on Frohmann’s downstream theory, among others. Frohmann’s downstream orientation theory suggests that prosecutors’ concern with convictability creates a ‘downstream orientation’ in prosecutorial decision-making:

¹³³ *Baloyi* (Minister of Justice Intervening) 2000 (1) BCLR 86 (CC) para 12.

¹³⁴ *Carmichele v Minister of Safety and Security* 2001 (10) BCLR 995 (CC) para 62 (hereafter referred to as *Carmichele* case).

¹³⁵ Frohmann (note 78 above) 222-3.

¹³⁶ *Ibid* 223.

anticipation and consideration of how others (i.e., jury and defence) will interpret and respond to a case'.¹³⁷ Some researchers assume the downstream orientation theory exists in South Africa.¹³⁸ This study aims to examine this theory empirically using an improvised method involving a document analysis of prosecutor reasoning for *nolle prosequi* decisions in dockets and an analysis of the themes that emerge. The outcome will enable this researcher to determine the reasons behind the non-improvement of prosecution of cases in South Africa despite the reform and whether this problem occurs due to what Frohmann describes as the downstream orientation theory. The main aim here is also to discover whether the common theme of victim blaming is apparent in prosecutor dispositions in South Africa.

The following section reviews feminist critical theory and blame attribution to the victim.

5. FEMINIST THEORY ON VICTIM ATTRIBUTION

Feminist theories on rape provide a complex and multifaceted understanding of this hideous crime. By challenging traditional narratives and societal expectations, these theories shed light on the systemic factors that contribute to rape culture. It is essential to recognise and address these theories to prevent rape and create safer and more equitable societies for all individuals, regardless of gender. Feminist critical theorists were the first to claim that rape cases reflected decision-makers' preconceived notions about acceptable and unacceptable behaviour by women.¹³⁹ Feminist critical theorists hold that extra-legal variables influence the decisions of

¹³⁷ Frohmann (note 99 above) 535.

¹³⁸ Artz & Smythe (note 95 above) 170-171; MRC report (note 54 above) 30; Swemmer (note 93 above) 49.

¹³⁹ Field (note 60 above) 93; LaFree et al (note 60 above) 399; Borgida & White (note 60 above) 339-351. The authors found that jurors' close scrutiny of the victim's credibility and moral character was directly related to the conviction rate.

the critical role players within the criminal justice system beyond the actual legislated legal burden to prove the crime of rape.¹⁴⁰ Brownmiller describes it as ‘victim precipitation’ that does not ‘hold the victim responsible, but it seeks to define contributory behaviour’.¹⁴¹ Brownmiller describes it further as ‘it accepts that a criminal act has been committed; however, had the victim behaved differently, the crime committed might have been avoided’.¹⁴² There is, thus, a correlation between acceptance of the rape myth and victim blaming. In other words, rape myths impact attributions of blame in rape cases.¹⁴³

A common theme highlighted by researchers is that the complainant’s behaviour significantly influences case outcomes. This is the case when victims are blamed. The victim is ‘always the cause of the crime’.¹⁴⁴ It occurs even in the event where the complainant is not regarded as ‘solely responsible for what becomes the unfortunate event’; however, she is often regarded as a ‘complementary factor’ to the rape.¹⁴⁵ Inaccurate beliefs about rape have problematic consequences for victims.¹⁴⁶ Although trite in other jurisdictions, this theme is not in South African empirical studies. A study on prosecutorial attrition is, therefore, timely in delineating the problem-based variables derived from existing theories that predict reasons for outcomes in cases. It will also assist in determining whether prosecutorial discretion is

¹⁴⁰ Brownmiller (note 4 above) 353. Also see, G LaFree ‘Rape and Criminal Justice: The Social Construction of Sexual Assault’ (1989); R Quinney *The Social Reality of Crime* (1974); Petrocelli, MA Piquero & M Smith Conflict Theory and Racial Profiling: An Empirical analysis of police traffic stop data. (2003) *Journal of Criminal Justice* 31(1) 1-11.

¹⁴¹ Brownmiller (note 4 above) 353.

¹⁴² Ibid.

¹⁴³ KR Klement *Women lie and other myths: How rape myths impact attributions of blame in a rape case* (2017) 4.

¹⁴⁴ Amir (note 13 above) 258.

¹⁴⁵ Ibid 493. Also see, Brownmiller (note 4 above) 353; K Weis & SS Borges ‘Victimology and rape: The case of the legitimate victim’ (1973) (8) *Issues Criminology* 71.

¹⁴⁶ Klemment (note 143 above) 3.

exercised in a manner that is discriminatory towards women and children in cases of rape despite rape law reform. The reasons behind this are essential if South Africa is to find a lasting solution to the problem of rape. It is important to remember that the same theme [blaming the victim] is not only evident in many early empirical studies in foreign jurisdictions but has been confirmed by more recent studies.¹⁴⁷ In addition, the complainant's credibility and the attribution of blame on them were correlated with the outcome of cases regardless of the study's focus. For example, research by Borgida & White established a correlation between the complainants' credibility and the court's verdict when studying the extent to which rape legal reforms affect the social perception of the complainant as well as its impact on the conviction rate in the US.¹⁴⁸ A study by Fields revealed that jurors held a strong belief that the punishment of the defendant must be more lenient in instances where there is a stronger belief that the complainant could have prevented the rape.¹⁴⁹ That study supported prior findings by Kalven & Zeisel that the jury not only tends to be biased against the complainant in a rape case, but the jury will also go to great lengths to be lenient with the defendant when there are any suggestions of 'contributory behaviour' on the part of the complainant.¹⁵⁰

The liberation hypothesis suggests that juries exercise discretion in finding guilt under two circumstances: (1) when the evidence against the defendant is weak and (2) when the crime is considered less severe.¹⁵¹ A study by Fields appears to support Brownmiller's proposition

¹⁴⁷ AC Adock & NK Ireland 'Attribution of blame in rape cases: The impact of norm violation, gender, and sex-role attitude' (1983) 9(2) *Sex Roles* 179-193.

¹⁴⁸ Borgida & White (note 60 above) 348.

¹⁴⁹ Field (note 60 above) 89. Also see, DCE Ugwuegbu 'Racial and evidential factors in juror attribution of legal responsibility' (1979) 15(2) *Journal of Experimental Social Psychology* 133, 142. Ugwuegbu presented data that also revealed that juror verdict preferences increase with knowledge of demographic variables and evidence factor.

¹⁵⁰ Kalven & Zeisel (note 20 above) 249-54.

¹⁵¹ Ibid.

that ‘rape cases which jurors might perceive as being victim-provoked will be decided in favour of the defendant since jurors believing in victim precipitation will tend to feel she got what she asked for or deserved’.¹⁵² It supports the contention that the primary reason found for victims opting not to press charges in rape cases relates to the complainant’s desire to avoid the ordeal of courtroom testimony.¹⁵³ As stated previously, it is common for rape complainants to opt not to press charges. In South Africa, cases referred to prosecutors did not progress due to complainants preferring to ‘move on with their lives’.¹⁵⁴ There is no comparative literature and research in South Africa. However, in the author’s view, the MRC report cannot satisfactorily determine any relationship between prosecutor decisions and extra-legal factors like victim characteristics, relationships with perpetrators, and complainant behaviour. There may thus be methodological weaknesses here, including using a small number of variables with this sample, which can prove problematic, as stated previously.

LaFree strongly criticised work by critical theorists Griffin, Madea & Thompson, including that of feminist critical theorists Brownmiller, as ‘partisan’, flagging their methods and conceptual frameworks as lacking and therefore unreliable.¹⁵⁵ LaFree was neither satisfied with the work done by Clark & Lewis as well as Sebba & Cahan nor, more specifically, that of Holmstrom and Burgess, even though he acknowledges that their work attempted a more systematic empirical approach and analysis.¹⁵⁶ LaFree thus offered what he labelled as ‘the first step toward the development of a theory of official reactions to rape’ in 1980.¹⁵⁷ His

¹⁵² Fields (note 60 above) 90.

¹⁵³ LL Holmstrom & AW Burgess *The Victim of Rape: Institutional Reactions* (1978).

¹⁵⁴ Ibid. The MRC report (note 54 above) 84.

¹⁵⁵ GD LaFree ‘Variables affecting guilty pleas and convictions in rape cases: Toward a social theory of rape processing’ (1980) 58(3) *Social Forces* 833, 834.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid 834.

findings showed that the ‘victim’s nonconformist behaviour, living arrangements, and carelessness’ remain the most relevant to the conflict theory of rape.¹⁵⁸

The author’s view is that LaFree confirmed that victim blaming and nonconformist behaviour remain central to the societal perceptions of rape and case outcomes despite his criticisms – which is a significant theme among researchers, as stated above. While he may have examined this from the analysis of cases that only led to guilty pleas, guilty verdicts, and convictions of accused/defendants, the critical theorist found this to be true. According to his findings, the victim’s nonconformist behaviour influenced case outcomes the most and is in line further with the observation that the laws against rape seek ‘to punish men who do not rape appropriately’.¹⁵⁹ It further correlates with the notion that the less severe penalties were imposed for men accused of raping women with ‘bad reputations’ or who were believed to be promiscuous or bad-behaved.¹⁶⁰

To conclude this literature review chapter, a review of the theoretical explanations and criticism of rape reform follows.

6. RAPE CRIME REFORMS

Several jurisdictions had implemented rape reform laws by the early 1980s.¹⁶¹ The advent of legislative reforms directly connects to feminism.¹⁶² Indeed, Bartlett & Kennedy describe feminist jurisprudence as a ‘powerful analysis of the relationship between law and gender, and

¹⁵⁸ Ibid 847.

¹⁵⁹ Ibid 847. Also see, M Reynolds *Rape as Social Control* (1974) 662-663.

¹⁶⁰ LaFree et al. (note 60 above) 390.

¹⁶¹ Estrich (note 81 above) 1133; Adler (note 33 above) 11.

¹⁶² J Galvin & K Polk ‘Rape: A Decade of Reform’ (1985) 31:2 *Crime & Delinquency* 163, 163; L Artz & D Smythe (ed) *Should we consent? Rape Law Reform in South Africa* (2008) 1; Horney & Spohn (note 60 above) 135.

new understandings of the limits of, and opportunities for, legal reform'.¹⁶³ Furthermore, although this approach has resulted in many successful reforms, such as women's suffrage, reproductive, and labour rights an adequate solution for the crime of rape is yet to be found.¹⁶⁴ McGlynn takes the view that 'rape remains a phenomenon in respect of which all legal systems appear to be incompetent. We are still searching for legal strategies to deal with rape'.

Notwithstanding, the focus on reform varied; it orientated around the rape shield laws mainly due to considerable public concern for the position of the victim.¹⁶⁵ Rape shield laws involved the exclusion of admissibility of prior sexual conduct, for example.¹⁶⁶ It also primarily sought to address the complex nature of consent and to encourage reporting.¹⁶⁷ Spohn et al

¹⁶³ Bartlett & Kennedy (note 45 above) 1.

¹⁶⁴ Ibid. CA Littleton 'Equality and Feminist Legal Theory' 1986 (46) *U. Pitt. L. Rev.*, 1043; Frohman & Mertz (note 113 above) 840; MA Fineman 'Feminist Legal Theory' (2005) 13 *AM. UJ Gender Soc. Pol'y & L.* 13, 18.

¹⁶⁵ Estrich (note 81 above) 1133; H Field & L Bifnen *Jurors and Rape* (1980) 207-458; Z Adler 'Rape: The Intention of Parliament and the Practice of the Courts' (1982) 45(6) *The Modern Law Review* 664, 664.

¹⁶⁶ Ibid (Adler) 674. Adler states that rape reform aimed to 'improve the procedures in rape trials and to eliminate some of the prejudices which had governed the treatment of the alleged victim for centuries.'

¹⁶⁷ Horney & Spohn (note 60 above) 20; Spohn et al (note 50 above) 233. The authors found that the relationship between the victim and suspect influenced the decision to charge or not, most respondents indicated that it did play a role. Moreover, cases involving acquaintances/relatives and intimate partners were more likely than those involving strangers to be prosecuted and there were no differences in the likelihood of charging between the two types of non-stranger cases. DP Bryden & S Lengnick 'Rape and the Criminal Justice System' (1997) 87(4) *Journal of Criminal Law and Criminology* 1194, 1326. The authors here reach a similar conclusion, noting that 'the prosecution's heavy burden of proof has played an important role in the justice system's treatment of acquaintance rape cases, but so have public biases against certain classes of alleged rape victims'. Furthermore, 'these reforms were designed primarily to increase the odds of successful prosecution in cases in which the victim and the suspect were acquainted, and the suspect claimed that the victim consented'.

found that the ‘relationship between the victim and suspect influenced the decision to charge or not, most respondents indicated that it did play a role. Moreover, cases involving acquaintances/relatives and intimate partners were more likely than those involving strangers to be prosecuted and there were no differences in the likelihood of charging between the two types of non-stranger cases’.¹⁶⁸ Bryden & Lengnick reach a similar conclusion, noting that ‘the prosecution’s heavy burden of proof has played an important role in the justice system’s treatment of acquaintance rape cases, but so have public biases against certain classes of alleged rape victims’. Furthermore, ‘these reforms were designed primarily to increase the odds of successful prosecution in cases in which the victim and the suspect were acquainted, and the suspect claimed that the victim consented’.¹⁶⁹

In South Africa, a significant amendment to the Sexual Offences Act was the ‘redefinition of consent through the introduction of a non-exhaustive list of coercive circumstances, which operate to vitiate consent’.¹⁷⁰ This particular reform speaks to feminist activism that aims to dismantle rape myths and victim-blaming tendencies. It is reform that is crucial since ‘the perpetrator used non-violent coercion in 80.9% of cases and a ‘higher proportion of acquaintance rapes involved collusion’.¹⁷¹ The author has argued previously that acquaintance rape is burdened with complexities that make it a very challenging crime to prosecute. It is central to the issues of consent and coercion because it is in acquaintance rape

¹⁶⁸ Spohn et al (note 50 above) 233.

¹⁶⁹ DP Bryden & S Lengnick ‘Rape and the Criminal Justice System’ (1997) 87(4) *Journal of Criminal Law and Criminology* 1194, 1326.

¹⁷⁰ S Mills ‘Consent and Coercion in the Law of Rape in South Africa’ (2010) 28 (1) *Canadian Woman Studies* 81. Changes to the sexual offences act ‘effects wide reaching and progressive changes to the definition of rape.’

¹⁷¹ The MRC report (note 54 above) 38.

that the line between consent and coercion can become blurred.¹⁷² The court in *MC v Bulgaria* explained coercion as follows: ‘coercion is nowadays understood broadly and is not limited to threats of serious violence.’ Importantly, ‘evidence of lack of consent is particularly important in cases where the accused and the victim knew each other. While the act of saying ‘no’ would be a sufficient expression of lack of consent, proving that it was said and understood as being meant seriously could be difficult. The principle that the prosecution must prove lack of consent, and not the presence of force, is well established’.¹⁷³

The perceptions of the complainant are perceived to be most credible in cases where consent was improbable compared to those cases where consent was probable but governed by restrictive radical reform rules.¹⁷⁴ LaFree et al. likewise confirmed, as many have suggested, that rape complainants continue to be put on trial instead of the accused but noted that it was only so when the legal issue of consent occurred.¹⁷⁵ In other words, a complainant is subjected to trial where doubt that an assault occurred is raised (an accused may raise consent as a defence). The research data of this thesis, detailed in the following chapter, may show that this is most likely to occur in acquaintance rape cases, as stated.¹⁷⁶ A plethora of previous research

¹⁷² *MC v Bulgaria* 2003-XII E UR. C T. H.R. 1., appl. no. 39272/98, decision of Dec. 4, 2003, paras 132-139 (hereafter referred to as *Bulgaria* case). The Court detailed that ‘nowadays, the prosecution is required to prove sexual penetration and lack of consent. Any elements that might show lack of consent will be taken into account, but the prosecution will mostly try to prove the existence of at least one of the factors ‘nullifying consent’, set out in the second paragraph of Article 375, namely violence, coercion, ruse or disability, even if there is no proof of physical violence or physical resistance, proof of coercion is sufficient. Whether or not there was coercion is a question to be assessed with reference to the capacities of the victim (age, actual state at the time of the facts).’

¹⁷³ Ibid.

¹⁷⁴ Borgida & White (note 60 above) 348.

¹⁷⁵ LaFree et al. (note 60 above) 402.

¹⁷⁶ Horney & Spohn (note 60 above) 19.

shows a correlation between the relationship of the complainant and the accused impacted the outcome of sexual assault cases; ‘rapes involving strangers are taken more seriously than rapes involving acquaintances’.¹⁷⁷

As stated above, the reform aimed to correct procedural barriers in South Africa. For decades, procedural rules, such as the cautionary rule and corroboration and resistance requirements, were recognised as procedural hindrances to the prosecution of rape cases.¹⁷⁸ The Constitutional Court was at the forefront and has, over the years, sought to correct procedural barriers, heralding the movement of rape jurisprudence ‘away from its patriarchal roots to a constitutional rights-based approach by infusing procedural rules with constitutional values’.¹⁷⁹ For instance, the Constitutional Court’s finding in *State v Jackson* led to the abolition of the cautionary rule in rape cases.¹⁸⁰ Soon after, the common-law definition of rape that included anal penetration was adopted in *State v Masiya* and legislated.¹⁸¹ In that ruling,

¹⁷⁷ Ibid. McCahill (note 117 above) 12; K Daly & B Bouhours ‘Rape and attrition in the legal process: A comparative analysis of five countries’ (2010) 39(1) *Crime and justice* 565-650.

¹⁷⁸ L Artz & D Smythe ‘Feminism vs. the state?: A decade of sexual offences law reform in South Africa’ (2007) 21(74) *Agenda* 6, 16.

¹⁷⁹ *Tshabalala v State; Ntuli v S* 2020 (5) SA 1 (CC) para 80 (hereinafter referred to as “*Tshabalala case*”).

¹⁸⁰ *State v Jackson* 1998 (1) SACR 470 (SCA) para 21 (hereinafter referred to as “*Jackson case*”). The court held that the ‘magistrate was not obliged to apply such a rule. The origin of the cautionary rule is a warning to judicial officers that the evidence of certain witnesses, such as complainants in sexual cases could not be safely relied upon without corroboration. Section 60 of the Sexual offences Act reads: ‘Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.’

¹⁸¹ *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* 9 2007 (5) SA 30 (CC) 23 (hereinafter referred to as “*Masiya case*”). Also see, *State v Mahomotsa* 2002 (2) SACR 435 (SCA); *State v Abrahams* 2001 (2) SACR 358 (C) and *State v Mvamvu* 2005 (1) SACR 54 (SCA).

Nkabinde J reinforced the courts' constitutional rights-based approach, declaring that the focus on the crime of rape in South Africa must be more focused 'on the breach of a more specific right such as the right to bodily integrity and security and safety of the person to be protected from degradation and abuse'.¹⁸² This constitutional rights-based approach was advanced in a landmark judgment in *Tshabalala v State*.¹⁸³ The case dealt with the doctrine of common purpose and instrumentality in a rape case. In this case, the Constitutional Court ruled that the doctrine of common purpose applies to the common law of the crime of rape.¹⁸⁴ The judgment expresses the court's commitment to the development and implementation of 'sound and robust legal principles that advance the fight against GBV to safeguard the constitutional values of equality, human dignity, and safety and security'.¹⁸⁵ The failure to develop and implement sound and robust legal principles relating to the eradication of GBV would be a failure in the court's duty.¹⁸⁶ Indeed, these cases reveal the Constitutional Court's commitment to the

In these cases, the courts dealt with the definition and ambit of substantial and compelling circumstances in the sentencing of sexual offenders.

¹⁸² *Masiya case* para 24. In the same matter, Langa CJ wrote a dissenting judgment that the definition should be taken further to include anal rape of men. Langa CJ similarly expressed that rape in this day and age was 'recognized as being less about sex and more about the expression of power through degradation and concurrent violation of the victim's dignity, bodily integrity, and privacy. In the words of the International Criminal Tribunal of Rwanda the 'essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion' para 78.

¹⁸³ *Tshabalala* (note 176 above) para 66.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid* para 63. The court held further that one of the ways in which to advance the end of patriarchy and rape culture is by disposing of the misguided and misinformed view that rape is a crime purely about sex.

¹⁸⁶ *Ibid.* Victor AJ echoed Mothapo J and held that 'the development of the common law and legislation in relation to cases of rape remains imperative to 'overcome reliance on existing rules of evidence and procedure.' The learned judge held furthermore that continuous 'vigilance within a

development and implementation of sound and robust legal principles that eliminated some discriminatory procedural obstacles in cases of rape to advance women's human rights. Yet, current statistics indicate an ongoing war on women and children despite the glowing reforms. This dissertation examines why this robust development of progressive case law has not resulted in actual social change and better prosecution of cases. In determining the causes and effects of prosecutorial attrition, the author will be able to establish the underlying causes of this specific problem. The author outlines this under the Claims section in chapter 4.

Reform impotence is also apparent in other jurisdictions.¹⁸⁷ The literature is unclear as to why the reform has not yielded the desired result. Feminist framing of the legal system is clear that the legal system is fundamentally patriarchal or supportive of patriarchy including men dominance of women and their bodies. More importantly, this feminist strand critiques liberal feminism and its faith in legal reforms. However, feminist framing fails to explain why statistics, for instance, show an increase in cases but a decrease in the prosecution and conviction rates.¹⁸⁸ Critics of rape reform attribute its failure to the reforms' focus on women without empowering women.¹⁸⁹ Adler suggests that the 'implementation of the law is very unsatisfactory in several important respects' but does not take this further.¹⁹⁰ No research in South Africa explores this. Research shows no difference between early reform countries such as the US, UK, Australia and Scotland, which adopted reform late in terms of reform and

constitutional context remained necessary in relation to any remaining (procedural rules) obstacles' para 83.

¹⁸⁷ Frohmann & Mertz (note 113 above) 852; Spohn et al (note 50 above) 233; Spohn et al found that older practices continued, despite legal change. Also see, Loh (note 92 above) 543; C Spohn & J Horney *Rape law reform: A grassroots revolution and its impact* (1992).

¹⁸⁸ Frohmann & Mertz (note 113 above) 852; Spohn et al (note 50 above) 233.

¹⁸⁹ Estrich (note (note 81 above) 1133.

¹⁹⁰ Adler (note 166 above) 674.

convictions.¹⁹¹ It is, therefore, not a matter of ‘giving it more time’ to be impactful. There appears to be no difference in attrition rates even with reforms.¹⁹² Loh compared attrition trends following law reform and before reform in 1980. In that study, the author found that under law reform, 51% filed cases for prosecution (first, second, or third-degree) rape, 19% statutory rape, 10% as other, and 19% declined. He compared these to the previous stats where there was no law reform wherein, he found that 51% of cases presented by police for prosecution as rape, 16% as carnal knowledge (statutory rape), 13% as another offence (other), and 20% cases prosecutors declined.¹⁹³

It may now be prudent to consider whether additional rights to women, beyond inherent human rights, that protect women are required or whether different types of rights are necessary that can cater (deal) with this problem. Substantive equality aims to ‘redress disadvantage, address stigma, stereotyping, prejudice and violence, enhance voice participation’.¹⁹⁴ The state bears a duty to enact specific measures relating only to rape victims (as opposed to victims of other forms of violent crime) to attain substantive equality.¹⁹⁵ Substantive equality may be justified considering that the crime of rape is not only a severe human rights violation but represents systemic discrimination since the crime of rape, along with the failure to prosecute, is perpetrated disproportionately against women. Notably, the reform in South Africa is not limited to legal developments via case law but through amendment of the statute, namely, the

¹⁹¹ Daly & Bouhours (note 175 above) 650.

¹⁹² Loh (note 92 above) 601.

¹⁹³ Ibid.

¹⁹⁴ S Fredman ‘Substantive equality revisited’ (2016) 14(3) *International Journal of Constitutional Law* 712-738.

¹⁹⁵ B Pithey, L Artz, H Combrinck & N Naylor ‘Legal Aspects of Rape in South Africa’ (1999) *Discussion Document* 138. Also see *Minister of Finance and Other v Van Heerden* (CCT 63/03) (2004) 25 ILJ 1593 (CC); *Harksen v Lane NO and Others* (CCT9/97) 1998 (1) SA 300.

Sexual Offences Act. I now turn to the advent of the Sexual Offences Act that has also been an ineffective disappointment, as indicated briefly above.

It is catastrophic that most rape victims receive post-rape care but are denied access to justice.¹⁹⁶ It may well be redundant even to consider whether the effectiveness of Sexual Offences Courts contributes to the fight against rape, for instance, because most cases of rape do not even make it to those courts. Some of the significant reforms enacted include medical services to the victims of sexual offences, including free post-exposure prophylaxis for HIV, and the investigating officer is empowered to obtain a court order to compel HIV testing of the alleged offender.¹⁹⁷ The evidence of a complainant may not be treated with caution.¹⁹⁸ A delay in reporting is inconsequential.¹⁹⁹ It further imposes a duty to report sexual offences against children.²⁰⁰ The National Register for Sex Offenders records details of those who have committed sexual offences against children and the mentally disabled.²⁰¹ The definition of rape was wholly reconstructed.²⁰² The definition of rape was previously limited to vaginal intercourse but now includes penetration of the anus and the mouth, even by the use of an instrument to sexually penetrate.²⁰³ The advent of the Sexual Offences Act repealed the common law offence of rape that previously defined ‘rape’ as the unlawful and intentional act

¹⁹⁶ L Vetten ‘It sucks/It’s a wonderful service: Post-rape care and the micro-politics of institutions’ (2015) *Johannesburg: Shukumisa Campaign and ActionAid South Africa* 14.

¹⁹⁷ Section 28 (1) (a) –(b) of the Sexual Offences Act.

¹⁹⁸ Section 60 of the Sexual Offences Act.

¹⁹⁹ Section 59 of the Sexual Offences Act.

²⁰⁰ Section 53 of the Sexual Offences Act.

²⁰¹ Section 43 of the Sexual Offences Act.

²⁰² Mills (note 164 above) 81. ‘Changes to the sexual offences act ‘effects wide reaching and progressive changes to the definition of rape.’

²⁰³ Section 1 of the Sexual Offences Act.

of sexual intercourse with a female without her consent to make the offence gender neutral. I now turn to the main issues related to rape crime reforms.

First, despite these impressive reforms, the cautionary rule continues to be applied in court despite being abolished and cemented in national legislation.²⁰⁴ Swemmer notes that: ‘trial transcripts examined in the study show that it [the cautionary rule] is still applied (un)consciously by prosecutors, defence counsel and presiding officers, whose questioning of complainants appears to assume that women are lying about violations perpetrated against them and should be treated as untruthful until the evidence can show otherwise’.²⁰⁵ Such procedural obstacles continue to influence prosecutors’ decision-making, including caution about a woman’s testimony and previous sexual history because such may be considered in court during the trial despite reformed laws that prohibits it.²⁰⁶ The author intends to show that this has impacted prosecutors’ attitudes towards cases that may ultimately filter onto society and can further lead to institutionalised rape culture. This calls for a gendered approach to prosecutions to adapt to the specific situation of women, such as the specific threats posed to women’s human rights. This is important because the certainty of time reveals that the rise of attrition rates and the infusion of procedural rules with constitutional values; and an amendment to statute that led to reform has not resulted in combating the problem of rape, the better prosecution of perpetrators or the achievement of higher conviction rates.

What this study aims to achieve through its methods is to establish empirically why law reforms have not led to systemic change. That involves change in how prosecutors exercise discretion and not only change in the rates of rape. In previous research, the author has indicated that those procedural obstacles, despite amendments to the law, appear to present difficulties

²⁰⁴ Swemmer (note 93 above) 52.

²⁰⁵ Ibid.

²⁰⁶ Ibid. Frohmann (note 99 above) 535.

that have a circular effect insofar as rape myths and stereotypes and prosecution of rape cases are concerned. These procedural obstacles are, furthermore, only present in cases of rape. One of the sub-theses defended here is that this failure reflects South Africa's state institution's failure. When public institutions are dysfunctional, social change through reform cannot be realised. This begs the question of whether the issue is with dysfunctional state institutions and resulting incompetence or rape myths that are institutionalised. In other words, would a functioning state not perpetuate these myths? The author argues that no amount of reform to the law can cure this.

Furthermore, because that problem relates to political will, there may be nothing researchers can do, but that is not the focus here. To improve the NPA, overhauling the process of appointing the Directors of Public Prosecutions (DPPs) and the National Director of Public Prosecutions (NDPP) may be prudent as a first start. DPPs and the NDPP must be elected by people they will serve through elections. South African researchers appear to attribute rape law reform failure to numerous exclusions to the 2003 Bill following public submissions.²⁰⁷ Arts & Smythe described these exclusions as battles lost.²⁰⁸ The Bill had 'dramatically departed' from what the SALRC had recommended.²⁰⁹ The Bill reverted from a 'victim-orientated

²⁰⁷ Criminal Law (Sexual Offences) Amendment Bill 50 –2003. Also see, L Vetten 'New crimes and old procedures can the new sexual offences bill deliver on its promises?' (2007) 22 *SA Crime Quarterly* 21, 2. 'The Bill paid considerably less attention to reforming legal procedures applicable to the investigation and prosecution of sexual offences;' SP Walker & DA Louw 'The Bloemfontein Court for Sexual Offences: Perceptions of its functioning from the perspective of victims, their families and the professionals involved' (2004) 17(3) *SACJ* 289, 308.

²⁰⁸ L Artz & D Smythe (eds) *Should we consent? Rape Law Reform in South Africa* (2008) 6-7. Also see, Artz and Smythe (note 175 above) 10.

²⁰⁹ Ibid 6. Other major revisions to the Law Commission's proposed Bill included the removal of sections dealing with: 'the medico-legal management of rape survivors', 'the appointment of support persons', 'evidence of the impact of rape', 'prosecutor-led investigations' and 'psychological support' of rape victims.

approach to what appeared to be a more conviction-driven operation’.²¹⁰ Vetten described the Sexual Offences Act as a legislative compromise.²¹¹ For instance, little provision was made to compel the management of investigations and prosecution.²¹² Legislators departed from the SALRC recommendation for the use of expert evidence merely on the basis that they would be ‘too costly’ to implement.²¹³ For example, the use of expert reports in court was also excluded.

All these shortcomings and compromises are, however, insufficient to explain why South Africa is still without any lasting solution to the problem of rape and ineffective prosecutions, including the refusal to prosecute cases based on discriminatory grounds. It should be possible to find a lasting solution to rape, at the very least, a reduction in the prevalence and attrition rates. Alternatively, it may be that the state (prosecutors) fails to implement reformed procedural rules similar to the findings by Adler.²¹⁴ This research aims to ascertain this.

A study may be required to explain the impact of rape law reform on the prosecution of cases despite the enormous reforms transposed into national legislation intended to address procedural obstacles (such as the use of a woman’s previous sexual history and broader definitions of consent, including coercion and prohibition of drawing an adverse inference for late reporting or the use of the cautionary rule and so forth). Machisa et al. were of the view that it is now necessary to understand the causes that have limited improvements despite

²¹⁰ Walker & Louw (note 203 above) 290.

²¹¹ Vetten (note 203 above) 25. ‘The Bill paid considerably less attention to reforming legal procedures applicable to the investigation and prosecution of sexual offences.’

²¹² Ibid.

²¹³ Artz & Smythe (note 176 above) 6.

²¹⁴ Swemmer (note 93 above) 52. A Heath, L Artz, M Odayan & H Gihwala ‘Improving Case Outcomes for Sexual Offences Cases Project: Pilot Study on Sexual Offences Courts. Cape Town, South Africa’ (2018) *Gender Health and Justice Research Unit* 11, 20. ‘Many studies conducted over the last decade have highlighted that the implementation of these has remained a challenge.’

numerous reforms, and the author agrees because much of the reform is intended to eliminate procedural obstacles in the prosecution of rape.²¹⁵ It appears that prosecutors do not comply with these reforms. It is unknown whether prosecutors received training following the enactment of reforms.²¹⁶

International studies provide a yardstick to compare our results to those studies to understand better the impact of law reform on investigations, prosecution, and conviction rates based on our domestic data. The MRC report, on the other hand, indicates a slight decrease in the overall attrition of cases and conviction rates in South Africa compared to a study by.²¹⁷ However, the author finds it unreliable to compare national data (MRC report, 2018) with regional data (Vetten et al., 2008). It begs the question whether better rape processing in the criminal justice system would be possible if reforms were not *solely* dependent on state actors to be implemented. However, this is not the focus of this study. This research will explore whether the state owes a duty to provide legal or paralegal support to complainants that may include, for example, assistance with capturing police statements, tracking of cases, and preparation of representations to the NPA in terms of the value of substantive equality. It will assess whether such an approach may enhance the criminal justice system (through careful monitoring of the implementation of the laws, for instance) while promoting access to justice for complainants.

7. CONCLUSION

This chapter reviewed various theories on rape. These theories included feminist critical theory,

²¹⁵ M Machisa, R Jina, G Labuschagne, L Vetten, L Loots, & R Jewkes ‘Factors Associated with Rape Case Attrition in the South African Criminal Justice System: A National Cross-Sectional Study’ (2022) 22 (1) *The British Journal of Criminology* 1, 14.

²¹⁶ Ibid 23.

²¹⁷ Vetten (note 204 above) 21.

ecological theory, and the relationship between prosecutorial discretion and rape outcomes. It reviewed these theories from a feminist legal perspective, recognising the various categories within this field. In summarising the main themes of the literature, rape also appears to be ecologically bound. Feminist theory and the subculture theory hold that rape occurs most frequently within familiar settings and among individuals of the same race, area, and age group. The review of the literature also explored the impact of rape myths and gender stereotypes on prosecutorial decision-making and case outcomes, as well as the challenges and failures of rape law reform. Feminist theory, as indicated above, provides a unique lens to gain a deeper understanding of the complexities of the legal system. At the core, however, this project mainly seeks to unpack whether the criminal justice system unfairly treats women, as suggested by feminist theorists. It will do so through a more profound look ‘beneath the surface of law to identify the gender implications of the rules’ as feminist methodology teaches. Feminist methodology challenges the assumption that the law is objective and just in its nature and structure. This is to expose those hidden biases that appear as neutral legal standards in order to ‘unmask patriarchy’.

Overall, the study aims to explore the relationship between the criminal justice system and the treatment of women in South Africa. The risk of victimisation is influenced by factors such as a woman’s age, race, and place of residence. Theorists agree on the influence of prosecutorial discretion and the impact of rape myths and discriminatory practices in the criminal justice system. Theorists agree, too, on the link between rape and gender inequality. There is a yawning gap in the South African literature on the extra-legal variables that influence decisions within the criminal justice system. This study will contribute to the literature by exposing correlations that influence prosecutorial decision-making in cases of rape that may lead to attrition. It aims to put into perspective the reasons behind the prosecution of cases and outcomes such as acquittals. It is essential because no studies have been conducted in South

Africa that go beyond the study of attrition rates and the handling of cases by the police. In conducting empirical research, this doctoral study aims to address and narrow the gap in research regarding rape case attrition.

The following chapter set out the data and findings.

CHAPTER 3: METHOD AND DATA RESULTS

1. INTRODUCTION

The purpose of this chapter is to set out the chosen method, study sample and results of the data. The focus of the chapter is mainly to outline the results and findings. Besides examining the variables related to failure to prosecute despite extensive rape law reform, this study further tests three primary hypotheses. The first is that a significant relationship exists between victim-defendant relationship and prosecutor decision-making in nolle cases: (a) “acquaintance rape” cases are the most prevalent type of cases, and (b) these types of cases are generally plagued by rape myths and stereotypes and (c) often raise issues of consent unlike in stranger rape cases, for example, where an accused is unlikely to claim consensual sex. In other words, these decisions are based on extra-legal factors in South Africa. This reasoning based on feminist conflict theory suggestions that extra-legal variables play a significant role in shaping the decisions and actions of the critical role players within the criminal justice system in cases of rape. These variables, according to feminist critical theorists, go beyond the actual legislated legal burden to prove the crime and encompass a wide range of factors, both internal and external to the system, that can significantly impact the outcome of rape cases. The author hypothesises that ‘acquaintance rape’ cases are the most difficult to prosecute and, therefore, often rejected by prosecutors. This has not been settled in law.

Further, the hypothesis is that there is a significant relationship between the complainant’s character (their age, education, and social standing) and prosecutor decision-making in nolle cases. The subculture theory posits that subcultures often perpetuate harmful stereotypes and beliefs about women’s sexuality and vulnerability based on their background and character. These beliefs can foster a sense of entitlement and objectification, leading to a higher likelihood of rape. As a result, this study is thus drawn to the subcultural theory of rape.

Also, prosecutors tend not to pour energy into what they deem a ‘hopeless case’ when their initial assessment is that the witness (victim) is not credible. There can be no rebuttal by the prosecution following an attack on a witness’s credibility, and the application of the procedural obstacles in court is a hindrance. In sum, the author's first hypothesis is that prosecutors are likely to consider a complainant’s version with caution in these cases.

The second hypothesis is that, as indicated above, driven by procedural obstacles, attrition of cases occurs due to state prosecutors throwing out cases they regard as ‘hopeless’. Put differently, prosecutors refuse to proceed with cases they deem as ‘hopeless’, aware of procedural obstacles. A ‘hopeless case’ is incapable of being enrolled for prosecution in a prosecutor’s view. For example, such a case may include instances where the incident occurred at the bar or came from the bar. In these instances, the use of alcohol exposes the complainant to credibility issues, such as their lucidity. Scholars do not know what prosecutors in South Africa regard as a ‘hopeless case’ and their views on procedural obstacles. Frohmann describes that prosecutors are concerned with convictability, creating a ‘downstream orientation’ in prosecutorial decision-making: anticipation and consideration of how others (i.e., jury and defence) will interpret and respond to a case’.¹ The author examines whether South African prosecutors refuse to prosecute based on (1) discriminatory views influenced by (2) the ‘downstream orientation’, which ‘downstream orientation’ is (3) influenced by anticipated courtroom procedural obstacles.

2. STUDY SAMPLE

This sample contains randomly selected rape case dockets ($n=50$). It includes nolle prosequi

¹ L Frohmann ‘Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking’ (1997) 3(1) *Law & Society Review* 531, 535.

dockets ($n=25$) and cases that proceeded to trial ($n=25$). These are randomly selected closed dockets from (2019 – 2023) derived from the Umlazi Police Station in KwaZulu-Natal (KZN). The case dockets were randomly selected to avoid any bias and to maintain credibility of the study. Also, poor filing by SAPS limited the authors ability to comb through the dockets, SAPS preferred to handle dockets themselves due to privacy laws. SAPS had to redact the dockets before handing them over to the candidate. The requirement to redact was made clear by the SAPS legal office. It must be borne in mind that the candidate required specific case dockets (that were prosecuted to finalisation and those that were rejected for prosecution). The request was thus of case dockets that had been finalised and filed. Finding such specific dockets was a tedious task for SAPS who do not have sophisticated filing systems in place. A further complication was that the Umlazi Police Station was not spared during floods that brought destruction to the entire province. As many news report pointed out many police stations were affected, and many dockets were damaged as a result of the flooding. It would have been unreasonable for the candidate to request anything other than a random selection, bearing in mind that SAPS bitterly argued that it had limited time and resources. Furthermore, many of the dockets were either active dockets, or dockets that did not meet the requirements, such as dockets that were filed by SAPS without input by the prosecutor.

This locale (Umlazi) was chosen randomly within KZN. The candidate chose Umlazi in KwaZulu-Natal Natal (KZN) because it is the biggest township in KZN therefore it has a wide demographic. It is also the fourth largest township in South Africa. Umlazi accounts for the second highest number of reported cases in KZN. The candidate placed emphasis on the wide demographic of Umlazi regard being had to the research questions to be answered as well as the theoretical framework of the study. The theoretical framework, for example, is anchored on the subculture theory and the demographic of the study due to this theory is therefore relevant. Subcultural theory, particularly within criminology, posits that certain

groups or subcultures within society develop values and attitudes that are conducive to crime and violence, often as a response to societal pressures or frustrations.

The candidate chose KZN also because previous studies and statistics by the SAPS and NPA reveal high levels of rape including child rape. KZN is recorded as having the greatest number of reported rape offences (8,468) after the Gauteng Province (8,811). A 2022/3 Crime Statistics report by SAPS reveals that KZN accounts for 18,9% of all reported cases of rape, the second highest, tailing Gauteng Province at 20,6% of all reported cases.²

The candidate was also influenced by the the demographic of Umlazi, but it must be kept in mind that the SAPS restricted the candidate to a single police station. Statistics South Africa (SSA) describes Umlazi as an urban area.³ The township of Umlazi has a population of about 404 811 in 30 different subsections.⁴ These subsections vary from middle-class housing to informal settlements. The number of households is 104 914, and female-headed households represent 44.3%.⁵ 63.2% of the population have no access to an internet connection.⁶ Only 9.5% of the population obtained a higher education (tertiary level); 40% hold a senior certificate (high school); 3.4% record no schooling; and 77.7% have never been married.⁷ Although data is derived from the South African Police Services (SAPS) in Umlazi, the focus is neither on the SAPS nor their members' conduct.

² SAPS Crime Statistics Report 2022/2023.

³ Statistics South Africa (hereinafter referred to as 'SSA'). SSA states that 98.7% of Umlazi is described as an urban area.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

The author must reiterate that this study strictly focuses on prosecutors and their decisions recorded in closed case dockets, which are filed and preserved by the SAPS. The dockets contain the complainant's statement, other witnesses' statements and police official statements taken under oath. The dockets also include parts B and C, the state's official diary detailing steps taken by the police, such as collecting further statements from witnesses or sending DNA samples to the forensics laboratory for testing, including any other instructions from state prosecutors to the police. It details the outcomes in some instances, such as bail application proceedings and finally details how the matter was finalised.

In some dockets, the written reasons are generic, and in some, prosecutors detailed reasons for specific outcomes. It is important to note that prosecutors oversee dockets from the moment an accused appears in court or when the police refer the docket to the NPA for a decision. Prosecutors instruct the police on how an investigation must be conducted and which evidence must be obtained as they build a case. Therefore, the author can draw prosecutors' insights from the dockets alone. It is the author's submission that the inability to interview prosecutors, are not fatal to this study. The fact that the study relies only on/has access to dockets is thus sufficient.

The main limitation of this study is the sample size, which is derived from one location. However, it must be borne in mind that even if there were 1200 cases reported each year, many of the cases would be active cases. The candidate was not granted permission to access active cases. Other cases would not meet my requirements, because many cases for example, are closed and filed by the SAPS without any decision from the NPA. The candidate required dockets that were finalised, by a prosecutor. That alone limits the number of dockets available to the author. The candidate was unable to burden SAPS that had unsophisticated filing systems, who had to redact the copies first before making those copies available to the author. Many dockets were also damaged due to floods in Kwa-Zulu Natal (KZN). Having said that,

this does not impact the method and interpretation of the results. As stated above, the dockets provide insights into prosecutor decisions and reasoning. This sample also contains information about various cases of rape, including gang rapes and child rape, with details such as the date, age, social class, race, immediate report/arrest, the relationship between victim and suspect, substance/alcohol use, mental disorders, condom use, the force used, marital status, sexuality, location, employment, and the outcome of each case. The sample size, though small, is methodologically sound and offers valuable insights that fulfil the objectives of the study, which is to mainly answer the research questions, taking into account the strength of the theoretical framework and the interdisciplinary approach. The sample size was a great limitation due to privacy laws, but the sample is not too small because the candidate was able to analyse the data and make findings. As stated, The SAPS initially rejected the request for the dockets citing privacy laws. The SAPS compromised 50 dockets which had to be redacted as stated about, and this contributed to the sample size of the study, however, the small sample size is nevertheless sufficient to conduct the study. Access to these dockets was obtained following ethics clearance from the University of Witwatersrand. It was followed by an application to the SAPS research unit at the SAPS Head Office which granted permission, followed by another application for clearance from SAPS KZN Provincial Office, which was also granted.

To recap, the limitations of this study are as follows:

- The candidate encountered numerous problems during the process of data collection. By way of overview. The candidate faced five challenges and obstacles in the process of collecting the data, namely access to dockets was initially rejected, redaction of dockets once approved was time consuming

for the SAPS, the expenses associated with access to the dockets, vast analysis of dockets; and impact of the analysis on the candidate.

- The first step of the process included obtaining ethics clearance from the Wits University Ethics committee. Once the author obtained ethical clearance, the author had to request permission to obtain closed dockets from the South African Police Station research department at its head office in Pretoria.
- The first difficulty was that the candidate's request was immediately rejected on privacy grounds. SAPS specifically cited POPIA. The candidate then appealed to the SAPS Legal Office. This appeal was successful; however, permission was granted to obtain only 50 dockets as agreed upon. The SAPS head office thereafter requested permission on behalf of the candidate from the KZN provisional office to grant the candidate access to closed dockets. However, the dockets had to be redacted before access. This was the second difficulty.
- Redaction of these copies was a strenuous process for the SAPS. Redaction did not only involve redaction of the first page (personal information about the complainant) and the last page (personal information about the suspect), it included redaction in all the documents contained inside the dockets such as affidavits, reports, and other pro forma forms (The J88 form is a medico-legal document used in South Africa, particularly in cases of violence against women, to record injuries sustained by victims and is considered prima facie evidence in court).

- The SAPS complained extensively that it did not have resources and capacity for such an exercise because it was time consuming. Insisting on more than 50 dockets would have been unreasonable given how resource intensive the exercise was for the SAPS. And many dockets had been damaged due to the floods.
- The third difficulty was the cost associated with obtaining copies of the dockets. The candidate was also required to pay for the copies, and a single docket involved up to 30-40 pages per docket. It must be kept in mind that a docket includes reports, pro forma forms, various statements by witnesses and statements by SAPS members. Therefore, it was expensive to make the copies. Further expenses included travelling and accommodation costs because the SAPS required the candidate to collect the data in person.
- The fourth difficulty was the process of analysing the dockets. Analysis of 50 dockets was time consuming. Prior rape attrition studies were conducted by multiple authors.
- Lastly, the fifth difficulty and challenge was the triggering impact of reading the dockets. The data analysis was emotionally difficult on the author due to having to read and analyse rape allegations, considering rape scenes, and rape acts over and over again. Finally, insofar as data collection is concerned, the SAPS limited access to dockets to a single police station due to the lack of resources by the SAPS. It should also be noted that Umlazi has one

police station where dockets are kept safely according to the Station Commander, Brigadier Zweli Nkabinde.

3. METHOD

The author uses these descriptive statistics (also known as descriptive analysis) as a first level of analysis to summarise the data and find patterns. Thereafter, the frequencies are measured to show how often (1) the extra-judicial factors influence how prosecutors assess a victim's character and (2) the victim-perpetrator relationship plays a role in nolle cases compared to enrolled cases. Finally, the variables are coded and tested in all samples; then, the results are compared. The author intends to use quantitative and qualitative data analysis methods. The methods chosen here are most suitable because they allow the author to obtain empirical results from the data. Quantitative research is number-based and uses statistics or measures percentages. The author uses STATA software to unpack the quantitative results through statistical analysis, in percentiles and regression analysis to describe how much of the variation in the dependent variable is explained by the independent variables.⁸ The most appropriate analytical technique for a dichotomous dependent variable is a logistic regression analysis. Therefore, the Poisson Regression, a Generalized Linear Model, tests the Incidence Rate Ratio (IRR) and the p-value.

ATLAS software is utilised to read the qualitative findings.⁹ Qualitative methods are descriptive, mainly describing the 'how' and the reasons for an outcome. Specifically, the author uses qualitative document analysis to review and analyse the study sample to 'elicit

⁸ STATA 18.0 SE (Standard Edition) is a statistical package for managing, analysing, and graphing data.

⁹ ATLAS.ti Software is a qualitative research tool that can be used for coding and analysing transcripts and data visualisation.

meaning, gain understanding, and develop empirical knowledge'.¹⁰ Therefore, failure to conduct interviews with prosecutors does not limit the methodology of this research project.¹¹ The author uses a convergent parallel design, where quantitative and qualitative data are collected simultaneously but analysed separately. Document analysis is often used in combination with other qualitative research methods as a means of triangulation.¹² A convergent parallel design is a: 'Convergent parallel design entails that the researcher concurrently conducts the quantitative and qualitative elements in the same phase of the research process, weighs the methods equally, analyses the two components independently, and interprets the results together' see Figure 1 below.¹³

¹⁰ G A Bowen 'Document Analysis as a Qualitative Research Method' (2009) 9 (2) *Qualitative Research Journal* 27, 28.

¹¹ Ibid 29. Bowen describes document analysis as follows: 'As a research method, document analysis is particularly applicable to qualitative case studies—intensive studies producing rich descriptions of a single phenomenon, event, organisation, or program (Stake, 1995; Yin, 1994). Non-technical literature, such as reports and internal correspondence, is a potential source of empirical data for case studies; for example, data on the context within which the participant operates (Mills, Bonner, & Francis, 2006). Furthermore, as Merriam (1988) pointed out, 'Documents of all types can help the researcher uncover meaning, develop understanding, and discover insights relevant to the research problem' (p. 118).'

¹² Ibid 28.

¹³ JW Creswell & VL Pablo-Clark *Designing and conducting mixed methods research* (2011).

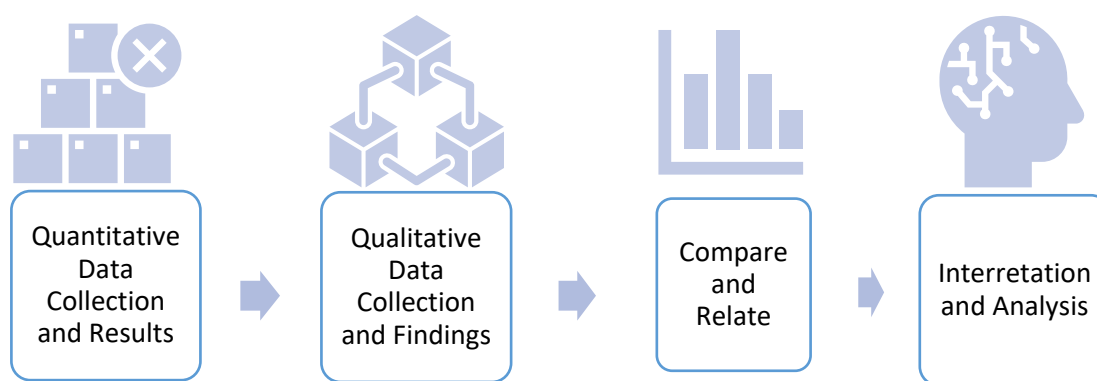


Figure 1. The research process in this study uses the convergent mixed-parallel design.

As seen in the diagram, once the analysis of both is complete, the author will compare the results to conclude the study that will answer the central research question and sub-questions. The primary purpose of adopting this method is to analyse the variables that predict prosecution decisions in rape cases, for instance, the factors taken into consideration by prosecutors in South Africa, based on hypotheses derived from the (i) feminist-conflict theory, (ii) Frohmann’s downstream theory, and (iii) the subcultural theory of violence. Feminist conflict theorists posit that extra-legal variables influence the decisions of criminal justice system agents in complete disregard of the required legal variables. The feminist-conflict theory further posits that extra-legal variables are more influential compared to legal variables in predicting the outcomes of rape investigations, including the use of rape myths in such cases. As stated above, Frohmann’s downstream orientation theory is concerned with convictability that creates a ‘downstream orientation’ in prosecutorial decision-making: ‘anticipation and consideration of how others (i.e., jury and defence) will interpret and respond to a case’.¹⁴ The subcultural theory suggests that forcible rape is an ‘intra-racial event between victims and offenders who were at same age level and who were ecologically bound, that is, victims and

¹⁴ L. Frohmann ‘Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking’ (1997) 3(1) *Law & Society Review* 531, 535.

offenders lived in the same area, which tended to be also the area of the offence'.¹⁵

The author uniquely creates category-based variables based on the categories of extra-judicial factors in all the samples. The author uses descriptive statistics to analyse case characteristics in cases. The author uses descriptive statistics to analyse the link between the different categories of extra-judicial factors and the analysis of the complainant's credibility by prosecutors. To be accurate, the author also considers the role of valid judicial factors such as lack of consent, unlawfulness, and mens rea in the decision-making process. The author intends to use in-depth coding (the grouping and assigning values to responses from dockets based on the variables) to gain insight into the patterns and frequency related to case rejection. In other words, the author uses these descriptive statistics (also known as descriptive analysis) as my first level of analysis to summarise the data and find patterns. The author measures the frequencies (the number of times a value is found) to show how often (1) the extra-judicial factors that influence how prosecutors assess a victim's character and (2) the victim-perpetrator relationship plays a role in nolle cases compared to enrolled cases. The author measures the variables in all samples and compares the results to test their hypotheses.

A rape myth theory that exists in the criminal justice system in South Africa can either be proven or disproved using these methods. In the event that the existence of the rape myth theory is confirmed by empirical evidence, this may attest to the fact that reforms are unlikely to be successful in the long run. Prosecutors' use of rape myths may explain why reforms failed in South Africa. Although conducted through a small sample, this project will indicate whether prosecutors in Umlazi exercise their discretion based on convictability at trial tested on discriminatory grounds guided by the downstream theory. It will inform us whether the criminal justice system is discriminatory or not and how this impacts women's and children's rights in South Africa in general.

¹⁵ M Amir *Patterns in Forcible Rape* (1971) 339-340.

The approach of this thesis is from a feminist jurisprudence perspective. This approach is vital because feminist jurisprudence encourages critical analysis and reinterpretation of legal texts to identify gender inequalities. This study, if interpreted from a feminist jurisprudence perspective, will shed light on patriarchal systems and gender biases that have permeated legal discourse throughout history. The feminist jurisprudence perspective influenced the selection of methods and analyses. Feminist methodology suggests a more profound look ‘beneath the surface of law to identify the gender implications of the rules’.¹⁶ Feminist methodology, therefore, challenges the assumption that the law is objective and just in its nature and structure.¹⁷ Feminist methods apply to seemingly neutral legal standards to expose those hidden biases; one such method is known as ‘unmasking patriarchy’.¹⁸

4. RESULTS

This section outlines the results derived from the case dockets that were concluded from 2019-2023. First, the Background Characteristics are outlined in all the dockets (Table 1). The Background Characteristics in prosecuted cases are outlined in Table 2, while the Background Characteristics in declined cases are set out in Table 3. The dependent variable is Case status, a dichotomous variable: (No if nolle prosequi meaning not prosecuted) and (Yes if prosecuted). Of these are nolle prosequi cases (nolle) that include no reasons given (Nolle: no reason), the complainant had lied (Nolle: complainant lied), the complainant was uncooperative (Nolle: complainant uncooperative), the complainant was incompetent to testify (Nolle: complainant incompetent), the complainant was untraceable (Nolle: complainant untraceable), the suspect was untraceable (Nolle: suspect untraceable), the suspect was deceased (Nolle: suspect

¹⁶ N Levit & RR Verchick *Feminist legal theory: A primer* (2016) 46.

¹⁷ K Bartlett & R Kennedy *Feminist Legal Theory: Reading in Law and Gender* (1991) 829.

¹⁸ Levit & Verchick (note 15 above) 41.

deceased), the case was withdrawn by the prosecutor after an interview with the complainant (Nolle: withdrawn after an interview with the complainant), the prosecutor withdrew the case after initially proceeding (Nolle: withdrawn after initially proceeding), the complainant withdrew the case (Nolle: complainant withdrew), the complainant was contradicted (Nolle: complainant contradicted). The other variables fall under prosecuted cases that include (Prosecuted: convicted), case prosecuted and accused was convicted on a lesser charge (Prosecuted: convicted on a lesser charge), case prosecuted and accused was found not guilty on any charge (Prosecuted: not guilty), case prosecuted and accused died during proceedings (Prosecuted: suspect deceased).

The legal variables tested include Penetration, No consent, and Coercion. The extra-legal variables in category one includes whether the complainant was employed (Complainant employed) or the complainant is educated (Complainant educated). Category two extra-legal variables include. The use of force by the suspect (Force), physical assault on the complainant (Physical assault), verbal assault on the complainant (Verbal assault), the use of any weapon by the suspect (Use of a weapon), resistance by the complainant (Resistance) identification of the suspect by the complainant or an eyewitness (Positive identification of suspect). Category three extra-legal variables include whether parties involved were strangers (Strangers), whether parties involved were acquaintances (Acquaintances), whether the complainant was under the influence of alcohol or drank alcohol (Use of alcohol), whether the complainant was under the influence of any substance or used substances (Use of substance), the complainant reported the incident promptly or as soon as they reasonably could (Immediate report), whether the police arrested the suspect (Suspect arrested), whether the complainant passed out during incident (Complainant passed out) or the complainant fled the scene (Complainant fled the scene), whether the complainant had sexual activity with the accused in the past (Prior sexual activity with the accused) and whether the complainant has a criminal record (complainant prior

crimes). All the tested variables were dichotomous either (Yes if the variable is present) or (No if the variable is absent), except for the variable of the complainant's age (Age). Other category one extra-legal variables excluded from these results are Race, Age, and Prior crime. Race is excluded from the analysis because the Race of all complainants and accused persons is the same. There was no indication of Prior crimes by the complainants in any of the dockets, and Age is not either yes or no because the ages of the complainants vary. Kindly refer to section 5 for the Codebook.

4.1 BACKGROUND CHARACTERISTICS

Table 1: Background Characteristics (n=50))

Variables	Level	n (%)
Case status	Nolle	25 (50)
	Prosecuted	25 (50)
Nolle cases		
Nolle: no reason	No	49 (98)
	Yes	1 (2)
Nolle: complainant lied	No	49 (98)
	Yes	1 (2)
Nolle: complainant uncooperative	No	47 (94)
	Yes	3 (6)
Nolle: complainant incompetent	No	48 (96)
	Yes	2 (4)
Nolle: complainant untraceable	No	49 (98)
	Yes	1 (2)
Nolle: suspect untraceable	No	48 (96)
	Yes	2 (4)
Nolle: suspect deceased	No	48 (96)
	Yes	2 (4)
Nolle: withdrawn after an interview with the complainant	No	46 (92)
	Yes	4 (8)
	No	49 (98)

Nolle: withdrawn after initially proceeding	Yes	1 (2)
	No	42 (84)
Nolle: complainant withdrew	Yes	8 (16)
	No	49 (98)
Nolle: complainant contradicted	Yes	1 (2)
Prosecuted cases		
	No	41 (82)
Prosecuted: convicted	Yes	9 (18)
	No	42 (84)
Prosecuted: convicted on a lesser charge	Yes	8 (16)
	No	43 (86)
Prosecuted: suspect deceased	Yes	7 (14)
Legal variables		
	No	2 (4)
Penetration	Yes	48 (96)
	No	3 (6)
No Consent	Yes	47 (94)
	No	46 (92)
Coercion	Yes	4 (8)
Extra-legal variables		
(Category 1)		
	No	49 (98)
Complainant employed	Yes	1 (2)
	No	44 (88)
Complainant educated	Yes	6 (12)
	No (0)	Other
Race	Yes (1)	Black
(Category 2)		
	No	0 (0)
Force	Yes	50 (100)
	No	33 (66)
Physical assault	Yes	17 (34)
	No	28 (56)
Verbal assault	Yes	22 (44)

Use of a weapon	No	34 (68)
	Yes	16 (32)
Resistance	No	24 (48)
	Yes	26 (52)
Positive identification of suspect	No	4 (8)
	Yes	46 (92)
(Category 3)		
Use of alcohol	No	44 (88)
	Yes	6 (12)
Use of substance	No	46 (92)
	Yes	4 (8)
Immediate report	No	20 (40)
	Yes	30 (60)
Suspect arrested	No	17 (34)
	Yes	33 (66)
Strangers	No	42 (84)
	Yes	8 (16)
Acquaintances	No	8 (16)
	Yes	42 (84)
Complainant passed out	Yes	46 (92)
	No	4 (8)
Complainant fled the scene	Yes	39 (78)
	No	11 (22)
Prior sexual activity with the accused	No	44 (88)
	Yes	6 (12)
Complainant prior crimes	No	50 (100)
	Yes	0 (0)

4.2 BACKGROUND CHARACTERISTICS: PROSECUTED CASES

Table 2: Background characteristics in prosecuted cases (n=25)

Variables	Level	n (%)
Case status	Prosecuted	25 (100)
Dependent variable (descriptive)		
	No	16 (64)

Prosecuted: convicted	Yes	9 (36)
Prosecuted: convicted on a lesser charge	No	17 (68)
	Yes	8 (32)
Prosecuted: suspect found not guilty	No	18 (72)
	Yes	7 (28)
Legal variables		
Penetration	No	1 (4)
	Yes	24 (96)
No consent	No	3 (12)
	Yes	22 (88)
Coercion	No	22 (88)
	Yes	3 (12)
Extra-legal variables		
(Category 1)		
Complainant employed	No	24 (96)
	Yes	1 (4)
Complainant educated	No	21 (84)
	Yes	4 (16)
(Category 2)		
Force	No	0 (0)
	Yes	25 (100)
Physical assault	No	14 (56)
	Yes	11 (44)
Verbal assault	No	9 (36)
	Yes	16 (64)
Use of a weapon	No	12 (48)
	Yes	13 (52)
Positive identification of suspect	No	1 (4)
	Yes	24 (96)
Resistance	No	8 (32)
	Yes	17 (68)
Complainant passed out	Yes	23 (92)
	No	2 (8)
Complainant fled the scene	Yes	17 (68)
	No	8 (32)
(Category 3)		
Force	No	0 (0)
	Yes	25 (100)
	No	24 (96)

Use of alcohol	Yes	1 (4)
Suspect arrested	No	1 (4)
	Yes	24 (96)
Use of substance	No	25 (100)
	Yes	0 (0)
Immediate report	No	8 (32)
	Yes	17 (68)
Strangers	No	20 (80)
	Yes	5 (20)
Acquaintances	No	5 (20)
	Yes	20 (80)
Complainant passed out	Yes	23 (92)
	No	2 (8)
Complainant fled the scene	Yes	17 (68)
	No	8 (32)
Suspect arrested	No	1 (4)
	Yes	24 (96)
Prior sexual activity with the accused	No	22 (88)
	Yes	3 (12)
Complainant prior crimes	No	25 (100)
	Yes	0 (0)

4.2.1 QUANTITATIVE OUTCOMES: PROSECUTED CASES

Table 2 shows that twenty-five (25) of the prosecuted cases, sixteen (16) of those cases were child rape cases, and only nine (9) were adult cases in women aged between 18-40, and one was over the age of 45. Of these cases, four (4) out of sixteen (16) resulted in a conviction in the said child rape cases, and five (5) of those processed resulted in conviction out of the nine (9) adult cases. Of the other child rape cases prosecuted, four (4) resulted in a conviction for other crime(s) and not rape. For example, for complainant five (5), which was an alleged rape of a child by her father, the matter concluded on a guilty plea for assault with intent to cause grievous bodily harm (assault GBH). In the case docket, the prosecutor noted that the state would only proceed with the rape charge if the DNA results were positive. Here, the accused is sentenced to five (5) years and suspended for three (3) years. The accused in *case number*

seven (7) pleaded guilty to statutory rape and possession of a firearm. The prosecutor emphasised that this case was ‘more of statutory rape’ despite the complainant’s evidence indicating rape because of penetration without consent. Statutory rape is a lesser crime because it is consensual sex with a minor. In *case number thirteen (13)*, the accused was convicted for assault GBH to eighteen (18) months imprisonment that was wholly suspended following a plea agreement. Here the complainant desired to withdraw charges because she had just given birth to a baby she conceived with the accused, but the state only offered to withdraw the rape charge. All suspects in the proceeded cases did not use a condom when penetrating complainants. Other prosecuted cases resulted in acquittal. Of those cases, six (6) cases were child rape cases and only one (1) was an adult case.

Like the *nolle* cases, all the parties in the twenty-five (25) processed cases were black and from poor backgrounds. Only a single complainant was employed, and four (4) were recorded as holding a senior certificate. Seven (7) of the suspects are recorded as employed, but all those employed varied from drivers to security jobs (entry-level employment), and five (5) possessed a senior certificate. Only two (2) of the accused were married. The total number of acquaintance rape cases stood at twenty (20), and five (5) were stranger rapes. Child rape cases represent eighteen (18) of all the reported acquaintance rape cases and four (4) out of five (5) of the stranger rapes. Of the total acquaintance rapes, which are twenty-five (22), ten (10) were known to each other, seven (7) were child rape cases and three (3) were adult cases. Three (3) cases were parties that had previously dated, and none of these represents child rape cases. However, child rape cases represent all the cases where the parties were either related or were direct family in three (3) of these cases and those cases where the parties met on the day in three (3) a total of three (3) cases. Of the stranger rapes, child rapes stood at two (2) out of the three (3) reported cases.

Furthermore, twenty-four (24) out of twenty-five (25) suspects in processed cases are reported as arrested and positively identified. Of these, seventeen (17) are immediately reported to the police. All the cases were ecologically bound, too. The location of the incidents is the same way as where the parties resided. Of the other extra-legal variables, the use of force is recorded in twenty-five (25) cases, and eighteen (18) cases recorded resistance. Sixteen (16) cases recorded physical assault and sixteen (16) verbal assaults out of the twenty-five (25), and the use of a weapon stood at thirteen (13). Two (2) of the complainants are recorded as having passed out, and twelve (12) fled the scene. These figures are significantly higher than those recorded in nolle cases. Of the twenty-five (25) cases, seventeen (17) are reported immediately, and like nolle cases, three (3) cases recorded that the complainant had prior sexual activity with the accused. Substance use was recorded only in one (1) case, and there were no cases that recorded the presence of alcohol. Of the legal variables, penetration is met in twenty-four (24) out of twenty-five (25) processed cases. Lack of consent is registered in all the cases, and three (3) registered coercive circumstances.

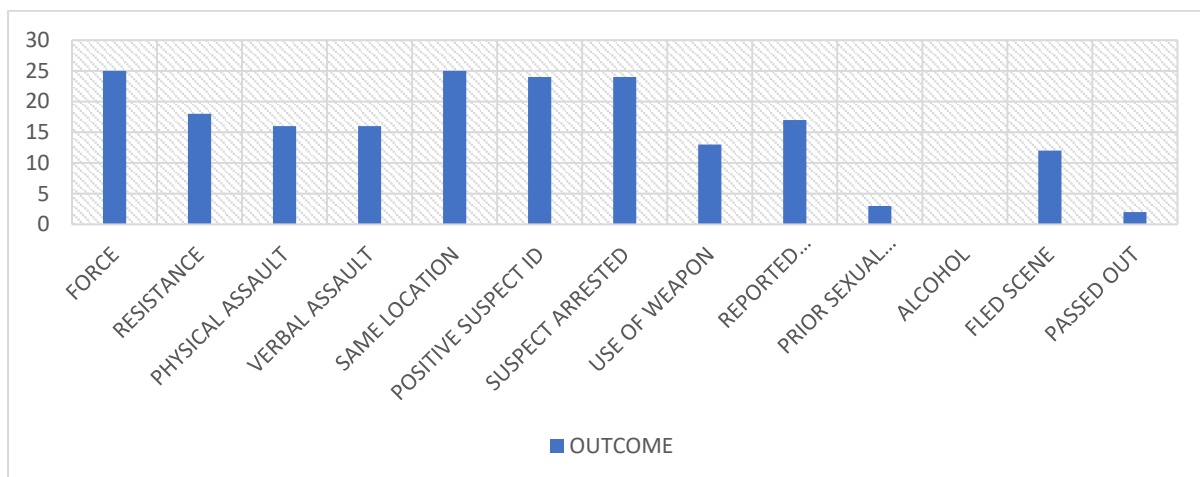


Figure 2: Qualitative Outcomes Nolle Prosequi Cases (Extra-Legal Variables)

4.2.1 QUALITATIVE OUTCOMES: PROSECUTED CASES

Document analysis of prosecuted cases ($n=25$) shows that many prosecuted matters do not contain reasons why the matter proceeds. However, out of the seventeen (17) cases of the

twenty-five (25), some suspects entered into plea agreements with the State and two (2) cases resulted in life imprisonment. For example, *case number one (1)* resulted in 15 years imprisonment following a plea agreement. However, the victims were unsatisfied with the sentence. Some of the cases resulted in convictions on charges other than rape, and many involved the guilty plea for assault causing grievous bodily harm instead of rape which was abandoned by the state, and many cases resulted in a suspended sentence. One (1) case involved consensual sex with a minor and possession of a firearm, and. One (1) case involved sexual assault, resulting in a guilty plea and a suspended sentence, and two other cases are mentioned without further details. Seven (7) of the cases resulted in the acquittal of the accused and in *case number 4*, which is a child rape case and the reasons for the court's decision.

4.3 BACKGROUND CHARACTERISTICS: NOLLE CASES

Table 3: Background characteristics in nolle cases (n=25)

Variables	Level	N (%)
Case status	Nolle	25 (100)
Dependent variables (descriptive)		
Nolle: no reason	No	24 (96)
	Yes	1 (4)
Nolle: complainant lied	No	24 (96)
	Yes	1 (4)
Nolle: complainant uncooperative	No	22 (88)
	Yes	3 (12)
Nolle: complainant incompetent	No	23 (92)
	Yes	2 (8)
Nolle: complainant untraceable	No	24 (96)
	Yes	1 (4)
Nolle: suspect untraceable	No	23 (96)
	Yes	2 (4)
Nolle: suspect deceased	No	23 (96)
	Yes	2 (4)

Nolle: withdrawn after an interview with the complainant	No	21 (84)
	Yes	4 (16)
Nolle: withdrawn after initially proceeding	No	24 (96)
	Yes	1 (4)
Nolle: complainant withdrew	No	17 (68)
	Yes	8 (32)
Nolle: complainant contradicted	No	24 (96)
	Yes	1 (4)
Legal variables		
Penetration	No	1 (4)
	Yes	24 (96)
No Consent	No	3 (12)
	Yes	22 (88)
Coercion	No	22 (88)
	Yes	3 (12)
Extra-legal variables		
(Category 1)		
Complainant employed	No	24 (96)
	Yes	1 (4)
Complainant educated	No	21 (84)
	Yes	4 (16)
(Category 2)		
Force	No	0 (0)
	Yes	25 (100)
Physical assault	No	19 (76)
	Yes	6 (24)
Verbal assault	No	19 (76)
	Yes	6 (24)
Use of a weapon	No	22 (88)
	Yes	3 (12)
Resistance	No	19 (64)
	Yes	6 (36)
Positive identification of suspect	No	3 (12)
	Yes	22 (88)
(Category 3)		
Force	No	0 (0)
	Yes	25 (100)
	No	20 (80)

Alcohol	Yes	5 (20)
Use of substance	No	21 (84)
	Yes	4 (16)
Immediate report to the police	No	12 (48)
	Yes	13 (52)
Strangers	No	21 (84)
	Yes	4 (16)
Acquaintances	No	4 (16)
	Yes	21 (84)
Suspect arrested	No	16 (64)
	Yes	9 (36)
Complainant passed out	Yes	23 (92)
	No	2 (8)
Complainant fled the scene	Yes	22 (88)
	No	3 (12)
Prior sexual activity with the accused	No	(88)
	Yes	3 (12)
Complainant prior crimes	No	25 (100)
	Yes	0 (0)

4.3.1 QUANTITATIVE OUTCOMES: NOLLE CASES

Table 3 shows the background characteristics in Nolle cases. Of those, fifteen (15) cases out of a total of twenty-five (25) were child rape cases; ten (10) were adult cases. Eight (8) are cited as withdrawn by the complainant, and the prosecutor withdrew four (4) after an interview with the complainant. It is followed by three (3) nolle cases due to a lack of cooperation because the mother did not bring the child for consultation. These were three (3) child rape cases, and the parties were known to each other. All suspects in the unprosecuted cases did not use a condom when penetrating complainants, except for two (2) cases where it was unknown. The total number of acquaintance rape cases is twenty-two (22), and three (3) are stranger rapes. Child rape cases represent thirteen (13) of all the reported acquaintances rape and (two) 2 out of three (3) of the stranger rapes. Of the total acquaintance rapes, which are twenty-two (22), ten (10) were known to each other, seven (7) were child rape cases, and three (3) were adult cases.

Three (3) cases were parties that had previously dated, and none of these represent child rape cases. However, child rape cases represent all the cases where the parties were either related or were direct family in three (3) of these cases and those cases where the parties met on the day in three (3) a total of three (3) cases. Of the stranger rapes, child rapes stood at two (2) out of the three (3) reported cases.

The other quantitative data reveals that all the parties were black and from poor backgrounds. None of the complainants are employed; only two (2) hold a senior certificate. Four (4) suspects are recorded as employed, and three (3) possess a senior certificate. None of the complainants were married, and only one of the suspects was married. Of the twenty-five (25) cases, thirteen (13) suspects are arrested, but the matter did not proceed. Of the twenty-five (25) cases, twenty (20) suspects were positively identified. All the cases were ecologically bound. The location of the incidents is the same as where the parties resided. As noted, ‘ecologically bound’ rape, as Amir put it, occurs predominantly between residents of the same neighbourhoods, members of the same race, and at certain times of the day and week.¹⁹ Accordingly, the risk of victimisation is not equally distributed across the entire female population but is influenced by a woman’s age, race, and place of residence.

Of the other extra-legal variables, the use of force was recorded in twenty (25) cases, and thirteen (13) cases recorded resistance. Physical assault and verbal assault are equally recorded in six (6) of the cases out of the twenty (25), and the use of a weapon stood at four (4). Two (2) of the complainants were recorded as having passed out, and three (3) fled the scene. Of the twenty-five (25) cases, fourteen (14) were reported immediately, and in three (3) cases, the complainant was recorded as having had prior consensual sexual activity with the accused. The presence of alcohol and substance use is recorded in nine (9) out of the twenty (25) cases. Finally, of the legal variables, penetration was met in twenty-four (24) out of twenty

¹⁹ M Amir ‘Forcible rape’ (1967) 31(1) *Federal Probation* 51-58.

(25) nolle cases. Lack of consent was registered in all the cases, and five (5) are registered in coercive circumstances.

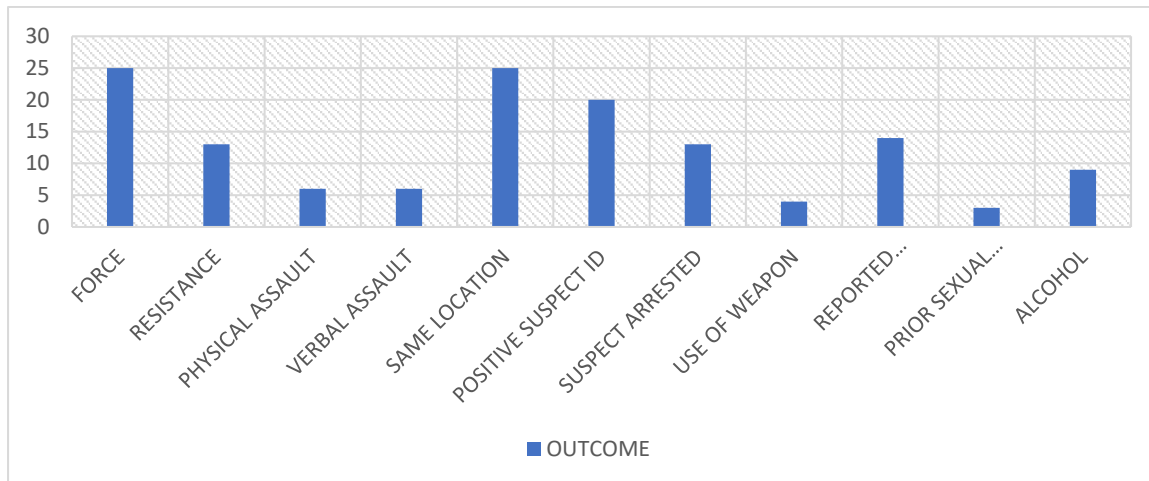


Figure 1: Quantitative Outcomes Nolle Prosequi Cases (Extra-Legal Variables)

4.3.2 QUALITATIVE RESULTS: NOLLE CASES

Document analysis of nolle dockets ($n=25$) shows that several cases reveal qualitative outcomes in cases that did not proceed. In case *number one (1)* a gang rape is noted, which is a schedule 5 offence in terms of s 60(11)(a) of the Criminal Procedure Act. The prosecutor instructed that the ‘affidavit of an eyewitness who may shed light on “how” the incident occurred must be obtained and filed in the docket’. The prosecutor further instructed that ‘affidavits of the person to whom the victim first reported the incident of sexual abuse complained of must be taken in a detailed manner, giving a set of facts ‘describing the acts of abuse complained of in a detailed manner’, must be filed in the docket’. The prosecuted noted that the ‘affidavits of two males ‘who assisted the complainant after the incident, complained of, must be obtained and filed’ because those are ‘very crucial witnesses in this case’. The DNA sample of the suspect on his arrest must be despatched to Forensic Services Lab (FSL) ‘as soon as reasonably possible’. Here, the prosecutor declined to prosecute because the complainant indicated she was ‘no longer interested in the case’. The prosecutor notes the request is ‘made

freely, voluntarily and without undue influence’. The complainant also ‘failed to attend interviews’ with the prosecutor’ on three (3) occasions, and the prosecutor could not reach her on her mobile cellphone.

In case *number two (2)*, the docket is filed by the police because the suspects are unknown. No DNA samples are not taken and preserved despite this being a child rape case. The matter is not presented to the prosecutor for instructions, nor is it considered whether a pattern exists compared with other cases. This case is nonetheless categorised as a *nolle prosequi* case, which is inaccurate. In case *number three (3)*, another child rape case, the district prosecutor refused to continue citing the victim’s assertions that she and the suspect “had sex”; however, disregarding that consensual sex with a minor is statutory rape in terms of the Sexual Offences Act.²⁰ The matter escalated to the senior public prosecutor (SPP), who declined to prosecute because the mother did not bring the minor victim to scheduled consultations on four (4) occasions. In case *number (five) 5*, the prosecutor declines to prosecute, citing no reasonable prospects of success due to the victim’s age: ‘far too young, easily influenced, disclosure of incident was obtained after a severe beating by mother, divulged during the interview, identification of the suspect is unknown, and guesswork done by mother leading to the arrest of suspect regrettable’. However, reading the mother’s statement, it is clear that the victim named the suspect, who is known to them and is a neighbour. Here, the prosecutor reconsiders the previous decision to refer the young victim to a social worker because social worker intervention will not alleviate the serious legal issues raised in this case.

In case *number (seven) 7*, the prosecutor declines based on an independent witness statement that contradicts the version of events by both victims. The witnesses stated that both the victims did not report a complaint of rape to her. Instead, the victims appeared to be in a

²⁰ Section 15(1) of the Sexual Offences Act provides that statutory rape is committed if— (a) an adult or a child who is 16 years or older engages in consensual sexual penetration with an adolescent.

jovial mood before leaving. In case *number ten (10)*, the police took a withdrawal statement from the victim without instruction from the prosecutor and were not mindful that this is a statutory rape case, even if the victim cited consensual sex with the suspect. The police note that the victim is ‘rude’ and ‘does not want this thing’. Here, the prosecutor gave directives that the victim be taken to counselling and ‘maybe her rudeness could be attributed to trauma/frustration?’. The prosecutor further instructs the police to investigate and obtain a ‘full statement from friends’, including a ‘full scene statement’ and questions ‘who is the first report’.

Further, the prosecutor instructs the police, depending on why the victim is uncooperative, that the state (police) may require a warning statement from the suspect for investigative purposes. However, ‘only once the victim’s full statement is taken’. The police note that the victim was contacted, and ‘she said she don’t want this case’. The complainant is never taken to counselling. The prosecutor does not follow up but declines to prosecute owing to the victim’s lack of cooperation. In case *number thirteen (13)*, the police filed the matter after they spoke to the complainant. The mother of the victim found out that the suspect was her daughter’s boyfriend. The case should not have closed because it amounted to statutory rape. In case *number seventeen (17)*, the prosecutor declined to proceed because the complainant stated that the suspects were unknown and wore masks, and the complainant furthermore reported the incident late. As a result, there is regrettably no possibility of positive linkage using DNA; therefore, ‘identification of suspect would never be unravelled by reliable and credible evidence’. In case *number eighteen (18)*, in a child rape case, the prosecutor withdrew the matter on 05/10/2020 ‘because the victim is ‘incompetent at this stage’ to testify and instructs the police to ensure the victim is seen by a forensic social worker for a competency report in about 12 months, so as to assess where she is in terms of competency’. When the docket was updated about seven (7) months later, a decision was made to file (close) the matter,

and no further action was taken. There is no indication that the victim was taken to a forensic social worker for the said report.

In *case of number nineteen (19)*, the prosecutor instructed retaking the grandmother's statement, who was the complainant. Upon being interviewed, the complainant advised that many mistakes were recorded by the person who wrote the statement. The suspect's DNA is taken because his underwear is found at the crime scene, which contradicts his warning statement. The regional court control prosecutor withdrew charges without giving any reasons, and despite that, the suspect's version is contradicted by evidence of his underwear. The complainant is recorded as unhappy with the decision and advised to file a complaint, which she did. The SPP allocated the matter to another prosecutor who raised concerns about her version, such as why the complainant failed to or did not take Uber to go home (meaning why she did not flee) and why the complainant failed to raise the 'alarm' by screaming or escaping. The matter was withdrawn.

In *case number 20 (twenty)*, the matter was withdrawn as the complainant appeared to grow tired as the matter progressed slowly after many interviews and counselling sessions. The complainant no longer wished to proceed and was advised that the matter was disturbing her schooling. It is noted that she filed a withdrawal statement, but the prosecutor declined to prosecute the matter. 'We cannot proceed with the matter if the complainant no longer wishes' to proceed. This is despite the fact that she is a minor. In *case number twenty-two (22)*, the prosecutor declines because the witnesses are all minors, citing versions that are 'mutually destructive' and 'contradictory'. In *case number twenty-four (24)*, the prosecutor declined because the grandmother of the victim, a minor, withdrew charges because the victim moved to her paternal grandmother in another province. The complainant, on behalf of the victim, alleged that the victim did not want her schooling to be disturbed. The prosecutor notes that

this is a ‘serious case’, and the victim is welcome to contact the I/O if ‘they want to pursue case’. How the family or victim will be made aware of this is unclear.

In *case number twenty-five (25)*, which is a child rape case, rape of a gay person and a gang rape, the prosecutor declines, noting that the state ‘cannot proceed to prosecute the matter if the complainant is no longer interested’ and ‘where suspects are unknown’. This is despite the mother (complainant) saying she managed to find one of the suspects and where the suspect goes to school. The rest of the cases are declined due to miscellaneous reasons such as the complainant withdrawing or the suspect being deceased, and in some cases, no reasons are given at all, or the reasons were generic, such a ‘lack of evidence’ or ‘no prospects of a successful prosecution’.

4.4 ASSOCIATION BETWEEN CASE STATUS AND PREDICTOR VARIABLES

Table 4 below outlines some significant relationships between Case status and predictor variables in all the cases. The results indicate that Case status and specific nolle prosequi reasons are significantly correlated as follows: Complainant withdrew (p-value = 0.004); Prosecuted: convicted (p-value = 0.002); Prosecuted: convicted on a lesser charge (p-value = 0.004) and Prosecuted: not guilty (p-value = 0.010). No significant association exists between Case status and any legal variables or category one extra-legal variables. There is a significant association between Case status and several category two extra-legal variables such as Verbal assault (p-value = 0.010), Weapon (p-value = 0.005) and Resistance (p-value = 0.046). There is only one significant association between Case status and a category three variable: Arrest (p-value = <0.001).

Table 4: Association between case status and predictor variables

Variables	Level	Case status		P-value
Case Status		No	Yes	
Nolle Cases				
	No	24	25	

Nolle: no reason	Yes	1	0	0.999
	No	24	25	
Nolle: complainant lied	Yes	1	0	0.999
	No	22	25	
Nolle: complainant uncooperative	Yes	3	0	0.235
	No	23	25	
Nolle: complainant incompetent	Yes	2	0	0.490
	No	24	25	
Nolle: complainant untraceable	Yes	1	0	0.999
	No	23	25	
Nolle: suspect untraceable	Yes	2	0	0.490
	No	23	25	
Nolle: suspect deceased	Yes	2	0	0.490
	No	21	25	
Nolle: withdrawn after an interview with the complainant	Yes	4	0	0.110
	No	24	25	
Nolle: withdrawn after initially proceeding	Yes	1	0	0.999
	No	17	25	
Nolle: complainant withdrew	Yes	8	0	0.004
	No	24	24	
Nolle: complainant contradicted	Yes	1	0	0.999
Prosecuted Cases				
	No	25	16	
Prosecuted: convicted	Yes	0	9	0.002
	No	25	17	
Prosecuted: convicted on a lesser charge	Yes	0	8	0.004
	No	25	18	
Prosecuted: not guilty	Yes	0	7	0.010
	No	24	25	
Prosecuted: suspect deceased	Yes	0	1	0.999
Legal variables				
	No	1	1	
Penetration	Yes	24	24	0.999
	No	0	3	
No Consent	Yes	25	22	0.235
	No	24	22	
Coercion	Yes	1	3	0.609
Extra-legal variables				
	No	22	20	
Strangers	Yes	3	5	0.999
	No	3	5	
Acquaintances	Yes	22	20	0.702
	No	23	21	
Victim educated	Yes	2	4	0.667
	No	25	24	
Victim employed	Yes	0	1	0.999
	No	19	14	
Physical assault	Yes	6	11	0.232
	No	19	9	
Verbal assault	Yes	17	5	0.010
	No	22	12	
Weapon	Yes	3	13	0.005
	No	16	8	
Resistance	Yes	9	17	0.046
	No	23	23	
Victim passed out	Yes	2	2	0.999
	No	22	17	

Victim fled	Yes	3	8	0.171
	No	20	24	
Alcohol	Yes	5	1	0.189
	No	21	25	
Substance	Yes	4	0	0.110
	No	12	8	
Immediate report	Yes	13	17	0.387
	No	16	1	
Arrest	Yes	9	24	<0.001
	No	3	1	
Positive Id	Yes	22	24	0.609
	No	22	22	
Prior Sex	Yes	3	3	0.999
	No			

4.4.1 ASSOCIATION BETWEEN CASE STATUS AND PREDICTOR VARIABLES: PROSECUTED CASES

Table 5 below explicitly shows an association between case status and predictor variables in prosecuted cases. The correlation in specific nolle prosequi reasons are significantly correlated as follows: Prosecuted: convicted (p-value = 0.002), Prosecuted: convicted on a lesser charge (p-value = 0.004) and Prosecuted: not guilty (p-value = 0.010). Correlation between Case status and legal variables is also significant: Penetration (p-value = <0.001) and No consent (p-value = <0.001). There is less significance between Case status and Coercion (p-value = 0.235). There is also a significant association in category two extra-legal variables, Physical assault (p-value = <0.001); Verbal assault (p-value = <0.001), Weapon (p-value = <0.001); Resistance (p-value = <0.001) and Positive ID (p-value = <0.001). Regarding category three extra-legal variables, the association is seen in Acquaintances (p-value = <0.001), unlike in Stranger (p-value = 0.050) in comparison. There is an association between Case status and Victim fled (p-value = 0.004), Immediate report (p-value = <0.001), and Arrest (p-value = <0.001), but there is no significance between Case status and Alcohol (p-value = 0.999) and Substance (p-value = 0.110) in prosecuted case.

Table 5: Association between case status and predictor variables in prosecuted cases

Variables	Level	Case Status		P-value
Case status		No	Yes	
		1	0	

Prosecuted Cases				
Prosecuted: convicted	No	25	16	0.002
	Yes	0	9	
Prosecuted: convicted on a lesser charge	No	25	17	0.004
	Yes	0	8	
Prosecuted: not guilty	No	25	18	0.010
	Yes	0	7	
Legal Variables				
Penetration	No	25	1	<0.001
	Yes	0	24	
No Consent	No	25	3	<0.001
	Yes	0	22	
Coercion	No	25	22	0.235
	Yes	3	0	
Extra-legal variables				
Strangers	No	25	20	0.050
	Yes	0	5	
Acquaintances	No	25	20	<0.001
	Yes	0	20	
Victim employed	No	25	24	<0.999
	Yes	0	1	
Victim educated	No	25	21	0.110
	Yes	0	4	
Physical assault	No	25	14	<0.001
	Yes	0	11	
Verbal assault	No	25	9	<0.001
	Yes	0	16	
Weapon	No	25	12	<0.001
	Yes	0	13	
Resistance	No	25	8	<0.001
	Yes	0	17	
Victim passed out	No	25	23	0.490
	Yes	0	2	
Victim fled	No	25	17	0.004
	Yes	0	8	
Alcohol	No	25	24	0.999
	Yes	0	1	
Substance	No	...	...	0.110
	Yes	...	...	
Immediate report	No	25	8	<0.001
	Yes	0	17	
Arrest	No	21	1	<0.001
	Yes	0	24	
Positive id	No	25	1	<0.001
	Yes	0	24	
Prior sex	No	25	22	0.235
	Yes	0	3	

4.4.2 ASSOCIATION BETWEEN CASE STATUS AND PREDICTOR VARIABLES: NOLLE CASES

Table 5 below explicitly shows an association between case status and predictor variables in nolle cases. It shows no association between Case status and nolle case reasons besides nolle: Complainant withdrew (p-value = 0.004). Similar to the results in Table 5 above, the correlation

between Case status and legal variables is also significant: Penetration (p-value = <0.001) and No consent (p-value = <0.001), and there is no significance between Case status and Coercion (p-value = 0.999). There is also a significant association in Category two extra-legal variables, Physical assault (p-value = 0.022), Verbal assault (p-value = 0.022) like in prosecuted cases indicated above. Physical assault (p-value = <0.001) and Verbal assault (p-value = <0.001), which is more significant. There is no association between Case status and Weapon (p-value = 0.235) in nolle cases compared to the association between Weapon (p-value = <0.001) and Case status. Resistance (p-value = 0.002) is significant, as well as Positive id (p-value = <0.001). Regarding category three extra-legal variables, the association is seen in Acquaintances (p-value = <0.001), unlike in Stranger (p-value = 0.235), which is consistent with the outcome in prosecuted cases noted in Table 5 above. There is no association between Case status and Victim fled (p-value = 0.235) unlike the association noted in Case status and Victim fled in prosecuted cases. Immediate report (p-value = <0.001) and Arrest (p-value = 0.002) are statistically associated, but there is no significance between Case status and Alcohol (0.050), although higher than the outcome between Case status in prosecuted cases and Substance is equally noted (0.110). Table 7 below shows a comparison of Tables 5 and 6.

Table 6: Association between case status and predictor variables: nolle cases

Variables	Level	Case status		P-value
Case status		No	Yes	
Nolle cases				
Nolle: no reason	No	24	25	0.999
	Yes	1	0	
Nolle: complainant lied	No	24	25	0.999
	Yes	1	0	
Nolle: complainant uncooperative	No	22	25	0.235
	Yes	3	0	
Nolle: complainant incompetent	No	23	25	0.490
	Yes	2	0	
Nolle: complainant untraceable	No	24	25	0.999
	Yes	1	0	
Nolle: suspect untraceable	No	23	25	0.490
	Yes	2	0	
Nolle: suspect deceased	No	23	25	0.490
	Yes	2	0	

Nolle: withdrawn after an interview with the complainant	No	21	25	0.110
	Yes	4	0	
Nolle: withdrawn after initially proceeding	No	24	25	0.999
	Yes	1	0	
Nolle: complainant withdrew	No	17	25	0.004
	Yes	8	0	
Nolle: complainant contradicted	No	24	25	0.999
	Yes	1	0	
Legal Variables				
Penetration	No	1	25	<0.001
	Yes	24	0	
No Consent	No	0	25	<0.001
	Yes	25	0	
Coercion	No	24	25	0.999
	Yes	1	0	
Extra-legal variables				
Strangers	No	22	25	0.235
	Yes	3	0	
Acquaintances	No	3	25	<0.001
	Yes	22	0	
Victim employed	No	...	...	...
	Yes	...	...	
Victim educated	No	23	25	0.490
	Yes	2	0	
Physical assault	No	19	25	0.022
	Yes	6	0	
Verbal assault	No	19	25	0.022
	Yes	6	0	
Weapon	No	22	25	0.235
	Yes	3	0	
Resistance	No	16	25	0.002
	Yes	9	0	
Victim passed out	No	23	25	0.490
	Yes	2	0	
Victim fled	No	0	25	0.235
	Yes	25	0	
Alcohol	No	20	24	0.050
	Yes	5	1	
Substance	No	21	25	0.110
	Yes	4	0	
Immediate report	No	12	25	<0.001
	Yes	13	0	
Arrest	No	16	25	0.002
	Yes	9	0	
Positive id	No	3	25	<0.001
	Yes	22	0	
Prior sex	No	22	25	0.235
	Yes	3	0	

Table 7: Comparison of the association between case status and predictor variables in prosecuted and nolle cases

Characteristics	Level	Case status: <u>Prosecuted</u>	P-value	Case status: <u>Nolle</u>	P-value
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		No	Yes		No	Yes	
Penetration	No	25	1	<0.001	1	25	<0.001
	Yes	0	24		24	0	
No consent	No	25	3	<0.001	0	25	<0.001
	Yes	0	22		25	0	
Coercion	No	25	22	0.235	24	25	0.999
	Yes	0	3		1	0	
Strangers	No	25	20	0.050	22	25	0.235
	Yes	0	5		3	0	
Acquaintances	No	25	5	<0.001	3	25	<0.001
	Yes	0	20		22	0	
Victim educated	No	25	21	0.110	21	25...	0.490
	Yes	0	4		4	0	
Victim employed	No	25	25	0.999	...	...	...
	Yes	0	1		...	...	
Physical assault	No	25	14	<0.001	19	25	0.022
	Yes	0	11		6	0	
Verbal assault	No	25	9	<0.001	19	25	0.022
	Yes	0	16		6	0	
Weapon	No	25	12	<0.001	22	25	0.235
	Yes	0	13		3	0	
Resistance	No	25	8	<0.001	16	25	0.002
	Yes	0	17		9	0	
Victim passed out	No	25	23	0.490	23	25	0.490
	Yes	0	2		2	0	
Victim fled	No	25	17	0.004	22	25	0.235
	Yes	0	8		3	0	
Alcohol	No	25	24	0.999	20	25	0.050
	Yes	0	1		5	0	
Substance	No	...	...	...	21	25	0.110
	Yes	...	...		4	0	
Immediate report	No	25	8	<0.001	12	25	0.999
	Yes	0	17		13	0	
Arrest	No	25	1	<0.001	163	25	0.002
	Yes	0	24		9	0	
Positive id	No	1	0	<0.001	3	250	0.999
	Yes	0	24		22	08	
Prior sex	No	25	22	0.235	22	25	0.235
	Yes	0	3		3	0	

4.5 ASSOCIATION (NOLLE CASES)

Table 8 shows an association between legal and extra-legal variables and other variables such as Nolle: withdrawn after an interview, Nolle: withdrawn by complainant and Nolle: complainant uncooperative. Of the legal variables, there is significance between variables: Penetration and Withdrawn after an interview. Including Penetration and Withdrawn by complainant but no significance between Penetration and Complainant uncooperative. There is also significance between No consent and Withdrawn by complainant. A comparison of the variables Strangers and Acquaintances reveals that only Acquaintances is associated with

Withdrawn by complainant. Verbal assault, Resistance, Alcohol, Arrested, Positive id and Prior sex are associated with Withdrawn by Complainant and Complainant uncooperative. All these reveal a p-value of less than 0.5, which indicates a statistically significant association. These nolle variables are chosen because of the higher percentile among other nolle variables.

Table 8: Association (nolle cases reasons) variables with legal and extra-legal variables

Characteristics	Level	Withdrawn after interview		p-value	Withdrawn by complainant		p-value	Complainant uncooperative		p-value
		No	Yes		No	Yes		No	Yes	
Penetration	No	26	0	0.046	26	0	0.001	26	0	0.103
	Yes	20	4		16	8		21	3	
No consent	No	25	0	0.111	25...	0...	0.004	25...	0...	0.235
	Yes	21	4		17...	8...		22...	3...	
Coercion	No	45	4	0.999	41	8	0.999	47	2	0.60
	Yes	1	0		1	0		0	1	
Strangers	No	44	3	0.226	39	8	0.999	44	3	0.999
	Yes	2	1		3	0		3	0	
Acquaintances	No	27	1	0.308	28	0	0.001	28	0	0.079
	Yes	19	3		14	8		19	3	
Victim educated	No	44	4	0.999	42	6	0.023	45	3	0.999
	Yes	2	0		0	2		2	0	
Victim employed	No	...	...	...	...	...	...	...	...	...
	Yes	...	...		...	...		...	...	
Physical assault	No	41	3	0.411	38	6	0.242	38	6	0.242
	Yes	1	1		4	2		4	2	
Verbal assault	No	40	4	0.999	39	5	0.044	39	5	0.044
	Yes	6	0		3	3		3	3	
Weapon	No	40	3	0.226	39	8	0.999	39	8	0.999
	Yes	2	1		3	0		3	0	
Resistance	No	39	2	0.114	37	4	0.026	37	4	0.026
	Yes	7	2		5	4		5	4	
Victim passed out	No	44	4	0.999	41	7	0.297	41	7	0.297
	Yes	2	0		1	1		1	1	
Victim fled	No	43	4	0.999	41	6	0.063	41	6	0.063
	Yes	3	0		1	2		1	2	
Alcohol	No	41	4	0.999	40	5	0.024	40	5	0.024
	Yes	5	0		2	3		2	3	
Substance	No	42	4	0.999	39	7	0.514	39	7	0.514
	Yes	4	0		3	1		(3)	1	
Immediate report	No	35	2	0.275	33	4	0.181	33	4	0.181
	Yes	11	2		9	4		9	4	
Arrest	No	37	4	0.999	37	4	0.026	37	4	0.026
	Yes	9	0		5	4		5	4	
Positive id	No	27	1	0.308	28	0	0.001	28	0	0.001
	Yes	19	3		14	8		14	8	
Prior sex	No	43	4	0.999	42	5	0.003	42	5	0.003
	Y	3	0		0	3		0	3	

4.6 ASSOCIATION (PROSECUTED CASES)

Table 9 shows an association between legal extra-legal variables and other variables such as Prosecuted: convicted; Prosecuted: convicted on a lesser charge; and Prosecuted: not guilty. Of the legal variables, there is significance between Penetration and No consent with Prosecuted: convicted; Prosecuted: convicted on a lesser charge and Prosecuted: no guilty but no significance between Coercion and Prosecuted: Convicted; Prosecuted: convicted on a lesser charge and Prosecuted: not guilty. A comparison between Strangers and Acquaintances reveals that Strangers is only associated with Prosecuted: convicted on a lesser charge, and Acquaintances is associated with Prosecuted: convicted and Prosecuted: not guilty. Physical assault is associated with Prosecuted: convicted, and Verbal assault with Prosecuted: not guilty. Resistance is associated with Prosecuted: convicted and Prosecuted: convicted on a lesser charge. The following variables: Victim passed out, and Victim fled, are associated with Prosecuted: convicted. Alcohol and Substance are not associated with any, while Immediate report is associated with Prosecuted: convicted and Prosecuted: convicted on a lesser charge. Arrested and Positive id are associated with Prosecuted: convicted; Prosecuted: convicted on a lesser charge; Prosecuted: not guilty; Prior sex associates with none. All these reveal a p-value of less than 0.5, which indicates a statistically significant association. These variables were chosen because of the higher percentile among other variables under Prosecuted.

Table 9: Association (prosecuted cases reasons) variables with legal and extra-legal variables

Characteristics	Level	Prosecuted: convicted		P- value	Prosecuted: Convicted on Lesser charge		P- value	Prosecuted: not guilty		P- value
		No	Yes		No	Yes		No	Yes	
Penetration	No	26	0	0.001	25	1	0.021	26	0	0.003
	Yes	15	9		17	7		17	7	
No consent	No	26	2	0.032	27	1	0.015	28	0	0.002
	Yes	15	7		15	7		15	7	
Coercion	No	39	8	0.456	41	6	0.063	40	7	0.999
	Yes	2	1		1	6		3	0	
	No	37	8		40	5		39	6	

Strangers	Yes	4	1	0.999	2	3	0.024	4	1	0.546
Acquaintances	No	29	1	0.002	27	3	0.240	29	1	0.012
	Yes	12	8		15	5		14	6	
Victim educated	No	40	6	0.016	38	8	0.999	40	6	0.464
	Yes	1	3		4	0		3	1	
Victim employed	No	40	9	0.999	42	7	0.160	42	7	0.999
	Yes	1	0		0	1		1	0	
Physical assault	No	36	3	0.002	34	5	0.351	33	6	0.999
	Yes	5	6		8	3		10	1	
Verbal assault	No	30	4	0.124	31	3	0.092	32	2	0.027
	Yes	11	5		11	5		11	5	
Weapon	No	32	5	0.214	33	4	0.181	34	3	0.065
	Yes	9	4		9	4		9	4	
Resistance	No	31	2	0.004	31	2	0.013	30	3	0.210
	Yes	10	7		11	6		13	4	
Victim passed out	No	41	7	0.029	40	8	0.999	41	7	0.999
	Yes	0	2		2	0		2	0	
Victim fled	No	37	5	0.026	36	6	0.598	36	6	0.999
	Yes	4	4		6	2		7	1	
Alcohol	No	40	9	0.999	41	8	0.999	43	6	0.140
	Yes	1	0		1	0		0	1	
Substance	No	...	...	...	...	...		...	...	...
	Yes	...	...		...	...		...	...	
Immediate report	No	31	2	0.004	31	2	0.013	29		0.677
	Yes	10	7		11	6		14	3	
Arrest	No	26	0	0.001	26	0	0.001	25	1	0.045
	Yes	15	9		16	8		18	6	
Positive id	No	26	0	0.001	26	0	0.001	25	1	0.045
	Yes	15	9		16	8		18	6	
Prior sex	No	38	9	0.999	40	7	0.414	41	6	0.370
	Yes	3	0		2	1		2	1	

4.7 FACTORS ASSOCIATED WITH CASE OUTCOMES

As stated, the most appropriate analytical technique for a dichotomous dependent variable is a logistic regression analysis. Therefore, a logistic regression is used to determine the impact of the independent variables on the predictability of case outcomes (case status). Table 10 below shows results based on the Poisson Regression, a Generalized Linear Model. When the Incidence Rate Ratio (IRR) is below (1.00), it contributes towards nolle outcomes, and being above (1.00) contributes towards prosecuted cases. No consent is statistically significant to the case status (p-value = <0.999), but the IRR of this variable (IRR = 0.47) shows that it does not contribute to prosecuted cases. Unlike the outcome for Victim employed (IRR = 2.04), which is four times higher than No consent, thus contributing to prosecuted cases. This is despite the significant association of both variables to case status. The other significantly associated

variables linked to case outcomes in terms of p-values less than (0.150) include the variables Physical assault (p-value = 0.112), Verbal assault (p-value = 0.008); Weapon (p-value = 0.002); Resistance (p-value = 0.038); Victim fled (p-value = 0.051); Substance (p-value = <0.999) and Arrest (p-value = 0.011). All these variables have an IRR of more than (1.00), thus contributing towards prosecuted cases, excluding Substance (IRR = 0.00), contributing to nolle cases instead.

The adjusted IRR shows the final results. Variables tested under adjusted IRR includes No consent (p-value = 0.017); Victim employed (p-value = 0.264); Physical assault (p-value = 0.761) Verbal assault (p-value = 0.782); Weapon (p-value = 0.086); Resistance (p-value = 0.331); Victim fled (p-value = 0.028); Substance (p-value = <0.999); Arrest (p-value = 0.036). The only significantly associated variables to case status in terms of the p-value include: No consent (p-value = 0.017); Victim fled (p-value = 0.028); Substance (p-value = <0.999); Arrest (p-value = 0.036). The IRR shows factors that are associated with the outcome of cases. No consent (IRR = 0.55), and Substance (IRR = 0.14) and Physical Assault (IRR = 0.94) are the factors that contribute to nolle case outcomes in terms of the IRR. Victim employed (IRR = 0.126); Verbal assault (IRR = 1.06); Weapon (IRR=1.51); Resistance (IRR = 1.23); Victim fled (IRR = 1.38); Arrest (IRR = 7.86) are the factors that contribute to prosecuted of cases.

Table 10: Poisson Regression model: Factors Associated with Case Status

Characteristics	Unadjusted IRR (95% CI)	P-value	Adjusted IRR (95% CI)	P-value
Penetration	1.00 (0.24 - 4.17)	0.999	...	...
No consent	0.47 (0.34 - 0.64)	<0.001	0.55 (0.34-0.90)	0.017
Coercion	1.57 (0.82 - 3.00)	0.173	...	...
Strangers	1.17 (0.57 - 2.40)	0.668	...	...
Acquaintances	0.85 (0.42 - 1.75)	0.668	...	...
Victim educated	1.40 (0.72 - 3.00)	0.315	...	...
Victim employed	2.04 (1.52 - 3.00)	<0.001	1.26 (0.84-1.89)	0.264
Physical assault	1.52 (1.00 - 3.00)	0.112	0.94 (0.65-1.36)	0.761
Verbal assault	2. 26 (1.23 - 4.13)	0.008	1.06 (0.70-1.63)	0.782
Weapon	2.30 (1.37 - 4.00)	0.002	1.51 (0.94-2.42)	0.086

Resistance	2.00 (1.03 - 4.00)	0.038	1.23 (0.80-2.00)	0.331
Victim passed out	1.00 (0.35 - 3.00)	0.999	...	...
Victim fled	2.00 (0.99 - 3.00)	0.051	1.38 (1.03-1.84)	0.028
Alcohol	0.30 (0.04 - 2.00)	0.204	...	...
Substance	0.00 (0.00- 0.00)	<0.001	0.14 (3.79-6.00)	<0.001
Immediate report	1.41(1.00 - 3.00)	0.277	...	...
Arrest	12.36 (2.00 - 85.37)	0.011	7.86 (1.14-53.9)	0.036
Positive id	2.08 (0.36 – 12.00)	0.407	...	...
Prior sex	1.00 (0.42 – 2.36)	0.999	...	...

5. CONCLUSION

This chapter described the chosen method, the study sample and the results. In summary, the study used a sample of randomly selected rape case dockets from the Umlazi Police Station. It focused strictly on prosecutors and their decisions recorded in closed case dockets. The study uses quantitative and qualitative data collection and analysis methods and employs descriptive statistics, regression analysis, and logistic regression to analyse the data. This chapter also described the three primary hypotheses to be tested, including the relationship between victim-defendant relationship and prosecutor decision-making in nolle cases. The results from the case dockets reveal reasons for nolle prosequi cases, the characteristics of prosecuted cases, and patterns in case rejection. The results in this chapter will enable the examination of the impact of legal and extra-legal variables on case outcomes.

The following chapter discusses the results outlined in this chapter.

CHAPTER 4: ANALYSIS OF DATA AND CLAIMS

1. INTRODUCTION

This chapter is divided into two sections. The first section is an analysis of the data based on the results outlined in the previous chapter. The second section of this chapter outlines the authors' claims/arguments based on the analysis outlined in the first section of this chapter. This approach is adopted for the sake of coherence. Having said that, the main purpose of this chapter is to discuss the relationship between the dependent variables and the legal and extra-legal variables based on the results outlined in the previous chapter. The dependent variable is case status, either a *nolle prosequi* decision or the decision to proceed under varying circumstances. It should be kept in mind that the aim of testing these variables is to test hypotheses that the decision to decline prosecution in cases of rape is mainly based on (1) the victim-perpetrator relationship; (2) a victim's character; and (3) other extra-judicial factors as alluded to above. The other aim is to test existing theories that rape decisions are based on (a) extra-legal variables as posited by feminist critical theorists; (b) that prosecutors concern themselves with the downstream orientation when deciding cases, and (c) rape is ecologically bound which may explain the reason behind law reform failure. For these reasons, this chapter will first discuss the common themes from the overall dataset, the relationship between the dependent and legal variables, and the extra-legal variables. Thereafter, the author outlines their claims as indicated just above. The discussions herein are approached from a feminist jurisprudence lens.

2. EMERGING THEMES

2.1 CHILD RAPE

The prevalence of child rape is the first glaring theme of this dataset. An analysis of the quantitative results reveals that child rape cases are the most prevalent, representing 62% of all

the cases. This result is consistent with prior studies that show that children continue to be disproportionately impacted by rape.¹ A comparison with the most comprehensive report on rape justice in South Africa (the MRC report) revealed similarities. The MRC report found that of the 295 cases (minors 0-11), 148 were withdrawn after enrolment, and 147 went to trial.² And of those — 3.9% of the victims disappeared.³ It is noticeable that it is unclear how a child can disappear. In this study, one child victim could not be traced, no reasons were proffered, and no effort was made to trace said victim. The MRC report also highlighted that 2.6% of the families reported “resolving” the matters.⁴ Such “resolutions” should not be legally permissible. It may be prudent to develop failure-to-protect laws since they are equally impermissible — 4.6% of the guardians refused to cooperate.⁵ Failure-to-protect laws refer to laws that prohibit the failure of a guardian to take reasonable steps to protect and report child abuse. The reasons to decline such cases are also linked to the disappearance of victims or amicable resolution between the perpetrator and the family of the victim or the guardian’s

¹ J Gallinetti & D Kassan ‘Children and Sexual Offences’ in L Artz & D Smythe (eds) *Should we consent* (2008) 144. Also see, A Heath, L Artz, M Odayan & H Gihwala ‘Improving Case Outcomes for Sexual Offences Cases Project: Pilot Study on Sexual Offences Courts. Cape Town, South Africa’ 2018 *Gender Health and Justice Research Unit* 12 11. Heath et al found that, on average, the cases involving children ‘constituted about 80-85% of the total caseload of the courts in the baseline study’.

² M Machisa, R Jina, G Labuschagne, L Vetten, L Loots, S Swemmer, B Meyersfeld & R Jewkes ‘Rape Justice in South Africa: A Retrospective Study of the Investigation, Prosecution and Adjudication of Reported Rape Cases From 2012’ (2017) *Gender and Health Research Unit, South African Medical Research Council* 90 (hereafter referred to as ‘MRC report’ or Machisa et al).

³ Ibid 85.

⁴ Ibid.

⁵ Ibid 91.

unwillingness to cooperate.⁶

It stands out that guardians of victims registered as complaints refused to cooperate in both studies (the MRC report and this study).⁷ Guardians referred to here are biological parents or grandparents responsible for child victims, for example. Indeed, recent studies have shown that a significant percentage of rape cases involving acquaintances involve children whose guardians had failed to provide adequate protection. The data from this project reveals that acquaintances committed several child rape cases — either by a relative, such as an uncle or by their biological fathers. On the one hand, the family links may explain why several families resolved the matters and why some guardians were utterly unwilling to co-operate, as indicated in both studies.⁸ On the other hand, this does not explain such unlawful conduct; failing to provide a safe and nurturing environment so children can grow and develop without fear of harm is unlawful.

There are feminist explanations for this link between the guardians and rape by acquaintances. Houston, for instance, posits that wives in the traditional family setting are merely ‘limited rights holders’ compared to their husbands and, by virtue, unable ‘to appeal directly to the state to have their rights enforced’ because such women’s rights are ‘diminished’ by the system.⁹ According to Millett, the family unit is merely ‘a patriarchal unit within a patriarchal whole system’.¹⁰ Feminist theorists take this further in relation to child rape,

⁶ Ibid. The MRC report also showed that in minors aged between (12-17 years): 403 cases were noted and of those, 160 were withdrawn after enrolment — 4.4% of the victims disappeared — 3.4% of the victim and perpetrator resolved the matter — 5.1% of families resolved the matter — 2.5% unwilling to co-operate — 1.1% of the guardians were unwilling to co-operate.

⁷ Ibid 85.

⁸ K Millett *Sexual Politics* (1970) 33.

⁹ C Houston ‘How feminist theory became (criminal) law: Tracing the path to mandatory criminal intervention in domestic violence cases’ (2014) 21 *Mich. J. Gender & L* 217, 239.

¹⁰ Millett (note 8 above) 33.

suggesting that male dominance over women and children in the family unit may also explain the problem of incest.¹¹ Weaver notes, ‘earlier theories of culpability on incest placed blame on the daughter as a seducer and on the mother as being in collusion based on her failure to protect the daughter and assumed abandonment of wifely duties’.¹² The author also reminds us of the history of gaslighting mothers by a patriarchal system.¹³ Weaver further points to the connections between state systems and critical state actors, such as the police and prosecutors, which underscore the abovementioned issues.¹⁴ MacKinnon belies liberal strategies that entrust women’s safety to the state are sufficient.¹⁵ She insists that the law sees and treats women the way men treat and see women in general.

2.1.2 PROSECUTORIAL DECISIONS AND CHILD CASES

As mentioned, studies that have been conducted do not focus on prosecutors and their decisions. The qualitative findings of this study reveal that prosecutors declined to prosecute due to reasons such as the complainants (parents/guardian of the victim) withdrawing the

¹¹ M Ashe & NR Cahn ‘Child abuse: A problem for feminist theory’ in E Driver & A Droisen (eds) *The public nature of private violence* (2013) 174. Feminist legal theory has been utilised to analyse the act of sexual abuse of female children - dominance theory, cultural theory, critical race theory, and even postmodern theory.

¹² JD Weaver ‘Close Encounters: A Feminist Legal Theory Analysis of the State Treatment of Female Child Sexual Abuse Victims’ (2017) *SMU Dedman School of Law Legal Studies Research Paper*, (362), 7.

¹³ Ibid 7. Weaver puts it as follows: ‘... a mothers’ report of child sexual abuse of their female children was treated by doctors in the mid-nineteenth century through the 1940’s is replete with incredulous actions by a male-dominated medical industry, ignoring the problem and delegitimise mothers’ knowledge about the body, sex and her child.’

¹⁴ Weaver (note 12 above) 7.

¹⁵ CA MacKinnon ‘Feminism, Marxism, method, and the state: Toward feminist jurisprudence’ *Signs: Journal of women in culture and society* (1983) 8(4) 635, 643.

complaint on behalf of the victims. The reasons for withdrawal varied, including that child victims preferred to move on with their lives because the process had become too tedious and was disturbing their schooling. Others gave no reasons, while others indicated having moved far away to a different province, for example, and in other cases, there was an evident lack of cooperation. There was a lack of cooperation by the complainant (parent/guardian of child victims), including the failure to bring the child victim for an interview with the prosecutor, which interview is mandatory in terms of the National Prosecuting Authority Policy.¹⁶

Notwithstanding, it is contradictory that the law imposes a duty to report sexual offences against children and failure of which could lead to criminal sanctions, but the same law does not impose any duty on parents/guardians to cooperate with state authorities in such cases.¹⁷ The author regards this as a limitation in the law that requires amending. Generally, mandatory reporting laws place a duty on members of particular occupations of the state, according to Bekink.¹⁸ The author goes on to explain that the Children's Act, as amended, also provides for the mandatory reporting of child maltreatment in that it compels certain designated persons to report any suspected child abuse or deliberate neglect to the relevant authorities.¹⁹ These laws were enacted because the Constitution guarantees every child the right 'to be

¹⁶ NPA 2014 <http://www.npa.gov.za/ReadContent504.aspx> 5 (hereafter referred to as NPA policy).

¹⁷ Section 54 of the Sexual Offences Act. Section 54 provides that: 'a person who has knowledge of sexual offences directed against children must report such knowledge immediately to a police official. A person who fails to report such knowledge is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding five years or both.'

¹⁸ M Bekink 'Reversing the 'syndrome of secrecy': Peremptory reporting obligations in cases of child abuse and neglect' *SA Crime Quarterly* (2021) (70) 1-13. Section 110 of the Children's Act, as amended, provides for the mandatory reporting of child maltreatment in that it compels certain designated persons to report any suspected child abuse or deliberate neglect to the relevant authorities.

¹⁹ Section 110 of the Children's Act.

protected from maltreatment, neglect, abuse or degradation’.²⁰ The author aligns with this sentiment that questions whether the reporting rules should be amended to serve their purpose more adequately. The author’s views, however, are slightly narrower. As a preliminary assessment, the author believes that attrition occurs in child rape cases because legislation imposes a duty to report child rapes but does not penalise parents or guardians who refuse to cooperate. In the author’s opinion, guardians who act unlawfully must bear consequences.

The dataset here reveals that in three (3) cases out of fifty (50) cases, the parent or guardian of the child rape victim did not bring the child victim for consultation. In one of these cases, for example, a matter was escalated to the senior public prosecutor (SPP), who declined to prosecute because the mother did not bring the minor victim to scheduled consultations on four (4) occasions. It implies that the matter may have been severe, even prosecutable. Hence, the prosecutor escalated the matter to the supervisor instead of declining outright. Equally concerning, as stated above, there are no legal sanctions against such parents/guardians who conduct themselves this way. The author is mindful that failure-to-protect laws have a disparate impact on women. This is so because ‘men are more frequently active abusers and women often cannot protect themselves or their children from a male partner's abuse or degradation’.²¹ The problem here appears circular, which becomes more apparent in the following section.

²⁰ Section 28(1)(d) of the Constitution.

²¹ E Stark ‘A Failure to Protect: Unravelling the Battered Mother's Dilemma’ (1999) 27 *W. St. UL Rev* 29; JA Smith ‘Battered non-wives and unequal protection-order coverage: A call for reform’ (2005) 23 *Yale L. & Pol’y Rev* 93; M Stanziani & J Cox ‘The failure of all mothers or the mother of all failures? Juror perceptions of failure to protect laws’ (2021) *Journal of interpersonal violence* 36(1-2); F Kaganas & C Murray ‘Law and women's rights in South Africa: an overview’ (1994) *Acta Juridica* 1; FA Fugate ‘Who's Failing Whom-A Critical Look at Failure-to-Protect Laws’ (2001) 76 *NYUL Rev* 272, 275.

2.1.3 DISCRIMINATORY VIEWS

In contrast to the cases mentioned above, four (4) of the child rape cases were withdrawn by the prosecutor following an interview with child complainants, which begs the question: Why was this the case? It stood out that two cases were rejected because the ‘victim was too young/incompetent’. In one such interview, the prosecutor was of the view that the victim was merely too incompetent to testify as a credible witness due to their age. It must be kept in mind that the assessment of a single witness's credibility is determined by applying the cautionary rule and evidence of the witness's character, which are inherently discriminatory. The author outlines this in greater detail under the claims sections below, but for context, the origins of these rules lie in the practice of warning the court against ‘facile acceptance’ of evidence by certain witnesses such as rape complainants and children.²² However, the point made is that it is a rule that continues to be strictly applied, especially in child rape cases.²³ For example, the court in *Sphanda v State* approached the evidence of the child strictly, stating the following

The cautionary rule relating to the evidence of children entails that the presiding officer should fully appreciate the dangers of accepting the evidence of children. In terms of the cautionary rule, the court should not easily convict unless the evidence of the child has been treated with due caution. Where the child witness is also the sole witness, the evidence should be regarded with more caution. In dealing with the evidence of children, our courts have developed a cautionary rule which should be applied to such evidence. *Consequently, the court will seek corroboration, even though corroboration of a child's evidence is not required by law.* Where the child's evidence is not corroborated, it must be scrutinised with great care and accepted with great caution. The rationale for this approach was followed

²² Schwikkard & van der Merwe *Principles of Evidence* (2015) 588; F Viljoen ‘Removing Insult from Injury: Reviewing the Cautionary Rule in Rape Trials’ 1992 *JS Afr. L* 743, 744. Viljoen cited *State v D* 1951 4 SA 450 (A) 455G) 744. ‘Such a cautionary rule also applies to the testimony of accomplices, agents provocateurs, children, prostitutes and the complainants in sexual offences, whether they are single witnesses or not.’

²³ *Sphanda v State* [2021] ZAGPPHC 186 para 20 (hereinafter referred to as “*Sphanda case*”).

in *R v Manda*, where the court emphasised that the dangers inherent in relying on the uncorroborated evidence of a young child should not be underrated. The court explained that the danger involved in the evidence of children can be attributed (among other factors) to their "imaginativeness and suggestibility", that require their evidence to be scrutinised with care.²⁴

In another case in this study, the prosecutor declined, noting nothing other than that the victim was 'far too young, easily influenced, disclosure of incident was obtained after a severe beating by mother, as divulged during the interview, identification of the suspect is [also] unknown, and guesswork done by mother leading to the arrest of suspect regrettable'. However, reading the mother's statement, it is clear that the victim named the suspect, who is known to them because he is a neighbour. No regard was given to this.

Here, the prosecutor goes as far as recanting the previous decision to refer the young victim to a social worker. According to the prosecutor, the social worker's intervention will not alleviate the serious legal issues raised in this case. It appears that Frohmann's downstream orientation theory is at play here, which is described as the concern with convictability that creates a 'downstream orientation' in prosecutorial decision-making, that is, anticipation and

²⁴ Ibid. 'In *Mailula* however, the court held the opposite as said that the SCA has, since *Woji*, cautioned against what is now commonly known as the double cautionary rule. It has stated that the double cautionary rule should not be used to disadvantage a child witness on that basis alone. The evidence of a child witness must be considered as a whole, taking into account all the evidence. This means that, at the end of the case, the single child witness's evidence, tested through (in most cases, rigorous) cross-examination, should be 'trustworthy'. *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) para 1028B-D. Note the caution courts are advised to take note of when they consider the reliability of a child witness in rape cases: *Woji* by M Bekink 'Defeating the anomaly of the cautionary rule and children's testimony – *State v Haupt* 2018 (1) SACR 12 (GP). Also see, *Woji v Santam Insurance Co Ltd* case 'the question that the trial Court must ask itself is whether the young witness evidence is trustworthy. Trustworthiness [...] depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter testified.'

consideration of how others (that is, jury and defence) will interpret and respond to a case.²⁵ According to this theory, the presiding officer may regard the victim as an unreliable witness if there is any hint that the victim may have easily been influenced.

The prosecutor also noted that the disclosure of the incident was obtained after a severe beating by the mother, as divulged during the interview. To a presiding officer, this may create further apprehension and raise doubt about whether a rape took place, and therefore a prosecutor may be discouraged from bringing this kind of case to a court of law. However, the author's view is that even if the disclosure was made after a severe beating, that does not imply or indicate that no rape took place, only that a child may have been too scared to inform her mother. Besides, proof of penetration (through a medical examination) should dispel any doubt that rape may not have taken place due to how the incident had been disclosed. It is, therefore, neither here nor there how the incident was disclosed. This would only concern a prosecutor because prosecutors refuse to take what they regard as hopeless cases to court, aware of procedural obstacles.

The prosecutor further indicated that the identification of the suspect is unknown, and guesswork done by the mother, leading to the suspect's arrest, is regrettable. The reading of the docket shows that the suspect's identification here is known. The suspect was a neighbour. However, these procedural obstacles were not only considered by the prosecutor but raised concern, anticipation, and consideration of how others (i.e., jury and defence) will interpret and respond to a case. In another similar case, the prosecutor withdrew the matter due to the victim's incompetence to testify at that stage due to age, and unlike in the other cases mentioned above, the prosecutor here instructed the police to ensure the victim was seen by a forensic

²⁵ L. Frohmann 'Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking' (1997) 3(1) *Law & Society Review* 531, 535.

social worker for a competency report in about 12 months, so as to assess her competency at that stage.

It appears that prosecutors have far too much discretion to assess a victim's mental state, even though prosecutors are untrained to do this. That did not happen, however. There is also no indication that the victim was ever taken to a forensic social worker for the said report. When the docket was updated about seven (7) months later, a decision (by the police) was taken to close the matter instead. What these two cases reveal is the prosecutors' concern with convictability. As a result, they flaunted the duty of care towards victims of this hideous crime, specifically in the latter case, where the case was permanently closed by police without taking instructions from the NPA. Nevertheless, beyond what these two cases reveal and including that child rape cases are prevalent, the dataset does not show that prosecutors concern themselves with characteristics of the victim or suspect, such as age, when exercising their discretion.

2.1.4 SUMMARY OF FINDINGS ON CHILD RAPE

Insomuch as child rape is prevalent, there was no discrimination linked to decisions. Discrimination is one of the primary hypotheses and theories I am testing. The dataset shows that 60% of the nolle cases ($n=25$) were child rape cases, and almost equally, 64% of all prosecuted cases ($n=25$) were child rape cases in total, that would be thirty-one (31) cases out of fifty (50) cases, which accounted for 62% of all cases ($n=50$). Therefore, prosecutors did not discriminate when deciding to prosecute or decline. The dataset debunks the author's hypothesis that there is a significant relationship between the complainant's age and the prosecutor's decision-making in nolle cases. Despite the prevalence of child rape cases, these cases were equally rejected in nolle cases and prosecuted in those cases that were processed. Child rape cases that were primarily processed resulted in a conviction on a lesser charge in

one case. In one of these cases, the prosecutor was concerned that the victim might not attend because the accused was her father despite that it was the second incident of rape that had occurred. It appears that the state was satisfied to secure a conviction on any charge other than rape, even if it were a lesser charge. This finding is similar to the findings of the MRC report that prosecutors concern themselves with conviction rates due to performance targets. It appears that the rape charge are withdrawn. However, the prosecution entered into a plea agreement for assault GBH, and the accused was sentenced to 5 years suspended for 3. A decision to only proceed with the rape charge if DNA results came back vivacious is deficient and not sound in law. The qualitative findings of this study reveal that the state more often opted to enter into plea agreements with the accused persons. In many of these cases, the charge of rape was abandoned for no apparent reason.

When compared to Hindelang and Davies, age is similarly only a slightly significant factor.²⁶ A study by Grace et al. also showed that the rape of younger children and older women was found to have resulted in a higher conviction rate.²⁷ Those findings echoed a study by Harris and Grace.²⁸ The authors found that cases involving particularly young or particularly old complainants were most likely to be proceeded with by the prosecution.²⁹ We have already indicated above that child rape is one of the themes that strongly emerged from the data; child rape is associated with the age of the victim, but the dataset does not show that prosecutors

²⁶ M Hindelang & B Davis 'Forcible Rape in The United States - A Statistical Profile From Forcible Rape - The Crime, The Victim, And The Offender By Duncan Chappell, Robley Geis, And Gilbert' (1997). The age of the victim mattered in (24.7%) was a significant factor

²⁷ S Grace, C Lloyd & L Smith *Rape: From Recording to Conviction* (1992) 25.

²⁸ J Harris & S Grace A Question of Evidence?: Investigating and Prosecuting rape in the 1990s (1999) 5. The authors compared their findings to S Grace, C Lloyd & L Smith *Rape: From Recording to Conviction* (1992) 1.

²⁹ Ibid.

concern themselves with the characteristics of the victim or suspect, such as age when exercising their discretion. Therefore, prosecutors did not discriminate when deciding to prosecute or decline. In fact, the characteristics of all parties as indicated in the previous chapter did not impact whether cases were prosecuted or not, and this is despite the prevalence of child rape cases, these cases were equally rejected in nolle cases and prosecuted in those cases that were processed. This finding supports a study by Spears and Spohn that shows that criminal justice officials do not only consider the age of the victim but also in addition to other factors.³⁰

2.2 ACQUAINTANCE RAPE

Another theme that emerged significantly was the prevalence of acquaintance rape cases. Here, the dataset shows that the total number of acquaintance rape cases represents 84% of all cases, and stranger rapes account for 16% of all rapes. Of these acquaintance cases, 74% are child rape cases. For example, many adult acquaintance cases were known to each other or friends. It should be recalled that, according to feminist critical theorists, the relationship between the parties in a rape case is one of the most significant extra-legal factors taken into consideration by prosecutors. The author has also argued previously in their master's dissertation that acquaintance rape may be the most prevalent form of rape in South Africa.³¹ This view was not based on empirically derived data but based on prior studies that revealed a higher percentage of reports of acquaintance rape.³² However, this dataset empirically proves this contention.

³⁰ JW Spears & CC Spohn 'The Effect of Evidence Factors and Victim Characteristics on Prosecutors' Charging Decisions in Sexual Assault Cases' (1997) 14(3) *Justice Quarterly* 501, 506.

³¹ Ibid 29.

³² Grace et al (note 23 above) 18; Harris & Grace (note 24 above) 5. The authors compared their findings to Grace et al, acquaintance rape stood at 45% and intimate rape at 43%.

Child rape cases represent all the cases where the parties were either related or were direct family. That is a clear link between child rape cases and acquaintance rape. It further speaks to the lack of safety of children in their homes as well as the difficulty in combating this form of hideous crime; for example, child rape cannot be combated through visible policing.³³ The author has already highlighted the challenges associated with child rape above, so it is not delved into them again. The prevalence also speaks to the changing nature of rape. The changing nature of rape is indicated by prior research showing a prevalence of stranger rapes to acquaintance rapes more recently.³⁴

2.2.1 THE CHALLENGES OF ACQUAINTANCE RAPE

Acquaintance rape is burdened with complexities that make it a very challenging crime to prosecute. It is central to the issues of consent and coercion because it is in acquaintance rape that the line between consent and coercion can become blurred.³⁵ According to Borges et al., ‘consent takes place without coercion, violence, or abuse of power’.³⁶ Feminism won some of those battles against acquaintance rape that date back to ancient times. For example, for the longest time, forceful sexual intercourse with a woman was a crime unless that woman was a spouse.³⁷ Mackinnon posits that if the accused person knows his victim, then ‘consent is

³³ N Andersson & S Mhatre ‘Do Unto Others – and Pay the Price: Combating Sexual Violence in the South of Johannesburg’ (2003) 3 *SA Crime Quarterly* 5, 6. The authors found that ‘60% of rapists are known to their victims, there is little that a police presence on the street will do to prevent these rapes.’

³⁴ Harris & Grace (note 24 above) 6.

³⁵ P Lebitse ‘Prosecutorial attrition: Its implication for South Africa’s domestic and international obligations to uphold women’s human rights’ (2021) 86.

³⁶ Ibid 87.

³⁷ C Spohn, D Beichner, E Davis Frenzel & D Holleran ‘Prosecutors’ charging decisions in sexual assault cases: A multi-site study, final report’ 2002 *Washington DC: National Institute of Justice*

inferred', and it is only rape if it is by someone unknown.³⁸

Like in other jurisdictions indicated in chapter 2, South Africa has embarked on law reform that sought to address this problem. The author argues in great detail, below in section 5 of this section, the reason why specific law reforms ultimately failed to improve the prosecution and conviction of this hideous crime that impacts children so significantly. It will, however, be highlighted that a significant challenge associated with failed reformed laws and acquaintance rape is procedural obstacles impacting the prosecution of rape cases, which is also well documented. Mackinnon describes this challenge so eloquently as follows

Having defined rape in male sexual terms, the law's problem, which becomes the victim's problem, is distinguishing rape from sex in specific cases. The law does this by adjudicating the level of acceptable force starting just above the level set by what is seen as normal male sexual behaviour, rather than at the victim's, or women's, point of violation. Rape cases finding insufficient force reveal that acceptable sex, from the legal perspective, can entail a lot of force. This is not only because of the way specific facts are perceived and interpreted but because of the way, the injury itself is defined as illegal. Rape is a sex crime that is not a crime when it looks like sex.³⁹

51; DP Bryden & S Lengnick 'Rape and the Criminal Justice System' (1997) 87(4) *Journal of Criminal Law and Criminology*: 1194, 1204. The authors note the following: '... the woman's character is inevitably a critical issue. In this type of case, in other words, the jurors have to evaluate the victim's character and behaviour at the time of the incident in order to determine whether she fabricated or exaggerated the sexual assault or had a motive to lie about the incident. In contrast, the defendant in a sexual assault involving strangers cannot plausibly claim that the victim consented; instead, he acknowledges that she was sexually assaulted but claims that he was misidentified. Because the defendant denies that he had sexual intercourse with the victim, he does not need to persuade the jury that she is promiscuous, vindictive, or dishonest. Moreover, in a stranger rape the possibility that the parties misunderstood each other's signals does not arise.'

³⁸ CA MacKinnon 'Feminism, Marxism, method, and the state: Toward feminist jurisprudence' *Signs: Journal of women in culture and society* (1983) 8(4) 635, 648-9.

³⁹ Ibid 649.

2.2.2 SUMMARY OF FINDINGS ON ACQUAINTANCE RAPE

Frohman demonstrated the importance of the offender-victim relationship in predicting the outcome of legal proceedings — which is the focus of this research.⁴⁰ For example, many studies have shown that the victim-suspect relationship influences the attribution of rape responsibility.⁴¹ However, even though the prevalence of acquaintance rape has been confirmed, the hypothesis that a significant relationship exists between victim-defendant relationships and prosecutor decision-making that results in nolle cases has been debunked. It is the most surprising result of this study. The hypothesis is furthermore debunked that these cases are the most difficult to prosecute and are often rejected by prosecutors. The outcome of this is two-fold. First, acquaintance rape cases are indeed the most prevalent among other types of cases, as indicated in the previous section, and there is no question that these types of cases are generally plagued by rape myths and stereotypes and often raise issues of consent. However, the dataset results show that acquaintance rape cases are equally processed in so much as these types of cases are also not processed, as indicated in Table 7, which shows a comparative result of the association between the dependent variable and independent variables in prosecuted and nolle cases. The result shows a p-value of 0.005 in both nolle cases and prosecuted cases with respect to the variable Acquaintances. The difference is the same. Thus,

⁴⁰ L Frohmann 'Discrediting victims' allegations of sexual assault: Prosecutorial accounts of case rejections' (1991) 38(2) *Social Problems* 213.

⁴¹ BS Fisher; FT Cullen & MG Turner 'The sexual victimization of college women. Research report' 2000 *Washington, DC: Department of Justice* 9. Also see, J Du Mont; KL Miller & TL Myhr 'The role of 'real rape' and 'real victim' stereotypes in the police reporting practices of sexually assaulted women' (2003) 9(4) *Violence Against Women* 466, 467; PA Frazier & B Haney 'Sexual assault cases in the legal system: Police, prosecutor, and victim perspectives' (1996) 20(6) *Law and human behavior* 607, 611; P Tetreault & M Barnett *Reactions to Stranger and Acquaintance Rape* (1987) 11(3) *Psychology of Women Quarterly* 353-358; Spears & Spohn (note 26 above) 503.

it cannot be concluded that prosecutors decline these cases over stranger rape cases, for example. The result in Table 10 confirms that Acquaintance as a variable is mainly associated with case outcomes in prosecuted cases. Acquaintance is not statistically significant to the Case status ($p\text{-value} = <0.668$), but the IRR of this variable ($\text{IRR} = 0.85$) shows that it is not a contributing factor in prosecuted cases. However, in contrast, Stranger is not statistically significant to the Case status ($p\text{-value} = <0.668$), but the IRR of this variable ($\text{IRR} = 0.117$) shows that it is a contributing factor in nolle cases.

Simply put, the quantitative data shows that the total number of acquaintance rape cases in declined matters is twenty-two (22) compared to three (3) stranger rapes. Similarly, the total number of acquaintance rape cases in prosecuted cases stands at twenty (20) compared to the five (5) stranger rapes. It cannot be said that prosecutors declined to proceed in these types of cases due to the nature of these matters. What remains to be identified is whether these cases result in conviction or acquittal of the accused when prosecuted — but that is not the focus of this research project. However, based on the dataset of this study sample, seven (7) of the acquaintance rape cases that were processed resulted in the acquittal of the accused.

Similarly, six (6) of the acquaintance rape cases that proceeded resulted in a conviction — two resulting in life imprisonment. Another six (6) of these cases resulted in a conviction of another lesser charge, and one (1) case of acquaintance ceased to proceed because the accused died. These represent twenty (20) cases of acquaintance rapes that were prosecuted. These results directly contrast those indicated in the MRC report that prosecutors in South Africa were twice as likely to process cases involving strangers compared to cases involving relatives or acquaintances.⁴² The MRC report concluded that cases involving relatives and acquaintance perpetrators more often resulted in a guilty verdict.⁴³

⁴² The MRC report (note 2 above) 84.

⁴³ Ibid 31.

2.3 RAPE IS ECOLOGICALLY BOUND

The result of this study shows that all the complainants and suspects were primarily black and from the same poor backgrounds. The incidents' location was recorded the same way as where the parties resided. In all the cases, the complainant and the victim were from the same section within the township of Umlazi. Umlazi has a population of about 404 811 in 30 different subsections. These subsections vary from middle-class housing to informal settlements. For example, a complainant from section BB in Umlazi was attacked by a person from section BB and not section DD and contrariwise. These factors indicate that rape in Umlazi is ecologically bound. It may indicate further that women in Umlazi are more at risk of victimisation and violent attacks compared to other areas where rape is not ecologically bound, as the subcultural theory on rape explains it.

The phrase 'rape is ecologically bound' was coined by subcultural theorist Amir holding that the risk of victimisation is not equally distributed across the entire female population but influenced by a woman's age, race, and place of residence.⁴⁴ Amir's theory suggests further that aggressive behaviours or conduct is often expected in certain situations, and therefore the highest rates of rape are among specific neighbourhoods that condone aggressive behaviour.⁴⁵ Amir's study was also able to 'refute some of the misconceptions surrounding the crime of rape', which is quintessential to this study.⁴⁶ The author lists some of those misconceptions further below in section 2.3.2. While this study is not primarily concerned with patterns of criminal behaviour, the subcultural theory is relevant for several

⁴⁴ M Amir *Patterns in Forcible Rape* (1971) 339-340. Also see, LA Curtis 'Rape, race, and culture: some speculations in search of theory' in MJ Walker & SL Brodsky (eds.) *Sexual Assault: The Victim and the Rapist* (1979); JG Rabkin 'The epidemiology of forcible rape' (1979) 49(4) *American Journal of Orthopsychiatry* 641.

⁴⁵ Ibid.

⁴⁶ M Amir 'Forcible rape' (1967) 31(1) *Federal Probation* 51, 52.

reasons. As a sociolegal study, this study seeks to empirically and theoretically understand how the criminal justice system treats the vulnerable (women and children) following reformed laws. It is therefore not only concerned with the law in action, but it also seeks to understand further the circumstances under which rape takes place; epidemiologic considerations are thus necessary. Understanding patterns help us to identify concepts and misconceptions about rape. Rabkin believes that ‘epidemiological data promotes an understanding of situational variables in terms of identification of risk factors’ such as the influence of alcohol that are relevant here.⁴⁷

Also, some of the subcultural tested variables, such as the use of alcohol, are similar to those that feminist-conflict theorists posit as influencing the decisions of criminal justice system agents, in complete disregard of the required legal variables.⁴⁸ The author’s analysis of rape is informed in large part by feminist critical theory, which also emphasises the importance of understanding patterns of distribution. Notably, the subculture theory makes similar feminist critical theorists’ suggestions that sexual assault is made more probable by the general acceptance of violence in our society. However, feminist critical theorists draw further attention to the imposed inferior status of women in society.⁴⁹ The theory here is that women are more at risk in surroundings that should be safe, such as their homes and neighbourhoods. Brownmiller explains this as follows: ‘... not that rapists prefer their class and kind — it is simply that rape is a crime of opportunity and opportunity knocks most frequently in a familiar milieu’.⁵⁰ When considered in accord, both theories (the subculture on rape and feminist theory on rape) are relevant, especially to the situation in South Africa. This is because research shows that South African society is characterised by excessive violence against women as well as

⁴⁷ Rabkin (note 44 above) 645.

⁴⁸ Ibid.

⁴⁹ S Brownmiller *Against Our Will: Men, Women, and Rape* (1975).

⁵⁰ Ibid 389.

racial and gendered inequality.⁵¹ The dataset here describes the general distribution of rape in the Umlazi, with a particular emphasis on characteristics of complainants and offenders, among other variables. It raises a significant issue of spatial injustice.

2.3.1 COMPARISON TO AMIR, RABKIN

Amir outlines several fallacies countered by facts based on his study about rape. Most of these debunked fallacies are supported by the results of this study. To begin with, indeed rape is an ‘intraracial event’ as described by Amir and Rabkin concurs.⁵² The findings of this study show that all of the rape in Umlazi incidents reported were interracial. Rabkin further supports Amir’s finding as decisive in refuting ‘the common belief that black men are more likely to attack white women’.⁵³ Amir also debunks a misconception that ‘rape reflects a demographic strain due to sex-marital status imbalance in the community’.⁵⁴ That, too, is confirmed by this study, and Rabkin similarly highlights higher rates in areas with ‘higher proportions of black residents, youths aged 14 to 21, unemployed youths, and families with lower median income’.⁵⁵ Amir also debunks the common fallacy that ‘rape usually occurs between total strangers’. As indicated above, this study confirms the prevalence of acquaintance rape cases. Amir found that the age pattern for victims was somewhat different from that of offenders.⁵⁶ Here, many

⁵¹ E Bonthuys & C Albertyn *Gender, law and justice* (2007) 7-8.

⁵² Amir (note 46 above) 51; Rabkin (note 44 above) 639-40.

⁵³ Rabkin (note 44 above) 640.

⁵⁴ Amir (note 46 above) 51.

⁵⁵ Rabkin (note 44 above) 640.

⁵⁶ Amir (note 46 above) 52. Amir puts it as follows: ‘Examination of age differences according to race of victims and offender showed that mainly in Negro and white intraracial rape events, offenders and victims were at the same age level. However, white victims tend to be younger than their white assailants by at least 10 years, while Negro offenders tend to be at least 10 years younger than their white victims.’

complainants were young children, and the offenders were young. Rabkin similarly notes that rape is a young man's crime between the ages of 16 and 25. He states further that this may be linked to the unmarried status rather than age, as MacNamara and Sagarin found.⁵⁷ Another function of their youth, Rabkin holds, is the social class of offenders which is low, stating that 'very few are college educated, highly skilled, or prosperous hence the propensity to commit the crime of rape.'⁵⁸ This study correlates in full with this take.

Interestingly, Amir finds that rape is not associated with drinking as commonly misunderstood, finding that 'in two-thirds of our cases alcohol was absent from the rape situation'.⁵⁹ This study similarly found that alcohol/substance was only present in 20% of all cases. Interestingly, prosecutors processed cases where alcohol was absent, but only for one case — many rejected cases involved alcohol — 36% of such cases, to be exact. Table 7 shows that Alcohol as a variable revealed an association in nolle cases (p-value = 0.050) compared to prosecuted cases (p-value = 0.999). However, Alcohol is not one of the substantial factors that influence case outcomes, as shown in Table 10, unlike Substance, for example, which shows a p-value = <0.001. Another interesting result that correlates to this study is that rape occurs in 'places where the victim and offender initially met each other (especially when the meeting was in the residence of one of the participants)'.⁶⁰ That also speaks to the nature of acquaintance rape. Rape does not occur in a deep, dark and scary ally as often believed. Also, rape is not a violent crime wherein 'brutality is inflicted upon the victim'. Amir found that verbal coercion is used initially to subdue the victim, which, too, is a finding of this study. The quantitative results show that prosecutors preferred to process cases where physical assault,

⁵⁷ Rabin (note 44 above) 639.

⁵⁸ Ibid.

⁵⁹ Amir (note 46 above) 52.

⁶⁰ Amir (note 46 above) 52.

verbal assault and the use of a weapon are recorded. Finally, over 50% of the victims ‘failed to resist their attackers in any way’, a surprising result, as stated in his own words. The result here is only slightly higher; 62% of the victims did not indicate any resistance. Resistance as a variable is associated significantly with both nolle and prosecuted cases, as indicated in Table 7. Therefore, it is not one of the factors strongly associated with case outcomes, as indicated in Table 7.

2.3.2 SUMMARY OF FINDINGS ON SUBCULTURE THEORY ON RAPE

Although the study is confined to one locale – Umlazi, there are different sections in Umlazi, varying from sections A - Z. From affluent areas to squatter camps. In all the cases, perpetrators and complainants were from the same sections. The police station where the data is drawn serves all the sections. None of the reported cases showed a complainant from a different section to the accused. So, rape occurred between persons who are both from section M and not between a person from section A and M, for example. Therefore, the results of this study confirm that rape in Umlazi is ‘ecologically bound’ occurring predominantly between residents of the same neighbourhoods, members of the same race and the complainant’s age — many of whom were young girls, and the offenders are mostly young men to middle-aged men as indicated in Table 1. More importantly, the dataset results reveal that prosecutors are not influenced by the fact that rape is ecologically bound. The prevalence of acquaintance rape and outcomes, as discussed above, attest to this. The results of this study mirrors Rabkin’s, which summarises this as follows

As defined by the research literature, the majority of arrested and convicted rapists tend to be under 30 and often under 20, poorly educated, unskilled, and disproportionately black, as are their victims. Few are mentally ill or drug abusers. Only a small minority are recidivist sex offenders, although half or more have been arrested or convicted for other crimes. Their victims are often their neighbors and acquaintances, which may partly

account for the fact that most rapes are intraracial. Offenders who resemble this modal portrait and who account for an estimated 30% to 40% of rapists.⁶¹

Indeed, this study's complainant and the accused were poorly educated, young, of the same race, and acquaintances.⁶² However, the author argues that this outcome mainly demonstrates that societal change may be warranted in the circumstances more than by enacting more laws or further amendments of laws. The implication is that since rape is ecologically bound, it may explain why rape reform has done little to prevent rape or even decrease its prevalence, for example. Perhaps a blight has been a lack of better understanding of the patterns and distribution of rape, for example, that terrific reforms have failed. Put differently, with expanded empirical knowledge (i.e., knowledge of the patterns and distribution of rape), we will be able to model prevention strategies to combat this problem more effectively, including amending laws more effectively. Rabkin suggests prevention strategies based on epidemiological data offer 'improved environmental protection (e.g., more police in the subways, better residential security systems, enforced prohibitions against hitchhiking) and public education about high-risk situations...'.⁶³

What follows in the next section is a discussion on the outcomes of the relationship between legal variables (namely, sexual penetration, lack of consent and *mens rea*) and the dependent variables examined.

3. LEGAL VARIABLES

In so much as the focus is to determine the prominence of extra-legal variables in the processing of cases, it is important to test legal variables. This will enable the author to accurately interpret

⁶¹ Rabkin (note 44 above) 644.

⁶² Amir (note 46 above) 51.

⁶³ Rabkin (note 44 above) 645.

and compare the results. As a reminder to the reader, the study aims to provide insights into prosecutor decision-making and the factors influencing case outcomes. Legal variables are therefore, important.

3.1 PENETRATION

3.1 DEFINITION

Sexual penetration in terms of the Sexual Offences Act is defined as ‘any act which causes penetration to any extent’ by ‘the genital organs’ of the accused into ‘the genital organs, anus, or mouth’ of the complainant or into ‘any other part of the body’ of the complainant, using, ‘any object, including any part of the body of an animal, into or beyond the genital organs or anus, or mouth of the complainant’.⁶⁴ The definition of rape now includes unlawful penetration of the anus and the mouth, even by the use of an instrument to sexually penetrate.⁶⁵ The advent of the Sexual Offences Act repealed the common law offence of rape that previously defined ‘rape’ as the unlawful and intentional act of sexual intercourse with a female without her consent to make the offence gender-neutral. It followed the Constitutional Court’s development of the common-law definition of rape to include anal penetration in *State v Masiya*.⁶⁶

3.1.2 SUMMARY OF FINDINGS ON PENETRATION

The overall results indicate that proof of sexual penetration does not impact prosecutor decision-making, as confirmed in Table 10, which shows a p-value of 0.999. Cases are equally rejected in so much as they are prosecuted as it relates to this variable, as indicated in Table 7. In all the cases, 48 complainants reported unlawful penetration, and only *complainant 17*

⁶⁴ Section 1 of the Sexual Offences Act.

⁶⁵ Section 1 of the Sexual Offences Act.

⁶⁶ See *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* 9 2007 (5) SA 30 (CC) (hereafter referred to as Masiya case).

reported a sexual assault in one of the prosecuted cases, but that case was nonetheless registered as a rape case. These outcomes are not surprising; however, they are in direct contrast to a study by Hindelang and Davies that revealed prosecutors were more prompted to enrol in cases that included medical evidence of proof of penetration.⁶⁷ In the author's view, sexual penetration is not a key element that requires proof in some instances of rape. For example, there is no need to prove sexual penetration if the accused cites consensual sex as a defence. Also, consider a case where the accused cites consent as a defence – medical evidence such as the DNA (semen) may become redundant.⁶⁸ Such evidence may be more useful in cases of stranger rapes because an accused can never claim consent from a stranger. Under those circumstances, DNA may serve as corroboration for that complainant. It has been shown, for example, that medical evidence such as DNA or physical injury (to the hymen and so forth)

⁶⁷ M Hindelang & B Davis 'Forcible Rape in The United States - A Statistical Profile From Forcible Rape-The Crime, The Victim, and The Offender By Duncan Chappell, Robley Geis, and Gilbert' (1997); Rabkin (note 44 above) 638; GD LaFree Rape and Criminal Justice: The Social Construction of Sexual Assault (1989) 582, 586.

⁶⁸ *State v Gentle* (317/2003) [2005] ZASCA 26 para 18 (hereafter referred to as *Gentle* case). The court held that: 'But the fact that the complainant's evidence accords with the evidence of other State witnesses on issues not in dispute does not provide corroboration. Thus, in the present matter, for example, evidence that the appellant had sexual intercourse with the complainant does not provide corroboration of her version that she was raped, as the fact of sexual intercourse is common cause. What is required is credible evidence which renders the complainant's version more likely that the sexual intercourse took place without her consent, and the appellant's version less likely that it did not.' Also see; *M S v State* (CA40/2017) [2019] ZANWHC 2 para 12. For example, the court in *M S v State* held the following: The complainant claim[ed] non-consensual sexual intercourse while the appellant claims consensual sexual intercourse. The J88 reflects no injuries, either physical or gynaecological and renders the medical evidence neutral. The medical evidence, therefore, does not assist either the state or the appellant. The central question is whether the evidence of the complainant, bearing in mind the onus on the state, is such that it renders non-consensual sexual intercourse more probable than the appellant's version of consensual sexual intercourse.'

may be key in cases where the complainant is a minor.⁶⁹ Proof of penetration does not prove that a rape occurred, and similarly, lack of penetration does not prove that a rape did not occur.⁷⁰ The court in *MS v S* also explained this as follows

complainant claim[ed] non-consensual sexual intercourse while the appellant claims consensual sexual intercourse. The J88 reflects no injuries, either physical or gynaecological and renders the medical evidence neutral. The medical evidence, therefore, does not assist either the state or the appellant. The central question is whether the evidence of the complainant, bearing in mind the onus on the state, is such that it renders non-consensual sexual intercourse more probable than the appellant's version of consensual sexual intercourse.'

Moreover, where the complainant reported an incident late, sexual penetration cannot be proven by way of medical records; the state relies on the complainant's testimony that the

⁶⁹ In *R M v State* (A158/2018) [2019] ZAGPJHC paras 31, 36 (hereafter referred to as *R M v State*). In this case, the complainant was an eleven-year-old minor who was raped by her biological father. The court held that '...the undisputed evidence of Dr V is that there was an injury to the hymen. That constitutes clear corroboration of the testimony by the complainant that a penis penetrated her. The penis is the cause of the injury to her hymen. Dr V is qualified to make such a finding and the evidence has not been gainsaid,' furthermore, '...the Doctor's findings that there was an insult to the hymen which is consistent with sexual intercourse not only corroborates the complainant's testimony that there was penetration, but also that she felt pain. The complainant was infected with a sexually transmitted disease. Such factors are clearly proven beyond reasonable doubt.' Also See; *M v State* 2020 (1) SACR 241 (WCC) para 31. The complainant in this case was also an eleven-year-old raped by her biological father. The court said that the uncontroverted evidence confirmed that the appellant's DNA was found in the complainant's undergarment. This fact, coupled with the complainant's injuries which established that she had been recently sexually assaulted, required an explanation. The appellant's failure to challenge the evidence of the first reporter or of the medical expert and his decision to remain silent in the face of the *prima facie* evidence of the assault having been committed by him, gives rise to the consequences enunciated by the judgments referred to above.'

⁷⁰ T Huda "“No signs of rape”: corroboration, resistance and the science of disbelief in the medico-legal jurisprudence of Bangladesh' (2022) 29(2) *Sexual and Reproductive Health Matters* 1, 2.

accused penetrated her. The complainant's version would be balanced against all the surrounding facts during the trial. Such evidence is regarded as the evidence of the single witness, which must be satisfactory in all material aspects.⁷¹ The problem, as indicated by Huda, is that proof of penetration by way of medical evidence is often given 'higher probative value' than the complainant's testimony and can even be used to contradict it. That and its impact on the cases are discussed in the claims section.

3.2 CONSENT AND COERCION

3.2.1 DEFINITION

The Sexual Offences Amendment Act states that 'consent' means voluntary or uncoerced agreement.⁷² There is no consent when there is a 'threat of harm' against the complainant or an 'abuse of power or authority' by the accused.⁷³ The complainant must be capable of consenting.⁷⁴ For example, a complainant is not capable to consent when the complainant is intoxicated and/or under the influence of any drugs.⁷⁵ The amended Sexual Offences Act wholly redefined the definition of consent. It introduced a list of coercive circumstances that are non-exhaustive. This list operates to vitiate consent because an accused person may raise consent as a legal defence, and this usually occurs in cases of acquaintance rape, where the parties are somehow known to each other; but it is equally unsustainable in cases of stranger rapes. There has been much debate regarding the retention of the element of consent in the amended Act.

⁷¹ See *State v Sauls* 1981 4 ALL SA 182 (A).

⁷² Section 1 (3) of the Sexual Offences Act.

⁷³ Section 1 (3) (a)(i) and section 1 (3) b) of the Sexual Offences Act.

⁷⁴ Section 1 (3)(d) of the Sexual Offences Act.

⁷⁵ Section 1(3)(d)(iii) of the Sexual Offences Act.

3.2.2 SUMMARY OF FINDINGS ON CONSENT

Consent as a legal variable does impact the outcome of cases insofar as decisions by prosecutors are concerned. Table 10 shows that No consent is a factor that is associated with case outcomes. It is the only legal variable significantly associated with a p-value of 0.017. It must be clear that in lieu of a lack of consent, Coercion is another legal variable that may prove guilt in certain circumstances. The Law Reform Commission in the Sexual Offences Bill 2003 recommended the retention of unlawfulness and intentional sexual penetration only, and legislators opted to retain consent as an element in the crime of rape which has been criticised.⁷⁶ Louise du Toit states that the retention of consent as an element continues to ‘genderise the crime of rape’ and ‘serve to enhance impunity for defendants’.⁷⁷ She argues that rape as a sexual crime continues to place a burden on the complainant.

The author disagrees with du Toit since the standard of proof in any criminal case burdens the state, and the crime of rape is no exception. That must be viewed in context. Logically, a person can never consent to [their] murder, assault, or robbery. However, a person may well consent to sexual intercourse. The other logic is that when a complainant reports a crime of rape, it is because he/she was penetrated without their consent. Thus, the state’s case will always be presented to prove a lack of consent, and if consent is granted, coercion suffices. The inclusion of consent as a key element is thus neither here nor there. The act of saying ‘no’ would be a sufficient expression of lack of consent but is not limited to threats of serious violence, for example. Instead, the author contends that an accused who raises consent as a defence should be burdened with proving that such consent was granted. It is trite in law that he who alleges must prove.

⁷⁶ L du Toit ‘From Consent to Coercive Circumstances: Rape Law Reform on Trial’ (2012) 28(3) *South African Journal on Human Rights* 380, 383.

⁷⁷ Ibid 384.

That is currently not how cases are handled in courts. In many instances, an accused will opt not to take the stand to avoid incriminating himself, which is his constitutional right, even though such an accused raised consent as a defence. However, the author argues that in order to prove consensual intercourse, if such a defence is raised, the accused would be required to take the stand and place his version before the court. He will no longer have the right to remain silent as contemplated by law if he so wishes because he would have raised a defence that requires him to put proof thereof. In that way, the burden is no longer placed solely on the complainant. Put differently, if an accused remains silent, the court must accept that the act occurred without consent.

The implication is that an application in terms of *s* 174 of the Criminal Procedure Act should also not be available to an accused who raises consent as a defence since such an accused must prove that consent was granted. The author has previously argued that an amendment to *s* 174 of the CPA may be necessary to reflect the above.⁷⁸ That is so since *s* 174 of the CPA is usually abused by accused persons to escape trial without testifying by requesting a discharge, usually as soon as the complainant completes their testimony. That is not to say that the burden of proof shifts to the accused person since the burden of proof refers to ‘the obligation of a party to persuade the trier of facts by the end of the case of the truth of certain propositions’.⁷⁹ Here, the author suggests and refers to the evidentiary burden, which refers, in this context, to the state’s ‘duty to produce sufficient evidence for a judge to call on the other party [the accused] to answer.’⁸⁰

⁷⁸ Lebitse (note 35 above) 54.

⁷⁹ Schwikkard & van der Merwe *Principles of Evidence* (2016) 602.

⁸⁰ *Ibid.*

In any event, Schwikkard states that ‘once the state establishes a prima facie case, the evidential proof will always shift to the accused to adduce evidence to escape conviction’.⁸¹ The author suggests that insofar as the element of consent is concerned, the evidentiary burden makes s 174 of the CPA unavailable to an accused who raises consent as a defence. He would have to take the stand. Consequently, the court must draw an adverse inference where an accused opts not to adduce any evidence regarding their claim that consent was granted. Though the courts have previously criticised the idea of refusing a discharge if there is a reasonable chance that the accused might supplement the state’s case, the author argues that in cases of rape, it is justified in terms of the principle of substantive justice. In any event, a refusal for a discharge in terms of s 174 of the CPA was found to be unconstitutional only in cases where there is no evidence against the accused.⁸²

Where there is scant evidence, a discharge may be denied. And in cases of rape where consent is raised as a defence, it becomes the common cause that sexual penetration took place. Therefore, there would be prima facie to continue the trial. For instance, when sexual penetration is a common cause, there will always be the existence of ‘a reasonable and probable cause’ of guilt.⁸³ The author argues that only in cases of rape is self-incrimination justified. Besides, an accused person may be acquitted if his version is accepted as reasonably accurate, which is a lenient standard of proof.⁸⁴ The author has argued further that the state should be more concerned with the burden to prove that sexual intercourse took place in coercive circumstances when consent is raised rather than without consent because the Sexual Offences

⁸¹ Ibid.

⁸² Ibid.

⁸³ *State v Lubaxa* 2001 (2) SACR 703 (SCA).

⁸⁴ *State v van de Meyden* 1991 (1) SACR 447 (W) AT 448 F-G.

Act provides for that.⁸⁵ The most comprehensive in South Africa, the MRC report found that ‘the perpetrator used non-violent coercion in 80.9% of cases — a ‘higher proportion of acquaintance rapes involved collude’.⁸⁶ It is in acquaintance rape that the line between consent and coercion becomes blurred. However, this study empirically shows that prosecutors in Umlazi process as many acquaintance cases as those they reject. It cannot be said that prosecutors face insurmountable challenges that put them off when exercising their discretion in such cases. The author has dealt with acquaintance rape above as an emerging theme. Indeed, the author has always held a strong view that acquaintance rape further involves challenges that are not present in cases of stranger rape. Spohn et al., among many others, alluded to the ‘difficulties’ faced by prosecutors when dealing with such acquaintance cases.⁸⁷

3.3 SUMMARY CONCLUSION: ALL LEGAL VARIABLES

It may be prudent to note that other relevant legal variables include *mens rea*, which refers to an accused person’s criminal intent and fault. It derives from the Latin term that translates: ‘guilty mind’. It also derives from the expression: *actus non facit reum nisi mens sit rea*, meaning that an act is not a crime unless the actor’s state of mind is blameworthy.⁸⁸ It is an accused person’s state of mind (not the course of conduct) at the time of the criminal act. Put differently, an accused who acts without criminal intent is not liable or blameworthy in terms of criminal law. However, more interestingly, there is an intersection between consent and

⁸⁵ Lebitse (note 35 above) 55.

⁸⁶ The MRC report (note 2 above) 29.

⁸⁷ JW Spears & CC Spohn ‘The Effect of Evidence Factors and Victim Characteristics on Prosecutors’ Charging Decisions in Sexual Assault Cases’ (1997) 14(3) *Justice Quarterly* 501, 503. Also see C Spohn & J Horney *Rape law reform: A grassroots revolution and its impact* (1992).

⁸⁸ WJ Hosten, AB Edwards, C Nathan & F Bosman *Introduction to South African Law and Legal Theory* (1983) 175.

mens rea in cases of rape, as exposed in *Coko v the State*.⁸⁹ The other variable is Unlawfulness which is another uncomplicated element of the crime of rape. The Sexual Offences Act does not define the meaning of unlawfulness. However, unlawfulness is proven if the state proves there was no justification for the act. Where an accused proves consent (consensual intercourse), the state will fail to prove unlawfulness and, consequently, its entire case, even where it proves sexual penetration, for example. *Mens rea* could not be tested in this study due to the nature of this variable. For example, prosecutors would not state in the dockets that intent is present or whether the incident was unlawful, and the complainant's statements do not indicate the same or any difference. However, the legal variables successfully tested here did not influence the dependent variable except for No consent. No difference is noted between decision-making in cases that were declined and those that were processed. The p-value for Penetration is 0.999, while the p-value for Consent is 0.017, revealing a significant association as indicated in Table 10. No consent is the only legal variable revealed as a significant factor in case outcomes.

On the other hand, extra-legal variables significantly influence the dependent variable; these are discussed next.

4. EXTRA-LEGAL VARIABLES

The relationship between prosecutor decisions and other extra-legal variables is prominent. This section answers the main research question based on data derived from this study. The research question reads as follows: Is prosecutorial discretion in South Africa exercised in a deficient manner that is discriminatory towards women and children based on extra-legal variables as suggested by feminist critical theorists in cases of rape despite rape law reform? I

⁸⁹ See *Coko v State* 2022 (1) SACR 24 (ECG).

test this, bearing in mind that my hypotheses that the decision to decline prosecution in cases of rape is based on (1) the victim-perpetrator relationship; and (2) a victim's character has not been proven. There is, however, strong support that other extra-judicial factors influence decision-making by prosecutors, as alluded to by feminist critical theorists. As stated, feminist critical theorists suggest that extra-legal variables influence the decisions of the key role players within the criminal justice system beyond the actual legislated legal burden to prove the crime of rape. Extra-legal variables tested here include: (a) alcohol and substance use, (b) physical assault and verbal threats, (c) weapon use, (d) resistance; (e) whether the victim passed out or fled the scene; (f); force (g) immediate report; (h) suspect arrested; (i) positive suspect identification, (j) victim-perpetrator relationship; (k) characteristics; (l) prior sexual activity with the accused; and (m) victim's prior criminal record.

To be clear, the author hypothesised that beyond the relationship and victim's character variables, there is a significant relationship between other extra-legal factors and the prosecutor's decision-making in nolle cases. The author's view further is that extra-judicial factors also vary in degree, and each category should not be lumped together to be understood better. Therefore, extra-judicial factors in this study were categorised into three. The approach undertaken here is novel because previous studies prior studies do not categorise extra-judicial factors. The following section outlines each category of extra-judicial variables, including a discussion of their relationship.

4.1 CATEGORY ONE EXTRA VARIABLES

Category one variables include the characteristics and socioeconomic standing of the victim, considering their race, education, marital status, and the victim's age. These mainly relate to their background. The results show no significant relationship between the employment status of the complainant and decisions, as revealed by the dataset, which indicates that 98% of the

complainants are unemployed with a p-value of 0.264 (see Table 10). The second finding indicates that 88% of the complainants do not possess a senior certificate; therefore, there is no association between Victim educated and Case status. It must be borne in mind that many complainants are children, so many are still in school. Case disposition does not depend on the age of the complainant, even in cases of child rape. The author discussed in detail above that child rape cases are a theme that strongly emerged in all the cases. However, there is no relationship between case outcomes and child rape. The race of the victim is also a non-factor, and so is the marital status because all the victims and suspects were of the same race, and all the victims were unmarried. These indicate a p-value of 0.999, revealing no relationship between these variables and decisions.

There is generally no relationship between category one variables and prosecutor decisions. This shows that prosecutors did not discriminate when exercising their discretion insofar as these variables under category one is concerned. The characteristics of all parties, the victims and the accused did not impact prosecutorial discretion in all cases. Therefore, category one variables do not provide strong support for the feminist-conflict theory in predicting nolle prosequi cases. Feminist-conflict theory suggests that extra-legal variables are more influential in predicting the outcomes of rape investigations. The author has also conceded above that part of her hypothesis, that ‘there is a significant relationship between the complainant’s character (their age, background, their social standing) and prosecutor decision-making in nolle cases’, has been debunked. Remember, the author hypothesised that the outcome of cases is mainly based on (1) the victim-perpetrator relationship, (2) a victim’s character, and (3) other extra-judicial factors which were based on hypotheses derived from

the (i) feminist-conflict theory,⁹⁰ (ii) Frohmann's downstream theory,⁹¹ and (iii) the subcultural theory of violence.⁹²

4.2 CATEGORY TWO EXTRA-LEGAL VARIABLES

Category two extra-legal factors include: medical evidence such as DNA, visible cuts and bruises, as well as variables examined here such as Resistance, Verbal assaults, and Physical violence including Weapon, force, and Positive id. These are characterised as variables as semi-extra-judicial factors. This study tested force, physical assault, verbal assault, weapon, resistance, and immediate report under category two variables (see Table 1).

Medical evidence is excluded, for example, because the complainant's medical records were excluded from the sample dockets obtained from SAPS due to the domestic laws that govern privacy.⁹³ The use of force does not influence the prosecutor's decisions — it was equally prominent at 100% in both prosecuted and rejected cases. The descriptive analysis of prosecuted cases only in Table 5 shows there also significant association in category two extra-legal variables, Physical assault (p-value = <0.001); Verbal assault (p-value = <0.001); Weapon (p-value = <0.001); Resistance (p-value = <0.001) and Positive id (p-value = <0.001).

⁹⁰ Brownmiller (note 49 above) 353. Also see, G LaFree 'Rape and Criminal Justice: The Social Construction of Sexual Assault' (1989); R Quinney *The Social Reality of Crime* (1974); Petrocelli, MA Piquero & M Smith Conflict Theory and Racial Profiling: An Empirical analysis of police traffic stop data. (2003) *Journal of Criminal Justice* 31(1) 1-11.

⁹¹ L Frohmann 'Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking' (1997) 3(1) *Law & Society Review* 531, 535. Frohmann's downstream orientation theory is described as concern with convictability that creates a 'downstream orientation' in prosecutorial decision-making that is, an anticipation and consideration of how others (i.e., jury and defence) will interpret and respond to a case.'

⁹² Amir (note 46 above) 339-340. The subcultural theory suggests that forcible rape is an 'intra-racial event between victims and offenders who were at same age level and who were ecologically bound, that is, victims and offenders lived in the same area, which tended to be also the area of the offense'

⁹³ Protection of Private Information Act 14 of 2013 (hereinafter referred to as "the POPI Act").

However, Table 4 shows only a significant association with Case status and some category two extra-legal variables such as Verbal assault (p-value = 0.010), Weapon (p-value = 0.005) and Resistance (p-value = 0.046) in all the cases. A descriptive analysis of the nolle cases in Table 6 shows there is also a significant association in category two extra-legal variables, Physical assault (p-value = 0.022), Verbal assault (p-value = 0.022) like in prosecuted cases indicated above (Physical Assault (p-value = <0.001), Verbal assault (p-value = <0.001) which is more significant. There is no association between Case status and Weapon (p-value = 0.235) in nolle cases compared to the association between Weapon (p-value = <0.001) and Case status. Resistance (0.002) is significant, as well as Positive ID (p-value = <0.001). These category two extra-legal variables influenced the disposition of cases; for instance, out of the 25 cases that proceeded, 64% involved Physical violence and Verbal assault, compared to only 24% in cases that were rejected. Resistance was indicated in 20% more cases that proceeded compared to those that were rejected.

Category two results confirm the Hindelang and Davies study outcomes that revealed that prosecutors were more likely to enrol cases where there were factors such as the use of physical force (82% of cases), followed closely by the medical evidence of proof of penetration (78%).⁹⁴ As indicated in chapter 1, Hindelang and Davies conducted the first comprehensive study in the United States of America (the US) that revealed factors considered by prosecutors when required to exercise discretion in cases of rape.⁹⁵ The author argued above in section 3.1 that proof of sexual penetration is irrelevant in most instances and relevant in some. For instance, researchers suggest that proof of penetration does not prove rape occurred, and

⁹⁴ Hindelang & Davis (note 63 above) 18.

⁹⁵ Ibid.

similarly, lack of penetration does not prove that a rape did not occur.⁹⁶ A study by Anderst et al. found no ‘association between the number of reported penile-genital penetrative events and definitive genital findings. Eighty-seven percent of victims who provided a history of 10 penetrative events had no definitive evidence of penetration’.⁹⁷ The MRC report highlights some similar factors revealed by Hindelang and Davies. Though limited and not focused on prosecutorial attrition, the MRC report found that prosecutors declined a higher proportion of cases where there was no physical force used (55.7%) and where the perpetrator did not threaten to kill the victim (50.6%), here categorised as verbal threats.⁹⁸

That said, the main result of category two extra-legal factors is that these factors influence prosecutors’ decision-making. Eurom et al. made similar findings: Emergency physicians have an obligation to provide care for victims of sexual assault cases. This care includes a possible legal defense. To that end, emergency physicians should be vigilant in the documentation of the history of the event (e.g., weapon use) and in the documentation of traumatic injuries because these factors can assist in a successful prosecution’.⁹⁹ Unlike the category one extra-judicial factors, the results here provide strong support for feminist-conflict

⁹⁶ J Anderst, N Kellogg & I Jung ‘Reports of repetitive penile-genital penetration often have no definitive evidence of penetration’ (2009) 124(3) *Pediatrics* e403, e402. Also see, MJ McGregor, J Du Mont & TL Myhr Sexual assault forensic medical examination: is evidence related to successful prosecution? (2002) 39(6) *Annals of emergency medicine* 639-647.

⁹⁷ Ibid.

⁹⁸ The MRC report (note 2 above) 87.

⁹⁹ K Gray-Eurom, DC Seaberg & RL Wears ‘The prosecution of sexual assault cases: correlation with forensic evidence’ (2002) 39(1) *Annals of emergency medicine* 39-40. The authors found: ‘Victims younger than 18 years, the presence of trauma, and weapon use by the assailant were all significantly associated with successful prosecution. Although not statistically significant, there was a trend toward successful prosecution if the victim was white. Conversely, cases were more likely to be dropped from prosecution by the state attorney’s office if the victim was older than 18 years and if no weapon was used by the assailant.’

theory in predicting nolle prosequi cases. Further, these extra-legal factors go beyond the required lawful elements to prove the crime of rape, and the author makes several claims that relate to and emerge from this result below in section 5 below.

4.3 CATEGORY THREE EXTRA VARIABLES

The third category includes extra-judicial factors such as alcohol or substance use, immediate reporting, prior sexual activity with the accused, or a complainant's prior criminal record. This category also includes factors that exist in what is regarded as any preceptory behaviour, which are the most arbitrary factors, which is described by Spohn et al. as 'risk-taking' behaviour that indicates that at the time of the assault, the victim was 'walking alone late at night, was hitchhiking, was in a bar alone, was using alcohol or drugs, willingly accompanied the suspect to his residence; or invited the suspect to her residence'.¹⁰⁰ LaFree similarly identifies five types of 'victim misconduct' from the records that include: hitchhiking, drinking at the time of the offence, being at a tavern or bar without a male escort, allegedly engaging in sex outside of marriage, and willingly entering the suspect's car. The most significant association between the dependent variable is Arrest, which shows a p-value of <0.001, the highest significant association with decisions in all categories, as indicated in Tables 5, 6 and 7. Table 4 shows an association between case outcomes and Alcohol (p-value = 0.189) and Substance (p-value = 0.110).

Interestingly, Immediate report (p-value = 0.387) while prior sexual activity with the accused shows no significance in association with decisions at 0.999. The complainant's prior criminal record was not significant equally in all cases. No record of the complainant's prior

¹⁰⁰ C Spohn, D Beichner, E Davis Frenzel & D Holleran 'Prosecutors' charging decisions in sexual assault cases: A multi-site study, final report' (2002) *Washington DC: National Institute of Justice* 14.

criminal activity was noted. A descriptive analysis of prosecuted cases es and case outcomes show an association in Acquaintances (p-value = <0.001), unlike in Stranger (p-value 0.050) in comparison. There is an association between Case status and Victim fled (p-value = 0.004), Immediate report (p-value = <0.001), and Arrest (p-value = <0.001), but there is no significance between Case status and Alcohol (p-value = 0.999) and Substance (p-value = 0.110) indicated in Table 5. A descriptive analysis of nolle cases in Table 6 shows that there is also a significant association between case outcomes in Acquaintances (p-value <0.001), unlike in Stranger (p-value = 0.235), which is consistent with the outcome in prosecuted cases noted in Table 5. However, there is no association between Case status and Victim fled (p-value = 0.004) unlike above and consistently, the association is noted in Case status and Immediate report (p-value = <0.001), Arrest (p-value = 0.002), but there is no significance between Case status and Alcohol (p-value = 0.050) although higher than the outcome between Case status in prosecuted cases and Substance is equally noted (p-value = 0.110). Table 10 reveals that category three variables, such as Victim fled (IRR = 1.38) and Arrest (IRR = 7.86), are the factors that mainly influence prosecuted cases, and Substance (IRR = 0.14) significantly contributes towards nolle cases. All these variables also have p-values of less than 0.5, revealing a significant association between those variables and the dependent variable.

Category three extra-judicial variables are discriminatory, unlike the category two variables that may be justifiable to prove consistency and corroboration. Simply put, these extra-judicial variables serve no purpose in the processing cases and provide strong support for the feminist theory in predicting nolle prosequi cases. The use of alcohol is a significant feature that is in stark contrast with a report by Hindelang and Davies (12.7%).¹⁰¹ It, however, supports the MRC report findings that indicate intoxication plays a more significant role in decision-

¹⁰¹ Hindelang (note 63 above) 18.

making: ‘prosecutors were 22% more likely to decline cases where the victim was intoxicated’.¹⁰² Although the MRC report made no empirical finding, the authors said that it may be ‘plausible that police detectives and prosecutors within the South African CJS continue to dismiss cases based on biased decisions informed by their perceptions about the victims’ alcohol consumption as risk-taking and problematic assumptions about the potential negative impacts of the victims’ intoxication on the credibility and inconsistencies of the testimonial evidence they provide’.¹⁰³ This study confirms this assumption with empirical results.

Prompt reporting features are a significant factor (71.3%), as indicated in Hindelang and Davies, but the outcome is not as significant as found in Hindelang and Davies.¹⁰⁴ That is in terms of percentage. It is important to note that it is common for victims not to report timeously.¹⁰⁵ South African legislators implemented law reform that addresses this problem.¹⁰⁶ It attempted to alleviate the stigma attached to incidents reported after their occurrence. Under Hindelang and Davies, prompt reporting is followed by the extent to which the complainant is able to identify the suspect (67.3%).¹⁰⁷ Put differently, the inability of the victim to identify the suspect is more likely to lead to cases being dropped.¹⁰⁸ The authors say that the single most

¹⁰² MRC Report (note 2 above) 88.

¹⁰³ Ibid 22.

¹⁰⁴ Hindelang (note 63 above) 18.

¹⁰⁵ SJ Lea & US Steve ‘Attrition in rape cases: Developing a profile and identifying relevant factors’ (2007) 43(3) *British Journal of Criminology* 583, 590. 13% were reported within two weeks, with the remaining 21 per cent being reported some time after the crime. In 6% of cases, the crime was reported more than six months after the crime, sometimes many years later. See MRC Report (note 2 above) 14.

¹⁰⁶ Section 59 of the Sexual Offences Act.

¹⁰⁷ Ibid.

¹⁰⁸ DP Bryden & S Lengnick ‘Rape and the Criminal Justice System’ (1997) 87(4) *Journal of Criminal Law and Criminology*: 1194, 1214. Andersson et al (note 29 above) 7. L Vetten, R Jewkes, R Sigsworth, N Christofides, L Loots & O Dunseith ‘Tracking Rape Case Attrition in Gauteng: The

important reason why most rapists are not punished is the failure of victims to report the crime to the police or their later refusal to cooperate as a prosecution witness. The MRC report contains similar findings about the situation in South Africa related to suspect identification.¹⁰⁹ The MRC findings reveal ‘that some investigators, in collusion with prosecutors, take cases with no perpetrator identified for a decision to prosecute to obtain a *nolle prosequi*, which is reflected as a success in the SAPS statistics’.¹¹⁰ Similarly, Vetten et al. found that: ‘Half of the cases were closed because an arrest was never made, either because of failure to identify a suspect (47%) or to locate a suspect and retain contact with him (17%)’.¹¹¹

The outcome of this study indicates the complete opposite. Whether the accused was arrested strongly features under category three compared to whether the victim could positively identify the accused and whether they were ecologically bound. The author has discussed above the significance of the victim and suspect being ecologically bound, and this is not repeated. However, although a theme emerged significantly, there is no relationship between this extra-legal variable and the dependent variable tested here.

In the final section of this chapter, the author outlines her claims based on the considerations of the outcomes of legal and extra-legal variables, as discussed above. Kindly note that the following section is not an analysis of the data, but claims by the author based on the above analysis of the data. The author did indicate at the beginning of this chapter that this chapter is divided in two parts.

Police Investigation Stage’ (2008) *Tshwaranang Legal Advocacy Centre, Medical Research Council, Centre for the Study of Violence and Reconciliation: Johannesburg* 35.
<http://www.csvr.org.za/docs/tracking_justice.pdf>

¹⁰⁹ The MRC Report (note 2 above) 54.

¹¹⁰ Ibid 85.

¹¹¹ Vetten et al (note 108 above) 48.

5. CLAIM ONE

5.1 EXTRA-LEGAL VARIABLES AND CORROBORATION

The author's first claim is that category two extra-legal factors serve as corroborative evidence in court proceedings. Category two extra-legal factors include: medical evidence such as DNA, visible cuts and bruises, as well as variables such as resistance, verbal assaults, and physical violence, including the use of a weapon and force; the complainant fled; and the complainant passed out. Simply put, corroboration is central in the adjudication of rape cases, even though corroboration is not a legal requirement.¹¹² A category two extra-legal variable such as DNA may well serve to prove sexual penetration and medical testimony based on a physical examination of the complainant as well as pregnancy. Another category two extra-legal variable, Physical assault, may be indicated by cuts and bruises noted in a J88 form concluded by a medical professional would serve both as corroboration proving force successfully.

In contrast, verbal assault and/or threats, on the other hand, may well serve to prove resistance or even coercion and a lack of consent. Section 4.2 outlined that category two variables are associated with case outcomes. In other words, these category two extra-legal variables influence the disposition of cases. These variables are also more pronounced in prosecuted cases than in nolle cases, as shown in Table 7. Given this, the author argues that prosecutors may, therefore, choose to process cases involving category two variables as they are burdened to establish their case beyond a reasonable doubt.¹¹³ The author's argument here is that prosecutors are influenced by the fact that the courts take these corroborating factors

¹¹² WS Gilbert *The Mikado* (2005) 3. Gilbert explains the requirement of corroboration as follows: 'Merely corroborative detail, intended to give artistic verisimilitude to an otherwise bald and unconvincing narrative.'

¹¹³ DJ Friedman 'The Rape Corroboration Requirement: Repeal Not Reform' (1972) 81 *YALE LJ* 1365, 1369.

into consideration during the adjudication of cases and not necessarily as a result of discriminatory views. It is important to note that although corroboration is not a legal requirement, it is unsound to suggest that corroboration in sexual offence cases should not or is not at all considered during the adjudication process. This study demonstrates that although the corroboration requirement has been repealed in South Africa, it still exists, though it has been veiled, dramatically impacting prosecutorial discretion — this is outlined in the sections to come.

5.2 CORROBORATION REQUIREMENT

According to Nicolson and Blackie, the corroboration requirement is designed to ‘act as an invaluable safeguard against wrongful convictions based on unreliable evidence’.¹¹⁴ That ought to be rejected, as stated by Carloway who persuasively argues that the prevention of miscarriages of justice is sufficiently covered by the ‘standard of proof required’ and, indeed, ‘the judge or jury must not convict unless convinced of guilt beyond reasonable doubt’, and I agree.¹¹⁵ While in agreement with Carloway’s position, the author must add that the requirement for corroboration is different in cases of rape. It is to guard against wrongful conviction due to false complaints by women resulting from ‘sexual neurosis, phantasy,

¹¹⁴ D Nicolson & J Blackie ‘*Corroboration in Scots law: “archaic rule” or “invaluable safeguard”?*’ (2013) 17(2) *Edinburgh Law Review* 152-183. The authors cite Gordon in classic rule-consequentialist terms they state: We accept that sometimes a single witness can be reliable and that by refusing to believe him we may be doing injustice in the particular case; but we cannot always be sure about our judgments of reliability, and indeed we are so likely to be wrong, and the results of our error are likely to be so serious, that it is better to make it a rule that we shall never rely on only one witness, because, on the whole, that will lead to less injustice than will reliance on our ability to detect unreliability.

¹¹⁵ The Carloway Review: Report and Recommendations (2011) para 7.2.41 (hereinafter referred to as “Carloway”).

jealousy, spite, or simply a girl's refusal to admit that she consented to an act of which she is now ashamed'.¹¹⁶ It is grounded on the perpetuation of stereotypes against women. The corroboration requirement in rape cases is thus deeply rooted in what is known as the cautionary rule.¹¹⁷ The rule has supposedly been abolished in South Africa, but its elimination is not straightforward. To understand this, it is essential first to take note that the cautionary rule in rape cases was not only intended to prevent a court from treating the evidence of the complainant with caution due to the nature of the offence as presently interpreted by the courts.¹¹⁸ Instead, the abolishment of the cautionary rule was to bring an end to (1) the judicial warning against relying upon the evidence of rape complainants, since complainants (women) often lie about such incidents, among others, and (2) that the rape complainant's version could *only* be relied upon if there was clear *corroboratory evidence* supporting it. However, South African courts presently apply caution in rape cases not based on the nature of the offence or the fact that the complainant is a woman but instead based on the fact that the complainant is a

¹¹⁶ Friedman (note 113 above) 1378. Friedman takes a view that the corroboration requirement is further 'linked to a psychological theory that fails to take into account the changing role of women in society.'

¹¹⁷ Schwikkard & van der Merwe (note 79 above) 588. Also see, F Viljoen 'Removing Insult from Injury: Reviewing the Cautionary Rule in Rape Trials' (1992) *JS Afr. L* 743, 744. Viljoen cited *State v D* 1951 4 SA 450 (A) 455G) 744. 'Such a cautionary rule also applies to the testimony of accomplices, agents provocateurs, children, prostitutes and the complainants in sexual offences, whether they are single witnesses or not.'

¹¹⁸ Section 60 of the Sexual Offences Act. A court may not treat evidence of complainant with caution on account of nature of offence: Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence. Also see, S Moreland 'Taking About Rape-and Why it Matters: Adjudicating rape in the Western Cape High Court' (2014) 47 *South African Crime Quarterly* 5, 11.

single witness, just as the court would do in any other criminal case.¹¹⁹ For example, in a recent judgment, the court in *Sphanda v State* was vehement that the *court a quo* presiding officer, erred and instead should have been cautious or applied caution in dealing with the evidence of the complainant and goes on to state that

Although the cautionary rule, as previously applied in the evidence of complainants in sexual cases was abolished by the Supreme Court of Appeal in *S v Jackson*, coupled with the provisions of section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 which provides that a court may not treat the evidence of a complainant in a sexual offence with caution on account of the nature of the offence, I am of the view that the trial court should have applied caution when considering (a) the evidence of the complainant as a single witness, (b) the evidence Ms M[...] who contradicted the complainant; (c) the evidence of the appellant as he denied the offence; (d) and the evidence of the doctor who ultimately conceded that there might not have been sexual penetration on the complainant.¹²⁰

The authors argue that eliminating the cautionary rule is thus only lip service to a change. It is so because it is common for women in such cases to be the single witnesses, and this deeply

¹¹⁹ *State v Jackson* 1998 (1) SACR 470 (SCA) 21. Also see, S Swemmer 'Justice denied? Prosecutors and presiding officers' reliance on evidence of previous sexual history in South African rape trials' (2020) 69 *South African Crime Quarterly* 52. For context, note that this rule, according to Swemmer, is still being applied in court despite being abolished. Swemmer notes the following: Trial transcripts examined in the study show that it [the cautionary rule] is still applied (un)consciously by prosecutors, defence counsel and presiding officers, whose questioning of complainants appears to assume that women are lying about violations perpetuated against them and should be treated as untruthful until the evidence can show otherwise. In the case of *State v Magagula*, the presiding officer stated that 'it is always common that when one is sentenced to prison some members of the community will always take a chance to try and lay charges similar to rape. In considering whether evidence is reliable the quality of the evidence must of necessity be evaluated and there must be corroborative evidence, if any.'

¹²⁰ *Sphanda v State* [2021] ZAGPPHC 186 para 19 (hereinafter referred to as "*Sphanda case*").

rooted discrimination against women has not simply been erased. This author is not the first to say this; Viljoen already explained this problem as follows

A complete repeal of the cautionary rule will only partly alleviate the problems related to the cautionary rule. Abolition of the requirement does not restrain the discretion of decision-makers who have to weigh up the evidence and make findings. This process is based on fixed patterns of behaviour and sociological factors.

The author, furthermore, disagrees with Burchell and Schwikkard's views that the general single witness rule in cases of rape has 'a separate rationale and should be retained'.¹²¹ This is so because weighing the evidence of a single witness in cases of rape is different inasmuch as corroboration in rapes is different, as alluded to above. It is simply an archaic rule that has no place in a modern legal system, as described by Carloway.¹²² Huda similarly labels it a colonial rule.¹²³ Huda convincingly describes it as a rule that has led to judicial officers 'wishing to avoid unmeritorious acquittals for want of full corroboration' in rape cases.

Conversely, this author agrees with the South African Law Commission, which opined that 'the court should have the opportunity to weigh the evidence of the single witness, without first cautioning itself of the fact that the witness is a single witness'.¹²⁴ However, the SALC

¹²¹ South African Law Commission 'Sexual Offences: Process and Procedure December' (2001) Discussion Paper 102 Project 107, 178 (hereinafter referred to as "SALC Discussion Paper 102").

¹²² Carloway (note 115 above) para 7.2.55.

¹²³ Huda (note 66 above) 1.

¹²⁴ SALC Discussion Paper 102 (note 121 above) 51. The SALC states that the provision should read as follows: Notwithstanding the provisions of the common law, any other law or any rule of practice, a court may not treat the evidence of a witness in criminal proceedings involving the alleged commission of a sexual offence pending before that court with caution merely because that witness is –

(a) the complainant in such proceedings; (b) less than 18 years of age; or (c) the only witness to the offence in question.

recommendation was not the outcome of the proposed reforms. The recommendation was watered down. Under the current application of this rule, which this author expands further below, the evidence of a single witness is usually not enough to convict. The prosecutor will also caution himself when assessing the credibility of a witness before trying a case. The problem is thus circular.¹²⁵ It also impacts the manner in which a prosecutor may approach a case, hence the reliance on corroborative evidence (category two extra-variables) as indicated by the study outcomes despite the reformed laws. Friedman puts it succinctly as follows

... the available empirical evidence suggests that the difficulty of defending against an uncorroborated rape accusation is far less than the difficulty in prosecuting one successfully. The female victim of a sexual assault who lacks evidence to corroborate her story is unlikely to persuade the police and prosecuting attorney to prosecute her assailant. And even if the man is prosecuted, the jury is extremely unlikely to convict him of rape.¹²⁶

In the following sub-section, the author discusses the issues related to procedural rules on the single witness in cases of rape and the impact of overreliance on corroboration.

5.3 CORROBORATION HURDLES

As stated, there is no legal requirement for corroboration. Section 208 of the Civil Procedure Act (the CPA) provides that: ‘An accused may be convicted of any offence on the single

¹²⁵ Carloway (note 115 above) para 7.3.1. Carloway states: ‘Corroboration is considered by police officers as essential before deciding whether to report all but the most serious of cases. It is considered by the procurators fiscal in determining whether to serve a complaint or to request the sheriff to commit a person to prison on petition. It is assessed by the Advocates Depute in deciding whether to authorise an indictment. However, none of these procedures normally involve any judicial scrutiny. The first decision which a court is likely to take in relation to corroboration occurs when a submission is made to it, at the end of the Crown case in either summary or solemn proceedings, that there is “no case to answer” because of a lack of sufficiency of evidence in a formal sense.’

¹²⁶ Friedman (note 113 above) 1383-4.

evidence of any competent witness'.¹²⁷ The operative word of this provision is 'competent'. It simply means that the evidence of a single witness must be satisfactory in all material aspects (without material inconsistency). The main issue/question that stands out first is: What constitutes 'material' or 'immaterial' inconsistencies in cases of rape? The answer is simple: It is subjective, meaning that the court exercises vast discretion to determine this. More interestingly, judicial officers are at odds over this in many instances.¹²⁸ Take the majority ruling in *Y v State* that took the view that the complainant (a minor) was manipulative based on speculation and held the following

In her statement to the social worker, the complainant appears to have been careful to make the time of the rape in the caravan coincide with the time that the applicant would have been off work, namely the morning.

The majority concluded this to be material inconsistency, while the minority judgment held an opposite view: 'The majority judgment finds that the complainant was 'careful to make the time of the rape in the caravan coincide with the time that the applicant would have been off

¹²⁷ Section 208 of the Civil Procedure Act (hereinafter referred to as "the CPA"). In *State v Sauls and Others* the court held that: 'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness. The trial judge will weigh his evidence, will consider its merits and demerits and having done so, will decide whether it is trustworthy and whether despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told'. Also see, *State v Webber* 1971 (3) SA 754 (A) para 758; *R v Mokoena* 1956 (3) SA 81(A) para 85. In *State v Webber* the court held that: 'A conviction is possible on the evidence of a single witness. Such witness must be credible, and the evidence should be approached with caution. Due consideration should be given to factors which affirm, and factors which detract from the credibility of the witness. The probative value of the evidence of a single witness should also not be equated with that of several witnesses'.

¹²⁸ *Y v State* [2020] ZASCA 42 para 48 (hereafter referred to as "*Y v S* case"). The Court cited *State versus Sauls* 1981 (3) SA 172 (a) to (h): '... there is no formula to apply when it comes to the consideration of the credibility of a single witness.'

work, in the morning’, said Molemela J (as she was then). The learned judge — now Supreme Court of Appeal President Judge — went on to say that there was ‘basis’ for the majority’s conclusion ‘given the fact that the applicant’s version was that he would sometimes be off duty over weekends, which meant that he would have been home both in the morning and at night.’¹²⁹ In *Cele v State*, Pillay J bemoans the other presiding officer for speculating about the complainants’ injuries, who is a minor, and said:

Respectfully, Chili J speculates from this that ‘the bruising and erythema could have been self-inflicted’ by the complainant scratching herself. None of these speculations were put to either of the prosecution witnesses. Significantly, it was never an issue at the trial. If self-infliction caused the bruising and erythema, it does not explain away the vaginal penetration.¹³⁰

Beyond the issue of what constitutes material and immaterial contradictions, the evidence of a single witness must also be holistically approached in order to be able to sustain a conviction.¹³¹

¹²⁹ *Cele v State* [2016] 2 All SA 75 (KZP) para 9 (hereafter referred to as “*Cele case*”). The SCA in *L v State*, for instance, also doubted whether an 11-year-old would not have bled following penetration beyond the hymen and questioned the fact that the complainant did not testify having bled. The Court held that there is insufficient evidence to support a finding that the appellant (accused) was guilty beyond reasonable doubt.

¹³⁰ Ibid.

¹³¹ *Cele case* (note 125 above) para 69. ‘Evidence of credibility cannot be approached in a piecemeal manner. All the evidence for and against each party has to be viewed holistically.’ Also see, *State v Trainor 2003* (1) SACR 35 SA 41 (b). The Court held that ‘... a conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside evidence that maybe found to be false. Independent verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable the quality of the evidence must of necessity be evaluated and there must be corroborative evidence, if any. Also see; *Abrahams v State* (A491/2010) [2011] ZAWCHC 77 para 23 (hereafter referred to as *Abrahams case*). The court held that ‘the process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to

However, of paramount importance is not only the credibility of the single witness but more so how this credibility is assessed. This assessment does not take into consideration the distinctiveness of rape as a crime that (1) there are usually no other witnesses, and (2) this means, therefore, that it is often the complainant's word against the accused person's word depending further on the nature of the rape.¹³² An 'obvious example', according to Carloway, is 'when the judge or jury is considering the testimony of a single independent or impartial eyewitness, whose character cannot be impugned,' and it is distinct compared to 'listening to members of a rival gang in a street fight or feuding neighbours in a public order debacle'.¹³³ So too is the single testimony of the rape complainant distinct. He argues that 'corroboration is also more likely to exist in relation to some offences than others... [w]here crimes are usually

acquit) must account for all the evidence.' See *State v Sauls and Others* 1981 (3) SA 172 (A) 180. The SCA in *Tshiki v S* explained this as follows: In a criminal trial, a court's approach in assessing evidence is to weigh up all the elements that point towards the guilt of the accused against all that which is indicative of their innocence taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt *Tshiki v S* [2020] ZASCA 92 (SCA). Also see, *State v Chabalala* 2003 (1) SACR 134 (SCA) para 15: the Supreme Court of Appeal amplified as follows, the 'holistic' approach required by a trial court in examining the evidence on the question of the guilt or innocence of an accused: "The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt".

¹³² Friedman (note 113 above) 1379. 'The nature of the crime is such . . . that eyewitnesses seldom are available.' Friedman citing '*Stapleman v State* 150 Neb. 460, 464, 34 N.W.2d 907, 910 (1948). This statement is borne out by an exhaustive empirical study of American jury trials which found that the prosecution had eye-witness testimony, in addition to that of the victim, in only four per cent of the rape cases. Also see, H Kalven & H Zeisel *The American Jury* (1966) 249, 210.

¹³³ Carloway (note 115 above) 7.2.43.

committed in private, the only potential evidence may be from the testimony of a complainer'.¹³⁴

It must be borne in mind that, at the core, given its distinctiveness, a rape case is often adjudicated based on the credibility and reliability of the complainant or lack thereof. It must be brought to the reader's attention that the idea that a single witness need only be competent (credible) to convict is artificial. In truth, whether a single witness is credible, which may be enhanced by corroboration and/or consistency of her evidence, would not matter because the accused needs only to give a probable explanation, even where such an explanation is improbable — it is not enough to convict — unless it is found to be completely false.¹³⁵ That means the court is impelled to give the accused the benefit of the doubt where he gives a probable version.¹³⁶ Zulman JA stated this as follows

It is trite that there is no obligation upon an accused person, where the State bears the onus, to convince the court. If his version is reasonably possibly true, he is entitled to his acquittal although his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond reasonable doubt it is

¹³⁴ Ibid 7.2.49

¹³⁵ *Sphanda case* (note 120 above) para 43. 'As indicated *supra* that in criminal proceedings the State bears the onus to prove the accused's guilt beyond a reasonable doubt, the accused's version cannot be rejected solely on the basis that it is improbable. It is only when the trial court has made a finding on credible evidence that the accused's explanation is false beyond a reasonable doubt. The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. It is trite that in an appeal the accused's conviction can only be sustained after consideration of all the evidence and the accused's version of events.'

¹³⁶ Ibid para 44. 'In a conspectus of the evidence on record and the arguments and submissions made before this court, I am of the view that the appellant should have been given the benefit of doubt and acquitted by the trial court, bearing in mind the concessions made by the doctor. convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable, but none of it may be simply ignored.'

false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably true, but one subjectively believes him is not the test.¹³⁷

In *S v Molaza*, Joubert AJ stated this as follows

The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond a reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence that the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may be simply ignored.¹³⁸

In *S v Munyai*, van der Spuy AJ held the following

A court must investigate a defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false.¹³⁹

To put it simply, proving a rape case beyond a reasonable doubt means ensuring that there is no reason the court should grant the accused a benefit of the doubt, but at times an accused person may fail to do this. He need only prove that his version is reasonably possibly true. These are general rules of procedure that do not take into account the nature of the rape crime

¹³⁷ *Khene v State* (CA 39/2022) [2023] ZANWHC 168 para 22. But at times an accused person may fail to do this. 'The evidence of the appellant that the sexual intercourse was consensual is improbable. According to him after they had sexual intercourse with the complainant, he left saying he was going to his friend. However, immediately after he left, the complainant went to report to Mike and again reported to Lerato. Lerato found her crying and said she was raped by the appellant. If indeed the complainant had agreed to the sexual intercourse, there was no reason for her to report to her friends when she was alone in the house.'

¹³⁸ *State v Molaza* (2020) 4 All SA 167 (GJ) 31 para 45.

¹³⁹ *State v Munyai* 1986 (4) SA 712 (V) para 715 G.

and its distinctiveness. These rules are further applied disjunctively because presiding officers exercise vast discretion. Different judges have different approaches to corroboration. According to Carloway, the corroboration requirement is often ‘misunderstood by lay persons and lawyers, not least judges’, difficult to explain to juries and applied differently by different judges, particularly because many lack criminal law experience’.¹⁴⁰ He goes on to state, ‘No one doubts that there has developed an elaborate, complex and at times contradictory case law on what is necessary to satisfy the corroboration requirement’.¹⁴¹

In this author’s view, these are only a few reasons why corroboration of some sort is essential, even though it is not a legal requirement in rape cases. The process of determining the credibility of a single witness in a rape case is complex. These problems and procedures are merely an ‘artificial bar to prosecution and conviction because of its restrictive method of looking at the quantity of the evidence without reference to its quality’, as Carloway states. Carloway argues persuasively that ‘the system is skewed by prioritising quantity over quality’.¹⁴² It becomes clear why category two extra-judicial variables allow the state to prosecute its case more confidently.

Besides, in determining the witness’s credibility, the court considers extra-judicial factors and applies logic and inferential reasoning. Theophilopoulos and Bellengerean, for example, put this as follows: ‘In determining the relevance of an evidentiary fact, an adjudicator in an adversarial trial setting is guided not by a set of legal rules but by a set of wholly extra-legal principles’.¹⁴³ The authors state that extra-judicial principles are based on

¹⁴⁰ Carloway (note 115 above) at 7.2.44-48 and 7.2.56.

¹⁴¹ Ibid.

¹⁴² Ibid 7.2.44.

¹⁴³ C Theophilopoulos & A Bellengere ‘Relevance, Admissibility and Probative Value in a Rational System of Evidence: A South African Perspective’ (2022) 25(1) *Potchefstroom Electronic Law Journal (PELJ)* 1-31. <<https://dx.doi.org/10.17159/1727-3781/2022/v25ia11966>>

traditional philosophical notions of logic and inferential reasoning. An adjudicator must draw common sense inferences from evidentiary facts to test a specific hypothesis and justify a particular substantive conclusion'.¹⁴⁴ Again, this suggests that judicial officers exercise vast discretion with no set formula. This author argues that the overall result of this blight has hampered the goals of the reform laws discussed next.¹⁴⁵

5.4 RAPE REFORM LAWS AND THE CRIMINAL JUSTICE SYSTEM

It bears emphasising at the onset that the extensive rape law reform in South Africa came as a result of feminist advocacy, including feminist scholarship on jurisprudence that advocated for better responsive treatment practices for rape survivors given the high levels of rape and the adoption of laws that will punish sexual offenders.¹⁴⁶ Thus, it is crucial to acknowledge the historical context in which reformed laws were created. Throughout history, legal systems in South Africa, like procedural rules, too were shaped by patriarchal norms and values that prioritise the interests of men over women. However, there has been a displaced focus on procedural laws rather than the function of the actual criminal justice system (CJS) itself. For example, how does the CJS interpret reformed procedural rules? This author is of the view that the CJS mistreat these procedural rules based on the interpretation of corroboration requirements in cases of rape. The author argues that this may be one of the primary reasons for the low impact of reform laws. Others in the US have suggested a repeal of the corroboration requirement. Friedman argues persuasively on the 'serious defects in the rule's rationale'; he argues further that the corroboration requirement, coupled with its adverse effect upon

¹⁴⁴ Ibid.

¹⁴⁵ *State versus Sauls* 1981 (3) SA (172) paras (a) to (h). For example, the court in *State v Sauls* held that '... there is no formula to apply when it comes to the consideration of the credibility of a single witness'.

¹⁴⁶ L Artz & D Smythe (eds.) *Should we consent? Rape Law Reform in South Africa* (2008) 1.

successful prosecutions, would seem to warrant repeal of the requirement in any form.¹⁴⁷ He suggests further that the justifications of such a rule (the possibility of falsification, the emotion raised by the rape charge, and the difficulty of defending against the accusation) are, in large part, without merit. The author agrees but argues further that repealing this rule is equally defective. This rule continues to apply in South Africa despite being repealed, and the courts are responsible for its continuous application.

In addition to this, the courts tend to follow strict rules regarding the acceptance of evidence from a single witness in cases of rape, as outlined above, which is unhelpful since the caution against such complainants no longer exists. The author here argues that this occurs in any case due to incorrect interpretation of reformed laws. Mackinnon's dominance theory, a subset of feminist legal theory, further explains this phenomenon. The dominance theory suggests that inadequate responses to violence against women are an example of ways in which the law contributes to the oppression of women.¹⁴⁸ An inadequate response may include an incorrect interpretation of the law or rules of procedure. The dominance theory holds that this domination is 'supported by the major institutions in society', such as the [police, prosecuting authority, and judiciary].¹⁴⁹

Feminist theorists similarly posit that male violence against women is legitimised through the CJS in instances wherein the state fails to intervene against sexual violence.¹⁵⁰ This has a ripple effect, according to Friedman. For instance, in jurisdictions where the corroboration requirement is strictly enforced, a relatively low rate of rape convictions was

¹⁴⁷ Friedman (not 113 above) 1365.

¹⁴⁸ C Mackinnon *Sexual harassment of working women* (1979). Theoretical framework: The concepts 'rape myths' 'gender stereotypes' and are central to this study. Define these concepts here and the theories about these relationship between the variables.

¹⁴⁹ N Levit & RR Verchick *Feminist legal theory: A primer* (2016) 21.

¹⁵⁰ Z Adler *Rape on Trial* (1987).

noticed.¹⁵¹ To deal with this, this author takes the direction of Swemmer, who suggests using a feminist lens to end biases around gender and stereotyping in judicial decision-making.¹⁵²

Swemmer puts this persuasively as follows

Viewing matters through this type of lens in judicial decision-making must include an examination and reflection on the ways gender bias and stereotyping permeate structures or systems (such as the judiciary) and our everyday social interactions. The lens requires this examination and reflection to consider these factors from the position of a marginalised gendered individual, such as a woman, a person who is part of the LGBTIAQ+ community or a child.¹⁵³

The author notes that the problems also start with the incorrect assumption that judicial officers are well-trained and well-vested to deal effectively with cases of this nature.¹⁵⁴ This assumption is flawed. A survey reveals that judges are neither immune to this type of dichotomisation of the crime of rape.¹⁵⁵ This can be related to feminist critique especially as influenced by the school of legal realism. Judicial officers use gender stereotypes and myths, as indicated by Swemmer, who found that judicial officers in South Africa are not immune from rape myths and stereotypes, finding further that prosecutors led unlawful evidence and judicial officers failed in executing their discretion to prohibit the leading of such evidence.¹⁵⁶ Swemmer, in some instances, found that prosecutors equally failed to ‘object to the defence’s line of questioning’ as to ‘the complainant’s previous sexual history’, whereas the legislation prohibits

¹⁵¹ Ibid 1370.

¹⁵² S Swemmer ‘S v P - The Abuse of Protection Orders to "Gag" Victims of Rape’ (2023) 26(1) *Potchefstroom Electronic Law Journal (PELJ)* 1, 14.

¹⁵³ Ibid.

¹⁵⁴ PJ Schwikkard ‘Getting somewhere slowly - the revision of a few evidence rules’ in Artz & Smythe (eds) *Should We Consent? Rape Law Reform in South Africa* 73.

¹⁵⁵ C Bohmer ‘Judicial attitudes toward rape victims’ (1974) 57(7) *Judicature* 303, 304.

¹⁵⁶ Swemmer (note 119 above) 22.

questioning along the lines of the victim's previous sexual history.

Similarly, the literature shows that agents in the criminal justice system, such as judicial officers as well generally dichotomise what constitutes the crime of rape versus what is not — based on the victim's character.¹⁵⁷ Some argue that this dichotomisation fails to capture the full complexity of rape and fails to account for the diverse ways in which rape can occur. That perpetuates harmful stereotypes. Feminist conflict theorists highlight and thoroughly argue that such stigma, perpetuated by societal attitudes, can result in survivors feeling unsupported, disbelieved, and discouraged from pursuing justice. That, in turn, can further hinder the investigation and prosecution of rape cases.

As supported by the outcomes of this study, the author agrees with the feminist conflict theorists that extra-legal variables beyond the actual legislated legal burden play a significant role in shaping the decisions and actions of the critical role players within the criminal justice system when it comes to the crime of rape. According to the author, the only distinction is the court's overreliance on corroboration, as demonstrated in several cases. The state must prove its cases, and to succeed, the state's witnesses ought to be corroborated, and their testimonies must be consistent, although this is not legislated explicitly. Simply put, although veiled, the legal system requires corroboratory evidence in cases of rape. As a result, the author argues

¹⁵⁷ Estrich S *Real Rape: How the legal System Victimizes Women who say No* (1987) 230; Field (note 60 above) 179; Borgida & White (note 60 above) 345. The authors found that jurors' close scrutiny of the victim's credibility and moral character was directly related to the conviction rate. Also see, HS Field 'Juror background characteristics and attitudes toward rape' (1978) 2(2) *Law and Human Behavior* 73-93; J Williams & K Holmes *The Second Assault: Rape and Public Attitudes* (1981) 24-50; GD Lafree, BF Reskin & CA Visser 'Jurors' responses to victims behavior and legal issues in sexual assault trials' (1985) 32(4) *Social Problems* 389-407; L Bourque *Defining Rape* (1989); J Horney & C Spohn 'The Influence of Blame and Believability Factors on the Processing of Simple versus Aggravated Rape Cases. (1996) 34(2) *Criminology* 135-162; J Temkin & B Krahé *Sexual assault and the justice gap: A question of attitude* (2008) 1.

that reformed rape laws have thus not improved the prosecution of cases, combated this problem, or even reduced the number of rapes because legislated laws conceal the actual extent of the burden placed on the state to prove its case. Notwithstanding this, to ensure a fair and equitable criminal justice system for rape survivors, it is vital to recognise and address these extra-legal influences as well as the underlying causes of reliance. This dissertation aims to contribute to this end, bringing us to the second claim.

6. CLAIM TWO

6.1 CORROBORATION AND PRIOR STATEMENTS

The second claim made here is that there is an overreliance on corroboration in cases of rape. As stated above corroboration here refers to independent evidence that confirms admitted evidence. An overreliance on corroboration is an incorrect interpretation of the law. It undermines rape reform laws that aimed to combat rape as well as end procedural obstacles. The author argues that it should be interpreted as an effort to lessen the state's burden of proof — by allowing the court to consider the complainant's previous consistent statements. There has been controversy surrounding the application and admission of this rule as reflected in contradictory precedents from the courts and varying opinions in journals, law reports and textbooks.¹⁵⁸ It must be kept in mind that the issue of corroboration and prior statements in cases of rape are intimately intertwined and bound. Previously, the single testimony of a rape complainant without corroboration was insufficient to sustain a conviction. After much discourse and advocacy, the evidence of a single witness is now sufficient to convict, and the corollary, therefore, is that corroboration is not required.¹⁵⁹

¹⁵⁸ DT Zeffertt, AP Paizes & JS Grant Complaints in sexual offences. (2008) 125 (4) *South African Law Journal* 642, 645.

¹⁵⁹ RN Gooderson 'Previous consistent statements' (1968) 26(1) *The Cambridge Law Journal* 64, 84.

For the sake of coherence, the author first defines prior statements relating to cases of rape.

6.2 PRIOR STATEMENT

The qualitative findings reveal that prosecutors often insist that the complainant's first report be obtained as a first point of departure. The current position is that a prior statement, also referred to as the 'first report', is only admitted into evidence as a matter going to the complainant's consistency to support their credibility as held by the SCA in *State v Hammond*.¹⁶⁰ For example, the court held that such evidence is not corroboratory and would not be treated as evidence to show a lack of consent. Generally, a previous consistent statement does not serve as corroboration due to the rule against self-corroboration or narrative.¹⁶¹ It is reasoned in law that self-corroboration is prohibited because it is self-serving.¹⁶² There are, however, some exceptions to this rule. For instance, the Sexual Offences Act provides an exception permitting the admission of previous consistent statements in sexual offences cases.¹⁶³ Put differently, a previous statement made by sexual offences complainants is permissible and may be admitted by law. Section 58 of the Sexual Offences Act provides that

Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: Provided

¹⁶⁰ *S v Hammond* (500/03) [2004] 4 All SA 5 (SCA) para 25 (hereinafter referred to as "*Hammond case*").

¹⁶¹ Gooderson (note 159 above) 67. The author notes: 'What the witness himself said outside the witness-box is not evidence.'

¹⁶² Ibid 64. The author notes: 'It is submitted that the view of Lord Atkinson is to be preferred.'

¹⁶³ Ibid 65. Also see, Sexual Offences Act. Section 58 of the Sexual Offences Act provides that: 'Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: Provided that the court may not draw any inference only from the absence of such previous consistent statements.'

that the court may not draw any inference only from the absence of such previous consistent statements.¹⁶⁴

It must be noted at the outset that the previous consistent statement is not a legal requirement, but it is admissible to benefit the state's case. It must be kept in mind further that the current legislated position was also not much of a departure from the common law position that allowed the admission of a prior statement provided that such a complaint was made as soon as reasonably possible.¹⁶⁵ It differs only to the extent that s 58 of the Sexual Offences Act removes the common law requirement that the prior complaint be made at the first reasonable opportunity, although not entirely interpreted by the court that way, according to Schwikkard.¹⁶⁶ The requirements for admissibility of such evidence include: a voluntary complaint was made, a complaint made at the first reasonable opportunity and that the complainant testifies at trial who is a victim of a sexual offence.¹⁶⁷ It is important to note that the admission of a previous consistent statement was based on the premise that women will report the alleged rape to someone as soon as they are aware of an incident in accordance with the 'hue and cry rule'.¹⁶⁸ Under the 'hue and cry rule', a woman must

¹⁶⁴ Section 58 of the Sexual Offences Act.

¹⁶⁵ Friedman (note 113 above) 1366. In prosecutions for rape and, in fact, for all sexual offenses committed upon women, the common law did not require corroboration. H Hill 'Prior complaint evidence under the evidence act 2006: The supreme court jurisprudence' (2012) 43 *Victoria U. Wellington L. Rev.* 321, 323.

¹⁶⁶ Schwikkard (note 154 above) 89.

¹⁶⁷ Ibid 116.

¹⁶⁸ H de Bracton *On the Law and Customs of England* (1968) translation by SE Thorne quoted in PJ Schwikkard 'Previous consistent statements – the sexual offence anomaly' (2022) 35 *SACJ* 58, 59.

go at once and while the deed is newly done, with hue and cry, to the neighbouring townships and there show the injury done her to men of good repute, the blood and clothing stained with blood, and her torn garments...

Two things emerge from this provision. The first is that a woman must report the incident immediately. The second is that corroboration of a vicious rape, for instance, will be apparent through the blood on the complainant's clothes as soon as she 'hue and cries', and this the court will not ignore. The South African law is no longer based on this rule when considering the development of rape laws. As stated, both these requirements (corroboration and immediate reporting) have been essentially 'abolished' by law in South Africa. To remind the reader, the cautionary rule 'abolished' the corroboration requirement and judicial officers have discretion regarding delayed reports under s 58 of the Sexual Offences Act. Steyn stated that the "hue and cry rule" was still being applied by the courts, though not in its original form.¹⁶⁹ The author here argues that the courts treat the first report's evidence based on this rule's original requirements. The courts, for example, require corroboration even in child rape cases to convict.¹⁷⁰ The court, in many instances, has rejected justifications for delayed reports. Stretch J elucidates this position exceptionally as follows

It seems on the face of it, that ss 58 and 59 place significant limits on the inferential processes that may legitimately be conducted by the courts. Differently put, courts are no longer at liberty to draw adverse inferences from either *only* the failure of the complainant to make a consistent statement, or *only* the length of the delay between the alleged commission of the offence and the making of such a statement, commonly referred to as 'the first report'. The deliberate inclusion of the word 'only' in both these sections, to my mind, presupposes that if there are any other grounds for the drawing of an adverse inference or adverse inferences, failure to report, or the making of inconsistent reports, or a delay in reporting, may, in a given set of circumstances, be considered as a further ground or grounds to justify the drawing of adverse inferences. In other words, an additional

¹⁶⁹ E Steyn 'Abolish the old age hue and cry rule in our law' *News and Views for Magistrates* 3.

¹⁷⁰ *Sphanda case* para 20.

trigger (established by an inferential process best left to the trial court) may well be required to establish a basis for exploring issues such as lack of previous consistent statements or an inordinate delay in making them - whether it is a feature of the complainant's testimony or the circumstances in which the act took place or was ultimately disclosed, or the nature of the relationship between the complainant and the accused, or discrepancies within the evidence of the complainant, or differences between the complainant's version and that of other witnesses.¹⁷¹

6.3 PURPOSE OF PRIOR STATEMENTS

The author can accept that, generally, previous statements aim to rebut a suggestion that the evidence given in court was recently fabricated.¹⁷² Milton puts it as follows

the purpose of admitting evidence of a complaint is that it serves to rebut any suspicion that the woman has lied about being raped. The corollary is, of course, that should a woman not complain or not complain timeously, the conclusion may be drawn that she is lying in her evidence that she was raped. The conclusion may well be unfair to the victim since women may hesitate to complain of rape for reasons of shame, embarrassment, or fear.¹⁷³

In the author's view, s 58 deals effectively with this issue. Here, a complainant would have to provide the court with a reasonable explanation for the delay. In most case this would not be difficult. Simply put, the laws provide that a court may draw an adverse inference only where the complainant fails to explain the delay satisfactorily.¹⁷⁴ That she felt scared due to threats by the accused person, which may be apparent through the relationship between the parties,

¹⁷¹ *S J v State case* citing Schwikkard para 23-9.

¹⁷² Gooderson (note 159 above) 87.

¹⁷³ JR Milton *South African Criminal Law and Procedure* (3rd ed.) 461.

¹⁷⁴ Section 59 of the Sexual Offences Act. Evidence of delay in reporting: In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw an inference only (*italics added*) from the length of any delay between the alleged commission of such offence and the reporting thereof.'

would be sufficient.¹⁷⁵ Alternatively, she may have been ashamed or that she suffered psychological trauma.¹⁷⁶

The point is that the court enjoys broad discretion in determining what constitutes a plausible and reasonable explanation, as stated by Stretch J above. However, this is not an insurmountable mountain to climb. The SALC took the view that ‘it would be problematic to state that the court may never draw a negative inference, since this would interfere with a trial court’s broad powers to evaluate evidence.’¹⁷⁷ The author disagrees with the position that a previous consistent statement is also solely intended to prove consistency and cannot be treated as corroborating evidence.¹⁷⁸ Milton takes the view that: ‘It is not mandatory that there should be evidence that the woman has complained that she has been raped. However, if she has, such [a] complaint is admitted in evidence *to* show consistency and to negative a defence of consent, but not as proof of their contents nor to corroborate the complainant’.¹⁷⁹

Zeffertt and Paizes concur with Milton and contend that admission of previous consistent statements as evidence of corroboration would constitute a radical departure from the common law without being explicitly contemplated by the sections of the code.¹⁸⁰ The authors hold further that s 58 of the Sexual Offences Act bears ‘vexing constitutional implications’.¹⁸¹ Schwikkard and van der Merwe mainly hold that the purpose of admission of

¹⁷⁵ *S v Maila* (429/2022) [2023] ZASCA (3) para 27 (hereinafter referred to as “*Mailula case*”). The SCA was satisfied that the complainant testified that the appellant threatened to beat her if she told anyone about the rape. She was not challenged with another version or shown to be lying through cross-examination. The explanation she gave was spontaneous and ‘has a ring of truth’ to it.

¹⁷⁶ Milton (note 173 above) 461.

¹⁷⁷ Goodson (note 159) 84.

¹⁷⁸ T Zeffertt & AP Paizes *The South African law of evidence* (2009) 482; Steyn (note 169 above) 3.

¹⁷⁹ Milton (note 173 above) 461.

¹⁸⁰ Zeffertt & Paizes (note 178 above) 482.

¹⁸¹ Zeffertt et al. (note 158 above) 643.

the previous consistent statement removes the common law requirement that the prior complaint be made at the first reasonable opportunity but agree with Milton, Zeffertt and Paizes that admissibility of prior statements aims to support the credibility of the complainant *solely*. Although the author is satisfied that previous statements are admitted, allowing complainants to refute recent fabrication allegations has a solid rationale beyond confirming consistency; prior statements should not be limited to that. As Hill suggests, specific requirements of this rule have ‘produced a body of case law that is anything but clear, principled and accessible’.¹⁸² Steyn refutes the claim that this rule favours rape complainants as proposed by proponents of this rule. She refutes this claim based on the fact that victims, given the unpredictable human nature, do not respond to trauma the same way. She claims that ‘the perception that a recent complaint may favour the complainant is unjustified’.¹⁸³

The author agrees with Steyn in one aspect, namely that not all rape complainants may act hysterically after a rape. However, I am afraid I have to disagree that the rule is unjustified because of the perception alluded to. It is quite true that a recent complaint may well favour the complainant but not all subsequent complainants. Instead, it is unjustified to abandon the rule merely because it does not benefit all. A corollary of this principle is that women who complain early need not be prejudiced. We both agree that the evidence of the first complaint is corroboratory. Steyn takes the view that once the first report is ‘considered as support for credibility of the complainants’ statements, it can be nothing but corroboration of the complainant’s testimony,’ and I agree.¹⁸⁴ However, the current position on prior statements rejects this view, as stated above, confining the first report to support consistency, which

¹⁸² Hill (note 165 above) 323; Steyn (note 169 above) 3.

¹⁸³ Steyn (note 169 above) 3.

¹⁸⁴ Ibid.

supports their credibility.¹⁸⁵ I argue that this position presents anomalies outlined in the following passage.

6.4 THE ANOMALIES CONCERNING PRIOR STATEMENT

A prior consistent statement in cases of rape, commonly referred to as a first report, is critical for the state's case but is currently not treated as such. The SALRC opted to allow courts to admit prior statements in rape cases precisely for this reason. The author notes that the value of the first report in South Africa is, however, watered down tremendously, stemming from the assumption that such evidence, while admissible, is irrelevant and lacks probative value. In the author's view, an issue on hand is that a first report may contain hearsay and independent evidence. As a result, there is a question of how the courts interpret what constitutes corroboration in the given circumstances. The courts often disagree on whether specific evidence is, for instance, corroborative or whether it goes solely to the consistency of the complainant. This muddled interpretation is a significant anomaly. To put it differently, it is problematic that the general rule is that the first report goes solely to prove the consistency of the complainant. However, in many instances, the courts do accept the first report as corroborative evidence. For example, the SCA in *Mailula v State* held that a child's report to her mother constituted corroboration:

To support the complainant's evidence, the State led the evidence of the complainant's mother. *Corroborating the complainant, her mother testified that the complainant reported to her that she was raped by the appellant when she was not at home and on the day when*

¹⁸⁵ K Singh 'Evaluating the 'First Report': The persistent problem of evidence and distrust of the complainant in the adjudication of sexual offences' (2006)19(1) *South African Journal of Criminal Justice* 37,55.

she had gone to deliver documents at another village. Further testifying that the complainant's vagina was 'torn' and she found a discharge in it.¹⁸⁶

The court in *Buso v State* considered a child's complaint of abdominal pain to her mother as corroboratory evidence:

Her mother testified how she came to know about the incident: the complainant complained of abdominal pain three weeks later, which led to her *confiding in her mother about the rape*. ... her mother and the doctor [thus] corroborated her evidence.¹⁸⁷

In *Ngoyelo v State*, the court accepted the evidence of a first report as corroboration:

[I]n the complainant's evidence, her version that the sexual intercourse was not consensual was cogent and *corroborated by the evidence of her first report of the rape to Dolly* and also by the J88 with regard to the injury she sustained on her back.¹⁸⁸

In court in *Gasebuse v State* considered the evidence of the first report as corroboration:

The sister to the complainant as *the first report testified and corroborated* the complainant's version in material respects.¹⁸⁹

In *Cele v State*, the court regarded testimony of when and how a witness learnt of the complaint as corroboration:

Some corroboration also emerged from Mandlenkosi Richard Cele, the father of the complainant. Testifying for the appellant he stated that he learnt of the allegations of abuse when 'Lungile' had taken her to the clinic where it was found that the complainant had been raped.¹⁹⁰

¹⁸⁶ *Maila case* (note 171 above) para 10.

¹⁸⁷ *Buso v State* (A256/2021) [2022] ZAGPPHC 404 paras 5 & 24 read together.

¹⁸⁸ *Ngoyelo v S* (A40/2021) [2021] ZAFSHC para 258.

¹⁸⁹ *Gasebuse v S* (CA 83/2019) [2023] ZANWHC 13 para 3.

¹⁹⁰ *Cele case* (note 125 above) para 69.

In *Vilakazi and Another v State*, the court accepted the testimony of other witnesses as corroboration:

The child's evidence was further consistent with that of the other witnesses who corroborated the child's story.¹⁹¹

This confusion among judicial officers is because first reports usually contain hearsay and independent evidence, as stated briefly above. Independent evidence bears the weight to corroborate. This is explained as follows: A prior statement made shortly after the incident to a third party is crucial if the complaint is made soon after the incident because the first report would have the opportunity to observe the complainant's emotional distress, visible physical injuries such as cuts and bruises, firsthand.¹⁹² Such observation is crucial, and it is independent in my view. Corroboration must emanate from an independent source. Corroboration as independent evidence that confirms the testimony of a witness provides a safeguard. Such corroboration must make the accused's guilt relevant and material. The argument here is that the complaint itself (that she was raped) would not serve as corroboration. The emotional distress observed, however, would amount to evidence from an independent source. To put it differently, the first report (the person reported to) would not be told of such emotional distress (hearsay) but witnesses such as those competent to testify. The emotional distress would be relevant and bear probative value even if the complainant officially reports to the police after

¹⁹¹ *Vilakazi and Another v S* [2021] ZAGPPHC 479 para 42.

¹⁹² Schwikkard (note 150 above) 113; Friedman (note 113 above) 1369. 'Similar considerations apply to the use of a complainer's distress, as observed by a third party after an alleged sexual offence, to corroborate the use of force, or lack of consent in the course of that offence, even where there is an alternative explanation for the particular emotional response. The reasoning behind this is that the complainer's distress, spoken to by a third party, is a physical manifestation or reaction, akin to but not the same as a *de recenti* statement. for the limited purpose of proving that the statement was made, and of the attitude or reaction of the accused at the time when it was made which is part of the general picture which the jury have to consider.'

many years. However, only as long as the first report recalls being informed and remembers what they observed. The first report recalls the consistency of the complainant, and what they remember would serve as corroboration.

This view is not at all controversial but based on logic and the data shows that prosecutors rely on corroboratory evidence. The argument remains that corroboration is critical given the complexities in assessing the credibility of a single witness in rape cases. As highlighted by Carloway, 'the law does not require two witnesses in the original Romano-canonical law sense of two testimonies, each confirming guilt. It requires one such testimony and another witness speaking to facts, making the truth or accuracy of the first witness's evidence more likely'.¹⁹³ Roger J in *Fox v HM Advocate* clarifies the importance of corroborative evidence according to Carloway putting it as follows

... evidence which supports or confirms the direct evidence of a witness... The starting point is that the jury have accepted the evidence of the direct witness as credible and reliable. The law requires that, even when they have reached that stage, they must still find confirmation of the direct evidence from other independent direct or circumstantial evidence... The evidence is properly described as being corroborative because of its relation to the direct evidence: it is corroborative because it confirms or supports the direct evidence. The starting point is the direct evidence. So long as the circumstantial evidence is independent and confirms or supports the direct evidence on the crucial facts, it provides corroboration and the requirements of legal proof are met.¹⁹⁴

However, other authors have argued that independent evidence is not merely deriving from the witness himself or herself, such as a previous statement made by him or her to anyone else, or the distressed condition alone of the complainant; this would be 'self-corroboration'.¹⁹⁵ I

¹⁹³ Carloway (note 115 above) 7.2.13.

¹⁹⁴ Ibid 7.2.12.

¹⁹⁵ J Chalmers 'Distress as corroboration of mens rea' (2004) *SLT (News)* 141, 142. 'Independent proof of the reaction can lead to an inference that whatever happened did so against the will of the

strongly disagree with the greatest respect. It is unfortunate that judicial officers have adopted this approach, and, as I see it, it is a flawed approach that does not consider the complexity of determining the credibility of a single witness. Even before introducing such a prior statement intended to enhance her credibility, her credibility is vulnerable to ruthless attacks. It is crucial to keep in mind, however, that consistency and corroboration enhance her credibility and that to convict based solely on the testimony of a single witness, her credibility must be beyond question and satisfactory in every way.

Consequently, acceptance of prior statements as evidence of witness consistency rather than corroboration, based on the arguments outlined above, is an incorrect approach because it does not consider the complexity of how the court determines the credibility of a single witness. However, the most extraordinary anomaly is the position that a prior statement is irrelevant and without probative value, which, therefore, serves to enhance consistency. The value of the evidence of the first report in South Africa is watered down tremendously, stemming from the assumption that such evidence, while admissible, is irrelevant and lacks probative value. The author addresses this problem in the following passage as they outline the rules of admissibility.

complainer and was therefore something brought about by violence or, now, at least without the complainer's consent. This development has in turn led to new problems, since the courts have also held that, whilst distress can corroborate lack of consent, it cannot be used as corroboration of the facts in the libel, such as intercourse or particular acts of violence or indecency. There is, of course, little problem with using this type of distress as a bolster to a complainer's credibility. It is its use, as something emanating from a single source (i.e. the complainer in the form of her oral testimony and demonstrable distress) that concerns corroboration purists on the issue of sufficiency.'

6.5 RULES OF ADMISSIBILITY

The author is mindful of the applicable rules of evidence here. I respectfully disagree with Schwikkard that a prior statement in cases of rape is irrelevant and lacks probative value, going solely to the consistency of the complainants. For the sake of coherence, the author first starts with relevance. It is trite to say that the court will always consider the relevance of adduced evidence and will not accept anything irrelevant and illogical.¹⁹⁶ Schreiner JA deduces relevance as a blend of ‘common sense, judicial experience and logic’.¹⁹⁷ Theophilopoulos and Bellengerean assume relevance is always a question of fact — and admissibility is, on the other hand, a question of law.¹⁹⁸ It is a bound two-step determination. According to Theophilopoulos and Bellengerean, a court must first assess potential evidentiary facts in terms of the natural rules of logic before applying any legal rules that may exclude logically probative evidence.¹⁹⁹ Relevance may also be explained in terms of its probative value.

Probative value may be generally defined as the weight of the evidentiary fact in proving or disproving a fact-in-issue. This value depends on the strength or weakness of the logical relationship between an evidentiary fact and a fact-in-issue, along with many other factors, such as the importance of the issue, the extent to which the fact is challenged by the opposing party, and whether it is outweighed by other countervailing factors.²⁰⁰

¹⁹⁶ Theophilopoulos & Bellengere (note 143 above) 3. ‘In adversarial jurisprudence of Thayer’s influential explanation of relevance as: a principle not so much a rule of evidence as a *pre-supposition* involved in the very conception of a rational system of evidence, as contrasted with the old formal and mechanical systems, which forbids receiving anything irrelevant, not logically probative.’

¹⁹⁷ Ibid.

¹⁹⁸ Ibid. Corroboration as independent evidence that confirms the testimony of a witness provides a safeguard. To be relevant and material such corroboration must point to the guilt of the accused.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

If the court applies logic as explained above, prior statements in cases of rape hold probative value, and there is no legal rule that renders it inadmissible, not even the bar from self-corroboration. It remains the duty of the court to determine the probative value to be attached to such evidence.²⁰¹ Theophilopoulos and Bellengerean explain that a court cannot receive any information or potential evidence which has not been assessed in terms of the natural rules of logic. As a concept, logic refers to reasoning and drawing conclusions based on evidence and reasoning. It is an essential tool in making decisions and resolving conflicts — the court thus often applies logic when adjudicating cases. However, Schwikkard and van der Merwe argue that it is incorrect to assume that evidence is admissible due to its logical relevance.²⁰² The authors argue that several key factors must be considered when determining what is logically probative or disapprobative.²⁰³ Several of these factors include: (a) The issue, namely, the nature and extent of the legal dispute; (b) the proliferation of information that may spiral; (c) the risk of fabrication; (d) prejudice; and (e) the reasonable or proper inference that may be drawn, amongst others. It seems evident to the author that rape occurs in private settings, and the difficulty of proving cases, as indicated by increasing attrition rates in the first chapter, puts a check on its logical and probative validity.

The proliferation of issues is a nonfactor because the admission of prior statements is limited to sexual offence cases, and such cases require care due to the complex nature of these cases. South Africa has one of the highest rape rates in the world. Effective prosecution, as well as careful adjudication of cases, is necessary to combat this problem. Prejudice and the reasonable or proper inference insofar as it relates to a prior consistent statement (in a case of rape unlike any other criminal case) is always relevant to the main issues because the credibility

²⁰¹ Ibid.

²⁰² Schwikkard & van der Merwe (note 18 above) 51.

²⁰³ Ibid 52.

of the complainant is related to these issues, such as whether the complainant provides a valid explanation for the delay. The evidence of the first statement cases of rape can never be inconsequential because it may well be corroborative depending on the facts of each case; as indicated above, category two variables in this study are significantly associated with the prosecution of cases.

However, Schwikkard lists further reasons for the general exclusion of prior statements, including: The general rule against (a) self-corroboration, (b) the risk of fabrication, and the risk of repetition.²⁰⁴ To begin with, the bar against self-corroboration limits the probative value of such a statement to the point that it excludes such evidence. Logic here dictates that the exception admitting such evidence in sexual offences precludes the limitation of the rule against self-corroboration. Alternatively, it should be interpreted that way. However, this must be so only in cases reported immediately, as it was interpreted under the common law. Schwikkard disagrees with this view, describing it as a legislated anomaly.

Schwikkard argues that the legislated admissibility excludes the common law requirement of immediate reporting. The only argument here is that if requirements under common law are accepted, such evidence must weigh more, namely, corroborative evidence, and not merely going to the consistency of the complainant. It is disappointing that the common law on corroboration has not adopted a more flexible attitude to the law of evidence.²⁰⁵ Second, on the issue of fabrication, evidence may well be fabricated in any criminal matter, and this birthed what is known as the crime of perjury. Put differently, fabrication may occur in any criminal matter and not just in cases of rape. Therefore, it is logical

²⁰⁴ Ibid

²⁰⁵ Gooderson (note 159 above) 100; Friedman (note 113 above) 1390. ‘Legislatively or judicially created rules requiring that the testimony of a complainant must be corroborated in order to sustain a conviction for rape should be abandoned.’

that prior statements are inadmissible, except to prove against recent allegations of fabrication. This is again universal to all crimes; a rebut against recent fabrication is not limited to sexual offence cases. Repetition of complaints in cases of rape is strictly limited, unlike in other criminal cases. For example, the first report in cases of rape is precisely that — it is strictly limited to the first person complained to and not the second or third person and so forth. It is a prior statement known as the first report for precisely that purpose.

In context, it becomes evident that this exception of admitting prior statements in sexual offence cases goes beyond the current position, especially considering that the exception follows a public outcry and feminist advocacy. Regard must be had to this. The SALRC opted to admit prior statements in such cases having regard to this. The said rule, as stated above, is linked to removing suspicion against such a complainant and caution to her evidence. The court can only draw an adverse inference if the delay of the first report is unjustified. If, however, such a hurdle is overcome, the rule, in the author's view, authorises the court to accept the prior statement of such a complainant and not concern itself with the risk of fabrication. The court would still apply the rules of accepting evidence of a single witness without considering possible fabrication. Consider it this way: Why would a woman hue and cry immediately after an incident if an attack did not take place? The first report ought to operate in two ways: (1) demonstrate the consistency of the complainant, and (2) serve as corroboration based on the facts of each case. This suggestion is similar to how the first report operates in the United Kingdom (The UK) in two ways. First, it operates in all criminal offences, and secondly, it does not merely go to the consistency of the complainant but may serve as corroboration once admitted into evidence.²⁰⁶ The author will now discuss this further approach from a feminist jurisprudence perspective, as outlined in the following subsection.

²⁰⁶ G Durston 'Previous (In)Consistent Statements After the Criminal Justice Act 2003' (2005) *Crim LR* 211.

6.6 A FEMINIST APPROACH TO PRIOR STATEMENTS

The operation and purpose of prior statements, considering the issue of corroboration, should be interpreted distinctly considering feminist jurisprudence teachings. Feminist jurisprudence is a theoretical framework that examines the ways in which gender norms and inequalities are embedded within legal systems and challenges existing power structures to promote gender equality and social justice. This approach has resulted in many successful reforms, such as women's suffrage, reproductive rights, and labour rights.²⁰⁷ The argument here is that the purpose of prior statements, when interpreted from a feminist perspective provides valuable insights into the patriarchal systems and biases that have shaped legal discourse over the centuries. Historically, feminist jurisprudence has contributed to overcoming these issues. As outlined in the Literature Review in chapter two. Among the most egregious rules dissected by feminists successfully was the cautionary rule, which originates from warning the court against 'facile acceptance' of evidence by certain witnesses, such as rape victims and children.²⁰⁸ By the 1950s, the rationale behind the cautionary rule was questioned and challenged.²⁰⁹ The rule

²⁰⁷ MA Fineman 'Feminist Legal Theory' (2005) 13 *AM. UJ Gender Soc. Pol'y & L.* 13, 18; CA Littleton 'Equality and Feminist Legal Theory' 1986 (46) *U. Pitt. L. Rev.* 1043; L Frohman and E Mertz 'Legal Reform and Social Construction: Violence, Gender, and the Law' (1994) 19(4) *Law and Social Inquiry* 829-852.

²⁰⁸ Schwikkard & van der Merwe (note 18 above) 588; F Viljoen 'Removing Insult from Injury: Reviewing the Cautionary Rule in Rape Trials' 1992 *JS Afr. L* 743, 744. Viljoen cited *S v D* 1951 4 SA 450 (A) 455G) 744. 'Such a cautionary rule also applies to the testimony of accomplices, agents provocateurs, children, prostitutes and the complainants in sexual offences, whether they are single witnesses or not.'

²⁰⁹ *R v J* (1958) (3) SA 699 (SR) para 90. The court held that although there may be circumstances that necessitate special caution, 'the exercise of caution must not be allowed to displace the exercise of common sense'. Also see, *S v D* 1992 (1) SA 513, 1992 (1) SACR 143 (Nm).

was a postulated discrimination against women.²¹⁰

Applying prior statements as proposed could be leveraged to challenge patriarchal biases and promote gender equality. Feminist jurisprudence encourages critical analysis and reinterpretation of legal texts to identify and eliminate gender inequalities. By examining prior statements through a lens of feminist critique, legal scholars and practitioners can identify and dismantle patriarchal assumptions embedded in legal doctrine. The purpose of prior statements from a gender perspective is to work towards gender equality in the legal system. By challenging patriarchal norms and assumptions, feminist jurisprudence seeks to promote a more inclusive and equitable legal system. Prior statements can be examined to identify discriminatory language and interpretations and replaced with more inclusive and feminist approaches.

The purpose of prior statements, when interpreted from a feminist jurisprudence perspective, sheds light on the patriarchal systems and gender biases that have permeated legal discourse throughout history. By critically examining prior statements, feminist scholars and practitioners can challenge and dismantle these biases, promoting gender equality and social justice within the legal system. I argue that the limitation currently placed on prior statements is reflective of patriarchal bias, perpetuating stereotypes and limiting women's access to justice and equality. Take, for example, the interpretation of what constitutes corroboration in cases of rape. An eyewitness account that a complainant was emotionally distressed and displayed visible bruises is regarded as self-corroboration. Winslow describes 'independent evidence' as 'evidence not merely deriving from the witness himself or herself, such as a previous statement

²¹⁰ South African Law Reform Commission Project 45 *Women and Sexual Offences in South Africa* (1985) para 3.55. 'A cautionary rule is applied to evidence in rape ... because experience has shown that it is dangerous to rely on the uncorroborated evidence of the complainant in such circumstances.'

made by him or her to anyone else, or the distressed condition alone of the complainant; for this would be self-corroboration'. Patriarchal norms and values influence this strict interpretation. In South Africa, the SCA in *Hammond* opted to adopt this interpretation (consistency and not corroboration) based on case law backdating to the 1950s — a period when discrimination against women was heightened.²¹¹ The norms of the 50s dictated that women's experiences and perspectives should be secondary to those of men and that women's voices are not worthy of equal consideration.

The rule in its current form does not consider the nature of this crime and the difficulties of prosecuting it. As a result, prior statements prioritise and validate male perspectives instead while discounting or ignoring the experiences of women. Conflict theorists and the feminist perspective on GBV argue that power inequality between men and women results in people (men) being able to dictate how the law is enforced and will therefore be prone to protect their interests; MacKinnon puts it as follows: 'Raped women are compelled to go to the state, men make the laws and decide if they will enforce them'.²¹²

7. CONCLUSION

The analysis of the data reveals that child rape, acquaintance rape and the ecological nature of rape are among the most prevalent theme. The study reveals that acquaintances, such as relatives or biological fathers, committed several child rapes. Concerns were raised about prosecutors declining to prosecute child cases due to various reasons, such as the complainants withdrawing the complaint, the process becoming too tedious, and the lack of cooperation by the child victim. The Children's Act, as amended, provides for the mandatory reporting of child

²¹¹ See *Hammond case*.

²¹² C MacKinnon 'Rape, Genocide, and Women's Human Rights' (2017) 17 *Genocide and Human Rights*, 133, 144; Also see, R Quinney *The Social Reality of Crime* (1974).

maltreatment but does not impose any duty on parents/guardians to cooperate with state authorities in such cases. The failure-to-protect laws to prohibit a guardian's failure to take reasonable steps to protect and report child abuse may be prudent.

The chapter also addressed the cautionary rule in assessing the credibility of single witnesses in cases of rape and the need for corroboration. The prevalence of child rape cases raises concerns about a lack of safety for children in their homes, with a significant percentage of rape cases involving acquaintances. Acquaintance rape represents 84% of all rape cases, with 74% of acquaintance rape cases being child rape cases. The study also reveals that the age and race of the victim and offender play a role in the occurrence of rape. The findings indicate that prosecutors are not influenced by the ecological nature of rape, as rape in Umlazi is found to be ecologically bound, occurring predominantly between residents of the same neighbourhoods and members of the same race. Prosecutors did not show discrimination when deciding to prosecute or decline cases. The study also addresses legal variables such as sexual penetration, consent, *mens rea* and how these factors impact the outcome of rape cases. The author argued that societal change may be more warranted than the amendment of laws to prevent rape and that with expanded empirical knowledge, prevention strategies can be modelled effectively. This chapter examined the impact of various extra-legal variables such as alcohol and substance use, physical assault, weapon use, resistance, and victim-perpetrator relationship on prosecutors' decision-making in nolle cases. It also discussed the influence of extra-legal factors on case outcomes, highlighting the significance of these factors in shaping prosecutorial discretion.

Additionally, the chapter addressed the impact of the cautionary rule and the corroboration requirement in rape cases and advocated for the reform of these laws based on feminist jurisprudence principles. It revealed the limitations of the current legal framework in addressing gender biases and promoting gender equality within the criminal justice system.

The dataset reveals that category two extra-legal factors can influence prosecutors' decisions in criminal cases. These factors include medical evidence such as DNA, visible cuts and bruises, as well as variables like resistance, verbal assaults, and physical violence, including the use of weapons. The study characterises these variables as semi-extra-judicial factors. The research specifically tested the influence of force, physical assault, verbal assault, weapon use, resistance, and immediate reporting on prosecutor decisions. It detailed that medical evidence, such as DNA, was excluded from the sample dockets obtained from SAPS due to privacy laws. The use of force was equally prominent in both cases that were prosecuted and those that were rejected, suggesting that it does not significantly influence prosecutor decisions. The descriptive analysis of prosecuted cases showed a significant association with category two extra-legal variables, specifically physical assault. This suggests that these factors may play a role in determining which cases are prosecuted.

In conclusion, the chapter found that category two extra-legal factors can impact prosecutor decisions in criminal cases. Overall, the findings indicate that category two extra-legal factors may significantly influence the processing of criminal cases, highlighting the importance of considering these factors in the criminal justice system.

The following chapter is the final chapter, which concludes this dissertation.

CHAPTER 5: CONCLUSION

1. INTRODUCTION

South Africa is plagued by a pandemic of GBV. The rape statistics reveal that South Africa has a rape crisis despite extensive rape reforms. This study focused on the criminal justice system — how it operates and impacts the decision-making processes of prosecutors — to understand better the relationship between prosecutorial discrimination, reformed laws, and gender disparities within the criminal justice system. The aims of this dissertation was to test several hypotheses that included:

- There is a significant relationship between victim-defendant relationship and prosecutor decision-making in nolle cases.
- Acquaintance rape cases are most prevalent, and these are generally plagued by rape myths and stereotypes, and often raise issues of consent unlike in stranger rape cases.
- A prosecutor cannot pour energy into what they deem a ‘hopeless case’ when their initial assessment is that the witness (victim) is not credible. Matters are prosecuted based on (1) discriminatory views influenced by (2) the ‘downstream orientation’, which means that ‘downstream orientation’ is (3) influenced by courtroom procedural obstacles.
- The internal NPA appeal process (representations) serves perpetrators rather than complainants and this, too, is a form of discrimination by prosecutors.

The unique contribution of this study is to understand rape through a deep empirical study that contributes new theoretical understandings by testing the rape myths and feminist arguments in the South African context.

2. EXTRA LEGAL VARIABLES: A FEMINIST PERSPECTIVE

Feminist conflict theorists argue that extra-legal variables such as physical assault, use of a weapon, verbal threats, arrest of the suspect among others play a significant role in shaping the decisions and actions of the critical role players within the criminal justice system when it comes to the crime of rape. These variables, according to feminist critical theorists, go beyond the actual legislated legal burden to prove the crime and encompass a wide range of factors, both internal and external to the system, that can significantly impact the outcome of rape cases. Following feminist conflict theorists' findings, this thesis explored how extra-legal variables influence the decision-making of state prosecutors in Umlazi. The main research question — In spite of rape law reform, is prosecutorial discretion in cases of rape still *generally* exercised in a deficient manner that is discriminatory towards women and children based on extra-legal variables, as suggested by feminist critical theorists? — is premised on these findings. This research sheds light on whether the prosecution of rape has improved following massive rape reform, including the elimination of procedural obstacles.

3. MAIN OUTCOMES

3.1 OUTCOME ONE

The results of this research fits with the feminist theory that extra-legal variables influence the prosecutors' decisions. However, there are two aspects to this. First, the findings of this study reveal that category two extra-legal variables indeed impact prosecutors. Category two extra-legal factors include: medical evidence such as DNA, visible cuts and bruises, as well as variables examined here such as Resistance, Verbal assaults, and Physical violence including Weapon, force, and Positive id. These are characterised as variables as semi-extra-judicial factors. This study tested force, physical assault, verbal assault, weapon, resistance, and immediate report under category two variables, see Table 1 in chapter three. In contrast, Table

7 in chapter 3 shows that category two extra-legal variables are more pronounced in prosecuted cases than in nolle cases when compared. There is statistical significance between case outcomes and variables such as Physical assault, Verbal assault, Weapon, Resistance and Immediate report.

3.2 OUTCOME TWO

Second, though this association is precise, the author disagrees with feminist theorists that such an association is due to discriminatory views by prosecutors. It was demonstrated in chapter four that the courts require corroboration, which category two extra-variables provide. This impact is passed onto the prosecutor, who must consider category two extra-legal variables when exercising discretion. In the main, this result enabled the author to answer the main research question both affirmatively and unfavourably regarding whether prosecutorial discretion in South Africa is exercised in a deficient manner that is discriminatory towards women and children — based on extra-legal variables as suggested by feminist critical theorists — despite the recent reform of the law.¹ Yes, there is no doubt that prosecutors take into account extra-legal variables; however, this is not because of discriminatory views but rather due to procedural difficulties of lack of corroboration outlined in section 5 in the previous chapter. This reveals that feminist critical theorist did not to consider categories of extra-legal variables and their broader respective implications. That is the unique contribution of this thesis, which is primarily centred on prosecutorial attrition, aiming to understand better the genuine factors creating this problem.

¹ The main research question is set out as follows: In spite of rape law reform, is prosecutorial discretion in cases of rape still *generally* exercised in a deficient manner that is discriminatory towards women and children based on extra-legal variables, as suggested by feminist critical theorists?

3.3 OUTCOME THREE

The extra-judicial variables under category three are also prominent, but unlike category two extra-legal variables, these serve no practical or procedural purpose in processing cases. Category three variables are simply discriminatory. Table 10 in chapter 3 reveals that the factors that are associated with decisions are category three variables. Category three extra-legal variables strongly support feminist-conflict theory in predicting nolle cases. This study further debunks feminist conflict theorists' views that one key factor influencing prosecutorial decisions is the relationship dynamics between the complainant and the accused person. The argument goes that unequal power distribution between individuals can lead to biases and prejudices within the justice system. Feminist conflict theorists argue that in cases of sexual violence, the power imbalance between the complainant and the accused person can tilt the scales in favour of the accused person due to the fear of retaliation, lack of support, or a general belief that the accused person is less likely to be believed.

3.4 OUTCOME FOUR

The results of this study further show that although rape is 'ecologically bound' occurring predominantly between residents of the same neighbourhoods, members of the same race — this does not at all influence the decision-making of prosecutors in the studied locale. The characteristics of the complainant do not influence prosecutors according to the dataset results of this study. That rape in Umlazi is ecologically may instead speak to the cultural and societal norms surrounding sexual violence. The former president of South Africa, Mr Jacob Zuma, explained this phenomenon when he testified in his rape trial. Zuma said his accuser was wearing only a khanga (cloth), and in Zulu culture, according to his knowledge and wisdom:

... you don't just leave a woman like that... I held her, and she responded like any other woman. She opened her thighs. I kissed her a bit, and she kissed me. We then started having intercourse.²

The outcome that rape in Umlazi is ecologically bound supports the subculture theory that suggests that aggressive behaviours or conduct are often expected in certain situations. In the South African context, and in the context of Black neighbourhoods in the US, it can be said to be ahistorical, decontextual and thus ultimately racially stereotyping, however I do not delve into this. Subculture theorists argue that the highest rates of rape are among specific neighbourhoods that condone aggressive behaviour.³ I repeat this outcome only because the subculture theory is similar to feminist critical theorists' suggestions that sexual assault is made more probable by the general acceptance of violence in our society, as posited by the subculture theorists as well as feminist critical theorists. Feminist critical theorist further highlights that the inferior status of women in society aggravates this.⁴ This outcome provides context. The confirmation of both the prevalence of acquaintance rape, though prosecuted without discrimination, as well as the confirmation that rape is ecologically bound indicates that amendments of rape laws or more laws in South Africa may not necessarily be a solution to combat the high incidents of rape. That may explain why reforms to the laws have not decreased the prevalence of rape in South Africa. I must remind the reader that one of the research aims was to examine why the robust development of progressive case law has not resulted in actual social change and better prosecution of cases. In determining the causes and effects of prosecutorial attrition, the author established the possible underlying causes of this

² Gill Gifford & Karyn Maughan 'Zuma: I had to comply' 4 April 2006 <<https://www.iol.co.za/news/south-africa/zuma-i-had-to-oblige-271913>> Also see, *S v Zuma* 2006 (2) SACR 191 (W) (8 May 2006).

³ M Amir 'Forcible rape' *Federal Probation* (1967) 31(1) 51-58.

⁴ S Brownmiller *Against Our Will: Men, Women, and Rape* (1975).

problem. The solution may not lie with more laws or better laws but perhaps the promotion of the legal equality of women taking into consideration the outcomes of the subcultural theory on rape reflected in this study. As stated throughout this study, substantive equality is important as it aims to ‘redress disadvantage, address stigma, stereotyping, prejudice and violence, enhance voice participation’.⁵ The state bears a duty to enact specific measures relating only to rape victims (as opposed to victims of other forms of violent crime) to attain substantive equality.⁶ Substantive equality may be justified considering that the crime of rape is not only a severe human rights violation but represents systemic discrimination since the crime of rape, along with the failure to prosecute, is perpetrated disproportionately against women. The author must also remind the reader of the critical feminism perspective. Critical feminism critiques the suggestions that mere legal reforms and legal/formal equality is enough. The author is of the view that this also effectively answers the third research question, which questions the impact of the relationship between prosecutorial discrimination, reformed laws, and gender disparities within the criminal justice system.

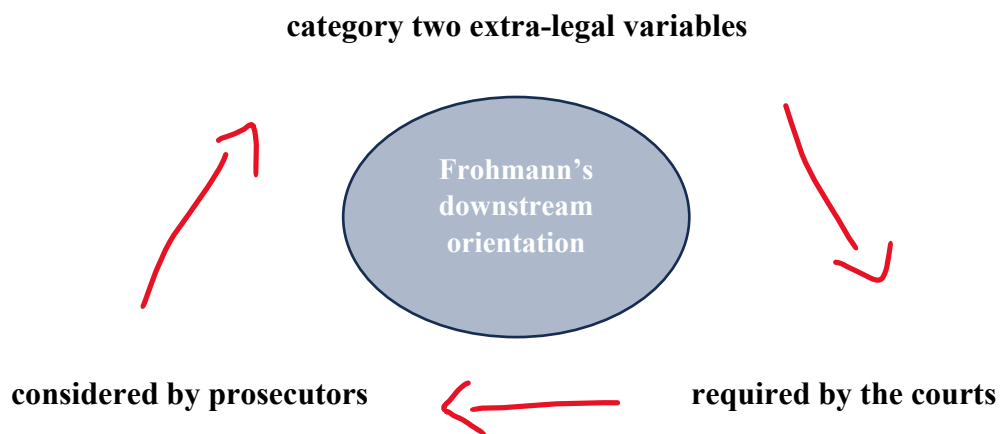
3.5 OUTCOME FIVE

As noted in chapter four, this study focused on the criminal justice system — how it operates and impacts the decision-making processes of prosecutors — to understand better the relationship between prosecutorial discrimination, reformed laws, and gender disparities within the criminal justice system. A significant outcome shows that despite not being required by law, a court will rarely convict an accused without corroboration when exercising discretion.

⁵ S Fredman ‘Substantive equality revisited’ (2016) 14(3) *International Journal of Constitutional Law* 712-738.

⁶ B Pithey, L Artz, H Combrinck & N Naylor ‘Legal Aspects of Rape in South Africa’ (1999) *Discussion Document* 138. Also see *Minister of Finance and Other v Van Heerden* (CCT 63/03) (2004) 25 ILJ 1593 (CC); *Harksen v Lane NO and Others* (CCT9/97) 1998 (1) SA 300.

Indeed, despite the robust constitutionally developed rules of procedure in cases of rape, the courts consider category two extra-legal factors. However, fundamental to this is that the increased importance of category two variables (disguised as corroboratory evidence) is also indicated in prosecutorial decisions in this study. There is a link, and the context therefore matters. As stated in the previous chapter, although the court considers legal and extra-legal variables, the court also uses logic. Thus, it is no surprise that prosecutors, based on their courtroom experience, consider the court's requirements considerations/interpretations when exercising discretion. Thus, the problem is circular and can be attributed to a process known as the downstream orientation described by Frohmann. As stated in the Problem Statement, Frohmann's downstream orientation theory concerns convictability that creates a 'downstream orientation' in prosecutorial decision-making: anticipation and consideration of how others (i.e., jury and defence) will interpret and respond to a case'.⁷



This outcome primarily answers the second research question — why the prosecution of rape in South Africa has not improved despite progressive legal reforms and whether this problem occurs due to what Frohmann describes as the downstream orientation theory. By applying this

⁷ L Frohmann 'Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking' (1997) 3(1) *Law & Society Review* 531, 535.

downstream orientation to cases, cases are prejudiced, and the incorrect or limited interpretation of cases in this manner restricts women's rights. When the court interprets evidence and applies laws in such a way that perpetuates gender inequalities by relying on outdated interpretations and precedents on prior statements, it has been the author's contention in the previous chapter that the court perpetuates gender stereotypes and limits women's access to full legal protections by perpetuating gender stereotypes.

As stated, feminist conflict theorists argue that the beliefs and attitudes held by individuals within the criminal justice system, including judges, prosecutors, and law enforcement officers, can significantly impact the way rape cases are investigated, prosecuted, and adjudicated. These norms can include stereotypes, victim-blaming, and preconceived notions about gender roles that can influence decision-making processes within the system. The common theme of victim blaming highlighted by feminist conflict theorists is not apparent in prosecutor dispositions in cases under this study. Though feminist lenses incorrectly interpret the variables that influence cases because they focus incorrectly on discrimination without taking into consideration the full context, this is not to indicate that the absence of a common theme of victim blaming in this study dismisses the validity of victim blaming in its entirety, as feminist theorists assert. The empirical outcome of this thesis is that extra-legal variables matter, and the main argument that emerges is that these variables matter even if they are not required in terms of the law. A study on prosecutorial attrition in South Africa was conducted in a timely manner to delineate the type of variables that matter. Apart from assisting in the determination of whether prosecutorial discretion is exercised in a deficient manner that is discriminatory towards women and children in cases of rape despite rape law reform and the reasons behind it — fellow researchers will be able to use this data to conduct further research.

3.6 OUTCOME SIX

As outlined in chapter 1, a key objective was to narrow the gap in the literature regarding the attrition of rape cases in South Africa because there is a yawning gap in the literature on the topic of prosecutorial attrition. This study has contributed to the literature by exposing any correlations that influence prosecutorial decision-making in cases of rape that may lead to attrition. It puts into perspective the reasons behind the prosecution of cases. It is crucial because no studies have been conducted in South Africa that go beyond the study of attrition rates and the handling of cases by the police. In conducting empirical research, this doctoral study successfully addressed and narrowed the gap in the literature regarding rape case prosecutorial attrition and the variables that matter and why such variables matter. The findings of this research contribute towards the feminist legal theory that debunks the assumptions that law is objective, neutral and just in its nature and structure.

4. RECOMMENDATIONS

According to Brownmiller, it is imperative to replace ‘man’s law’ with ‘law that reflects the female reality’.⁸ Brownmiller further states that she is ‘convinced that the battle to achieve parity with men in the critical area of law enforcement will be the ultimate testing ground on which full equality for women will be won or lost’.⁹ The author cannot agree with Brownmiller more. With this in mind, the author leans towards the common law position that the prior statement is admissible provided that the complaint is made at the first available opportunity but argues that in such circumstances, the evidence must go to the consistency of the complainant and serve as corroboration. Where a report is made late, the current legislative

⁸ Brownmiller (note 4 above) 388.

⁹ Ibid.

position must apply, meaning that a first report will go only to the consistency of the complaint and not serve to corroborate.

At first glance, this may seem discriminatory. However, it is an argument based on logic, fairness, and, most importantly, on this study's empirical outcomes. Consider it this way: Those complainants that 'hue and cry' at the first available opportunity should not be encumbered by regressive legislation that is limited. That is not to say that complainants who report late are less credible and that their evidence should be treated differently. It is to say that those who do report early should not be unduly encumbered. The current position does not benefit any rape complainant. The argument here is that those who 'hue and cry' should be granted some benefit. There is no need to throw the baby out with the bathwater. This argument is based on logic and fairness because this evidence is likely to contain corroboratory evidence, unlike a first report that is reported too late. For all these reasons, it is clear that the first report or voluntary complaint can amount to corroboration. It is evident here that the first report is crucial, as in all cases examined under this study, prosecutors required the first report to be obtained and submitted by the state. It was a common law rule that was legislated but limited for reasons challenged here.

The crime of rape is difficult to prove. The dichotomisation of rape (what constitutes real rape versus what does not) has far-reaching implications and consequences. The dichotomisation of rape has shaped public perception, influenced legal definitions, and affected the way rape is investigated and prosecuted. The force versus non-force dichotomy has also contributed to the stigmatisation of survivors and hindered efforts to address the broader issue of sexual assault. Moving forward, the author argues that it may be crucial for society to shift towards a more nuanced and comprehensive understanding of rape, taking into consideration the context of rape (how it occurs, where it occurs, when it occurs and between whom) as well as context on variables that impact the rules of evidence and procedure. By challenging the

dichotomisation process and embracing a broader understanding of consent, power dynamics, and psychological manipulation, we can work towards creating a more equitable and just society and a better functioning criminal justice system.

3. SUMMARY OF RECOMMENDATIONS

Table 11: Summary of recommendations

Present application	Recommendations
The first report is admissible but only serves to prove consistency and not corroboration.	Retain common law position on corroboration. The first report should serve as corroboration and consistency <i>only</i> where the report is made <i>immediately</i> or at the <i>first available opportunity</i> to any person. The implication is that the complaint and the first-hand account of emotional distress must serve as both corroboration and consistency.
The dockets reveal that prosecutors give insufficient, primarily generic, reasons for the decisions in nolle prosequi cases.	Amend to section 20 (1)(c) of the NPA Act – to limit prosecutorial discretion (to decline) when concerned with cases of rape because prosecutorial discretion is shaped by statute and policy (Lebitse, 2022). ¹⁰

¹⁰ P Lebitse (note 1 above) 90.

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4.9 ANNEXURES

4.9.1 ETHICS CLEARANCE CERTIFICATE



Research Office

HUMAN RESEARCH ETHICS COMMITTEE (NON-MEDICAL)
R14/49 Lebitse

CLEARANCE CERTIFICATE

PROTOCOL NUMBER: H23/01/12

PROJECT TITLE

A Feminist Legal Theory Perspective on Prosecutorial Decision Making and Case Attrition for the Crime of Rape and the Role of Law Reform: A Mixed Method Approach to Case Rejection Decisions

INVESTIGATOR(S)

Ms P Lebitse

SCHOOL/DEPARTMENT

School of Law

DATE CONSIDERED

27 January 2023

DECISION OF THE COMMITTEE

Approved
Risk Level: Minimal

EXPIRY DATE

04 April 2026

DATE 20 June 2024

CHAIRPERSON

A handwritten signature in black ink, appearing to be 'J Watermeyer'.

(Professor J Watermeyer)

cc: Supervisor : Professor T Madlingozi

DECLARATION OF INVESTIGATOR(S)

To be completed in duplicate and **A SIGNED COPY** returned to the Secretary electronically. Unreported changes to the application may invalidate the clearance given by the HREC (Non-Medical)

I/We fully understand the conditions under which I am/we are authorized to carry out the abovementioned research and I/we guarantee to ensure compliance with these conditions. Should any departure be contemplated from the research procedure as approved I/we undertake to submit an amendment of the protocol to the Committee. **I/we agree to completion of a regular progress report. For Minimal and Low Risk studies, this is due annually on 31 December. For Medium and High Risk studies, this is due twice annually on 30 June and 31 December.**

Signature _____

Date / /

PLEASE QUOTE THE PROTOCOL NUMBER ON ALL ENQUIRIES

4.9.2 SAPS PERMISSION LETTER

23.P.S. 032-0222

SAP 21

SUID-AFRIKAANSE POLISIEDIENS



SOUTH AFRICAN POLICE SERVICE

P.O. Box 1965, DURBAN, 4000

Versending Reference	: 3/34/2(151)
Navres Enquires	: Colonel I Walljee
Telefoon Telephone	: 031 325 4841
Faksnummers Fax Number	: 031 – 325 6072
E-pos Email	: ShazilS@saps.gov.za

**THE PROVINCIAL COMMISSIONER
KWAZULU-NATAL**

2023-04-20

The Head
RESEARCH

PERMISSION TO CONDUCT RESEARCH IN THE SOUTH AFRICAN POLICE SERVICE: UNIVERSITY OF THE WITWATERSRAND: DOCTORATE DEGREE: A FEMINIST LEGAL THEORY PERSPECTIVE ON PROSECUTORIAL DECISION MAKING AND CASE ATTRITION FOR THE CRIME OF RAPE AND THE ROLE LAW REFORM: A MIXED METHOD APPROACH TO CASE REJECTION DECISIONS: RESEARCHER: P LEBITSE

1. Your minute 3/34/2 dated 2023-03-28 received by this office on 2023-04-04, regarding permission to conduct the above-mentioned research has bearing on this matter.
2. Paragraph 5 of the said minute requests the final approval of the Provincial Commissioner: KwaZulu-Natal to permit the researcher to collect data by analyzing fifty (25) closed dockets from Umlazi Police Station, in line with the proposed topic/ title.
3. The application to conduct interviews with participants from KZN Provincial Head Office Supply Chain Management is approved by this office on condition that:
 - 3.1 Participation in collecting data must be voluntary;
 - 3.2 Accessing sensitive information/nature or seriousness can result in respondent's refusal to answer certain questions; and
 - 3.3 The researcher adheres to the conditions stipulated in Paragraph 8 of Head Office minute 3/34/2 dated 2023-03-28.

4.9.3 CODEBOOK

Codebook			
Variable name	variable description	level code	level description
Dependant variable: case status		0	NP
		1	P
Legal variables			
penetration	unlawful penetration	0	No
		1	Yes
no consent	the victim did not consent	0	No
		1	Yes
coercion	victim coerced to consent	0	No
		1	Yes
Category 1 extrajudicial variables			
race		0	Black
		1	Other
same location incident		0	No
		1	Yes
Victim educated	victim education status (nsc)	0	No
		1	Yes
Suspected uneducated	suspect education status (nsc)	0	No
		1	Yes
Victim emp	victim employment status	0	No
		1	Yes
Suspect emp	suspect employment status	0	No
		1	Yes
Category 2 extrajudicial variables			
force	force was used by the suspect	0	No
		1	Yes
physical assault	physical assault	0	No
		1	Yes
verbal assault	verbal assault	0	No
		1	Yes
weapon	use of a weapon	0	No
		1	Yes
resistance	victim resisted	0	No
		1	Yes
positive id	positive identification of the suspect by the victim	0	No
		1	Yes
Category 3 extrajudicial variables			
alcohol	mention of alcohol	0	No
		1	Yes
substance	mention of substance	0	No
		1	Yes
immediate	victim reported immediately	0	No
		1	Yes

arrest	suspect arrested	0	No
		1	Yes
prior sex	Prior sexual activity with the accused	0	No
		1	Yes
prior crime	Complainant's prior crime record	0	No
		1	Yes
fled	victim fled scene	0	No
		1	Yes
strangers	victim attacked by a complete stranger	0	No
		1	Yes
acquaintances	victim and suspect know each other	0	No
Other variables			
NP: no reasons	Nolle: no reasons given for declining prosecution	0	No
		1	Yes
NP: lied	Nolle: the victim lied and therefore prosecution declined	0	No
		1	Yes
NP: uncooperative	Nolle: complainant/guardian is uncooperative and prosecution declined	0	No
		1	Yes
NP: incompetent	Nolle: the victim is incompetent to testify and the prosecution declined	0	No
		1	Yes
NP:(V) untraceable	Nolle: the victim is untraceable and the prosecution declined	0	No
		1	Yes
NP:(S) untraceable	Nolle: the suspect is untraceable and the prosecution declined	0	Yes
		1	No
NP:(S) deceased	Nolle: the suspect is deceased and the prosecution declined	0	No
		1	Yes
NP: withdrawn After Interview	Nolle: declined to prosecute after an interview with the victim	0	No
		1	Yes
NP: withdrawn After proceeding	Nolle: declined to prosecute after initially proceeding	0	No
		1	Yes
NP: victim withdrew	Nolle: declined to prosecute after the victim withdrew	0	No
		1	Yes
NP: victim contradicted	Nolle: victim contradicted and the prosecution declined	0	No
		1	Yes
P: convicted	Prosecuted and convicted	0	No
		1	Yes
P: lesser charge	Prosecuted and convicted on a lesser charge	0	No

		1	Yes
P: not guilty	Prosecuted and found not guilty	0	No
		1	Yes
P:(S) deceased	Prosecuted but the suspect deceased during the proceedings	0	No
		1	Yes