



The Legal Consciousness of Women as Influenced by Policing of Rape Cases

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DECLARATION

I, Jessica Blunden declare that this research report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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ABSTRACT

This report aims to interrogate the relationship between women and the law in South Africa and how this relationship is informed by the way in which the South African Police Service (SAPS) handles cases of rape, specifically those where the victim knows the identity of their rapist. This report argues that there is a link between South Africa's culture of rape and violence and whether women approach the SAPS. This link is premised on various aspects, firstly, the culture informs the legal consciousness and conduct of the SAPS. Secondly, the SAPS' conduct then informs the legal consciousness of women in South Africa. Finally, the legal consciousness of women in South Africa then determines whether they approach the SAPS. Having established the various aspects of this argument, this report offers some ideas for potential reform from both a practical and ideological perspective. The method and approach adopted in formulating the report has not involved the use of any direct research methods, but rather an analysis of the writings and research of various scholars and organisations.

DEDICATION

To my late oupa, Edward Bernard Meyer.
A man who stood for fairness his entire life and continues to serve as my moral compass.
All I do, I do for you.

TABLE OF CONTENTS

Declaration

Abstract

Dedication

1. Introduction
2. South Africa's Culture of Rape and Violence
3. Legal Consciousness
4. The Conduct of the SAPS in Relation to Cases of Rape Where the Victim Knows the Identity of Their Rapist
 - a) Issues Rooted in Practical Failures
 - b) Issues Rooted in Ideology
5. The Extent to Which the SAPS' Conduct Influences the Legal Consciousness of Women in South Africa
6. Why Women Choose Not to Approach the SAPS
 - a) Reasons Not Linked to Legal Consciousness
 - Presence of Relationship
 - Financial Dependence
 - b) Reasons Linked to Legal Consciousness
 - Failure to Recognise That What Has Happened is Rape
 - Framing of Rape as a Private Issue
7. Potential Reform
8. Conclusion

Reference List

1. Introduction

Aimed at evaluating the relationship between women and the law in South Africa, this report draws a particular focus on the way in which the legal consciousness of women is influenced by the conduct of the South African Police Service (SAPS) in respect of cases of rape, where the victim knows the identity of their rapist.¹ This report argues that there is a link between South Africa's culture of rape and violence and whether women approach the SAPS.² This link is premised on various aspects. Firstly, the culture informs the legal consciousness and conduct of the SAPS.³ Secondly, the SAPS' conduct then informs the legal consciousness of women in South Africa.⁴ Finally, the legal consciousness of women in South Africa then determines whether they approach the SAPS.⁵ In terms of format, following this introduction, this report is divided into six substantive sections. The section to follow delves into the idea of South Africa's culture of rape and violence. Section three considers the concept of legal consciousness, both generally and in relation to this report's focus. Section four considers the conduct of the SAPS in relation to cases of rape, specifically where the perpetrator's identity is known to the victim. Within this section several issues are highlighted in relation to this conduct from a practical and ideological perspective. Section five considers the extent to which the conduct of the SAPS influences the legal consciousness of women in South Africa. Section six considers the reasons why women do not approach the SAPS to report instances of rape, with a focus on the role of legal consciousness. The final substantive section, before concluding, looks at potential reform.

2. South Africa's Culture of Rape and Violence

The term 'rape culture' is not universally defined, however, there is general consensus 'that it denotes an interrelated spectrum of sexual violence as well as the normalisation of these practices within society.'⁶ This normalisation is enabled by the different stereotypical constructs of masculinity and femininity and the way that which is 'feminine' is seen as

¹ One cannot deny that the issue of rape in South Africa is complex and multi-layered, however, due to various constraints, this report draws attention to a particular aspect of South Africa's 'rape crisis.' As a result, it is acknowledged that a critical limitation of this report is its focus on the SAPS conduct in relation to rape cases involving female victims raped by male perpetrators whom they know.

² Pumla Dineo Gqola *Rape: A South African Nightmare* (2015) at 22.

³ This is discussed and proven in section four.

⁴ This is discussed and proven in section five.

⁵ This is discussed and proven in section six.

⁶ Selina Palm 'Religion, gender norms and campus rape culture: Building resistance from below' (2018) 37 *Politeia* 1 at 4.

inferior.⁷ Power dynamics are key.⁸ In South Africa, one further needs to recognise the role played by patriarchy, colonialism and apartheid in the creation of the culture of rape and violence.⁹ It is vital to note that this culture is prevalent at a societal, individual and institutional level within the SAPS.¹⁰ The ways in which this culture manifests are discussed below.

3. Legal Consciousness

Through the lens of legal consciousness, this report aims to investigate the legal consciousness of women in South Africa vis-à-vis the SAPS within the context of cases of rape where the victim knows the identity of their rapist. For ease of reference, this report uses the term ‘given context,’ to refer to the outlined contextual focus.

The origins of the concept of legal consciousness can be traced back to the United States of America in the 1980s where it was developed by scholars Susan Silbey, Austin Sarat and Christine Harrington.¹¹ The concept was and continues to be developed in South Africa by several scholars, including but not limited to, Joel Modiri,¹² Jackie Dugard,¹³ Grace Khunou,¹⁴ Brandon Bodenstein¹⁵ and Thato Masiangoako.¹⁶

Briefly, legal consciousness is a diverse ‘theoretical framework and tool’¹⁷ which ‘attempts to understand the law’s ability to maintain its authority in spite of the gap that exists between what the law is and what the law should be.’¹⁸ The theory calls the law’s hegemonic status into

⁷ Ibid at 4-5.

⁸ Ibid.

⁹ Supra note 2 at 66-70.

¹⁰ Joel M Modri ‘The rhetoric of rape: An extended note on apologism, depoliticization and the male gaze in *Ndou v S*’ (2014) 30 *SAJHR* 134 at 157; Penelope Andrews ‘Violence against women in South Africa: The role of culture and the limitations of law’ (1999) 8 *Temple political & Civil Rights Law Review* 425 at 437-439; Safer Spaces ‘Tackling violence in South Africa: The context’ available at <https://www.saferpaces.org.za/learn-how/entry/tackling-violence-in-south-africa-the-context>, accessed on 29 August 2022; Mamello Mosiana ‘Rape culture is a product of systemic and institutionalised patriarchy’ *Daily Maverick* 24 May 2017, available at <https://www.dailymaverick.co.za/opinionista/2017-05-24-rape-culture-is-a-product-of-systemic-and-institutionalised-patriarchy/>, accessed on 29 August 2022.

¹¹ Anne Wyvekens ‘The historical roots of legal consciousness studies. Susan Silbey as observer and actor’ (2018) 100 *Droit et société* 1 at 2.

¹² Thato Masiangoako ‘Rationalising injustice: The reinforcement of legal hegemony in South Africa’ (2018) 66 *SA Crime Quarterly* 7 at 9.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid at 7-16.

¹⁷ Ibid at 8.

¹⁸ Ibid at 11.

question and investigates this status in light of the law's shortcomings.¹⁹ A significant shortcoming in this regard is the difference between the law 'on paper' and the law 'in action.'²⁰ The theory is further aimed at understanding and exploring individuals' awareness and understanding of the law and the ways in which this awareness and understanding inform individuals' actions.²¹ The concept of legal consciousness is 'complex and fluid' in nature.²²

For the purposes of this report, an important consideration is the need to interrogate whether victims, in line with their legal consciousness, understand and acknowledge that what has happened to them is indeed rape.²³ One needs to question when a dispute, in the given context, rises to the level of a legal dispute for victims, and thus results in their approaching the SAPS.²⁴ This is explored in greater detail in section six.

4. The Conduct of the SAPS in Relation to Cases of Rape Where the Victim Knows the Identity of Their Rapist

To evaluate the way in which the SAPS handles cases of rape, in the given context, it is necessary, first, to 'set the scene' and outline the current South African context. Often termed the 'rape capital of the world,'²⁵ it is no secret that South Africa is facing a rape 'epidemic.'²⁶ According to a media briefing by Police Minister Bheki Cele on Friday 3 June 2022, 10 818 people were raped in South Africa between January and March 2022.²⁷ In order to appreciate the scale of the problem, it is important to remember that most cases of rape are not reported to the SAPS and so the available data refers only to the select number of reported cases.²⁸

¹⁹ Susan S. Silbey 'After legal consciousness' (2005) 1 *Annual Review of Law and Social Science* 323.

²⁰ Supra note 12 at 8.

²¹ Amy Blackstone, Christopher Uggen & Heather McLaughlin 'Legal consciousness and responses to sexual harassment' (2009) 43 *Law Soc Rev* 1 at 2-3.

²² Kathryn M. Young 'Everyone knows the game: Legal consciousness in the Hawaiian cockfight' (2014) 48 *Law & Society Review* 499 at 500.

²³ Arnold S. Kahn, Jennifer Jackson, Christine Kully et al. 'Calling it rape: Differences in experience of women who do or do not label their sexual assault as rape' (2003) 27 *Psychology of Women Quarterly* 233.

²⁴ Supra note 21 at 2.

²⁵ Dee Smythe *Rape Unresolved: Policing Sexual Offences in South Africa* (2015) 16.

²⁶ Stephanie Wild 'South Africa's hidden pandemic: Rape' (2022) 10 *Journal of Political Risk*.

²⁷ South African Government 'Minister Bheki Cele: Quarter Four Crime Statistics 2021/2022' available at <https://www.gov.za/speeches/minister-bheki-cele-release-quarter-four-crime-statistics-202122-3-jun-2022-0000>, accessed on 26 June 2022.

²⁸ Marie Stopes South Africa '10 Reasons people don't report rape and sexual assault' 9 December 2017, available at <https://www.mariestopes.org.za/10-reasons-people-dont-report-rape-sexual-assault/>, accessed on 20 October 2022.

Regarding the South African legal context in relation to rape, Dee Smythe describes it as a context which is ‘paper rich and policy prolific.’²⁹ Rape is regulated in South Africa at both an international and a domestic level.³⁰ In terms of South Africa’s international obligations, the country has ratified a number of treaties, conventions and protocols, from both the United Nations³¹ and African Union,³² aimed at the protection of women.³³ In addition, South Africa, as a member of the Southern African Development Community (SADC), is further committed to upholding the SADC’s commitments to the eradication of violence and discrimination against women.³⁴ Domestically, the crime of rape is governed by numerous pieces of legislation.³⁵ Rape is defined by section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act as the ‘unlawful’ and ‘intentional’ ‘penetration’ of an individual ‘without their consent.’³⁶ In addition to the aforementioned, the crime of rape is policed in South Africa in accordance with various national policies.³⁷

For the purposes of this report, it is important to consider the regulation of rape at the ‘police station level,’ where national legislation and policies are given effect by the National Police Commissioner who is responsible for issuing National Instructions and Standing Orders in terms of the South African Police Service Act.³⁸ National Instruction 3/2008 (the National Instruction) is particularly relevant as it aims to ensure that members of the SAPS ‘render a professional service to victims [of sexual offences] in respect of the investigation of offences of this nature and to assist victims in this regard.’³⁹ Elements of the National Instruction are detailed below in order to understand how it aims to achieve its objective.

Having outlined the relevant legal environment, it is worthwhile to consider the ‘physical amenities’ that have been put in place to achieve the legal objectives. Thuthuzela Care Centres

²⁹ Supra note 25 at 28.

³⁰ Ibid at 24-28 & 30-38.

³¹ The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and CEDAW’s Optional Protocol.

³² African Charter on Human and People’s Rights and the Charter’s Optional Protocol on the Rights of Women in Africa.

³³ Supra note 25 at 24-28.

³⁴ Ibid at 26.

³⁵ Vinesh Basdeo ‘Policing Sexual Violence in South Africa: Problems and Challenges’ (2018) 13 *International Journal of Criminal Justice Sciences* 112 at 116.

³⁶ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

³⁷ Supra note 25 at 33-35.

³⁸ Ibid at 35; South African Police Service Act 68 of 1995 section 25.

³⁹ National Instruction 3/2008 issued in terms of section 25 of the South African Police Service Act 68 of 1995 section 1 available at https://www.saps.gov.za/resource_centre/acts/downloads/sexual_offences/ni/ni0308e.pdf, accessed on 26 June 2022.

(TCCs) serves as one example of a ‘physical amenity.’⁴⁰ TCCs are described by the South African government as ‘one-stop facilities’ aimed at supporting victims of sexual violence and offering them the necessary resources to ensure that they are taken care of and are also able to report a case of rape to the SAPS, should they wish to do so.⁴¹ TCCs form part of South Africa’s ‘anti-rape strategy’ and are a project led by the National Prosecuting Authority’s (NPA) Sexual Offences and Community Affairs Unit (SOCA) in partnership with various non-governmental organisations (NGOs).⁴²

Building on the preceding foundational understanding of the relevant legal context, the remainder of this section offers an analysis of some of the issues associated with the SAPS’ conduct, looking at both issues arising from practical failures and those rooted in ideology.⁴³ The way in which these issues are exacerbated in the given context is also considered.

a) Issues Rooted in Practical Failures

The first noteworthy practical issue relates to a general failure on the part of the SAPS’ members to adhere to the duties and obligations outlined in the National Instruction, as outlined below.⁴⁴ This failure is prevalent in numerous ways. First, a failure by investigating officers to enable a victim to access a medical examination.⁴⁵ According to the National Instruction, a victim needs to be taken for such examination as soon as possible, even in situations where ‘the sexual offence was only reported more than 72 hours after it had been committed, and even if the victim has already washed.’⁴⁶ Despite such clear instructions, many members of the SAPS fail to take the victim for a medical examination if they feel it is unnecessary and others simply hand victims a J88 form and tell them to go to a hospital for the examination themselves.⁴⁷ To clarify, a J88 form, issued by the Department of Justice, is the official form which healthcare practitioners are to use to document the medico-legal examination which they

⁴⁰ South African Government ‘Thuthuzela Care Centres’ available at <https://www.gov.za/TCC>, accessed on 5 February 2023.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Please note that these issues are only split into two different categories in the interests of clarity and for ease of reference. All the issues covered across the two categories are interrelated and co-constitute each other.

⁴⁴ Romi Sigsworth, Lisa Vetten, Rachel Jewkes et al. ‘Policing Rape in South Africa’ (2009) 82 *Agenda* 39 at 42.

⁴⁵ Ibid at 41.

⁴⁶ Supra note 39 section 10(2).

⁴⁷ Supra note 44 at 41.

perform on victims.⁴⁸ The J88 form is vital for criminal procedure purposes as it provides medical evidence of the assault, which can be relied on in proving a case.⁴⁹ The failure by members of the SAPS to ensure victims have access to medical examinations in accordance with their duties serves as an important barrier, as many victims are unable to afford the expenses associated with the examination,⁵⁰ expenses which, according to the National Instruction, should be covered by the State.⁵¹

Secondly, once a medical examination has been completed, if one is done at all, it is the responsibility of the relevant investigating officer to ensure that the samples obtained during the examination ‘are forwarded to the Forensic Science Laboratory (FSL) within 7 days.’⁵² This, however, is often not done.⁵³ A study by Sigsworth et al. showed that in 41.6% of the cases which they studied, investigating officers failed to send the retrieved samples to the FSL at all.⁵⁴ Where samples were sent, it took the investigating officer an average of 15 days to send them to the FSL.⁵⁵

Thirdly, despite an obligation to do so in terms of the National Instruction, many officers do not visit the scene of a rape.⁵⁶ While much of the relevant evidence may be found on the victim themselves, the visiting and securing of the scene of a rape is crucial and should not be overlooked, as the scene may contain additional evidentiary material.⁵⁷ In the study by Sigsworth et al., 73.7% of the cases they studied showed a failure on the part of the investigating officer to ‘visit and examine’ the scene.⁵⁸ Regarding the failure to collect evidentiary material, Smythe reports that in all the cases they studied, where a victim reported that their perpetrator had used a condom, none of the investigations referred to the condom and no attempts were made to retrieve it.⁵⁹

⁴⁸ Ramadimetja Mogale, Kaysi Eastlick Kushner & Magdalena Solina Richter “‘If it is a tear let it be a tear, not a laceration’: Form J88 as evidence in prosecution of violence against women in South Africa’ (2015) 13 *African Safety Promotion Journal* 17 at 18.

⁴⁹ Ibid.

⁵⁰ An example of such expenses includes the travel costs incurred in terms of getting to a hospital.

⁵¹ Supra note 44 at 41; Supra note 39 section 10.

⁵² Supra note 39 section 10(6)(f).

⁵³ Supra note 44 at 41.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Supra note 39 section 7(5).

⁵⁸ Supra note 44 at 41.

⁵⁹ Supra note 25 at 78; Supra note 39 sections 7(5) & 8.

The final noteworthy practical issue in relation to the way in which the SAPS handles cases of rape relates to the fact that investigating officers shift much of their investigative duty onto the victim, forcing investigations, rather than being ‘victim-centred,’⁶⁰ to become ‘victim-led.’⁶¹ This is evident from consideration of a related failure by investigating officers to ‘keep the victim informed of the progress of the investigation’ despite a duty to do so in terms of the National Instruction.⁶² The duty placed on victims to find suspects and witnesses serves as further evidence of this failure.⁶³ In this regard, the use of ‘pointing out notes’ by investigating officers is crucial.⁶⁴ Such a note provides any officer with probable cause and so the victim is expected to hand the note to an officer and physically point out the perpetrator to the officer, so that they may be arrested.⁶⁵ Evidently, this places a significant burden on the victim to locate their perpetrator and arrange for ‘pointing out.’⁶⁶

While the practical issues listed above are indeed applicable within the given context, it is worthwhile to note that they may also be exacerbated in the given context. For example, the need for an investigating officer to visit the scene of a rape may be heightened. Where a victim is raped by someone they know, the likelihood of this rape occurring in a space which is also known to the victim increases.⁶⁷ Where a rape occurs, for example, in a private home, at work or at school, the failure by the investigating officer to visit the scene is arguably ‘more severe’ as there is a stronger likelihood that vital evidence is not being recorded.⁶⁸

b) Issues Rooted in Ideology

The first identifiable ideological issue relates to the pervasiveness of the notion of an ‘ideal rape’ and ‘ideal victim’ within the SAPS.⁶⁹ In this regard, Smythe details the ‘informal vetting’ procedure that a victim is subjected to.⁷⁰ On the basis of normative assumptions that pervade

⁶⁰ *AK v Minister of Police* (CCT 94/20) [2022] ZACC 14 (5 April 2022) para 63.

⁶¹ *Supra* note 25 at 93.

⁶² *Ibid.*

⁶³ *Ibid* at 95.

⁶⁴ *Ibid* at 95-97.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Linda Geddes ‘Why sexual assault survivors forget details’ *BBC Future* 26 September 2018, available at <https://www.bbc.com/future/article/20180926-myths-about-sexual-assault-and-rape-debunked>, accessed on 12 February 2022.

⁶⁸ Larry Jetmore ‘Investigating rape crimes, part 2: Evidence collection and analysis’ *Police 1* 13 July 2006, available at <https://www.police1.com/police-products/investigation/evidence-management/articles/investigating-rape-crimes-part-2-evidence-collection-and-analysis-m9xK3iJEXeUSS4NT/>, accessed on 12 February 2022.

⁶⁹ *Supra* note 25 at 4 & 84-85.

⁷⁰ *Ibid* at 84.

the SAPS, a rape victim is more likely to be believed by an investigating officer if they are a modest ‘sexually inexperienced’ woman who was raped by a stranger, who used a weapon, and physically injured them beyond the injuries associated with the rape itself.⁷¹ These assumptions are informed by pervasive ‘rape myths’ that ‘implicitly and explicitly blame victims for sexual victimisation’⁷² and result in secondary victimisation at the hands of the SAPS.⁷³ Here, one can draw a direct link to South Africa’s culture of rape and violence.⁷⁴

Linked to the notion of an ‘ideal victim,’ it is important to note that this ‘vetting procedure’ does not end once an investigating officer has chosen to open a docket.⁷⁵ This is due to the fact that ‘there is an ingrained scepticism regarding rape complainants and an ongoing need for them to affirm the validity of their claims and their credibility as complainants.’⁷⁶ There are many ways in which a victim may allay this ‘scepticism,’ most of which involve meeting the normative assumptions held by the SAPS and portraying themselves as an ‘ideal victim.’⁷⁷ As an ‘ideal victim,’ they would need to ‘show an interest’ in their case to an extent deemed appropriate by the relevant investigating officer in order to be ‘worthy’ of the officer’s time.⁷⁸ ‘Ideal victims’ care about their cases enough to take on the unfair investigatory expectations placed on them by investigating officers.⁷⁹ They will be readily available,⁸⁰ regularly check in with the officer,⁸¹ seek out their perpetrator⁸² and provide reliable information.⁸³ All of these preposterous ‘ideal victim’ expectations fail to recognise any failure on the part of the SAPS to provide victims with access to justice, the intricacies of the victims’ lived realities, the trauma they have endured and the implications this trauma may have on their capacity.⁸⁴

The second ideological issue plaguing the conduct of the SAPS within the given context relates to the issue of secondary victimisation, as mentioned above. One can define secondary

⁷¹ Ibid at 4 & 84-85.

⁷² Eric M. Cooke, Richard H. Lewis, Brittany E. Hayes et al. ‘Examining the relationship between victimisation, psychopathy, and the acceptance of rape myths’ (2022) 37 *Journal of Interpersonal Violence* NP6384 at NP6387.

⁷³ Rebecca Campbell & Sheela Raja ‘Secondary victimisation of rape victims: Insights from mental health professionals who treat survivors of violence’ (1999) 14 *Violence and Victims* 261 at 262.

⁷⁴ Supra note 6 at 4-5.

⁷⁵ Supra note 25 at 95.

⁷⁶ Ibid.

⁷⁷ Ibid at 4 & 84-85.

⁷⁸ Ibid at 93.

⁷⁹ Ibid.

⁸⁰ Ibid at 97-100.

⁸¹ Ibid at 93-95.

⁸² Ibid at 95.

⁸³ Ibid at 101-103.

⁸⁴ Ibid at 93-103.

victimisation as ‘a prolonged and compounded consequence of certain crimes’ which ‘results from negative, judgemental attitudes and behaviours directed towards the victim’ and ultimately produces ‘a lack of support, perhaps even condemnation and/or alienation of the victim.’⁸⁵ Secondary victimisation can be linked to the pervasive rape myths outlined above which both inform and are informed by the process of secondary victimisation that many victims are subjected to at the hands of members of the SAPS when they report cases of rape.⁸⁶

In relation to secondary victimisation perpetrated by the SAPS, one needs to consider the role played by toxic masculinity. Toxic masculinity is defined as ‘social practices that reify difference, hierarchy, patriarchy, and hegemony through sexual, physical, emotional, political, economic and symbolic violence and domination directed toward feminised others.’⁸⁷ Toxic masculinity is evident within the SAPS when one considers the way in which the SAPS continues to be run as a military operation which displays exaggerated machismo.⁸⁸ This machismo and the sense of hypermasculinity which it creates is linked to South Africa’s culture of rape and violence.⁸⁹ This culture both informs and is informed by a failure to transform the South African Police, as they were under apartheid, from a ‘force’ to a ‘service’ in South Africa’s new democracy.⁹⁰ While the transition to democracy saw numerous reforms of the police force, a failure to transform the institutional culture of the police later meant that the ‘force’ remained largely intact and merely operated under another name.⁹¹ Additional examples of secondary victimisation are explored below.

In South Africa justice remains out of reach for many rape victims, for innumerable reasons, one of which is the fact that the ‘police respond to whoever yells the loudest’ and that ‘the women who get their cases attended to are the ones who show up at the station and demand it.’⁹² In line with this, one needs to acknowledge the role played by race. In this regard, it is crucial to note that the ‘ideal victim’ is often a white, middle-class woman.⁹³ Furthermore, due

⁸⁵ Supra note 73.

⁸⁶ Supra note 72.

⁸⁷ John C. Pruitt, Amanda G. Pruitt & Carol Rambo “‘Suck it up, buttercup’: Status silencing and the maintenance of toxic masculinity in academia’ (2021) 52 *Studies in Symbolic Interaction* 95 at 98.

⁸⁸ Supra note 25 at 53; Staff Reporter ‘South African police much too macho’ *Mail & Guardian* 3 June 2011, available at <https://mg.co.za/article/2011-06-03-south-african-police-much-too-macho/>, accessed on 29 August 2022.

⁸⁹ Ibid.

⁹⁰ Ziyanda Stuurman *Can we be safe? The future of policing in South Africa* (2021) 19.

⁹¹ Ibid at 33-36.

⁹² Supra note 25 at 94-95.

⁹³ Ibid at 4.

to South Africa's 'racialised poverty,' women of colour are not only at greater risk of being victims of sexual violence, but they are also unable to 'demand' justice in the same way as white women.⁹⁴

Again, while the ideological issues highlighted above are indeed applicable within the given context, there is also an element of exacerbation. Much of this exacerbation stems from the fact that, firstly, a woman who is raped by a man they know, whether an intimate partner or not, does not fall within the notion of an 'ideal victim.'⁹⁵ The myths which inform the notion of an 'ideal victim' often lead to claims of rape being denied in such cases in favour of the idea of 'rough sex.'⁹⁶ This is compounded by the fact that sex is often seen as an obligation within certain relationships and that women may 'invite rape' through their conduct.⁹⁷ Here, it is crucial to highlight the issue of legal consciousness and the fact that women, raped by someone they know, may not recognise that what has happened to them is in fact rape.⁹⁸ This thinking is informed by and perpetuates the notion of the 'ideal victim and ideal rape.'⁹⁹ It is important to note this issue in the context of the conduct of the SAPS as well as in relation to why women may not report rape, as discussed below.

Secondly, due to the role which they play in being part of the problem, many members of the SAPS fail to take cognisance of the broader context within which victims in such cases find themselves, in terms of gender power dynamics.¹⁰⁰ It is important to note that many victims here are ultimately forced to withdraw their complaints due to the fact that they rely on their perpetrator financially,¹⁰¹ have received significant pressure from their families or communities¹⁰² or have been financially compensated by the perpetrator.¹⁰³ The prevalence of cases being withdrawn on the basis of financial 'compensation' is significant for the purposes of this report as, according to Smythe, it points to a broader 'abdication of responsibility' on the part of the criminal justice system, particularly the SAPS.¹⁰⁴

⁹⁴ Ibid at 126.

⁹⁵ Ibid at 4 & 84-85.

⁹⁶ Philip N.S. Rumney & Charnelle van der Bijl 'Rape, attitudes, and law enforcement in South Africa' (2010) 13 *New Criminal Law Review* 826 at 829.

⁹⁷ Ibid.

⁹⁸ Supra note 23.

⁹⁹ Supra note 96.

¹⁰⁰ Supra note 25 at 127.

¹⁰¹ Ibid at 126-127.

¹⁰² Ibid at 122.

¹⁰³ Ibid at 125.

¹⁰⁴ Ibid.

While not the focus of this report, it is worth noting the role played by the legal consciousness of the SAPS members. Scholar Richard Martin notes recent research in this regard which suggests that the legal consciousness of police officers can have profound effects on their conduct.¹⁰⁵ Informed by South Africa's culture of rape and violence, the legal consciousness of the SAPS is arguably one which exacerbates the shortcoming between the law 'on paper' and the 'law in action' in the context of rape.¹⁰⁶ This exacerbation is clear when one considers the fact that the law 'on paper' denounces pervasive rape myths¹⁰⁷ while many SAPS members ensure that such myths permeate police stations.¹⁰⁸ Accordingly, the first aspect of this report's argument, namely that South Africa's culture of rape and violence informs the legal consciousness and conduct of the SAPS, is established.

5. The Extent to Which the SAPS' Conduct Influences the Legal Consciousness of Women in South Africa

Section three illustrated that the term 'legal consciousness' is used to describe the way in which people view and understand the law.¹⁰⁹ This section aims to understand the extent to which the conduct of the SAPS influences the legal consciousness of women in South Africa. To achieve this objective, this section begins by drawing a correlation between an individual's view of the SAPS and their legal consciousness. This correlation is premised on the interrelatedness of the SAPS and the law, which can be attributed to two elements. Firstly, the SAPS, in accordance with the Constitution of the Republic of South Africa, 1996 (the Constitution), serve as the individuals tasked with upholding and enforcing the law.¹¹⁰ Secondly, the legal system in South Africa remains largely inaccessible to average South Africans for various reasons.¹¹¹ As a result of this inaccessibility, many South African women will only ever interact with the law through the SAPS.¹¹²

¹⁰⁵ Richard Martin 'Lethal force, legal consciousness and the social field of policing' 2022 *Social and Legal Studies* 1 at 7.

¹⁰⁶ Supra note 12 at 8.

¹⁰⁷ Supra note 25 at 46-47.

¹⁰⁸ As depicted within this section.

¹⁰⁹ Supra note 21.

¹¹⁰ Constitution of the Republic of South Africa, 1996 section 205(3).

¹¹¹ The Centre for the Study of Violence and Reconciliation 'Gender-Based Violence (GBV) in South Africa: A Brief Overview' April 2016 at 14, available at <https://www.csvr.org.za/pdf/Gender%20Based%20Violence%20in%20South%20Africa%20-%20A%20Brief%20Review.pdf>, accessed on 17 July 2022.

¹¹² Ibid.

Having established the aforementioned interrelatedness, this section moves on to consider the view held by women in South Africa of the SAPS in the given context. However, to achieve this objective, it is necessary, due to the highly specific nature of the view this report aims to determine, to first establish the view of the SAPS held by most South Africans.

In general, the majority of South Africans do not trust the SAPS, nor do they view them as legitimate. This is established based on the responses received in the South African Social Attitudes Survey (SASAS), which has been conducted annually since 1998, by the Human Sciences Research Council of South Africa and the European Social Survey.¹¹³ According to the SASAS, in the period from 1998 to 2021 there has never been a year where more than 50% of the South African population expressed trust in the police or a perception of the police as legitimate.¹¹⁴ In the year 2021, a mere 27% of the South African population expressed a sense of trust in the police.¹¹⁵ Authors attribute the decline seen in 2021, from 34% in 2020, to experiences of police brutality during the country's hard COVID-19 lockdown and the significant criticism of the police that arose in light of their 'poor performance' in relation to the social unrest that plagued South Africa in July 2021.¹¹⁶ This negative view of the SAPS and law enforcement authorities in general held by the majority of South Africans is no secret and has been previously acknowledged by the Minister of Defence and Military Veterans, Thandi Modise.¹¹⁷ Speaking at the Justice, Crime Prevention and Security Cluster Meeting in 2022, Modise highlighted the issue of a 'low level of public trust in South African law enforcement' and the persistent problem relating to legitimacy that the police face in this regard in terms of the 'police-public' relationship.¹¹⁸

Therefore, one can readily argue that the majority of South Africans do not trust the SAPS, nor do they view them as legitimate. It is, however, necessary, for the purposes of this report, to narrow this view to understand the view held by women in South Africa within the given context in relation to the SAPS' conduct. To achieve this aim, this section outlines six elements used by scholars to establish perceptions of the police. Four of these elements speak directly to

¹¹³ Ben Roberts & Steven Gordon 'Feeling blue: Changing patterns of trust in the police in South Africa' available at <http://www.hsrc.ac.za/en/media-briefs/dces/changing-patterns-of-trust-in-sa-police>, accessed on 17 July 2022.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

police conduct. As a result, it is these four elements that are then situated within the given context to establish the required view.

According to scholars, public perceptions of the police are established on the basis of six factors, which scholars maintain influence public trust in the police and perceptions of legitimacy.¹¹⁹ The first identified factor relates to personal experiences or fears of crime.¹²⁰ In terms of this factor, scholars assert that people are less likely to trust the police or view them as legitimate if they themselves have been the victim of crime or live in fear of crime.¹²¹

The second influencing factor relates to the personal experiences which people have of policing.¹²² Here, scholars explain that people are less likely to express trust in the police and view the police as legitimate if their personal experiences of policing have been negative.¹²³ Importantly, this negative experience often spreads beyond the individual as they are likely to share their experiences within their social circles.¹²⁴

The third factor identified by scholars relates to public displays of police brutality or failures on the part of the police to act in accordance with their duties.¹²⁵ In terms of this factor, scholars assert that people are less likely to trust the police following well publicised incidents of this nature.¹²⁶ The fact that trust in the police declined in South Africa in 2021 following instances of police brutality and failures to act, as mentioned previously, serves as evidence of this.¹²⁷

The fourth influencing factor relates to the issue of corruption and public perceptions of corruption within the police.¹²⁸ In relation to this factor, scholars assert that people are less likely to trust the police if they perceive high levels of corruption within the police.¹²⁹

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Andrew Faull 'When I see them I feel like beating them: Corruption and the South African Police Service' (2010) 34 *SA Crime Quarterly* 33 at 38.

¹²⁵ Supra note 113.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

The fifth identified factor again relates to public perceptions; this time however, the focus is on negative public perceptions relating to how the police treat people.¹³⁰ Individuals are less likely to trust the police and view them as legitimate if they perceive the police as mistreating individuals.¹³¹

The final factor relates to the broader context within which the police operate and public perceptions of the government.¹³² Scholars assert that, if people hold negative perceptions about the government and the overall political context, they are less likely to express trust in the police as they serve as agents of this government.¹³³

Factors two, three, four and five can be directly linked to police conduct. As a result, this section now situates these factors within the given context. A discussion of factors two and three is best achieved by first considering the case of *AK v Minister of Police*.¹³⁴ Briefly, the case concerned the rape of Ms. AK¹³⁵ and the conduct of the SAPS during and following her brutal ordeal.¹³⁶ In December 2010, Ms. AK was on a business trip in Gqeberha.¹³⁷ During a walk along the beach on 9 December 2010, Ms. AK was attacked, robbed and held against her will in the sand dunes next to Gqeberha's Kings Beach where she was then repeatedly raped by an unknown number of perpetrators, until she managed to escape.¹³⁸ This harrowing ordeal lasted around fifteen hours.¹³⁹ While the case of *AK* did not involve a total failure to act on the part of the SAPS, their response was deemed insufficient due to numerous flaws and a failure to satisfy the standards of reasonableness.¹⁴⁰ Ms. AK was failed by numerous members of the SAPS on at least four occasions: Firstly, she was failed by the two officers who arrived on the scene first and failed to search for her at all.¹⁴¹ Secondly, she was failed by an officer who failed to search for her accurately as he, without providing any reasonable explanation,

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Supra note 60.

¹³⁵ Although not named within the judgement of the case, I felt it was important to name Ms. AK here as Ms. Andy Kawa to recognise the important work she has done and continues to do in relation to the rape epidemic in South Africa.

¹³⁶ Supra note 60 paras 1-3.

¹³⁷ Ibid para 7.

¹³⁸ Ibid paras 8-9.

¹³⁹ Ibid para 8.

¹⁴⁰ Ibid paras 95-96.

¹⁴¹ Ibid paras 17 & 74.

searched the entire area with his K-9 Unit dog except the section where Ms. AK was.¹⁴² The third failure of the SAPS occurred when a helicopter team was deployed and, yet again, failed to search the entire area and missed the vital section wherein Ms. AK was.¹⁴³ Finally, Ms. AK was failed by the SAPS when the officer in charge of her case failed to conduct proper investigations.¹⁴⁴ An important critique levelled against the SAPS by the Court relates to the recognition that, while it is not their duty to ensure every case results in a successful prosecution, it is their duty to act reasonably, and in accordance with their constitutional mandate to ensure that all their available resources are deployed in a reasonable manner.¹⁴⁵ While Ms. AK did not know the identity of her rapist, her case is crucial in terms of factors two and three, as discussed below.

In terms of factor two, one needs to consider the personal experiences of women of the SAPS within the given context.¹⁴⁶ Section three of this report, as well as the aforementioned case, establish the fact that such experiences are generally negative. As outlined previously, such negative experiences can be attributed to that fact that, within the given context, the victims fail to meet the standards of an ‘ideal rape victim.’¹⁴⁷ This failure to meet the standard of the ‘ideal rape victim’ significantly affects their experience of the SAPS and often leads to secondary victimisation.¹⁴⁸ As a result, many victims choose not to report instances of rape to the SAPS within the given context.¹⁴⁹ This decision is based on the belief that such reporting will be futile¹⁵⁰ and will only involve more trauma.¹⁵¹ South Africa’s low conviction rate in reference to reported cases of rape, particularly where the rapist is known to the victim,¹⁵² and

¹⁴² Ibid paras 18 & 76-77.

¹⁴³ Ibid paras 19 & 80.

¹⁴⁴ Ibid paras 22-25 & 82-86.

¹⁴⁵ Ibid paras 78 & 81.

¹⁴⁶ Supra note 113.

¹⁴⁷ Supra note 25 at 4 & 84-85.

¹⁴⁸ Supra note 72.

¹⁴⁹ Marley Jones ‘I will never report my rape’ – 3 women tell us why they won’t go to the police’ *News 24* 16 February 2021, available at <https://www.news24.com/w24/selfcare/wellness/mind/i-will-never-report-my-rape-3-women-tell-us-why-they-wont-go-to-the-police-20210216>, accessed on 8 August 2022; Mecilene Machisa, Ruxana Jina, Gerard Labuschagne et al. ‘Rape justice in South Africa: Retrospective study of the investigation, prosecution and adjudication of reported rape cases from 2012’ at 17, available at <https://www.samrc.ac.za/sites/default/files/files/2017-10-30/RAPSSAreport.pdf>, accessed on 8 August 2022; Richard B. Felson, Steven F. Messner, Anthony W. Hoskin et al. ‘Reasons for reporting and not reporting domestic violence to the police’ (2002) 40 *Criminology* 617 at 624; Jennifer Temkin *Rape and the Legal Process* 2 ed (2002) 17 at 17-18.

¹⁵⁰ Ibid Jones; Ibid Machisa at 17; Ibid Felson.

¹⁵¹ Supra note 149 Jones; Supra note 149 Temkin.

¹⁵² Supra note 149 Machisa at 31.

experiences of secondary victimisation¹⁵³ and police brutality, serve as justification of this belief.¹⁵⁴ Accordingly, factor two is satisfied as the personal experiences of women in the given context are likely to be negative and thus they are unlikely to trust the SAPS or view them as legitimate.

In accordance with factor three, one needs to consider publicised instances of police brutality and a failure to act on the part of the police within the given context. Three elements are worthy of consideration in this regard. First, one needs to consider the rape of victims by members of the SAPS. Secondly, one needs to consider the failure of the SAPS to act reasonably. Thirdly, one needs to consider the failure of the SAPS to act at all, with reference to the violation of protection orders. In terms of the first element, numerous reports and complaints have been lodged by victims of gender-based violence, often perpetrated by intimate partners, who state that they were raped by a member of the SAPS when attempting to report the violence.¹⁵⁵ Many of these instances are public knowledge. In terms of the second element, a failure on the part of the SAPS to act reasonably is evident from the aforementioned case of *AK*.¹⁵⁶ Despite having the necessary resources at their disposal, the SAPS, without offering any justifiable explanation, failed to act reasonably.¹⁵⁷ This case and others like it are well publicised. In terms of the third element, one needs to consider the myriad of cases wherein women who had obtained protection orders against their abusers in terms of the Domestic Violence Act 116 of 1998, were subsequently raped or murdered by their abusers due to a failure on the part of the SAPS to respond to breaches of protection orders.¹⁵⁸ The majority of these cases involve women being abused and later raped or killed by previous intimate partners.¹⁵⁹ According to scholar Lisa Vetten, ‘in 2009 approximately one in 20 of the women killed by their intimate partners was in possession of a protection order.’¹⁶⁰ Vetten draws a clear link between these cases and ‘police negligence.’¹⁶¹ The case of *Minister of Safety and Security v WH* is integral

¹⁵³ Supra note 72.

¹⁵⁴ Lisa Vetten ‘*Aluta continua: Police accountability and the Domestic Violence Act 1998*’ (2017) 59 *SA Crime Quarterly* 7 at 15-16.

¹⁵⁵ Nomalanga Tshuma ‘Woman shares how seeking help after GBV assault resulted in her being raped by a cop’ *Cape Argus* 14 January 2022, available at <https://www.iol.co.za/capeargus/news/woman-shares-how-seeking-help-after-gbv-assault-resulted-in-her-being-raped-by-a-cop-aecc413c-2ac6-4554-bede-608f4c7dc043>, accessed on 17 July 2022.

¹⁵⁶ Supra note 60.

¹⁵⁷ Ibid paras 78 & 81.

¹⁵⁸ Supra note 154.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid at 15.

¹⁶¹ Ibid.

here as it clearly depicts the impact of a failure to act on the part of the police.¹⁶² The case involved the rape of a woman by her estranged husband in their family home.¹⁶³ The rape occurred despite the fact that the woman had a protection order against her estranged husband and there had been a warrant issued for his arrest.¹⁶⁴ The woman made various attempts to have the protection order upheld and her husband arrested, however, all of these attempts proved unsuccessful and the police, siding with the woman's husband, chose not to act, resulting in the rape of the woman by her estranged husband.¹⁶⁵ Again, incidents of this nature are generally well-publicised, not only due to the fact that many cases have been to court, but also due to the role played by social media.¹⁶⁶ A consideration of all three elements reveals that there are indeed numerous publicised instances of police brutality and institutionalised misogyny and a failure to act on the part of the police within the given context. As a result, in accordance with factor three, women in the given context are less likely to trust the SAPS or view them as legitimate.¹⁶⁷

In terms of factor four, one needs to consider the perceptions of corruption within the SAPS that are held by women in the given context. For ease of reference, instances of corruption within the given context can be split into two main categories. The first such category involves a situation wherein an officer is found guilty of misconduct in relation to their conduct towards a victim.¹⁶⁸ The second category of corruption relates to instances of extortion and bribery within the given context.¹⁶⁹ Such corruption manifests in two ways. Firstly, an officer may request money from a perpetrator's family to make charges 'disappear'.¹⁷⁰ Secondly, an officer may bribe victims on behalf of a perpetrator's family to dissuade the victim from opening a case against the perpetrator.¹⁷¹ In accordance with factor four and the categories of corruption outlined above, perceptions of corruption held by women in the given context are likely to be high. This view is supported by the fact that, in general, the SAPS fails to take the requisite

¹⁶² *Minister of Safety and Security and Other v WH* 2009 (4) SA 213 (E).

¹⁶³ Ibid para 2.

¹⁶⁴ Ibid paras 3-5.

¹⁶⁵ Ibid.

¹⁶⁶ Today, a significant amount of activism and awareness is spread on social media. For example, Instagram pages such as 'Keep the Energy' play a vital role in this regard.

¹⁶⁷ Supra note 113.

¹⁶⁸ Daneel Knoetze 'South Africa: Cops who rape are rarely disciplined, data reveals' 4 August 2021, available at <https://allafrica.com/stories/202108040279.html>, accessed on 17 July 2022.

¹⁶⁹ Daneel Knoetze 'Revealed: the staggering range of police corruption in SA and why the lockdown is ripe for abuse' 15 April 2020, available at <http://viewfinder.org.za/revealed-the-staggering-range-of-police-corruption-in-sa-and-why-the-lockdown-is-ripe-for-abuse/>, accessed on 17 July 2022.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

action against officers found guilty of such corruption.¹⁷² For example, according to statistics published by ‘allAfrica,’ ‘964 rape cases were registered against police officers between April 2012 and March 2020,’ despite this, the ‘SAPS only dismissed 50 officers for rape.’¹⁷³ Therefore, in terms of factor four, women in the given context are unlikely to trust the SAPS or view them as legitimate.

In terms of factor five, one needs to consider the perceptions held by women in the given context in relation to how the SAPS treats other victims. Arguably, factor five is established based on the previous factors. In accordance with factor two, many women associate the SAPS with negative treatment in terms of their own personal experiences of the SAPS’ conduct.¹⁷⁴ Such negative perceptions and experiences are generally shared within social circles, and so, women in the given context may hold negative perceptions of the SAPS in relation to their treatment of other women because of what they have been told by friends and family.¹⁷⁵ In terms of factor three and its publicised nature, women are also likely to establish negative perceptions of policing in that regard.¹⁷⁶ Finally, in terms of factor four, perceptions of corruption are generally shared publicly and so these will also inform the way in which women in the given context perceive the SAPS in terms of their treatment of other victims.¹⁷⁷ Therefore, in terms of factor five, women in the given context are less likely to trust the SAPS or view them as legitimate due to the fact that they perceive the SAPS as mistreating other victims.

Having situated factors two, three, four and five within the given context, it is evident that most women are unlikely to trust the SAPS or view them as legitimate. This lack of trust and view of illegitimacy can be linked directly to the conduct of the SAPS, as illustrated above. In addition, this negative view of the SAPS held by most women further informs a negative view of the law. This can be attributed to two important factors, namely, the interrelatedness of the police and the law, as highlighted above, and the legal consciousness of women in South Africa within the given context.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ See the discussion of factor two above.

¹⁷⁵ Supra note 124.

¹⁷⁶ See discussion of factor three above.

¹⁷⁷ See discussion of factor four above.

In relation to the second factor, namely, the legal consciousness of women in South Africa within the given context, one needs to consider the fact that the freedom promised to women by the law is vastly different to their lived realities.¹⁷⁸ This speaks to the focus of legal consciousness as a theory, on the gap that exists between the law ‘on paper’ and the law as it is ‘in action.’¹⁷⁹ It is easy to understand why most women in South Africa are likely to hold a negative view of the law, not only due to their view of the SAPS, but more importantly due to the fact that, within the given context, the law has failed to provide them with the fundamental rights which it promises.¹⁸⁰ In line with the well-known critique of South Africa’s socioeconomic reality that, individuals ‘cannot eat the Constitution,’¹⁸¹ one could also argue that the Constitution is of little use in warding off rapists.

In light of the above, it is clear that the negative view which women hold of the SAPS in the given context is largely influenced by the conduct of the SAPS. Due to the interrelatedness of the SAPS and the law, this negative view of the SAPS then informs a negative view of the law. One can thus draw a link between the conduct of the SAPS and the legal consciousness of women in South Africa, proving the second aspect of this report’s overall argument, as outlined in section one.

6. Why Women Choose Not to Approach the SAPS

When one considers the overarching argument made by this report, as outlined in section one, it is clear that a number of the aspects of the argument have been proven by previous sections. Section four made it clear that South Africa’s culture of rape and violence informs the legal consciousness and conduct of the SAPS. Section five drew a clear link between the conduct of the SAPS and the legal consciousness of women in South Africa. The final aspect then, which this section is tasked with proving is that the legal consciousness of women in South Africa determines whether they approach the SAPS. In pursuit of this objective, this section considers why women may choose not to approach the SAPS and which of these potential reasons can be linked to legal consciousness.

¹⁷⁸ Supra note 2 at 65.

¹⁷⁹ Supra note 12 at 8.

¹⁸⁰ People Opposing Women Abuse ‘Criminal injustice: Violence against women in South Africa’ March 2010 at 5, available at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ZAF/INT_CEDAW_NGO_ZAF_48_10364_E.pdf, accessed on 20 October 2022.

¹⁸¹ Marius Pieterse ‘Eating socioeconomic rights: The usefulness of rights talk in alleviating social hardship revisited’ (2007) 29 *Human Rights Quarterly* 796 at 804 & 811-812.

It is a well-established fact that in South Africa, as in much of the world, many cases of rape are never reported to the police.¹⁸² Due to this, it is very difficult to determine the true magnitude of the rape epidemic in South Africa.¹⁸³ It is also incredibly difficult to ascertain why women do not report cases of rape, as many cases are simply never discussed. This is especially true in the given context, for two reasons. Firstly, there is a lack of accurate statistics relating to the reasons why women do not report rape to the SAPS.¹⁸⁴ Secondly, where statistics do exist, none specify where the cases of rape involved the rape of a woman by a man who was known to her.¹⁸⁵ Nevertheless, it is clear that women may decide not to approach the SAPS for various reasons. This report divides these reasons, within the given context, into three main categories. First, those that depict no obvious link to legal consciousness. Secondly, reasons which can be linked to legal consciousness. Finally, reasons linked to the conduct of the SAPS.

It has been established in previous sections of this report that there are numerous issues relating to the conduct of the SAPS. These issues, as highlighted above, may indeed be the reason why a woman in the given context chooses not to approach the SAPS.¹⁸⁶ Here, it is important to note, in line with the first aspect of this report's argument, that legal consciousness and South Africa's culture of rape and violence play a key role in the issues relating to the SAPS' conduct.¹⁸⁷ However, due to the fact that these reasons have been discussed already, this section focuses on the first two categories of reasons.

a) Reasons Not Linked to Legal Consciousness

- **Presence of Relationship**

A victim may choose not to approach the SAPS in the given context due to an unwillingness or inability to lay criminal charges.¹⁸⁸ This unwillingness or inability may be attributed to a previous or ongoing relationship.¹⁸⁹ A victim may, understandably, still have an emotional attachment to the perpetrator where they have been or are in a relationship.¹⁹⁰ They may feel a

¹⁸² Supra note 28.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Such statistics may in fact exist but were not found at the time of writing this report.

¹⁸⁶ Please refer to section four of this report for examples of these issues.

¹⁸⁷ This is established in section four of this report.

¹⁸⁸ Supra note 149 Felson at 621.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

need to protect the rapist from criminal prosecution due to this attachment.¹⁹¹ Where the rapist is the father of their children, the victim may wish to protect their children from any trauma associated with the potential arrest and prosecution of their father.¹⁹²

- **Financial Dependence**

A victim, in the given context, may choose not to approach the SAPS as they feel they are unable to lay criminal charges against their rapist where they and potentially their family are financially dependent on the perpetrator.¹⁹³ This can be linked to the first reason highlighted above and is particularly prevalent in cases where the victim and their rapist are related, have been or are in a relationship or he is the father of the victim's children.¹⁹⁴ The prevalence of this reason is evident when one considers the discussion of the issue in section four and the number of women who are 'forced' to abandon their cases due to financial dependence.¹⁹⁵

b) Reasons Linked to Legal Consciousness

- **Failure to Recognise That What Has Happened is Rape**

A victim may be unwilling to report an instance of rape to the SAPS due to a lack of recognition on the part of the victim that what happened to them is in fact rape.¹⁹⁶ This can be linked to the concept of legal consciousness.¹⁹⁷ The victim's lack of recognition is informed by society and is particularly prevalent in situations of marital rape and rape within intimate relationships.¹⁹⁸ It is important to note that marital rape has only been recognised as a crime in South Africa since 1993.¹⁹⁹ Due to the rape myths which pervade both the SAPS and society in general, many individuals still fail to recognise marital rape, and rape within intimate relationships as a possibility and a crime, this can be linked back to the discussion of the 'ideal victim' in section four.²⁰⁰ One can draw a broader connection here to South Africa's culture of rape and violence which has fostered a sense of 'male sexual entitlement'²⁰¹ and the normalisation of abuse within

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Supra note 24 at 125-127.

¹⁹⁶ Supra note 23.

¹⁹⁷ Supra note 21 at 2.

¹⁹⁸ Supra note 149 Jones.

¹⁹⁹ Prevention of Family Violence Act 133 of 1993 section 5.

²⁰⁰ Supra note 96.

²⁰¹ Supra note 149 Machisa at 45; Elena Moore "My husband has to stop beating me and I shouldn't go to the police": Family meetings, patriarchal bargains, and marital violence in the Eastern Cape province, South Africa' (2020) 26 *Violence Against Women* 675 at 679 & 680.

domestic relationships as a way in which men ensure compliance and ‘submission’ from their wives or partners.²⁰²

- **Framing of Rape as a Private Issue**

A victim may be unwilling or feel they are unable to lay criminal charges against their rapist due to pressure from their family, community and/or society.²⁰³ Often, rape is framed as a ‘private issue’²⁰⁴ with victims then facing pressure from their families and/or communities to ‘resolve’ ‘disputes’ ‘internally.’²⁰⁵ Despite its prevalence, rape is not something which is spoken about candidly in most circles.²⁰⁶ A woman who is raped may be chastised for bringing shame upon her family and community and thus be pressured into not reporting the rape to avoid such ‘stigma and humiliation.’²⁰⁷ This ‘blaming and shaming’ of victims for rape serves as an example of secondary victimisation and can be linked more broadly to pervasive rape myths, as highlighted in previous sections of this report.²⁰⁸ Although beyond the scope of this report, it is important to note the significant role that may be played in this regard by culture and/or religion.²⁰⁹ Additionally, while this reason may be argued to be independent of the victim’s legal consciousness, it can be linked to the legal consciousness of her family, community or society and links back to the issue of understanding when a dispute rises to the level of a legal dispute.²¹⁰

There are various reasons why women may choose not to approach the SAPS. While some of these reasons arguably exist independently of legal consciousness, one cannot deny that legal consciousness significantly influences a woman’s decision to approach the SAPS. The legal consciousness of the SAPS is informed by a culture of rape and violence which is then evident in and perpetuated by their conduct. This conduct then significantly informs the legal consciousness of women in South Africa in the given context which undeniably influences their decision whether to approach the SAPS. Additionally, the legal consciousness of a

²⁰² Ibid Moore at 687-688.

²⁰³ Ibid at 676, 685 & 687.

²⁰⁴ Manasi Sinha ‘Beyond law and rape culture: Recovering the ‘gaze’’ (2014) 3 *The IIS University – Journal of Social Sciences* 64 at 70.

²⁰⁵ Supra note 149 Machisa at 17.

²⁰⁶ Supra note 2 at 67-68.

²⁰⁷ Supra note 201 Moore at 686; Supra note 149 Jones.

²⁰⁸ Supra note 72.

²⁰⁹ Supra note 201 Moore at 676; Supra note 25 at 124.

²¹⁰ Supra note 21 at 2.

victim's family, community or society may form the basis of reasons why the victim may choose not to approach the SAPS. The final aspect of this report's argument is therefore proven.

7. Potential Reform

In accordance with the previous sections of this report, it is evident that South Africa is facing a rape epidemic.²¹¹ It is this epidemic which needs to be solved. To solve this epidemic, one needs to address the problem practically and ideologically. Practically, it is necessary to eliminate, as far as possible, the practical issues faced by the SAPS, as discussed in section four. From an ideological perspective it is necessary to address the issue of legal consciousness to reform the conduct of the SAPS and create an environment which not only encourages the reporting of rape to the SAPS but attacks South Africa's culture of rape and violence, which enables the rape epidemic. At the outset of this section, I wish to remind the reader of the report's limitations of space and time (being a mini dissertation). Due to these limitations, this report does not provide entirely novel reforms.

From a practical viewpoint, there is a need to re-evaluate the initial medical examination process and the responsibilities which lie with members of the SAPS in terms of the National Instruction in this regard.²¹² A significant number of victims are barred from any sense of justice due to the fact that members of the SAPS do not take them for a medical examination²¹³ nor do they ensure the collected medical samples are taken to the FSL to be examined, as required by the National Instruction.²¹⁴ There is room for improvement by potentially limiting the responsibilities which lie with the SAPS in this regard. While many of the SAPS' failures can be linked directly to a failure to act or act reasonably on the part of members of the SAPS, one cannot deny the fact that the SAPS is overworked and resource constrained and that this is likely to significantly hinder their ability to comply with the National Instruction.²¹⁵ In line with this, it is also difficult to understand the need for the SAPS to operate as the 'middleman' between the hospital and the FSL in terms of the collection and delivery of collected medical

²¹¹ Supra note 26.

²¹² Supra note 39 section 10(2).

²¹³ Supra note 44 at 41.

²¹⁴ Ibid.

²¹⁵ Iavan Pijoos 'Overworked police face serious resource shortages, unhygienic conditions – report shows' *News24* 1 December 2022 available at <https://www.news24.com/news24/southafrica/news/overworked-police-face-serious-resource-shortages-unhygienic-conditions-report-shows-20221201>, accessed on 12 February 2023.

samples.²¹⁶ Having samples collected and stored by the FSL directly would, again, potentially alleviate some of the current practical issues.²¹⁷

From an ideological perspective, three things are required to address the rape epidemic and South Africa's culture of rape and violence.²¹⁸ Firstly, it requires South Africa, as a country, to stop viewing rape as a series of isolated incidents.²¹⁹ As described by Pumla Dineo Gqola, 'rape is not a moment but a language.'²²⁰ Viewing rape as a singular event, rather than as a product of both patriarchy²²¹ and colonialism²²² leads to a failure to dismantle South Africa's culture of rape and violence which enables rape.²²³ This failure to interrogate and dismantle this culture is the reason why many reforms are arguably superficial, since they address the issue solely from a practical perspective, and have thus failed, as we have yet to attack the root cause of rape.²²⁴

Secondly, in line with the first requirement, this ideological perspective requires South Africa to challenge patriarchy.²²⁵ In line with the objective of this report, it is crucial to highlight the fact that the SAPS exists as a product of our patriarchal society, as a result, challenging patriarchy needs to be done at both a societal and institutional level.²²⁶ In accordance with Gqola, I think reforming our society by challenging patriarchy needs to happen, primarily, through education.²²⁷

Finally, in line with the previous two requirements, this perspective requires South Africa to stop framing rape as 'sex minus consent.'²²⁸ The need for such framing to come to an end is crucial for two reasons. Firstly, such framing fails to locate rape 'within the logic and operation of the system of male power, as central to the disciplinary apparatus of patriarchy and as a means to control women.'²²⁹ Secondly, in line with the discussion outlined in section six above,

²¹⁶ Supra note 39 section 10(6)(f).

²¹⁷ Supra note 44 at 41.

²¹⁸ Supra note 2 at 67.

²¹⁹ Ibid at 22.

²²⁰ Ibid.

²²¹ Ibid at 66-70.

²²² Ibid.

²²³ Ibid at 22.

²²⁴ Ibid at 66-70.

²²⁵ Supra note 10.

²²⁶ Ibid.

²²⁷ Supra note 2 at 76.

²²⁸ Supra note 10 Modri.

²²⁹ Ibid at 146.

this framing encourages the failure of some women to view what has happened to them as rape.²³⁰

While the practical perspective is important and needs to be addressed, practical reforms are rendered ineffective if they are not accompanied by a development of the aforementioned ideological perspective and reforms in line with such a perspective.

8. Conclusion

This report aimed to evaluate the relationship between women and the law in South Africa, with a particular focus on the way in which the legal consciousness of women is influenced by the conduct of the SAPS in terms of cases of rape, where the victim knows the perpetrator's identity. In pursuit of this objective, this report has argued that there is a link between South Africa's culture of rape and violence and whether women approach the SAPS.²³¹ This link is premised on various aspects. Firstly, the culture informs the legal consciousness and conduct of the SAPS.²³² Secondly, the SAPS' conduct then informs the legal consciousness of women in South Africa.²³³ Finally, the legal consciousness of women in South Africa then determines whether they approach the SAPS.²³⁴ In proving these aspects and the overarching argument, this report has considered various features of the conduct of the SAPS in the given context, the role of legal consciousness and the way in which South Africa's culture of rape and violence permeates every element. Ultimately, this report has established that the legal consciousness of women in South Africa is indeed influenced by the conduct of the SAPS in relation to cases of rape in the given context. However, there is a much larger influence at play that is both informed by and informs the conduct of the SAPS, namely; South Africa's pervasive culture of rape and violence. To address South Africa's rape epidemic, this culture needs to be challenged from an ideological perspective. Practical reforms, while arguably easier to achieve, are ineffective if not accompanied by ideological reforms. Without such reforms, women in South Africa will continue to live within the confines of the 'female fear factory'²³⁵ and the rape epidemic will rage on, largely unabated. My hope is that this report contributes to the continuous engagement which is needed in relation to the topic of rape in South Africa. In the

²³⁰ Supra note 23.

²³¹ Supra note 2.

²³² This is discussed and proven in section four.

²³³ This is discussed and proven in section five.

²³⁴ This is discussed and proven in section six.

²³⁵ Pumla Dineo Gqola *Female Fear Factory* (2021) 14.

words of Pumla Dineo Gqola, ‘a future free of rape and violence is one we deserve, and one we must create.’²³⁶ I hope that this report reaffirms the need to create this future and perhaps adds to its creation by highlighting the current barriers put in place by patriarchy, colonialism, and the SAPS.

²³⁶ Supra note 2 at 179.

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