The impact of The Criminal Law (Sexual Offences and Related Matters) Amendment ACT 32 OF 2007 on the offence of Rape and the sentencing thereof.

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CHAPTER 1: AN INTRODUCTION

1.1 GENERAL ITRODUCTION

[1]"The main aims of the new Act is to include all sexual offences in one law; define all sexual offences; make all forms of sexual abuse or exploitation a crime; make sure that both men and woman can use the law with regard to sexual crimes; make sure that government departments works together to protect complaints from unfair treatment or trauma; improve the way the criminal justice system (the courts and police) works; make the age when both men and women can give permission (consent) to have sex, 16 years; make sure that rape survivors get post-exposure prophylaxis(pep), which is medical treatment that can reduce their chance of getting HIV from rape; allow rape survivors to find out if the person who raped them has HIV; establish a national register (a list of names) for sex offenders". The legislature dismantled the common law wall that differentiated a woman from a man as far as rape was concerned.

Sexual penetration is defined in section 1(1) of Act 32 of 2007 as follows: [2]"sexual penetration includes any act which causes penetration to any extent whatsoever by

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

The Act introduced a number of offences related to rape, one such offence is compelled rape which is defined as follows in Act 32 of 2007 [3]"Any person (A) who unlawfully and intentionally compels a third person (C) without the consent of C, to commit an act of sexual penetration with complainant (B), without the consent of B, is guilty of compelled rape". Statutory rape is another such offence defined in chapter 3 of Act 32 of 2007 as follows: [4]"A person (A) who commits an act of sexual violation with a child (B) is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child". Introduction of this Act further meant that the consenting age for a person to have sexual intercourse which was initially 18years was changed and at present a person 16years of age can give consent to engage in sexual intercourse with another person 16 years of age or older. The Act however still recognises the fact that any person who is under the age of 18 years is a child and therefore a minor in terms and in accordance with the law of South Africa.

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[1]CALS (2008). A summary of the Criminal Law Sexual Offences Amendment Act 32 of 2007.Center for Applied Legal Studies and Tshwaranang Legal Advocacy Centre: Johannesburg, South Africa

[2] Criminal Law (Sexual offences and related matters) Amendment Act 32 of 2007

[3]Criminal Law (Sexual offences and related matters) Amendment Act 32 of 2007

[4]Criminal Law (Sexual offences and related matters) Amendment Act 32 of 2007

1.2 RESEARCH QUESTION

Rape in South Africa was initially a common law offence and was defined as follows: a male person having unlawful and intentional sexual intercourse with a female person without her consent and this therefore meant this offence of rape could only be committed by a man against a woman and never the other way around. [5]"The act consist in the penetration of the female's sexual organ by that of the male. The lightest penetration is sufficient, it is immaterial whether semen is emitted or whether the female becomes pregnant". This therefore meant that anal penetration would not qualify as rape and was as a result categorised as another offence. This narrow definition of rape meant that a man could never be a victim/complainant of a rape case.

This definition of rape was drastically changed and given a far more extensive definition as opposed to what the position was under the common law. This change was brought about by the introduction of The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 0f 2007 which came into effect since 16 December 2007, section 3 of the Act provides that: [6]"any person who unlawfully and intentionally commits an act of sexual penetration with another person without the latter's consent, is guilty of the offence of rape". The introduction of this Act meant a total different approach to sexual offences as they were under common law. [7]"The Act repeals the common-law crime of rape and replaces it with an expanded statutory crime of rape, which is applicable to all forms of sexual penetration without consent, irrespective of the gender of the perpetrator or the victim".

[8]"As far as the crime of rape is concerned, in terms of the Act it no longer matters whether it is the vagina or the anus which is penetrated, whether the perpetrator is male or female, whether the victim is female or male or whether the penetration is by a penis or by a finger, some other part of X's body or even by some object or part of an animal's body". Simply speaking this means that both male and females can now open criminal cases against perpetrators of rape as complainants irrespective of their gender. The definition of rape as we know it today has been given a much broader meaning in that, acts that previously could have not qualified as rape are now covered and fall within the ambit of the definition of rape in terms of The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 0f 2007.

[5]Criminal Law CR Snyman fourth Edition (2002)
[6]Criminal Law CR Snyman Fifth Edition (2008)
[7]Criminal Law CR Snyman Fifth Edition (2008)
[8]Criminal Law CR Snyman Fifth Edition (2008)

The present-day definition of rape seems to be in accordance with section 9(3) of the Constitution of South Africa Act 108 of 1996, which states [9]"The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion conscience, belief, culture, language and birth".

Act 32 of 2007 is completely silent with regard to the type of sentence which a court can impose upon convicting an accused of an offence created in terms of the Act. [10]"The fact that the maximum punishment is not stipulated does not mean that the principle of legality has not been complied with, the fact that the maximum punishment is not specified simply means that punishment is at the discretion of the court. Absent any provisions in respect of sentencing nothing excludes the court from proceeding in terms of the Criminal Law Amendment Act 105 of 1997, As a result an argument can arise that the position where sentencing is concerned is still as was under the common law".

It is clear from Act 105 of 1997 a sentencing court is not to deviate from the minimum sentences unless there are substantial and compelling circumstances that warrant such a deviation from the prescribed minimum sentence. In terms of section 51(1) of Act 105 of 1997 any offender convicted of an offence listed in part I of schedule 2 shall be sentenced to life imprisonment. Part I of schedule 2 includes Rape as defined in section 3 of Act 32 of 2007 which include amongst others rape of a person under 16 years of age, rape of a mentally or physically disabled person, rape of a victim by more than one offender or more than once.

And any offender convicted of an offence listed in part III of schedule 2, which includes rape or compelled rape as defined in section 2 or 4 of ACT 32 of 2007, shall be sentenced to [11]"(i) a first offender, to imprisonment for a period not less than 10 year;(ii) a second offender of any such offence, to imprisonment for period not less than 20 years; and (iii) a third or subsequent offender of any such offence, to imprisonment for period not less than 20 years;".

In S v Malgas 2001 (1) SACR 469 (SCA) a leading case on sentencing, the court held that it was no longer business as usual as far as sentencing was concerned in respect of certain listed offences. [12]"In that first, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances".

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[9]Constitution of South Africa Act 108 of 1996

[10]Criminal Law CR Snyman Fifth Edition (2008)

[11]Criminal Law Amendment Act 105 0f 1997

[12]S v Malgas 2001 (1) SACR 469(SCA)

Additional to the minimum sentences the Zinn triad are also factors to be taken into consideration when determining the appropriate sentence for offences listed in Act 32 of 2007, the Zinn Triad are factors established in an in important case in our country S v ZINN 1969 (2) SA 537 (A) and these are the following three factors the (1) personal circumstance of the accused, (2) the nature and seriousness of the offence as well as (3) the interest of the community.

The personal circumstances of the accused are normally factors that existed prior the commission of the offence that is his age, marital status, dependents, previous convictions and whether he is employed. The nature and seriousness of the offence is normally factors that will be taken into consideration as aggravating circumstances for example the prevalence of the offence, relationship between accused and the complainant, injuries sustained during the commission of the offence, number of counts, to mention but a few. The interest of the community entails taking into account the feelings of the community towards a specific offence by considering the outrage of the community as well as protecting the community from people who have a tendency to commit such offences. The court is likely to find mitigating and aggravating factors from evaluating the Zinn Triad.

Does the silence of the legislature as far as sentence is concerned in Act 32 of 2007 mean it was the intention of the legislature not to interfere with the inherent discretion of the court as far as sentencing is concerned or was this as a result of an oversight on the part of the legislature; this is one aspect that the author entails to tackle extensively in the writing of this mini dissertation.

There has been an extensive paradigm shift from the position as was in terms of the common law. The definition of rape has been drastically changed by the introduction of Act 32 of 2007 the motivation for this entire topic is what are the implications of this change of the common law offence of rape to a statutory offence as well as the sentencing of the offences listed in Act 32 of 2007. The author finds it necessary to have a concrete and critical evaluation of any such changes brought about by Act 32 of 2007. This research is going to look at both positions prior and subsequent to the introduction of Act 32 of 2007 in respect of rape and sentencing thereof. The author will also be considering whether the transformation from a common law offence to a statutory law offence is more favourable to the interests of the community of South Africa as well as the victims of such offences. What are the constitutional implications of the introduction of Act 32 of 2007?

It is further intended by the author not only to answer the above-mentioned research question but also to elucidate solutions to any such problems that may arise in conducting this research.

1.3 PROPOSED RESEARCH METHODOLOGY

Now that the research question has been formulated the author ought to decide on the appropriate methodology for the chosen topic. The topic is one of a legal nature and the author's research will be based on the doctrinal/black letter methodology as well as the desktop methodology. Doctrinal methodology looks at the law within itself with reference to legislation, case law as well as other legal sources; it is a typical legal research. Desktop methodology entails reading, analysing, thinking, writing, re-reading, it basically involves collecting data from existing resource.

[13]"Doctrinal method is normally a two-way part process, because it involves first locating the source of the law and then interpreting and analysing the text. Most would argue that the law is rarely certain. However, if we take legislation as an example, the laws are passed by parliament and the words are written down. It is at the next step where the law or rule is interpreted and analysed within a specific context that the outcome becomes 'contingent or conditional on the expertise, views and methods of the individual researcher".

[14]"Doctrinal research also requires a trained expert in legal doctrine to read and analyse the law-the primary sources: the legislation and case law. Doctrinal research is not simply the locating of secondary information. It includes that intricate step of reading, analysing and linking the new information to the known body of law".

The author believes this type of methodology ties in with the topic as the research is for all intents and purpose a typical legal research in that the author intends to investigate the Impact of a piece of legislation that is The criminal law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 on a specific offence that is rape and the sentencing of such an offence. In conducting this research, the author will be making an analysis as to what the law was under common law as far as rape is concerned and what has become of the law after the Introduction of Act 32 of 2007.The author will also determine whether the introduction of Act 32 of 2007 is to the advantage or disadvantage of the criminal justice system.

Both the above-mentioned methodologies are effective as most of the basic information will be easily available to the writer, provided the writer fully understand the research question and has proper knowledge on where to start looking for the required information in completion of the proposed research. The chosen methodologies make economic sense as it will be inexpensive for the author to obtain most of the required research material. Legislation, books and case law is readily available on the internet as well as libraries.

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[13]Defining and describing what we do: doctrinal legal research: T Hutchinson and N Duncan.Deakin Law Review, Vol 17, No 1, 2012
[14]Defining and describing what we do: doctrinal legal research: T Hutchinson and N Duncan.Deakin Law Review, Vol 17, No 1, 2012

1.4 CONCLUSION OF CHAPTER

[15]"It is clear that the Criminal Law (Sexual Offences And Related Matters) Amendment Act 2007 made provision for the adoption of a national policy framework regulating all matters in this Act, including the manner in which sexual offences and related matters must be dealt with uniformly, in a co-ordinated and sensitive manner, by all Government departments and institutions and issuing of national instructions and directives to be followed by the law enforcement agencies, national prosecuting authority and health care practitioners to guide the implementation, enforcement and administration of this Act in order to achieve the objects of this Act".

Act 32 of 2007 is the point of departure when you prefer charges of a sexual nature, specifically rape against an accused person. The provisions in this Act are long and detailed and seem to provide a clear guideline as to how one should handle offences created under the Act 32 f 2007. By comparing the common law offence of rape to statutory rape as in terms of Act 32 of 2007 it will be uncomplicated to understand the differences between the two and hopefully it will also be straightforward to interpret the views and intention of the legislature in promulgating The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 0f 2007(hereinafter referred to as Act 32 of 2007).In the subsequent chapters emphasis will be placed on drawing an analogy between the position under common law as against the position after the introduction of the above-mentioned Act.

[15] *Criminal Law (Sexual offences and related matters) Amendment Act 32 of 2007*

CHAPTER 2: A HISTORICAL OVERVIEW OF THE OFFENCE OF RAPE

2.1 COMMON LAW RAPE

[16]"The elements of the common law rape were as follows:

(a) Sexual intercourse
(b) Between a male and a female
(c) Without the women's consent
(d) Unlawfulness and
(e) Intention".

(a) Sexual intercourse involved the penetration of a female vagina by a male penis and it was not a requirement that the male perpetrator penetrates the vagina until such a time that he ejaculates, all he had to do is to insert his penis inside the vagina nor was it necessary that he (the perpetrator) simulates the up and down movements that are normally expected when an act of sexual intercourse is performed, it was sufficient that the perpetrator merely inserts his penis into the vagina irrespective of how long his penis was inside the vagina of the female complainant.

(b) Between a male and female person means that it must be between a man and a woman, but could only be committed by a man against a woman. Where two males had sexual intercourse this amounted to another form of an offence called Sodomy. [17]"Sodomy was defined as the unlawful and intentional sexual relations per anum between two human males".

(c) Without the women's consent meaning a woman that is being raped must not have consented to the sexual act [18]"It is, however, wrong to assume that a court may find that the act took place without Y's consent only if she had offered actual physical resistance or had expressly stated or shouted her opposition to the act. Just as Y's consent to the act may be signified either expressly or tacitly (by implication), her refusal to consent may likewise be signified either expressly or tacitly".

(d) Unlawfulness, the act must be an offence under the law of the country and the must be no ground of justification for the alleged act, for example consent. [19]"Consent by the person who would otherwise be regarded as the victim of X's conduct may, in certain cases, render X's otherwise unlawful conduct lawful".

(e) Intention, the perpetrator must intentionally commit the offence knowing fully so that the complainant has not given consent to the said act. The perpetrator must have a determination to perform the said act against the victim.

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[16]Criminal Law CR Snyman fourth Edition (2002)

[17]South African Criminal Law and Procedure: Common-law crimes P.M.A Hunt, John Milton

[18]Criminal Law CR Snyman Fourth Edition (2002)

[19]Criminal Law CR Snyman Fourth Edition (2002)

Rape as a common law offence seemed to have been aimed at protecting the dignity of woman and their sexual organs that is the vagina and accordingly a woman was not said to be raped if penetrated in the anus just as much as a man could never be raped even where he was penetrated per anum. The rationale behind this was probably that a male or female anus was not considered as a sexual organ, the vagina and penis were traditionally regarded as the sexual organs. This definition of rape is based on the old age traditional understanding of what sexual intercourse was, that is the penetration of a female vagina by a male penis. The common law definition of rape was in conformity with the primitive times.

2.2 Section 14 OF The Sexual Offences Act 23 OF 1957

This section specifically dealt with offences of a sexual nature committed against people who are regarded as minors. Section 14 (1) of the Sexual Offences Act 23 of 1957 (here-in referred to as the Act 23 of 1957) states as follows : [20]"that any male person who (a) has or attempts to have unlawful carnal intercourse with a girl under the age of sixteen years; or (b) commits or attempts to commit an immoral or indecent act with such a girl or with a boy under the age of nineteen years; or (c) solicits or entices such a girl or boy to the commission of an immoral or indecent act, commits an offence".

This section created an offence which is commonly referred to as statutory rape and this particular section in Act 23 of 1957 prevented adults from taking advantage of minors who consented to sexual intercourse with adults. This is because it was not unprecedented for an adult male to be involved in a sexual relationship with a minor. One can argue that the purpose of this section was to prevent adults taking advantage of the mental immaturity of minor children.

Offences under this section of Act 23 of 1957 could only be committed by a male person. Where the investigation in the case show that consent was given by such a minor the prosecution could proceed to charge and prosecute the alleged offender under this section.[21]"According to our courts' interpretation of section 14(2), X cannot rely on any mistake on his part relating to the girl's age. In other words a male perpetrator charged of this offence could never rely on the fact that he was under the impression that the complainant was of consenting age or he was misled by the complaint and/or her guardian to believe she was of consenting age".

The above mentioned was rectified by the substitution of section 14 by section 1 of the Immorality Amendment Act 57 of 1969 and by section 5 of the Immorality Amendment Act 2 of 1988.

[20]The Sexual Offences Act 23 of 1957

[21] Criminal Law CR Snyman Fourth Edition (2002)

Section 1 of Act 57 of 1969 reads exactly the same as section 14 except that sub-section 2 was added which read as follows [22]"(2) It shall be a sufficient defence to any charge under this section if it shall be made to appear to the court –

(a) that the girl at the time of the commission of the offence was a prostitute, that the person so charged was at the said time under the age of twenty-one years and that it is the first occasion on which he is so charged; or

(b) that the person so charged was at the said time under the age of sixteen years if the offence was committed in respect of a girl; or

(bA) that the person so charged was at the said time under the age of nineteen years if the offence was committed in respect of a boy; or

(c) that the girl or person in whose charge she was, deceived the person so charged into believing that she was over the age of sixteen years at the said time".

Section 5 of Act 2 of 1988 was also a substitute of section 14 of Act 23 of 1957 in this section sub-section 3 which now made for provision of the offense in section 1 of Act 57 of 1969 to be committed by woman against a minor boy.

Section 5(3) – (4) of Immorality Amendment Act 2 of 1988 reads as follows:

[23]"Any female who –

(a) has or attempts to have unlawful carnal intercourse with a boy under the age of 16 years; or

(b) commits or attempts to commit with such a boy or with a girl under the age of 19 years an immoral indecent act; or

(c) Solicits or entices such a boy or girl to the commission of an immoral or indecent act, shall be guilty of an offence.

(4) It shall be sufficient defence to any charge under subsection (3) if it shall be made to appear to the court –

(a) that the boy at the time of the commission of the offence was a prostitute, that the person so charged was at the said time under the age of 21 years and that it is the first occasion on which she is so charged; or

(b) that the boy or person in whose charge he was deceived the person so charged into believing that he was over the age of 16 years at the said time".

Section 14 of the Sexual Offences Act 23 of 1957 was substituted twice and eventually repealed by section 68 of Act 32 of 2007. It appears the substitution was initiated in order to Acclimatize to the conditions of life. As the times changed, minors also diverted from the conventional way of doing things. Things that were initially a taboo, unheard of, for example minors becoming prostitute became a norm in modern day life

[22] ***Immorality Amendment Act 57 of 1969***

[23] ***Immorality Amendment Act 2 of 1988***

2.3 RAPE IN TERMS OF THE CRIMINAL LAW (SEXUAL OFFENCES RELATED) AMENDMENT ACT 32 OF 2007

The introduction of the Criminal Law (Sexual Offences and Related) Amendment ACT 32 of 2007 introduced new offences altogether as well as modified the definition of rape as understood under the common law. Section 3 of the Act contains the definition of rape and the elements of rape in terms of Act 32 of 2007 are as follows: [24]"(a) Sexual penetration of another person

(b) Without the consent of the latter person
(c) Unlawfulness
(d) Intention"

(a) Sexual penetration of another person encompasses both man and female which is a shift from the common law position that required the parties to this act to be male and female with the exclusion that males can be subjected to being victims of such an offence. The rest of the elements that is b, c and d, are same as discussed above under common law rape.

The definition of sexual penetration in Section 1(1) Act 32 of 2007 was broadened enough to an extent that this offence can now be committed by a female person whether be it against a male or female complainant as well as by a male person against another male person. Rape now also extends to and includes rape committed by a husband against a wife as long as all the element of the offence have been complied with a husband will be convicted of rape committed against his wife and vice versa, a wife will be convicted of rape committed against her husband.

The following examples will demonstrate the broadness of the definition:
Example (1) where a perpetrator inserts a nozzle of a hoover or beer bottle (any object) into the vagina or anus of the complainant should accordingly be charged of rape.
Example (2) a perpetrator forces a complainant to perform what is known as oral sex, that perpetrator should also be charged of the offence of rape.
Example (3) a male perpetrator inserts his penis into the anus of a female or male complainant this act will also amount to rape.
Example (4) where a perpetrator inserts a genital organ of a dog into the mouth of the complainant, the elements of rape would have been complied with.
Example (5) where a perpetrator inserts his tongue, finger, ear (any other part of one person) beyond the vagina or anus of the complainant shall be guilty of rape.
Example (6) where a female perpetrator forces the penis of the complainant into her vagina she commits rape.

[24] *Criminal Law CR Snyman Fifth Edition (2008)*

2.3.1 COMPELLED RAPE

Compelled rape is defined in section 4 of Act 32 of 2007 and is basically the act of one person (perpetrator), forcing another (complainant) to engage in the act of sexual penetration with a third party without the consent of the said third party.
A good example of compelled rape is where a father of two children a boy and a girl forces the boy to commit an act of sexual penetration with the daughter without the consent of the daughter.

Another example would be where armed robbers break open into a home of a married couple and in the process the armed robbers compels the husband to have sexual intercourse with his wife, the armed robbers can be prosecuted and convicted for the offence of compelled rape. The husband and the wife in the above mentioned example become the victims of the offence of compelled rape.

2.3.2 SECTION 15 OF ACT 32 OF 2007

Section 15(1) of Act 32 of 2007 reads as follows:
[25]"A person who commits an act of sexual penetration with a child (B) is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child".
In terms of the Act [26]"a child is (a) a person under the age of 18 years; or
(b) with reference to section 15 and 16, a person 12 years or older but under the age of 16 years".
Where both parties to the sexual intercourse are both children, prosecution in terms of this section can only be instituted after obtaining the written authorization of the National Director of public prosecutions. Both children should be charged in contravention of section 15 (1) of Act 32 of 2007.

The offence in this section is what is informally referred to as statutory rape.
An example of this type of offence would be where an adult male or female is involved in an intimate relationship with a child and as result of the nature of their relationship they engage in sexual penetration with the consent of the child. The adult partner in the relationship would not be in a position to plead consent in court even in the event where the child testifies that she had consented to the act of sexual penetration and was a willing participant.

[25] Criminal Law (Sexual offences and related matters) Amendment Act 32 of 2007
[26] Criminal Law (Sexual offences and related matters) Amendment Act 32 of 2007

2.4 CONCLUSION OF CHAPTER

In the case of Masiya v Director of public prosecutions 2006 (11) BCLR 1377 (T) NKABINDE J stated [27]"This case is about the constitutional validity of the common law definition of rape to the extent that it excludes anal penetration and is gender specific. This case concerns the manner in which the definition of rape has been understood, developed and interpreted in South African law".
The Constitutional court in the case of Masiya v Director of public prosecutions held as follows [28]"It follows that I would confirm the decision of the High court to develop the common-law definition of rape to include the non-consensual penetration of the male penis into the vagina or anus of another person". Soon after the Masiya decision Legislature introduced ACT 32 of 2007 which incorporated the decision in Masiya in the definition of the offence of Rape, the definition was changed to an extent that it included non-consensual penetration of the male penis into the vagina or anus of another person.

It appears that the evolution of the definition of the offence of rape is to a certain extent motivated by the fact that society is constantly evolving and legislature deemed it necessary to broaden the definition of rape in order for it to be in accordance with the constant changing society that we live in today. The fact that the law recognises the age that a child can consent to sexual intercourse as 16 years, yet majority is only obtained at the age of 18years is a clear indication that children today are highly likely to be involved in sexual activities at a much earlier stage in life than initially expected.

Societal norms that may be deemed acceptable today may tomorrow be deemed unacceptable by the next generation. For example same sex relationship was something uncommon just a few years ago and today one can safely say this bracket of relationships has become permissible in present day society, another example is the fact that in the past it was not something conventional to find a child 16 years of age or younger openly involved in a sexual relationship, however in today 's society it is not unparalleled to find a child of that age engaged in such a relationship, instead society finds it acceptable that condoms and birth control measures are made available to schools in order to protect learners who are normally minors from teenage pregnancies, sexually transmitted diseases and or HIV/AIDS, society today knows and has accepted that our children are engaging in sexual activities at a young age.

Sex education has now been incorporated into the educational syllabus in South Africa. Children under the age of 18 years can get an abortion done, HIV test done all without the consent or knowledge of a parent and/or guardian.

[27]Masiya v Director of public prosecutions 2006 (11) BCLR 1377 (T)
[28]Masiya v Director of public prosecutions 2006 (11) BCLR 1377 (T)

It was intolerable in years gone by for minors to be engaged in sexual acts, let alone with an adult person but today more and more minors are involved in intimate relationships with men old enough to be their parents and these types of relationships are slowly becoming encouraged and the new normal amongst our communities.

Sexual intercourse is no longer what it traditionally was; people have found unconventional ways to sexually satisfy themselves, ways which one may even refer to as bizarre or unheard of. The reality is these new found ways of sexual gratification fall outside the ambit of what the common law definition of rape was. Change in the law appears inevitable as people in the communities are evolving with the times.

Law reform is important so that the law is able to meet the needs of the very society it intends to protect, a society which is constantly changing.[29]"It's clear that changing social values have a profound effect on criminal law. The views of the community and society as a whole shape and drive the changes to the law and will continue to do so well into the future. As social values change, the law evolves to keep up with them to help ensure that legal and criminal processes reflect modern day values".[30]"Law is a lasting social institution but it must also be open to change".

[29]Urgur Nedim: How do Changing Social Values Affect Criminal Law

[30]Mary Arden: Common Law and Modern Society Keeping Pace with Change

CHAPTER 3: MISCELLANEOUS ASPECTS OF ACT 32 0F 2007

3.1 NATIONAL REGISTER FOR SEXUAL OFFENDERS

Chapter 6 of Act 32 of 2007 deals with the establishment of the national register for sexual offenders section 42 of the Act defines the register as [31]" A national register for sex offenders containing particulars of persons convicted of any sexual offences against a child or a person who is mentally disabled or who have been dealt with in terms of section 77(6) or 78 (6) of the Criminal procedure Act 1977, whether committed before or after the commencement of this chapter and regulations made thereunder, be established and maintained by the Minister". The registrar of the national register of sexual offenders will be appointed by the Minister and the person holding this office must be a fit and proper person. The sole purpose of the establishment of this register is to protect children and mentally disabled people by making sure that they are not placed in the care of a person whose name is entered into the register because their guardian and/or parent was not aware. The register will enable parents and guardians to take informed decisions with regard to the care of their children and/or mentally disabled loved ones and might assist in preventing exposing their children who are in need of care to a person likely to re-offend and a person who will take advantage of their vulnerability by sexually assaulting them.

The objects of the register are as follows [32]"The objects of the Register are to protect children and persons who are mentally disabled against sexual offenders by -

(a) Establishing and maintaining a record of persons who –
    (i) have been convicted of a sexual offence against a child or a person who is mentally disabled, whether committed in or outside the Republic:
    or
    (ii) are alleged to have committed a sexual offence against a child or a person who is mentally disabled, in respect of whom a court, whether before or after commencement of this Chapter-
    (aa) in the Republic has made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977 or
    (bb) outside the Republic has made a finding and given a direction contemplated in subparagraph (aa) in terms of the law of the country in question:
(b) informing an employer applying for a certificate as contemplated in this Chapter whether or not the particulars of the employee contemplated in section 45 (1)(a) or (b) are combined in the Register:

[31] *Criminal Law (Sexual offences and Related Matters) Amendment Act 32 of 2007*
[32] *Criminal Law (Sexual offences and Related Matters) Amendment Act 32 of 200*

(c) informing a licencing authority applying for a certificate as contemplated in this Chapter whether or not the particulars of an applicant contemplated in section 47 are contained in the Register; and
(d) informing the relevant authorities dealing with fostering, kinship care-giving, temporary safe care-giving, adoption or curatorship applying for a certificate as contemplated in this Chapter whether or not the particulars of an applicant, as contemplated in section 48, have been included in the Register".

The register can be used in respect of people convicted before and after this Act meaning this section of the Act has retrospective effect. In court the process of applying for the name of a convicted person to be entered into the register of sexual offenders will only take place once the accused person is convicted and sentenced. The prosecutor will bring the application on behalf of the complainant or the court will mero motu order that a name of a person sentenced for a sexual offence be entered in the register. After the order has been made the court will proceed to explain to the sentenced person the implications as well as the consequences of having their name entered into the register. This order by the court is appealable and reviewable and this must also be explained to the convicted person so he knows and understands he the is entitled to appeal the decision of the court and what route he/she should take in making the application for review or appeal.

In respect of offenders convicted prior to the coming effect of Act 32 of 2007 the National Commissioner of Correctional Services was supposed to submit the names of the people serving sentence for sexual offences to the registrar and the submission of the names was to be done within three months of the establishment of this chapter the names of persons who have since completed their sentences were also to be submitted as long as the sentence served was in respect of a sexual offence. After the submission of the names it becomes the duty of the registrar to finalize the inclusion of the submission of the names in the register.
Section 50 (7) (a) states : [33]"The Director-General: Health must, in the prescribed manner and within three months after the commencement of this chapter, forward to the registrar the particulars referred to in section 49 of every person , who, at the commencement of this chapter, is subject to a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act ,1977, as the result of an act which constituted a sexual offence against a child or a person who is mentally disabled and the registrar must forthwith enter those particulars in the register".

A court making such an order will where reasonably possible inform the employer of the offender of such an order and the details thereof.

[33]*Criminal Law (Sexual offences and Related Matters) Amendment Act 32 of 2007*

Once the order has been made the clerk of the court of the specific court making the order will facilitate the transfer of the order with the details of the convicted person to the registrar so the name of the person is accordingly entered into the register. The details of the offender will be entered into the register provisionally where the offender intends to enter an appeal or proceed with review proceedings, the order will accordingly be made final upon finalization of the appeal or review process. The register will contain the following information the full names of the convicted person and/or including his nickname and his identity number, his address, the details of the court that convicted the offender as well as the offence for which he was convicted of, the date and sentence imposed by the court, including the court case number, police station and cas number of the said police station or any other factor which might be deemed necessary by the court.

Since the establishment of chapter 6 of the Act investigations should be done to determine whether a name of a potential foster or adoptive parent appears in the register before finalization of the adoption process.
Section 48 (1) [34]"states: A relevant authority may not consider an application or approve the appointment of a person as a foster parent, kinship care-giver, temporary safe care-giver, an adoptive parent or curator without having determined, by way of an application to the, registrar for a prescribed certificate whether or not the particulars of such person have been recorded in the register".
Failure on the part of any authority to comply with the provisions of this section is an offence punishable by a fine or imprisonment not in excess of seven years or both such imprisonment and/or fine.

The registrar or any person who works together with the registrar shall not divulge any confidential information that came into his knowledge through the execution of his duties as a registrar unless insofar as its necessary in the execution of their duties or in compliance with the provisions of this chapter, for example where the clerk of the court must notify the employer of any person whose name has been so registered of the registration and the necessary details as to the offence. In the event of information being divulged in conflict with chapter 6 of the registrar will be liable for prosecution of an offence in terms of section 52(4) of the ACT and upon conviction can be sentence to imprisonment or a fine or both such fine or imprisonment.

It is clear from chapter 6 in the Act that failure by the court, prosecutor and clerk of the court to play their role in ensuring that the necessary information is submitted to the registrar will result in the disturbance of updating the register accordingly and could result in a dismal failure of the entire initiative, the court is the starting point of the process.

[34]*Criminal Law (Sexual offences and Related Matters) Amendment Act 32 of 2007*

The court has a very important role to play in ensuring that those so convicted of sexual offences committed against children and persons suffering from mental illness or defect have their names entered into the register, the prosecutor is also not to play a passive role in this process and should where the court fails to make the order of its own accord bring it to the attention of the court to ensure compliance with chapter 6 of this Act and the court should proceed to make the order accordingly.

3.2 EMPLOYER AND EMPLOYEE RESPONSIBILITY

It goes without saying that an employer should be entitled to know if a prospective employee or a previously employed employee‘s name is entered into the register especially where the employee will be responsible for children or people suffering from mentally illness or defect. But what happens in the event that an employee fails to disclose this to the employer? In terms of the chapter 6 of the Act failure to disclose is upon conviction punishable to a fine or to imprisonment not exceeding seven years or to both such fine and imprisonment. Section 44 of Act 32 of 2007 enables the employer to obtain a certificate with information as to whether or not a person‘s name has been entered into the register. An employer is also entitled to terminate employment of an employee who fails to disclose that he has been convicted of a sexual offence against a child or a person suffering from mental illness and that has been dealt with in accordance with section 77 (6) or 77(8).

Chapter 6 of Act 32 of 2007 clearly indicates that a person convicted of a sexual offence against a child or a person suffering from mental illness who has been dealt with in terms of section 77(6) or 77(8) of the Criminal Procedure Act 51 of 1977 Will not be allowed to work directly or indirectly with children or persons suffering from mental illness or defect. Section 77(6) is applicable where an accused is not fit to stand trial and Section 78 (6) is applicable where at the time of the commission of the offence the accused was unable to appreciate the wrongfulness of his/her conduct and to act accordingly.

Although an employer is entitled to check with the registrar whether a prospective employee or an employees has their name entered into the register it appears to be the responsibility of the employee to inform the employer of the pending sexual offence case against him or a conviction and further that subsequent to such a conviction his name has since been entered into the national register for sexual offenders. Often than not employees might opt to conceal this fact from their employers hence measures are put in place to enable the employer to also investigate an employee. An employer should accordingly conduct the necessary investigation as to whether an employee’s name is entered into the register and if the employer finds that an employee’s name appears in the register act in accordance with Section 45 that is terminate employment where appropriate or remove an employee from being in contact with a child or person suffering from mental illness or defect, an employer who is found to have failed to comply with the provisions of

section 45 of the ACT will upon conviction be eligible to a sentence of a fine or to imprisonment for a period not exceeding seven years of both such fine and imprisonment.

3.3 PROCESS TO REMOVE A NAME FROM THE NATIONAL REGISTER OF SEXUAL OFFENDERS

Section 51 of Act 32 of 2007 deals with the removal of a name of a person form the national register for sex offenders an offender whose name was entered into the register is entitled to make an application to the registrar when the time limits have been complied with.
(a) where such an offender was sentenced to imprisonment, periodical imprisonment, correctional supervision or a sentence in terms of section 276(1) (i) without the option of a fine for six months but not exceeding eighteen months an application can only be brought after ten years has expired after the release of the offender from prison or the suspension period has expired
(b) sentenced to imprisonment, periodical imprisonment, correctional supervision or a sentence in terms of section 276(1)(i) without the option of a fine for a period of six months or less, the application can only be brought after seven years
(c) An offender in respect of whom a finding was made in terms of either section 77(6) and 77(8) can only apply for removal five years after the offender has recuperated from mental illness/defect.
The Registrar should remove the name of a person from the Register where it is proved that the insertion of that person's name was a mistake.
Section 51 (2) states that [35]"The particulars of person who has –

(a) been sentenced for conviction of a sexual offence against a child or a person who is mentally disabled to a term of imprisonment, periodical imprisonment, correctional supervision or to imprisonment as contemplated in section 276(1)(i) of the Criminal Procedure Act 1977, without the option of a fine for a period exceeding eighteen, whether the sentence was suspended or not; or
(b) two or more convictions of a sexual offence against a child or a person who is mentally disabled,

may not be removed from the Register".

[35]Criminal Law (Sexual offences and Related Matters) Amendment Act 32 of 200

3.4 HIV AND RAPE WITH REFERENCE TO ACT 32 0F 2007

HIV means Human Immune-deficiency virus one of the ways a person can be infected with the virus is through having unprotected sexual intercourse with a person so infected by the virus. In majority of the rape cases the perpetrator does not use protection that is a condom in the commission of the offence and chapter 5 of Act 32 of 2007 deals specifically with HIV where the complainant is a victim of rape.

A victim of rape who lays the charges at the police station within 72 hours is in terms of the Act is entitled to receive from a government hospital as part of treatment, medication to prevent the victim from being infected with HIV. The medication which is administered to the victim is referred to as post exposure prophylaxis. The complainant of rape is further entitled to bring an application before court for the perpetrator of the offence to submit his blood for HIV testing, this application can be made by the complainant/victim, an interested party, investigating officer and/or the guardians of a victim who is still a minor or person who is mentally disabled. The application is submitted to the investigating officer who is allocated to handle the case; the investigating officer will then present the application to a magistrate for consideration. This application should be made as soon as possible after the case is opened against the accused person and can even be brought before accused has been arrested.

Upon the application being made and the magistrate is [36]"satisfied that there is prima facie evidence that-

(a) a sexual offence has been committed against the victim by the alleged offender;
(b) the victim may have been exposed to the body fluids of the alleged offender; and
(c) no more than 90 calendar days have lapsed from the date on which it is alleged that the offence in question took place

Order the alleged offender to submit his bloods for the HIV test to be conducted". Once the order is made the investigating officer will be responsible to facilitate the submission of the offender blood for such tests to be done. Once an order is so made by the court and an offender refuses to submit himself for such test he/she will be guilty of an offence and can be sentenced up to a fine for a period not exceeding three years. The results so obtained will only be made available to people concerned with the case that is the victim, investigating officer, prosecution and or court and anyone who discloses the results to any person not concerned with the matter shall be guilty of an offence.

[36]Criminal Law (Sexual offences and Related Matters) Amendment Act 32of 2007

Case law has set precedents that an accused person knowing that they are HIV positive rapes or has sexual intercourse will additional to being charged with rape also be charged with attempted murder. In State vs Nyalungu (2005) JOL 13254(T) the complainant was walking alone when she was attacked and taken to the bush where she was raped by the accused who at that stage was HIV positive, the accused was arrested near the scene of the crime and was later identified by the victim in an identity parade. The DNA results were positive and additional to the evidence of the identity parade the accused was also linked with DNA evidence. As the investigations were being done accused admitted to the fact that he knew at the time of raping the complaint that he was HIV positive.
The court found [37]"In Nyalungu it was established that conduct by a HIV positive sexual partner who does not take measures to prevent transmission during sexual intercourse constitutes the necessary mens rea and amounts to attempted murder".

In another case Phiri v S (2013) ZAGPPHC 279 the complainant met the accused when she took an HIV test and the accused, Mphikeleli Lovers Phiri was the counsellor who assisted her, the results of the complaint came back as HIV negative. After this encounter a romantic relationship ensued between the two parties and they had sexual intercourse twice without a condom. Later the complainant took another test which came back as positive, the accused Mr Phiri was charged with attempted murder and convicted of same by the court a quo, the matter was taken on appeal to the High court on appeal found that [38]"It was established over a decade ago by this court that such conduct constitutes attempted murder. See S v Nyalungu 2013 (2) SACR 99 (T). We are therefore satisfied that the appellant was properly convicted of attempted murder".

S v Nyalungu held [39]" It is to be borne in mind that the appellant was not convicted of having in fact transmitted HIV to the complainant. The State did not have to go that far. It was sufficient for a conviction on the count of attempted murder, to establish that the appellant, knowing that he was HIV positive, engaged in sexual intercourse with the complainant, whom she knew to be HIV negative without any preventative measures. This entails the presence of mens rea in the form of dolus eventualis".

3.5 CONCLUSION OF CHAPTER

From the above discussed topics it is clear that in enacting Act 32 of 2007 legislature put measures in place to protect victim of offences. The national register for sex offenders eliminates the possibility of a person with a tendency to take advantage of children and or mentally disables person through raping them.

[37]S v Nyalungu (2005) JOL 13254(T)
[38]Phiri v S (2013) ZAGPPHC 279
[39]S v Nyalungu (2005) JOL 13254(T)

Employees can also be vetted way before they resume their duties and at any period of their employment. The offender is also to a certain degree protected in that the contents of the register can only be disclosed to a certain group of individual and it is not a document which any member of the public has a right of access to it.

HIV is a growing epidemic and one cannot refrain from discussing sexual offences without discussing HIV and this was a factor taken into consideration by the legislature in drafting Act 32 of 2007 and this fact is clear from the provisions in chapter five of the above mentioned Act. This chapter in the Act gives extensive protection of a complainant of rape from exposure to HIV.

The complainant is protected firstly by being afforded an opportunity to receive treatment which will prevent infection, this protection extends further and up to the complainant having excess to the medical records of the accused persons in order to ascertain if the accused had knowledge of his HIV status prior to the commission of the offence in order to establish if the accused can be charged with attempted murder for engaging in a sexual act with the complainant fully knowing that he is HIV positive and failing to take measures to protect the complainant from transmission of the virus, thus risking infection.

Marius Pieterse stated [40]"is probably fair to say that HIV and AIDS have challenged the way in which we think about the relationship between public health, morality and law, more so than any disease".

[40] ***Marius Pieterse***

CHAPTER 4: A SUMMARY OF IMPORTANT CASE LAW IN SOUTH AFRICAN LAW IN RELATION TO RAPE

4.1 NATIONAL COALITION OF GAY AND LESBIAN EQUALITY V MINISTER OF JUSTICE 1998 2 SACR 557

[41]"This matter concerns the confirmation of a declaration of constitutional invalidity of

(a) section 20A of the Sexual Offences Act, 1957;
(b) the inclusion of sodomy as an item in Schedule 1 of the Criminal Procedure Act, 977 ("Schedule 1 of the CPA"); and
(c) the inclusion of sodomy as an item in the Schedule to the Security Officers Act, 1987 ("the Security Officers Act Schedule").

This case was heard on the 27th of August in 1998 in the Constitutional court, the first applicant in this case was The National Coalition for Gay and Lesbian Equality, the second respondent was The South African Human Rights Commission. The respondents were as follows the first respondent was The Minister of Justice, second respondent cited was The Minister of Safety and Security and the third respondent was The Attorney-General of The Witwatersrand.

The first applicant in this matter is an association furthering the interests of the South African LGBT (lesbian, gay, bisexual, and transgender). The applicants 's argument was based on the fact that the offence of Sodomy was applicable in respect of sex between two men and as a result was an unfair discrimination on the ground of equality specifically sexual orientation and gender. The applicants also argued that the concept of unnatural sexual offence was wide and vague and it was not clear for an individual to determine which conduct exactly amounted to a criminal act.

The decision was handed down on the 9th of October 1998. In considering its decision the court considered both the interim and final Constitution specifically section 8 in the interim Constitution and section 9 in the final Constitution of South Africa. Both section 8 and 9 contains the equality clause and are clear that no person shall be discriminated against directly or indirectly for amongst other gender, sex and sexual orientation. In its decision the court held that the common law offence of Sodomy was unconstitutional and it based its decision on the chapter 2 of the Constitution that is the Bill of Rights. The court found [42]"The sole reason for its existence was the perceived need to criminalise a particular form of gay sexual expression; motives and objectives which we have found to be flagrantly inconsistent with the Constitution".

[41]National Coalition of Gay and Lesbian Equality v Minister of Justice1998 2 SACR 557
[42]National Coalition of Gay and Lesbian Equality v Minister of Justice1998 2 SACR 557

The court made reference to a Canadian case decided by the Supreme Court Vriend v Aberta:

[43]"perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding the effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates (sic) the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination".

The said section 20A of the Sexual Offences Act of 1957 reads as follows:

(1) [44]"A male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification, shall be guilty of an offence.
(2) For the purpose of subsection (1) 'a party means any occasion where more than two persons are present
(3) The provisions of subsection (1) do not derogate from the common law, any other provision of this Act or a provision of any other laws".

When one considers what was said in the Canadian case of Vriend v Aberta as well as the provisions of section 20A of the Sexual Offences Act of 1957 one can easily argue that section 20A clearly discriminates against people in same sex relationships that is gay and lesbians to the extent that one can argue that the equality clause in the constitution does not extend to them and thus discriminate against them on the basis of sexual orientation and or gender.

It does not come as a surprise that the court in the above mentioned case arrived at the decision that the discrimination was unfair and unjustifiable as required in terms of section 36 of Act 108 of 1996. The court further held that rape where the complainant is male and the accused is male could be prosecuted in our courts as indecent assault, and the Sexual Offences Act had a provision dealing with same sex conduct with any person who is under the age of 19 years. The court also held that previous convictions of rape could only be set aside in respect of cases where the act of penetration per anum was with consent from both parties or in instances where the case had not yet been dealt with to finality. The order as made by the court is as follows:

[43]Vriend v Alberta (1998) 1 S.C.R 493

[44]National Coalition of Gay and Lesbian Equality v Minister of Justice1998 2 SACR 557

(1) [45]"It is declared that the common-law offence of sodomy is inconsistent with the Constitution of the Republic of South Africa 1996.
(2) It is declared that the common-law offence of commission of an unnatural sexual act is inconsistent with the Constitution of the Republic of South Africa 1996 to the extent that it criminalises acts committed by a man or between men which, if committed by a woman or between women or between a man and a woman would not constitutes an offence.
(3) It is declared that section 20A of the Sexual Offences Act, 1957 is inconsistent with the Constitution and invalid.
(4) It is declared that the inclusion of sodomy as an item in Schedule 1 of the Criminal Procedure Act, 1977 is inconsistent with the Constitution and invalid.
(5) It is declared that the inclusion of sodomy as an item in Schedule to the Security Officers Act, 1987 is inconsistent with the Constitution and invalid.
(6) The aforementioned orders, in so far as they declare provisions of Act of Parliaments invalid, are referred to the Constitutional Court for confirmation in terms of section 172(2)(a) of Act 108 of 1996".

[45] ***National Coalition of Gay and Lesbian Equality v Minister of Justice1998 2 SACR 557***

4.2 MASIYA V DIRECTOR OF PUBLIC PROSECUTIONS CC 628/05 (2006)

Nkaninde J stated [46]"This case is about the constitutional validity of the common law definition of rape to the extent that it excludes anal penetration and is gender specific. The case concerns the manner in which the definition of rape has been understood, developed and interpreted in South African Law. The definition has been debated by the courts, legislature and civil society over the years". The facts of this case are as follows Mr Masiya the accused was charged with rape and initially appeared in the district court and the case against Mr Masiya was then appropriately referred to the Regional court for the trial to proceed there. [47]" The state alleged that on or about 16 March 2004 at or near Sabie he wrongfully and unlawfully had sexual intercourse with a nine-year old girl (the complainant) without her consent". The accused had penetrated the complainant in this matter on her anus, and in terms of common law at that stage was supposed to be nothing more than a charge of indecent assault. The prosecution in this matter opted to prosecute the accused in this matter for the offence of rape. The accused Mr Masiya elected to exercise his constitutional right to remain silent and did neither testify nor call witnesses in his defence and proceeded to close his case in the matter.

The common law definition of rape at that stage was [48]"a male person having unlawful and intentional sexual intercourse with a female person" because of what the definition of rape was at that stage the court could not proceed to convict Mr Masiya of rape and the Regional court Magistrate proceeded to do the unprecedented and amended the common law definition of rape to include non-consensual penetration of the anus of a person. The Regional court found that: [49]"In terms of the existing common law definition of crime, the non-consensual penetration of a girl (or boy) amounts only to the (lesser) common law crime of indecent assault, and not rape, because only non-consensual vaginal sexual intercourse is regarded as rape. One's initial feelings of righteousness would however immediately rebel against such thought. Why must unconsensual sexual penetration of a girl (or a boy) per anum be regarded as less injurious, less humiliating, and less serious than the unconsensual sexual penetration of a girl per vaginam? The distinction appears on face value to be irrational and totally senseless, because the anal orifice is no less private, no less subject to injury and abuse and its sexual penetration no less humiliating than vaginal orifice.

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[46]Masiya v Director of Public Prosecutions cc 628/05 (2006)
[47] Masiya v Director of Public Prosecutions cc 628/05 (2006)
[48] Criminal Law CR Snyman fourth Edition (2002)
[49] Masiya v Director of Public Prosecutions cc 628/05 (2006

It is therefore that the common law definition of rape is not only archaic, but irrational and amounts to arbitrary discrimination with reference to which kind of sexual penetration is to be regarded as the most serious, and then only in respect of women".

The matter was sent to the High court for confirmation. The High court found on the facts that the Regional court magistrate was supposed to have convicted Mr Masiya of indecent assault which carried a sentence far less than a sentence that would follow upon a conviction of rape and as result the Judge agreed with the decision of the Regional court and proceeded to confirm the conviction of rape as found by the Magistrate. The High court developed the definition of common law rape to include anal penetration of a person where there is no consent. The matter was thereafter referred to the Constitutional court for confirmation of the decision of the High court. In the Constitutional court the applicant was Fanuel Sitakeni Masiya, the first respondent was the Director of Public Prosecutions and the second respondent was the Minister of Justice and Constitutional Development.

The Constitutional court in dissecting the fact of the case found what was wrong with the definition of common law rape to be[50]"To my mind the problem is not about males and females; it is about altering our understanding of why rape is prohibited. There are two elements to this ; first that rape is about dignity and power and second, that anal rape is equivalent to vaginal rape".[51] "Today rape is recognised 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".

The Constitutional court further held [52]"Having found that the common-law definition of rape is not constitutionally invalid but merely falls short of the spirit, purport and objects of the Bill of Rights, the declaration of invalidity of the definition of rape should therefore be set aside and replaced with an appropriate order". The Constitutional court was to a certain extent in agreement with the decision of the Magistrate of the Regional court as well as that of the High court insofar as the common law definition of rape was concerned the only difference was that it extended the definition to anal penetration of a female not a person and the order was made as follows:

1. [52]"The application for leave to appeal against the declarations of invalidity and the order and judgement of the High Court confirming the conviction of MR Masiya of rape is granted.
2. The application for leave to appeal against the conviction on the merits is dismissed.
3. The order of the High Court is set aside in its entirety.

[50] Masiya v Director of Public Prosecutions cc 628/05 (2006)

[51] Masiya v Director of Public Prosecutions cc 628/05 (2006)

[52] Masiya v Director of Public Prosecutions cc 628/05 (2006)

4. The order of the Regional Court referring the criminal proceedings to the High Court for purposes of sentence in terms of section 52(1)(b)(i) of the Criminal Law Amendment Act 105 of 1997, is set aside.
5. The common-law definition of rape is extended to include acts of non-consenual penetration of a penis into the anus of a female.
6. The development of the common law referred to in paragraph 5 above shall be applicable only to conduct which takes place after the date of judgement in this matter.
7. The conviction of Mr Masiya by the Regional Court of rape is set aside and replaced with a conviction of indecent assault
8. The case is remitted to the Regional Court for Mr Masiya to be sentenced in the light of this judgement".

The court also found that in so far as the case of Mr Masiya was concerned the definition of rape as so developed should not have retrospective effect. [53]"The evidence adduced at the trial established that Mr Masiya was guilty of indecent assault. To convict him of rape would be in violation of his right as envisage in section 35(3)(1) of the Constitution. I conclude therefore that the developed definition should not apply to Mr Masiya".

4.3 CONCLUSION OF CHAPTER

It is clear from the above discussion of case law that this was the turning point for South African criminal law with regard to the common law definition of rape. The case law paved a way for the inception of The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 0f 2007 which came into effect since 16 December 2007.

Soon after the decision in Masiya, Act 32 of 2007 was introduced encompassed in it was the new definition of what rape is ought to be. One cannot but consider the fact that the two cases as discussed above had a role to play as the legislature commenced with the drafting of Act 32 of 2007. In evaluating the definition of rape as incorporated in Act 32 of 2007 it is clear that much of what were regarded as a stumbling block in the case of Masiya as well as the case of The National Coalition for Gay and Lesbian Equality must have been considered in depth by the legislature. The new definition of rape encompasses the prayers in both cases.

[53] *Masiya v Director of Public Prosecutions cc 628/05 (2006)*

Act 32 of 2007 cemented the definition of rape as develop in the case of Masiya and proceeded to give the definition an even further wider interpretation than what it initially was under the common law. It is apparent that the legislature took into considerations the recommendations made by the Constitutional court in order to ensure that the new definition of rape is in accordance with the Bill of Rights and does not discriminate against anyone as provided for in the equality clause. Because what the legislature did is that they did not exclude males insofar as the definition of rape is conferenced as it is in terms of Act 32 of 2007 a male can be a complainant in a rape case even where the male complainant is penetrated in the anus provided that no consent was obtained by the accused.

CHAPTER 5: SENTENCING

5.1 SENTENCING OF THE OFFENCE OF RAPE UNDER COMMON LAW

Once an accused person is tried and convicted for rape under the common law the court was to proceed to sentence a convicted person in terms of the Criminal Law Amendment Act 105 of 1997. The courts were besides being guided by Act 105 of 1997 to consider guidelines as set out in case law and the overall evidence adduced during the criminal trial proceedings. Section 51 Act 105 0f 1997 states:

1. [54]" (1) Notwithstanding any law, but subject to subsections (3) and (6),a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.
2. Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in –
   (a) Part II of Schedule 2, in the case of-
      (i) a first offender, to imprisonment for a period not less than 15 years;
      (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
      (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;
   (b) Part III of Schedule 2, in the case of-
      (i) A first offender, to imprisonment for a period not less than 10 years;
      (ii) A second offender of any such offence, to imprisonment for a period not less than 15 years; and
      (iii) A third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years".

Schedule 2 part I and part III includes amongst other offences, rape committed under different circumstances. In the same Section 51 (3) (a) states : [56]"If any court referred to in subsection (1) or (2) Is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence".

[54] ***Criminal Law Amendment Act 105 OF 199***

5.2 SENTENCING OF THE OFFENCE OF RAPE POST ACT 32 OF 2007

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 0f 2007 does not contain any sentencing clause dealing with the offence of rape or any other offence as created by the Act. Legislature simply did not entertain the sentencing stage in drafting of the above mentioned Act and one can safely assume that the sole purpose of the legislature was not to interfere with the position as regard to the sentencing of sexual offences. It is therefore appropriate to raise an argument that since the introduction of Act 32 of 2007 nothing has changed in so far as the procedure of sentencing sexual offences is concerned. Absent any sentencing clause it is for the court to continue relying on Act 105 of 1997, The Criminal Procedure Act 51 of 1977 as well as case law.

Act 105 of 1997 was however amended to include rape as contemplated in Act 32 of 2007 in Schedule 2 part I and part III
Part I states as follows:
[55]"Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007

(a) When committed
  (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;
  (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
  (iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or
  (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;
(b) where the victim-
  (i) is a person under the age of 16 years;
  (ii) is a physically disabled person who, due to his or physical disability, is rendered particularly vulnerable; or
  (iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or
(c) involving the infliction of grievous bodily harm".

[55] *Criminal Law Amendment Act 105 OF 1997*

Further on in Schedule 2 part I its stated:

[56]"Compelled rape as contemplated in section 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 –

(a) when committed –
    (i) in circumstances where the victim was raped more than once by one or more than one person;
    (ii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or
    (iii) under circumstances where the accused knows that the person committing the rape has the acquired immune deficiency syndrome or the human immunodeficiency virus;
(b) where the victim –
    (i) is a person under the age of 16 years;
    (ii) is a physically disabled person who, due to his or her physical disability is rendered particularly vulnerable; or
    (iii) is a person who is mentally disabled as contemplated in section 1 of the The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 ; or
(c) involving the infliction of grievous bodily harm".

Schedule 2 part III states [57]"Rape or compelled rape as contemplated in section 3 or 4 of The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively in circumstances other than those referred to in part I".

5.3 SUBSTANTIAL AND COMPELLING CIRCUMSTANCES

There are no steadfast rules with regard to what these substantial or compelling circumstances are supposed to be. The dictionary defines the word substantial as a considerate amount and on the other hand compelling is defined as tending to compel, but what does these definitions mean in conjunction with the imposition of the minimum sentence?

A number of case law has given guidelines to enable our court to analyse the existence of these so called substantial and compelling circumstances. I will briefly discuss three such cases in which our courts laid down guidelines. The leading case on these circumstances is with no doubt S v Malgas 2001 (1) SACR 469 (SCA)

[56] *Criminal Law Amendment Act 105 OF 1997*

[57] *Criminal Law Amendment Act 105 OF 1997*

In S v Malgas 2001 (1) SACR 469 (SCA) the court dealt at length with the concept of substantial and compelling circumstances and the Judge held that [58]"Equally erroneous, so it seems to me, are dicta which suggest that for circumstances to qualify as substantial and compelling they must be "exceptional" in the sense of seldom encountered or rare. The frequency or infrequency of the existence of a set of circumstances is logically irrelevant to the question of whether or not they are substantial and compelling".
The court in this case also held [59]"The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded".
What is clear from this case is that such substantial and compelling circumstances must justify the court departing from the minimum sentences as stipulated in Act 105 of 1997.
In this regard the court in Malgas set the following guidelines [60]"if the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing the sentence, it is entitled to impose a lesser sentence".

In S v Vilakazi 2009 (1) SACR 552 (SCA) (A) the court stated: [61]"Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided"

In a case of S v Matyityi (695/09) (2010) ZASCA 127 the court was requested to consider he age as well as remorse of an accused as substantial and compelling circumstances and the court found both to be insufficient to be considered as such. The court held: [62]"Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them courts are not free to subvert the will of the legislature by resort to vague, ill-defined concept such as 'relative youthfulness or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order".

[58] S v Malgas2001 (1) SACR 469 (SCA)
[59] S v Malgas2001 (1) SACR 469 (SCA)
[60] S v Malgas2001 (1) SACR 469 (SCA)
[61] S v Vilakazi 2009 (1) SACR 552 (SCA) (A)
[62] S v Matyityi (695/09) (2010) ZASCA 127

What is clear from the above case is that the facts of each case will have to be taken into account by a court considering the absence or presence of substantial or compelling circumstances; each case is to be considered in accordance with its merits.

5.4 THE CRIMINAL PROCEDURE ACT 51 OF 1977 ON SENTENCING

The Criminal Procedure Act 51 of 1977 also has a section dedicated to the sentencing proceedings and that is section 276 and its appropriately titled Nature of Punishments and stipulates the type of sentences a court can impose after conviction, section 276 (1) states as follows

[63]"Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely

(a) …… (deleted by s 34 of Act 105 of 1997
(b) Imprisonment, including imprisonment for life or imprisonment an indefinite period as referred to in section 286B (1);
(c) Periodical imprisonment;
(d) Declaration as an habitual criminal
(e) Committal to any institution established by law;
(f) A fine
(g) …… (deleted by s 2 Act 33 of 19970
(h) Correctional supervision
(i) Imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board".

These are simply put the sentencing options that are available to a court who has convicted an accused person of a criminal offence in a criminal court whether be in a Magistrate, Regional or High court within the Republic of South Africa.

5.5 FACTORS TO BE CONSIDERED DURING SENTENCING

The sole purpose of sentence is deterrence, retribution, prevention and reformation
And these factors all together are to be considered during the sentencing stage. The sentence should be of such a nature that it deters future potential offenders from committing similar offences however in the same breath it should be a sentence that will rehabilitate the offender in that once the sentence is served the offender can be re-integrated back into society without any setbacks. The sentence should also be able to give a sense of retribution to the affected members of society.

[63] *The Criminal Procedure Act 51 of 1997*

In S v Martin 1996 (1) SACR 172 (W) court held [64]"The court must take command of all directions of strain on the decision about punishment. Neither the call for true punishment and revenge nor the cry for understanding must be given undue weight. The interests of the community require that the court should be strict enough to ensure that the objects of punishment are adequately furthered. Those objects include that is signalled clearly that crime will be effectively punished".

Courts should also take into consideration the personal circumstance of the accused, the nature and seriousness of the offence as well as the interest of the community/society. The above mentioned factor are referred to as the Zinn Triad in the legal fraternity as they were found as factors to be considered for purpose of sentencing in an important case in South Africa of the State vs Zinn.

The personal circumstances of an accused person is self-explanatory as these are factors regarding the person of the accused such as whether the offender is a first offender, his or her age, employment, salary, address, whether he or she is married and/or has any dependants.

The nature and seriousness of the offence refers to the severity of the particular offence such as the prevalence of the offence, the degree of violence used in the commission of the offence, lack of remorse or any other factors the court deems as such.

The interest of the community/society goes to how the affected community feels about that particular offence? Is the offence one which a community deserves to be protected from? Is there an outrage from the society? The community are constantly looking up to the courts wondering are the courts aware how we feel, how we are affected by crime and if so what is it that our courts are doing to protect us. The personal circumstances of the accused should not been seen to out-weigh the interest of the community/society but a court considering an appropriate sentence should be in a position to strike a balance between the two conflicting interest.

The court has to distinguish between what is called mitigating circumstances as against aggravating circumstances. The mitigating circumstances are those circumstances that are in favour of the accused and could possibly result in a court leaning towards a lesser sentence whereas the aggravating circumstance weigh against the accused in that when a courts considers the merits of the case the accused person before court is worse off than the next accused person.

5.6 CONCLUSION OF CHAPTER

The introduction of Act 32 of 2007 has not affected the processes a court should consider when sentencing an offender and the position with regard to the sentencing of rape is still the same as was under the common law.

[64] *S v Martin 1996 (1) SACR 172 (W)*

CHAPTER 6: CONCLUSION

My opinion of Act 32 0f 2007 is that although it has its flaws it is a great addition to the criminal justice system of South Africa. Law must evolve as the people/community it serves also evolves the definition of rape as a common law offence was discriminatory towards certain groups of people and as a result was in conflict with chapter 2 of the bill of rights in the Constitution of South Africa Act 108 of 1996.
Rape as common law offence excluded men from being complainants to such an offence and also a woman could never be a perpetrator to such an offence. This follows that the gay and lesbian community were unfairly discriminated on the basis of sexual orientation; the very same argument could be relied on by a straight man in that he is unfairly discriminated on the basis of gender because common law rape could only be committed by men. Anal penetration of a man by another man was regarded as sodomy and eventually indecent assault I find this line of thought as disturbing especially for a member of the gay community who would regard their anus as a sexual organ, it goes without saying that such a man will suffer the same amount of trauma, agony and discomfort as a female person penetrated in the vagina.
Penetration per anum of a woman was charged as indecent assault under common law, I also do not understand the rationale why penetration of a woman‘s anus and vagina should be differentiated both acts whether penetration per vagina or anus, are invasive and will arguably have the same psychological trauma on a complainant. What Act 32 of 2007 has done is come and remedied all this differentiation between men and women.

I believe the Act is in accordance with the spirit and purport of the bill of rights and has taken into consideration what is stipulated in our Constitution, that is no form of discrimination on sex, gender or sexual orientation amongst others will permitted unless otherwise justified. I am of the opinion that rape today is an offence committed for sexual gratification together with power; it is committed in order for the perpetrator to exert dominance over the victim. With that line of thought I believe that rape can therefore be committed by any individual male or female whose intention is sexual gratification and or exerting dominance over the victim. Legislature has accurately placed males and females on an equal footing as far as the offence of rape is concerned

The Act also takes into account that society has evolved and that the common law definition of rape was obsolescent and sexual intercourse has also transformed as members of the community have found unconventional methods to satisfy their sexual desires. Sexual intercourse is no longer just the insertion of a penis into a vagina, in the quest for sexual gratification and dominance perpetrators engage in acts that are not necessarily what members of the society in the past would have expected or alluded to as normal .

As I indicated at the beginning the new definition of the offence is not without its flaws, there is no perfect piece of legislation the broadened definition of rape under the Act has brought with it its fair share of drawbacks. Act 32 of 2007 has the effect that a whole lot of contrasting acts can now be charged as rape including those acts committed not with sexual gratification in mind. What this definition has done is that where a person inserts his penis into the vagina of a woman, or a stick into the anus, or a finger into the vagina the said perpetrators will equally be charged of rape, irrespective of the intention of the perpetrator. Cases have also been reported where jealous partners suffering from insecurities insert their fingers in the vaginas of their partner solely to check if their partner has had sexual intercourse with another man and thus cheating on them, this type of partner's act has nothing to do with sexual gratification but more to do with their insecurities but as a result of the Criminal Law (Sexual Offence and Related Matters) Amendment Act 32 of 2007 an act that appears to be a less form of an invasion than the other receives the same treatment as what would be considered a more severe invasion. In other words the jealous partner in the example above will be guilty of the same offence as an offender who inserts his penis inside the vagina or anus of a complainant.

I however believe that this inequity can be rectified during the sentencing stage in that each perpetrator will be sentenced in accordance with the merits of the case for which he or she has been charged with and accordingly the court will consider the specific conduct of the alleged offender. I believe the variation in the degrees of violence or invasion is rightly considered by the court and this prevents a person convicted of the worst form of rape from receiving the same sentence as a person convicted of what can be referred to as a minor form of rape. I am of the opinion that this is the very reason why the legislature when drafting Act 32 of 2007 didn't include a sentencing provision; they had no intention to interfere with the position regarding sentencing.

ACT 105 of 1997 sets prescribed sentencing options without interfering with the discretion of the court with regard to the appropriate sentence to be imposed. It appears that the legislature stance in the process of drafting Act 32 of 2007 was not to interfere with the inherent discretion of the court as far as sentencing proceedings in respect rape cases was concerned.

The court still needs to consider the circumstances of each and every case in order to determine the appropriate sentence for that particular case. The court still has discretion to impose or not to impose the minimum sentence depending on the presence or absence of substantial and compelling circumstances. The facts of a particular case will determine the sentence a court ought to impose.

The Act further introduced the register for sexual offenders, which is an initiative I commend the legislature for; this register prevents people previously convicted of sexual offences against children and mentally disabled persons from ever working or dealing with such persons. This measure by the legislature prevents creating an opportunity for an offender to re-offend and also protect children from being exposed to such an offender. Employers are

also given an opportunity to investigate whether of a potential employee's name has been so entered in the register for sexual offenders in order to determine if such a person is a suitable candidate for a particular position to be filled, especially where the employee will be required to interact with children and/or disabled persons.

Act 32 of 2007 also made it possible for victims of sexual offences to have excess to treatment for the purpose of prevention against HIV and AIDS. It also allows access to medical records of such a perpetrator in order to determine the HIV status of a person at the time of the commission of the offence and because of this provision it is now possible to charge a person who fully knowing that he or she is HIV positive, engages in sexual intercourse with another, with attempted murder. A person can be charged with attempted murder in two instances firstly, where the victim was raped and thus did not give consent and secondly, where the complainant consented to the sexual intercourse but was unaware of the fact that the perpetrator (or sexual partner) was HIV positive at stage that they engaged in sexual intercourse. This is by far a milestone in the history of the criminal justice system of South Africa, absent this it would mean that individuals who knowingly and purposely infect their partners or in case of rape their victims of the HIV virus would do it without any legal ramification. I believe the Legislature should also consider adding a provision to the Act that provides that a complainant who later dies after being infected of HIV/AIDS by an offender who was aware of his status should also be charged of murder in the event she dies from HIV/AIDS related illness. The rationale would be that had the complainant, now the deceased not been infected with the virus by the accused he or she would not have fallen ill and therefore not succumbed to their illness caused by the HIV/AIDS virus. The accused should have foreseen the possibility that the complainant once infected with the virus could become ill and thus could die as a result of the HIV/AIDS related illness (dolus eventualis).

In conclusion I am of the opinion that The Criminal Law (Sexual Offence and Related Matters) Amendment Act 32 of 2007 is exactly what the South African criminal law needed to cure the unfair and or discriminatory definition of the offence of rape in terms of the common law it also attaches the much required degree of sternness to the offence of rape. South Africa is a country with an alarming crime rate and rape is amongst the highest crimes that are reported on a daily basis.
Act 32 of 2007 will be of assistance in helping South Africa to curb the number of rape cases that are opened on a daily basis at various police stations. This piece of legislation is by far one of the most imperative and effective tool in the fight against the high rising number of sexual offences amongst our communities.

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