

SEXUAL PENETRATION, PARTICIPATION AND NEW LEGISLATION: A CRITICAL NOTE

1 Introduction

The crime of rape has long been the target of severe criticism in contemporary South Africa (see Hall “Rape: The politics of definition” 1988 *SALJ* 67; Artz and Combrink “‘A wall of words’: Redefining the offence of rape in South African

law” 2003 *Acta Juridica* 72; Allan “Psigiiese gevolge van verkragting” 1993 *SACJ* 186). Such criticisms, coupled with the evolution of society’s desire to protect certain core values and interests (see Artz and Combrink 2003 *Acta Juridica* 72 78), have resulted in extensive law reform with three notable legislative interventions to the definition of rape being effected in the past thirteen years alone. These legislative interventions may be said to have extended the scope of liability to actors not previously classified as perpetrators.

2 Puberty, husbands and common purpose

Prior to 1987, the crime of rape was defined as “a male of the age of 14 years or over, who has unlawful carnal knowledge of a female without her consent” (Gardiner and Lansdown *South African criminal law and procedure* (1957) 1622). In order to cure the anomaly and irrationality (see Milton “Law reform: The demise of the impunity of pre-pubescent rapists” 1988 1 *SACJ* 123) of the irrebuttable presumption that children under the age of 14 years were incapable of having sexual intercourse and thus committing the crime of rape, the legislator promulgated the Law of Evidence and the Criminal Procedure Act Amendment Act 103 of 1987. The effect was to abolish this anachronistic presumption and thus to extend the scope of criminal liability to boys under the age of 14 years, obviously providing that they had criminal capacity (see Snyman *Criminal law* (2002) 446 and s 1 of Act 103 of 1987).

In *R v K* 1958 3 SA 420 (A) 421F, Schreiner JA stated that “the offence [of rape] consists in having connection with a woman, other than the man’s wife, without her consent”. (See *R v Masago* 1935 AD 32 34 for a substantially similar definition.) This notion, that a husband could not be convicted of raping his own wife, was met with scathing criticism from civil society and the feminist movement (see Hall 1988 *SALJ* 67; Campanella “The marital rape exemption resurrected” 1994 *SALJ* 31; Van der Merwe “Marital rape, judicial inertia and the fatal attraction of the Roman-Dutch law” 1993 *THRHR* 675; Schiff “Rape: Wife vs husband” 1982 *J of the Forensic Science Society* 235; Williams “Marital rape – time for reform” 1984 *NLJ* 26). In 1993 the legislator intervened through the promulgation of the Prevention of Family Violence Act 133 of 1993 which effectively abolished the marital rape exemption by providing in section 5 that “a husband may be convicted of the rape of his wife” (see Le Roux “Maritale verkragting: Van huweliksdaad tot misdad” 1996 *De Jure* 261; Le Roux “The Prevention of Family Violence Act: An evaluation” 1997 *De Jure* 301; Snyman *Criminal law* (2002) 446; Burchell and Milton *Principles of criminal law* (2005) 701).

Despite the above changes the definition of rape still lent itself to considerable criticism, often being described as “too narrow” (Hall 1988 *SALJ* 67), “inadequate” (Artz and Combrink 2003 *Acta Juridica* 72) and “antiquated” (Burchell and Milton (2005) 716). In response hereto the legislator finally enacted the long-awaited Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (“the Act”) which sought “[t]o comprehensively and extensively review and amend all aspects of the laws and the implementation of the laws relating to sexual offences, and to deal with all legal aspects of or relating to sexual offences in a single statute” (Long Title of the Act). The most notable amendment to the law for purposes of this note is the replacement of the narrowly-defined defunct common law crime of rape (see in this regard Hall *SALJ* 67) with the broader gender-, orifice-, and instrument-neutral statutory offences of rape and compelled rape. Within the architecture of the Act these two expanded

statutory offences are constituted by acts (*actus reus*) of sexual penetration. “Sexual Penetration” is defined in chapter 1, section 1 of the Act as

“includ[ing] 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” (own emphasis).

Sections 3 and 4 further provide for the definitions of rape and compelled rape. Section 3 reads that “[a]ny person (‘A’) who unlawfully and intentionally commits *an act of sexual penetration* with a complainant (‘B’), without the consent of B, is guilty of the offence of rape” (own emphasis). Section 4 reads as follows: “Any person (‘A’) who unlawfully and intentionally *compels a third person (‘C’)*, without the consent of C, *to commit an act of sexual penetration* with a complainant (‘B’), without the consent of B, is guilty of the offence of compelled rape” (own emphasis added).

These definitions when read with the definition of “sexual penetration” have given rise to intellectual discomfort amongst not only scholars but practitioners, prosecutors and the judiciary alike. The source of this intellectual discomfort is the question whether the Act has, by couching the crime of rape and compelled rape in a gender-neutral fashion, caused the definition of rape to lend itself to an interpretation that it is no longer a formally defined crime as it was at common law, but rather a materially defined crime. In the latter case it would have far-reaching consequences which may possibly negatively impact on the rights of victims as well as perpetrators. Artz and Combrink 2003 *SALJ* 72 73 make a pertinent remark that should be borne in mind when seeking to address the above concern, *albeit* in a different context:

“The question that inevitably arises is what the impact of this redefinition of the offence of rape as proposed by the Law Commission will be. Will this merely be an exercise in semantics, or will this reformulation in some way contribute to the establishment of a criminal justice regime that responds to the nature and extent of sexual violence in South Africa?”

It is for this reason that this issue must be addressed critically.

3 Southern African courts and the problem of the “innocent perpetrator” to rape

The prevalence of violence against women, especially sexual violence, has reached staggering proportions in Southern Africa. Amongst this rise in sexual violence a new phenomenon has developed, the so-called “innocent perpetrator” to rape. The scenario entails the compelling of an innocent male and female to have sexual intercourse with one another without either’s consent. This factual setting has caused much concern and deliberation as evidenced by the synoptic perspective provided below.

3 1 R v D 1969 2 SA 591 (RA)

The salient facts of the case appear from the judgement of Quènet ACJ (Macdonald AJP concurring): The appellant had persuaded the 18-year-old complainant to accompany him under the pretext that he would find employment for her.

The appellant led the complainant on a “wild-goose chase”, frequently assaulting her and keeping her under close watch during the course thereof. The appellant raped the complainant (count 1) and further caused her through the inducement of fear to submit to sexual intercourse with one A and J (counts 2 and 3). The appellant was convicted on, *inter alia*, three counts of rape and received an effective sentence of 10 years’ imprisonment. At the outset of the judgment Quènet ACJ took a principled stance, stating that

“where the facts show an accused person has induced fear in the mind of his victim which disables her from exercising a free choice, then, whether he himself commits rape upon her or causes her to submit to a third party who believes, even on reasonable grounds, that she is a consenting party, he (that is to say, the person accused) is himself guilty of rape” (592A).

The court put a hypothetical case to the appellant’s counsel:

“A tells B that he has arranged that C should visit B in her bedroom; that on his arrival C will tell her that he wishes to have intercourse with her; when C arrives he, A, will be beneath the bed with a loaded revolver; if B refuses to have intercourse with C, he, A, will discharge the gun at her. If B allows C to have intercourse with her because she fears A will fulfil his threat, would A, in such circumstances, be guilty of rape?” (592C–D).

The court answered the above in the affirmative, citing that such case vignette is an apt example of the maxim *qui facit per alium facit per se*.

The decision in *R v D* cannot be correct (see Rabie “*R v D* 1969 2 SA 59 (A)” 1969 *THRHR* 308). The rationale propounded by the court above which was the basis of the confirmation of the conviction in respect of counts 2 and 3 is materially flawed. The common-law crime of rape provided that a man could only be convicted of rape if he unlawfully and intentionally had sexual intercourse with a woman without her consent (see Milton *South African criminal law and procedure* (1996) 436; Skeen “Criminal law” 6 *LAWSA* (2004) para 270). It stands to reason that only a man who has sexual intercourse with a woman may be found guilty as a perpetrator to rape. Those parties who assist in the commission but do not themselves penetrate the complainant may at most be found guilty as accomplices (see Ellis “Kante van die medepligtigheidsmisdad” 1983 *De Jure* 356; Paizes “Parties to crime” 1991 *Annual Survey of South African Law* 443; Pantazis “Parties to crime” 1993 *Annual Survey of South African Law* 633). The crime of rape may therefore be categorised as a formally-defined crime, unlike murder, which is materially defined, and thus the ambit of perpetrators is limited only to those men who penetrate the complainant (Whiting “Principles and accessories in crime” 1980 *SALJ* 199 202 states that “there are certain crimes which can only be committed personally as a principal . . . The most obvious example is rape. A person cannot be guilty of rape as a principal unless he himself has had sexual intercourse with the victim”; Du Toit *et al Commentary on the Criminal Procedure Act* (1993) 22-10 state that “certain crimes can only be committed personally and not through another. Rape falls into this category”).

The correct decision in *R v D* would have been to convict the appellant as an accomplice to rape (see *S v Jonathan* 1987 1 SA 633 (A); *S v Kock* 1988 1 SA 37 (A)), provided that J and A were convicted as principal offenders (*S v M* 1950 4 SA 101 (T); *S v Williams* 1980 1 SA 60 (A); *S v Khoza* 1982 3 SA 1019 (A)). In the event that it was found that both J and A *bona fide* believed that the complainant had consented to the intercourse, the appellant could not have been convicted as an accomplice to rape, either as the requirement of accessoriness because accomplice liability would not have been met (see, for the different

theories of accessoriness, Whiting 1980 *SALJ* 199; Rabie “Die aksessoriteitsbeginsel in the deelnemingsleer” 1970 *THRHR* 244; Burchell and Milton (2006) 604). In the latter event the court could possibly have convicted the appellant of the inchoate crime of incitement to commit rape (see *S v Nkosiyana* 1966 4 SA 655 (A); cf *R v Milne and Erleigh* 1951 1 SA 791 (A) 822).

3 2 *S v Gaseb* 2001 1 *SACR* 438 (NmS)

The formal nature of the definition of rape was clearly illustrated by the Supreme Court of Namibia in *Gaseb*. The salient facts of the case appear from the judgment of O’Linn AJA (Strydom CJ and Dumbutshena AJA concurring): The facts *prima facie* illustrated a so-called “gang rape”. Appellant no 1 was the first to have sexual intercourse with the complainant without her consent, assisted by the other two. After completion of intercourse by no 1, no 2 commenced and completed intercourse, assisted by nos 1 and 3. Lastly, no 3 commenced and completed intercourse assisted by appellants 1 and 2. The question to be addressed was whether, in the case of a multiple rape, it is sound practice to charge each accused with assisting in the rape of the other resulting in multiple counts, or whether such practice was oppressive (445). In essence the question was whether or not there has been an improper splitting of charges or, more correctly, whether or not there has been an improper duplication of convictions. Surely the prejudice, if any, would have occurred if the accused were improperly convicted twice and not where they were charged twice (see *S v Grobler* 1966 1 SA 507 (A)).

The court in *Gaseb* referred with approval (442) to the first available report of a Namibian court dealing with the procedure of charging and convicting on the so called “gang rape”. In *S v David Garoeb* (unreported) Frank J held that, although the custom is to regard gang rape as one rape, technically speaking each participant is guilty of more than one rape. Each appellant was a perpetrator of rape when he had intercourse with the complainant. In addition he was an accomplice to all the other rapes by assisting when holding the complainant down.

O’Linn AJA in *Gaseb* correctly stated (451) that the logical point of departure for an examination of the duplication of convictions is the *definition* of those crimes in regard to which a possible duplication has occurred. (See also Rabie 1969 *THRHR* 308–309 who states that

“ten eerste moet dit duidelik gestel word dat hy op grond van bogenoemde feitestel nie as dader aan verkragting skuldig kan wees nie omdat hy nie binne die raamwerk van die misdaadsomskrywing van verkragting val nie: Hy het naamlik nie geslagtelike verkeer met C gehad nie en geslagtelike verkeer is een van die vereistes van die misdaadsomskrywing. Dit is nie voldoende om te veroorsaak dat geslagtelike verkeer plaasvind nie”.)

O’Linn AJA in *Gaseb* proceeded to define rape as the “unlawful and intentional sexual intercourse by a male person with a female person, without her consent” (451). Once the evidence proves these elements in regard to the perpetrator and the accomplice(s), the crime of rape has been proved against the perpetrator and accomplice(s). Any repetition thereafter meeting these elements constitutes a further crime of rape. This approach followed by O’Linn AJA emphasises the formal nature and personal character of rape and clearly assigns distinct roles to the perpetrator, who has intercourse, and the accomplice, who assists (452). The *actus reus* is committed when there is sexual penetration without consent. This cannot be committed through the agency of another person (466). The three appellants were convicted on a number of rapes and sentenced to periods of imprisonment.

3 3 S v Saffier 2003 2 SACR 141 (SE)

The accused was convicted in the Regional Court on two counts of rape. The matter was thereafter referred to the High Court for sentencing in terms of section 52(1)(b) of the Criminal Law Amendment Act 105 of 1997. The High Court per Neppen J, however, requested reasons for the conviction on count 1 as he was doubtful as to the correctness thereof. The salient facts may be summarised as follows: The accused, Jonas Saffier, and the complainant, Marie Tarentaal, had been in a cohabital relationship for more than fifteen years. Despite this relationship the complainant also, at times, had a relationship with one Godfrey Toby ("Toby"). The latter state of affairs caused the accused much distress. On the evening in question the accused, the complainant and Toby were walking past an empty farmhouse when the accused decided that the complainant had to choose between him and Toby. The accused ordered Toby at knife point to have sexual intercourse with the complainant. Toby was unwilling and unsuccessfully attempted to flee. The accused then forcefully held the complainant down and threw Toby on top of her. The complainant resisted but the accused ordered her to keep still. Toby managed to penetrate the complainant whereafter the accused grabbed Toby and pushed him aside. Hereafter the accused himself had intercourse with the complainant. It was common cause that she did not consent to either of the two incidences of intercourse.

The reason advanced by the regional magistrate for the conviction on count 1 was that the accused had used Toby as an instrument to rape the complainant, the maxim *qui facit per alium facit per se* thus finding application (para 3). The legal question which fell to be considered by Neppen J was thus whether a person who did not himself have intercourse with the complainant could legally be found guilty of rape (para 6). Neppen J correctly held that the answer to this question would be found on a thorough deconstruction of the common-law definition of rape (para 7). The court referred with approval to various authors who held the view that the crime of rape could only be perpetrated personally, that is by the accused himself having sexual intercourse with the complainant and not through the instrumentality of others (para 9). Burchell and Milton (2006) 573 state that "certain crimes can only be committed *personally* and cannot be committed through the instrumentality of another. Thus, if X procures Y to rape Z, X will not be a perpetrator of the rape unless he himself has sexual intercourse with Z. X may, however, be an accomplice to rape". Snyman (2002) 258 also explains that "if the crime is of such a nature that it can by definition be committed only with one's own body, it is not possible to commit the crime through the instrumentality of somebody else. Examples of such crimes are rape" (see para 10).

Neppen J accordingly held that rape may only be perpetrated by a man who personally has sexual intercourse with a woman without her consent (para 18). The court in essence confirmed that the maxim *qui facit per alium facit per se*, owing to the definition of rape, does not find application (see Rabie 1969 *THRHR* 308 310). The first conviction of rape (where Toby was forced to penetrate the complainant) was found to be incorrect and was set aside. The accused was instead convicted of indecent assault on that count (para 20). Neppen J was of the opinion that it is extremely unsatisfactory that an accused who compels another to have intercourse with a woman without her consent should escape liability on a charge of rape and suggested that this is perhaps an issue to which the legislator should give attention (para 19). The decision in *Saffier* cannot be faulted. Even though it may have been an unsatisfactory conclusion to reach on the facts it is a correct decision based on the legal framework at the time.

3 4 S v Kimberley 2004 2 SACR 38 (E)

The judgment is cited here to display the formal nature of the crime of rape at common law. Owing to this, material aspects pertaining to the interpretation of the Criminal Law Amendment Act 51 of 1997 are omitted as they are not relevant to the purpose set out above. It is worthwhile to note, however, that the rationale adopted by Erasmus J in the interpretation of the aforementioned Act was rejected by the Supreme Court of Appeal in *S v Kimberley* 2005 2 SACR 663 (SCA) by Zulman AJ (Mthiyane, Brand and Mlambo JJA and Maya AJA concurring).

The salient facts of the case appear from the judgment of Erasmus J: The complainant, whose evidence was accepted by the magistrate, testified that the two accused entered her home and proceeded to attack her. Accused 1 then held her down while accused 2 raped her. The two accused were convicted of rape by the regional magistrate in the Alexandria regional court. The basis for the conviction was not recorded. The matter was thereafter referred to the High Court for sentencing in terms of the provisions of section 52 of the Criminal Law Amendment Act 105 of 1997 (“the Minimum Sentence Act”).

When the case came before the court, Erasmus J indicated that certain information was required in order for the matter to be dealt with properly by the court. The court requested *inter alia* the following:

“2. The magistrate is requested to furnish her reasons for the referral, indicating therein the section of the relevant Schedule on which the Court relied. It would seem that the Court convicted accused 1 on the basis that he aided accused 2 in raping the complainant. *Can it be said that on such basis accused 1 committed rape*, as contemplated in the Schedule? The magistrate is referred to the judgment of this Court in *S v Jonas Saffier*, a copy of which is attached (CC4/03); which judgment might have a bearing on the question” (own emphasis).

In response the regional magistrate “simply replied that she had found that accused 1 was ‘an accomplice’”. She further declared that she had misinterpreted the Minimum Sentence Act and thus had erred in referring the matter to the High Court for sentencing. She requested that the matter be transferred back to the regional court for proper adjudication as it appeared that she had lacked jurisdiction in referring the matter. This request was denied by the judge and the matter proceeded before him in terms of the provisions of section 52(3) of the Act.

The decision that ultimately befell the court was whether the crimes committed by the two accused fell within the ambit of Part 1 of Schedule 2 of the Act. It is submitted that the subtext of the judgment was an analysis of the formal nature of the crime of rape through the determination of whether it was possible for an accused to be found guilty as a perpetrator to rape where he himself does not penetrate the complainant personally but merely aids or assists the actual perpetrator in the commission thereof. The relevant provision of the Schedule reads as follows:

“Rape- (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 conspiracy.”

The court in this vein proceeded to draw a clear distinction between perpetrators and co-perpetrators on the one hand, and accomplices on the other (para 10). The distinction drawn by the judge cannot be faulted. It was held that an accomplice, although a participant, is neither a perpetrator nor a co-perpetrator as his conduct

does not constitute the *actus reus* of a particular crime. An accomplice merely makes it possible for the perpetrator and co-perpetrator to commit the crime by affording him the means or information needed to commit the said crime. The liability of an accomplice is therefore accessory in nature (see also Van Oosten “Deelneming aan gevolgs misdade: (Mede)daderskap of medepligtigheid?” 1979 *De Jure* 346; Snyman “*S v Williams en 'n Ander* 1980 (1) SA 60 (A)” 1980 *TSAR* 188; Schwikkard “Instrumental arguments in criminal law: A mirage of tensions” 2004 *SALJ* 289).

The court further proceeded to illustrate the formal nature of rape with reference to the application of the doctrine of common purpose (para 11). Erasmus J opines that, in the case of certain crimes, the roles of an accomplice and perpetrator conflate, resulting in them becoming co-perpetrators. This result is brought about through the application of the doctrine of common purpose, where the act(s) of one perpetrator are imputed to all the other perpetrators as well as to those persons who assist him in the commission of the crime. The doctrine of common purpose, according to Erasmus J, thus blurs the distinction between co-perpetrator and accomplice in the case of crimes such as murder and theft (para 12). It is submitted that the court’s reasoning is incorrect. Not only must each participant in the common purpose perform an act of active association in the furtherance of the crime, but each participant must also be proved to have entertained the necessary *mens rea* for the commission of the crime before the common purpose doctrine will make each of them a co-perpetrator. The *mens rea* of a perpetrator and that of an accomplice are not the same. While a perpetrator has the necessary *mens rea* to commit the crime, the accomplice does not have the *mens rea* required for the commission of the crime but rather the intention to facilitate the commission of the crime by the perpetrator. The doctrine of common purpose thus does *not* turn an accomplice into a co-perpetrator (see Boister “Common purpose: Association and mandate” 1992 *SACJ* 167; Burchell “*S v Nzo* 1990 (3) SA 1 (A): Common purpose liability” 1990 *SACJ* 345; Cameron “Inferential reasoning and extenuation in the case of the Sharpville Six” 1988 *SACJ* 243; De Vos “Common purpose – ’n Warboel?” 1992 *SACJ* 160; Paizes “Common purpose by active association: Some questions and some difficult choices” 1995 *SALJ* 561; Reddi “The doctrine of common purpose receives the stamp of approval” 2005 *SALJ* 59; *S v Thebus* 2003 6 SA 505 (CC); *S v Dube* 2010 1 SACR 65 (KZP)).

In the case of rape the distinction between perpetrators/co-perpetrators and accomplices is, according to Erasmus J, “clear and logical” (paras 12–13). This clear distinction is based on the formal nature of rape as reflected in the definition of the crime. A woman can never be a perpetrator or co-perpetrator as her personal quality of being a woman disqualifies her from committing the act of male *coitus* (see also Jansen JA in *S v Jonathan* 1987 1 SA 633 (A) 643H–I). Snyman (2002) 254 fn 4 supports this reasoning by explaining that where another male person (Z) assists the perpetrator (X) to commit rape without himself having actual intercourse with the woman, Z is not a co-perpetrator but an accomplice. This stems from the fact that heterosexual coition involves one woman and one man exclusively. The act is particular to that male and cannot be imputed to any other person, male or female (para 13). (See also *S v Gaseb* 2001 1 SACR 438 (Nm) 452h–I 466g–I as discussed above and *Thebe and Two Others v The State* 1961 1 PH H 247 (A)). The court correctly concluded that the common purpose doctrine cannot be applied to crimes that cannot be committed through the instrumentality of another; in other words, formally defined (para 15).

4 Rape, compelled rape, sexual penetration and perpetrators

16 December 2007 was seen as a monumental day for civil society when the long-awaited Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 was signed into law by the President. The Act brought a swift and well-needed change to the antiquated system governing sexual offences. The Act, which was the outcome of lengthy legislative deliberations, repealed most of the Sexual Offences Act 23 of 1957 (except insofar as the regulation of adult prostitution is concerned) as well as the common-law crimes of rape, indecent assault, incest, bestiality and violation of a corpse insofar as it relates to the commission of a sexual act with a corpse.

The issues highlighted in the introductory paragraph to this note, namely whether the Act has, by couching the crime of rape and compelled rape in a gender-neutral fashion, caused the definition of rape to lend itself to an interpretation that it is no longer a formally-defined crime, as it was at common law, but rather a materially-defined crime needs to be critically addressed.

Before embarking on a deconstruction of the sections pertinent to this note, namely, sections 1, 3 and 4, one should consider what the purpose would be of eliminating the formal nature of the crime of rape, especially considering that the legislator deemed it necessary to include a separate crime of compelled rape to deal with the anomalies illustrated above.

The definitional elements of the statutory offence of rape may be stated as follows: (1) unlawful; (2) intentional; (3) sexual penetration; (4) with a complainant; (5) without consent. Likewise, the definitional elements of the offence of compelled rape are: (1) compelling a person; (2) to commit an act of sexual penetration with another; (3) without the consent of such person; (4) and without the consent of the complainant; (5) unlawfulness and (6) intention (Snyman (2008) 370).

“Sexual penetration” provided for in both sections above is defined in section 1 of the Act as “any act *which causes penetration* to any extent whatsoever by” (own emphasis). The use of the words “which causes penetration” has caused confusion within the legal fraternity with some proponents arguing that the legislature has brought an abrupt end to the history of rape as a formally-defined crime. Snyman (2008) 358, for instance, argues that the statutory offence of rape is now, owing to the use of words above, by definition a materially-defined offence. That means that the offence consists of the causing of a certain situation, namely sexual penetration. This, with due respect, cannot be correct. Should such an interpretation be accepted as correct it would do violence to our legal order. The implications of same would be to import the doctrine of common purpose and effectively abolish the distinction between perpetrators and accomplices in the case of rape, as so clearly expounded by O’Linn AJA in *Gaseb* and Erasmus J in *Kimberley* (see Snyman (2004) 272 for a discussion of accomplice liability in cases of murder which too is a materially-defined crime). It also would render the provision dealing with section 4 nugatory which is contrary to the basic principle of statutory interpretation that a provision should not be interpreted in such a way as to render provisions redundant. Du Plessis *Re-interpretation of statutes* (2002) 187 notes that “the intention of the legislature” also refers to the truism that statutes are meant to be effective and to the common law presumption that statutes do not contain invalid or purposeless provisions (see also *Curtis v Minister of Safety and Security* 1996 5 BCLR 609 (CC) para 57 and *Olivier v Olivier* 1998 1 SA 550 (D) 555).

It is proposed that the above interpretation is merely a knee-jerk reaction. On the application of the principles of statutory interpretation a more sound and viable interpretation appears. If one considers a contextual interpretation of the Act due regard must be had to the matter of the statute, the apparent scope and its purpose (De Ville *Constitutional and statutory interpretation* (2001) 141). The purpose may be gleaned from the Act's long title, namely "repealing the common law offence of rape and replacing it with a new expanded statutory offence of rape, applicable to *all forms of penetration* without consent, irrespective of gender" (own emphasis). Furthermore, it is stated that the Act is "creating new statutory offences relating to certain compelled acts of penetration". It may thus be said that the primary purpose of the Act concerning acts of "rape" was to bring about a gender-neutral definition that by implication caused the doing away of the male sexual organ as the means to penetrate a complainant. Furthermore, the primary purpose of "compelled rape" may be said to be to circumvent the anomalies of the "innocent perpetrator" scenario and giving heed to the words of Nopgen J in *Saffier*. This argument is strengthened by the presumption of interpretation that it "is presumed that the legislature does not intend to enact invalid or purposeless provisions" (De Ville (2001) 167).

In addition, homage must be paid to the definitional elements of the offence. If carefully considered the term "which causes" does not appear within the definitional elements of the offence unlike in the case of murder (the unlawful and intentional causing of the death of another human being (Snyman (2004) 421)). Thus can the term "sexual penetration" simply be imputed into the definitional elements of the offence? It is submitted not. The purpose of the inclusion of a definition section in an Act is so as to operate as an interpretive aid by ascribing to certain words a technical meaning that may deviate from their ordinary grammatical meaning (Du Plessis (2002) 204; De Ville (2001) 104). The term "sexual penetration" for instance is defined in the *Oxford advanced learners dictionary* as "the act of a man putting his penis into his partner's vagina or anus". The technical meaning of the definition ascribed by the legislator, however, was to make provision for a woman who "causes penetration" to fall within the ambit of the Act, as it is physiologically impossible for a woman to penetrate a complainant with her sexual organ. An example is where X (a woman) causes the complainant Y (a man) to penetrate her (X). It is propositioned that such reasoning gives proper recognition to the gender-neutrality of the sections in question.

5 Conclusion

At the outset of this contribution the question was posed whether the Act has, by couching the crime of rape and compelled rape in a gender-neutral fashion, caused the definition of rape to lend itself to an interpretation that it is no longer a formally-defined crime, as it was at common law, but rather a materially defined crime. Through an analysis of the definition of the common-law crime and the anomalies presented in the past, coupled with an interpretation that is consistent with the constitutional interests sought to be protected, it is submitted that the crime of rape is and remains a formally-defined crime.

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