

1. DEFINITION OF CONCEPTS, PROBLEM STATEMENT AND OVERVIEW OF THE STUDY

1.1. INTRODUCTION

According to Cotton and Groth (1982:47), correctional facilities (jails, detention centres and correctional centres) are high risk settings for sexual assault and rape among offenders. This assumption is supported by Messerschmidt (in Sabo, Kupers & London, 2001:67) who notes that rape is a widespread practice among males in male correctional centres. Derrick Mdluli, the previous national president of the South African Prisoners' Organisation for Human Rights (SAPOHR) and an ex-offender, postulates that "prisoners are sodomised every day and every night" (Lazarus, 2002:82). Despite these revelations, male-on-male sexual violation and rape in men's correctional facilities remain ignored crime problems within the larger society (Lehrer, 2001:24). This may be ascribed to the fact that correctional authorities rarely mention the sexual assault that takes place in their centres, and if they are confronted with the issue, refer to it as the "homosexual problem" (Rideau & Sinclair, 1982:4). It is therefore no surprise that the general public knows little, if not nothing, about the plight of many male offenders who are the victims of sexual violation and rape in a correctional centre.

One of the most fearful events for a heterosexual male is to be anally penetrated ("butt fucked"), and for most heterosexual offenders witnessing or experiencing male rape can be their first confrontation with same sex contact (Gear, [sa]; McMullen, 1990:53; Sabo *et al.*, 2001:14). During male-on-male rape the victim may get an erection and/or ejaculate during the act. This usually leaves the victim with guilt feelings, and the physiological sexual response may lead to the perception that he is homosexual or bisexual. Thus, the victim questions his sexual identity and manhood and may view the sexual attack as confirmation of him being homosexual (McMullen, 1990:53). The effect of the rape on the victim is summarised by Roberts (in Welborn & Lantz, 2004:112) as follows:

For heterosexual men, rape almost always causes some confusion or questioning about their sexuality. Since many people believe that only gay men are raped, a heterosexual survivor may begin to believe that he must be gay or that he will become gay. Furthermore, perpetrators often

accuse their victims of enjoying the sexual assault, leading some survivors to question their own experiences.

Cotton and Groth (1982:50) propose that rape is the sexual expression of anger rather than the aggressive expression of sexuality. Groth (1979:12-13) explains this statement by categorising rape as an aggressive act. In some cases of rape the assault appears to comprise a discharge of anger, frustration, anxiety and rage. In other cases the aggression seems to be reactive in nature. If a victim attempts to resist the rape, the aggressor may retaliate by striking, hitting or hurting the victim in some way. Furthermore, the aggression shows less an anger motivation and more a means to dominate and control the victim and to be in charge of the situation. Finally, the aggression is eroticised by the aggressor, so that he derives pleasure both from controlling and hurting the victim. According to Cotton and Groth (1982:51), rape in a correctional centre, as in free society, is not about sex, but to hurt, humiliate, dominate, control and degrade the victim. In the light of this, it is put forward by Groth (1979:133) that rape seems to validate the manhood of the aggressor, since it corresponds with being in control, being aggressive and being the penetrator.

Coerced sex in corrections is not referred to as rape by the offenders, but rather known as “turning out” a person. This is a non-sexual description of an act of conquest and demasculation of the victim (O’Donnell, 2004:244; Rideau & Sinclair, 1982:5). Related to this is the belief in corrections that inmates who have been raped are not “victims”. This is based on the notion that a “real man” cannot be forced to do anything he does not want to do. Thus, a “real man” cannot be sexually assaulted and raped, and if a man is “turned out” he is regarded as being weak and not worthy of respect from those who are “men” (i.e. penetrators). Consequently this weakness both invites and justifies sexual exploitation and rape (O’Donnell, 2004:244; Knowles, 1999:267).

For the purpose of this study a historical overview of corrections in South Africa will not be discussed, since this is not the focus of the study. The researcher will also not discuss homosexuality as sexual assault and rape in correctional centres are not related to the sexual orientation of either the victim or the perpetrator.

The following concepts will be used interchangeably throughout the study (Draft White Paper on Corrections in South Africa, 2003):

- Awaiting-trial prisoner or detainee: Refers to all persons who are lawfully detained in prison, but who have not been sentenced to imprisonment.
- Prison or correctional centre: Refers to any place established under the Correctional Services Act (Act 111 of 1998) as a place for the reception, detention, confinement, training or treatment of persons liable to detention in custody or to detention in placement under protective custody. It includes all land, branches, outstations, camps, buildings, premises or places to which any such persons have been sent for the purpose of imprisonment, detention, protection, labour, treatment or otherwise.
- Inmate, prisoner, convict, offender or correctional client: Refers to any person, whether convicted or not, who is detained in custody in any prison or who is being transferred in custody or is en route from one prison to another prison.

1.2. DEFINITION OF CONCEPTS

As indicated in the introduction, male offenders and detainees can be subjected to sexual assault and rape within correctional centres. Therefore the concepts sexual assault and rape will be defined by mainly referring to the South African Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act 32 of 2007). The date of commencement of this act is 16 December 2007. Since offenders and correctional officials refer to the coerced anal penetration of an inmate as sodomy, this concept will also be defined. Lastly masculinity is defined, as in correctional environments this is what separates a “man” from a victim.

1.2.1. Sexual assault

As stipulated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act 32 of 2007), the statutory offence of sexual assault has replaced the common law definition of indecent assault. It is therefore necessary to define the act of indecent assault, before describing it in order to understand why it was repealed.

Snyman (2002:436) defines indecent assault as “unlawfully and intentionally assaulting, touching or handling another in circumstances in which either the act itself

or the intention with which it is committed is indecent”. Snyman’s definition is a generic conceptualisation of what was used to describe unlawful sexual acts other than rape. Thus, in this context indecent assault is a gender-neutral crime and both male and female victims of penetrative sexual assault either *per vaginam* or *per anum* who were not covered under the then (pre 1994) definition of rape, could have reported a crime of indecent assault (Van der Bijl, 2002:149).

Subsequently Burchell (2005:691) defined indecent assault as “an assault that by its nature or design is of an indecent character”. Considering this definition the following acts were described as indecent assault (Burchell, 2005:692–693):

- Failed rapes: A failed rape is when the perpetrator, for various reasons, fails to insert his penis into the vagina of the victim. The perpetrator therefore did not complete the sexual act and subsequently did not commit rape. However, his penis touching the vagina of the victim constitutes a crime of indecent assault.
- Quasi-rapes: These rapes are those acts that have the characteristics of rape, but due to the limitations of the definition of rape they are punishable as indecent assault. Included in this category are instances where an object, not a penis, is inserted into the vagina, or where the penis is inserted into an orifice other than the vagina.
- Molestation: This entails the touching or fondling of a person in an indecent (meaning sexual) manner.
- Consensual sexual acts that are *contra bonos mores*. This category of indecent acts is punishable because it is committed without the consent of the victim. Some cases of consensual acts of indecency are, however, viewed as indecent assault because they are *contra bonos mores*. In the correctional setting this can be an inmate who “consents” to the sexual act because of intimidation or threat by the perpetrator.

Neither the definition of Snyman nor Burchall’s definition of indecent assault **clearly** indicated which acts were considered to be indecent. In the researcher’s opinion it is unclear whether coerced oral sex and masturbation also constitute indecent acts. In the

Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act 32 of 2007) there is a clear description of the violating acts that are regarded as sexual offences, and therefore an inmate who makes himself guilty of any of the following sexual violations will be guilty of the crime of sexual assault:

- “(a) direct or indirect contact between the:
- (i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;
 - (ii) mouth of one person and –
 - (aa) the genital organs or anus of another person or, in the case of a female, her breasts;
 - (bb) the mouth of another person;
 - (cc) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could -
 - be used in an act of sexual penetration;
 - cause sexual arousal or stimulation; or
 - be sexually aroused or stimulated thereby; or
 - any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or
 - (iii) mouth of the complainant and the genital organs or anus of an animal;
- (b) the masturbation of one person by another person; or
- (c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person, but does not include an act of sexual penetration”.

Genital organs within this context refer to the whole or part of the male and female genital organs, and include surgically constructed or reconstructed genital organs.

Accordingly, a male inmate who coerces another male inmate to participate in inter-femoral sex, oral sex or masturbation is sexually violating that person and is guilty of sexual assault. Furthermore, if a male inmate coerces another male inmate to participate in kissing him he is guilty of sexual assault. Another important implication of this Act is the use of an object for sexual gratification. This includes contact of the genital organs or anus of an inmate with an object, or if an object is inserted into the mouth of an inmate to simulate oral sex.

In the United States of America (USA) the California Department of Corrections (2000) defines sexual assault as engaging or attempting to engage in a sexual act, the use of threats, intimidation, inappropriate touching, or other actions or communications by one or more inmates aimed at coercing and/or pressuring another inmate to engage in a sexual act. This definition encompasses more than just physical acts, and includes verbal threats, which are not included in the South African Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act 32 of 2007).

Operational definition: For the purpose of this study an operational definition of sexual assault in correctional centres is the contact between the genital organs or anus of one person with any part of the body of another person, including the mouth; contact between the genital organs, anus or mouth of one person with an object; verbal sexual threats, and masturbation of one person by another person.

1.2.2. Rape

Before the commencement of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act 32 of 2007), rape in South Africa constituted a male having unlawful and intentional sexual intercourse with a female without her consent (Burchell, 2005:699; Snyman, 2002:445). All cases of non-consensual anal penetration between males were recorded as indecent assault (Snyman, 2002:439).

As a result of this void in the legislation together with the acknowledgement that male rape is more prevalent than previously thought, and the Constitutional obligation of equality, the South African Law Commission (SALC) proposed the following definition for the act of rape: “Any person who intentionally or unlawfully commits an act of sexual penetration with another person, or who intentionally and unlawfully compels, induces

or causes another person to commit such an act is guilty of the offence of rape” (South African Law Commission, 2002:117).

The SALC (2002:114) further proposed that sexual penetration means any act that causes penetration, and includes:

- The insertion of the genital organs of one person into the anus, mouth or genital organs of another person.
- The insertion of any object, including any part of the body of an animal, or part of the body of one person into the anus or genital organs of another person in a manner which simulates sexual intercourse.

However this definition of rape by the SALC was criticised as being too broad and as a result rape is defined in the Criminal Law (Sexual Offences and Related Matters) Amendment Bill (Bill 50B of 2003) as “any person who intentionally and unlawfully commits an act of sexual penetration with another person without such person’s consent”. Within this context, according to the Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act 32 of 2007), sexual penetration includes any act which causes penetration to any extent 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.

Thus, what the SALC has done and the way it is set out in the Criminal Law (Sexual Offences and Related Matters) Amendment Bill (Bill 50B of 2003) is to replace the words “male” and “female” with the gender neutral concept “person”, and subsequently a man can be the victim of a rape.

In 2007 the Criminal Law (Sexual Offences and Related Matters) Amendment Bill (Bill 50B of 2003) was approved by Parliament and since 16 December 2007 both males and females can be the victims of rape. For the first time in South Africa forced oral sex is considered to be rape. Since oral sex is widely practiced in correctional centres, victims will be able to lay a formal charge of rape. The insertion of an object (finger, mop, broomstick) into the anus of a man is also regarded as rape. It is however suggested by the researcher that offenders be made aware of the changes in the legislation of rape, in order to empower them if they do fall victim to such a crime while in a correctional centre.

This broadened definition of rape also ensures that penalties and sentencing for male rape will be on par with those of female rape. Before 1994 a person found guilty of the rape of a female could have received the death penalty, whereas indecent assault was regarded as a lesser offence. Furthermore, all cases of rape, including male-on-male rape are categorised as a Schedule six offence. This type of offence prescribes a minimum sentence of ten years imprisonment for a first offence as introduced in the Criminal Law Amendment Act (Act 105 of 1997), and no bail, except under “substantial and compelling circumstances” (Fuller, 2007:10; Sloth-Nielsen & Ehlers, 2005:6).

The subsequent section offers a discussion of court cases that paved the way for the future prosecution of a man guilty of male rape. During 2002 South Africa saw its first court case involving the sexual offence of male rape that occurred in Pollsmoor Correctional Centre in the Cape Province. However, since the definition of rape had not yet passed through parliament during that period, the thirty-seven year old perpetrator was charged with four counts of indecent assault and one of assault. The perpetrator allegedly engaged in coerced sex with the victim and threatened the victim with a knife (Prisoner in court for male rape, 2002).

In 2005 *S vs Masiya* (unreported) made legal history when Magistrate Lamprecht found Fanual Sitakeni Masiya guilty of rape in the Graskop Regional Court after he sodomised a nine year old girl. The Regional Court remarked as follows:

In terms of the existing common law definitions of crime, the non-consensual anal penetration of a girl (or a 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 the 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 the vaginal orifice. It therefore appears 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 Regional Court extended the definition of rape to include "...acts of non-consensual sexual penetration of the male sexual organ into the vagina or anus of another person". Having convicted Masiya of rape in terms of this extended definition, the Regional Court referred the case to the Pretoria High Court for confirmation of conviction and sentencing. During 2006 Judge Ranchod of the High Court declared the common law definition of rape unconstitutional and confirmed the Regional Court's conviction of rape to include anal penetration. This ruling was also extended to male rape. Hereafter Ranchod referred his judgement to the Constitutional Court for confirmation of a declaration of constitutional invalidity (Combrinck, 2006:2; Fuller, 2007:7; Judge extends definition of rape, 2006; Venter, 2006:3).

In the majority judgement, Judge Nkabinde of the Constitutional Court (unreported) in 2007 ruled that the extended definition of rape to include non-consensual anal penetration of females will be in the interest of justice. Judge Nkabinde added that the anal penetration of males is no less degrading, humiliating and traumatic but that the case brought before the Constitutional Court focused on the anal penetration of females. It was emphasised that the Court was not being disrespectful to male bodily integrity, or insensitive to the trauma suffered by male rape victims. Judge Langa in the minority judgement stated that:

... young men, prisoners and homosexuals, are, like women, also vulnerable groups in our society. Moreover, they, and most other male victims, are raped precisely because of the gendered nature of the crime. They are dominated in the same manner and for the same reason that women are dominated; because of a need for male gender-supremacy. That they lack a vagina does not make the crime of male rape any less gender-based.

It is opined by the researcher that these two court cases may pave the way for future litigation of male-on-male rape within correctional settings. With regard to the first court case, male victims of prison rape may in future be encouraged to report rape and open a docket with the South African Police Service (SAPS), since the conviction of an offender is possible. The second court case was positive in that it showed that the legal fraternity is acknowledging that males are the victims of rape, and that their offenders should be charged with this offence.

While great strides are made in South Africa to acknowledge men as victims of rape, the USA adopted a law focusing specifically on the reduction of prison rape. On 4 September 2003, President George W. Bush signed into law the Prison Rape Elimination Act. Under Section 10 of this Act prison rape is defined as follows (Data collections for the Prison Rape Elimination Act of 2003, 2005):

- (a) “the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person, forcibly or against that person’s will; or
- (b) not forcibly or against the person’s will, where the victim is incapable of giving consent because of his or her youth or his or her temporary or permanent mental or physical incapacity; or
- (c) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person achieved through the exploitation of the fear or threat of physical violence or bodily injury”.

Operational definition: For the purpose of this study an operational definition of male-on-male prison rape is any male offender, detainee or correctional official who intentionally and unlawfully commits an act of sexual penetration with another male offender or detainee without such an offender’s or detainee’s consent.

1.2.3. Sodomy

Snyman (2002:438) notes that consensual sexual intercourse *per anum* between males, before 1994 known as sodomy, is no longer considered a crime. Although the researcher acknowledges this legal standing, it is still imperative to discuss sodomy

since some inmates and correctional officials still refer to non-consensual anal penetration as sodomy.

Before 1994, sodomy was defined as the unlawful, intentional relation between males *per anum*. If one person did not consent to the act, the perpetrator could be punished under the lesser offence of indecent assault. However, if both parties agreed to the act, both were equally guilty of committing sodomy (Van der Bijl, 2002:142). After the introduction of the Constitution of the Republic of South Africa (Act 108 of 1996) this viewpoint was questioned in *S v Kampher*. The accused was convicted of sodomy in the Knysna magistrate's court. Although the accused did plead guilty, he indicated that the other party consented to the sexual intercourse. Based on Section 9(3) of the Bill of Rights contained in the Constitution (Act 108 of 1996), the State may not unfairly discriminate against a person on the grounds of amongst others "sexual orientation", and as a result homosexual activity between two consenting adults was no longer proscribed (Jazbhay, 1998:54; Louw, 1998:113).

This ruling was again confirmed in the *National Coalition for Gay and Lesbian Equality v Minister of Justice*. The Constitutional Court ruled that the former crime of sodomy is unconstitutional, since its existence is incompatible with the right not to be discriminated against on the basis of sexual orientation, the right to dignity and the right to privacy. The court further upheld that non-consensual sexual intercourse *per anum*, the so-called anal rape or male rape, may not be punished, since the core of the crime was declared unconstitutional. Such intercourse may be punished as indecent assault or assault with intent to do grievous bodily harm (Snyman, 2002:439).

Prior to the introduction of the Constitution (Act 108 of 1996), Judge Ackerman, in foreseeing future constitutional attacks on the offence of sodomy, stated that the offence might survive in certain circumstances (Louw, 1998:115):

One possible qualification needs to be mentioned. This judgement deals only with the position in society as it normally functions. There may be special circumstances where a legitimate social interest might justify a different view being taken of private sodomy, even between consenting adults. The position of prison inmates comes to mind. There may well be others. The proscription of sodomy between consenting adults undergoing imprisonment could well serve a legitimate social interest. Such proscription would, however, not be on the basis of discrimination against male homosexual acts, but because the situation in prison might

necessitate the proscription of all sexual relationships of contact involving prisoners, whether homosexual or heterosexual. The proscription would be directed against sexual activity; not against the gender or sexual preference of the parties indulging in the activity.

Burchell and Milton (1997:634) also argued that the offence could be applicable in certain circumstances:

In so far as heterosexual sexual intercourse is punishable if it occurs in public or without the consent of one of the parties, or where one of the parties is under the age of consent, it follows that homosexual sexual intercourse which is not private, or without the consent of one of the parties, or with a person who is under the age of consent may be punished as sodomy.

Operational definition: For the purpose of this study an operational definition of sodomy is the unlawful non-consensual sexual interaction between two males *per anum*.

1.2.4. Masculinity

Before defining masculinity one should consider the strategies utilised to construct the meaning of what a masculine person is. According to Connell (in Whitehead & Barrett, 2001:31-32), there are four distinct strategies namely the essentialist strategy, positivist strategy, normative strategy and the semiotic strategy. The essentialist strategy focuses on the core characteristics of what constitutes a man such as risk-taking, responsibility, irresponsibility and aggression. It has its origin in the writings of Freud who “equated masculinity with activity that is contrast to feminine passivity” (Whitehead & Barrett, 2001:32). Positivists define masculinity as what men actually are, and measure this by applying masculinity/femininity scales. The items of this scale are designed to differentiate statistically between groups of men and women. Normative strategies define masculinity as what men ought to be. References to this are often found in the media, with the characters played by, for example, John Wayne and Clint Eastwood as the norm. The semiotic strategy defines masculinity as the symbolic differences between masculine and feminine and accordingly masculinity is described as non-femininity.

Various authors have defined the concept of masculinity. Masculinity is defined by Whitehead and Barrett (2001:15) as “those behaviours, languages and practices, existing in specific cultural and organisational locations, which are commonly associated with males and thus culturally defined as not feminine”. According to Beasley (2006:178) masculinity is contextualised against social, historical and cultural variables and is measured against that which is deemed non-masculine. Guttermann (in Whitehead & Barrett, 2001:61) is of the opinion that masculinity or the male identity is “achieved by the constant process of warding off threats to it. It is precariously achieved by the rejection of femininity and homosexuality”.

Operational definition: For the purpose of this study an operational definition of masculinity constitutes all the variables, whether socially, historically or culturally, that distinguishes a man from a woman and a heterosexual male from a homosexual male.

1.3. PROBLEM STATEMENT: MALE-ON-MALE SEXUAL VICTIMISATION IN CORRECTIONAL CENTRES

Hodge and Canter (1998:222) insist that male-on-male rape in correctional centres is one of the easiest crimes to get away with, and consequently the most under-addressed issue in society. In correctional facilities offenders are too afraid to refuse sex because of the overt threat of violence. The correctional code of silence also prohibits offenders from reporting any cases of sexual victimisation. This code means that offenders “do their own time”, implying that an offender should mind his own business when others are being attacked or exploited. Thus this code serves the interest of the “elite”, in this case the “men” of the centre, and if an inmate is not among the elite he is fair game for sexual and other types of coercion and violence (Johnson, 2002:132). To illustrate this, an offender describes his encounter with a perpetrator as follows: “He gave me an ultimatum: He said you’re going to let me fuck you, or my homeboys will stab you” (Human Rights Watch, 2001).

According to Scacco (1975:6), it is the duty of correctional authorities to inform society about what is happening in correctional centres (including rape), who the victims are and whose responsibility it is to address the issue of male-on-male rape. In South Africa, the Department of Correctional Services (DCS) fails in this duty in that it is unwilling to even acknowledge that coercive sex takes place inside their correctional centres (Gear, 2001). When authorities of the DCS do speak about male-on-male rape

they tend to underplay the problem. A statement by a social worker at Pollsmoor Correctional Centre regarding a case of repeated gang rape supports this. She said that “a guy was raped by 16 prisoners for two weeks. Eventually he ended up in hospital sick. He got sick from lack of sleep, I suppose” (Farren, 2000:33).

This lack of acknowledgement and understatement of the problem from correctional authorities may be because there is no coherent, national policy within the DCS to deal with sexual assault and rape in their correctional centres. The problems relating to sexual assault and rape that occur in correctional centres that will be addressed by the researcher include the dark figure surrounding male-on-male sexual victimisation, the extent of male-on-male sexual victimisation, the transmission of sexually transmitted infections (STI's), the human immunodeficiency syndrome (HIV) and the acquired immunodeficiency syndrome (AIDS), and finally the involvement of correctional officials in cases of male-on-male rape.

1.3.1. The extent and dark figure of male-on-male sexual assault and rape in correctional centres

Victims of sexual assault and rape in a correctional centre are not likely to report these incidents to the correctional authorities, thus leading to a dark figure concerning this specific crime. Even if victims want to report such incidents, there are currently no mechanisms for reporting available within the DCS (Oersen, 2001:29). The victims can report to Independent Prison Visitors (IPV's), but no mention was made of any incidents of sexual assault and rape in the Annual Report (2004 – 2005) of the Judicial Inspectorate of Prisons.

This underreporting could be coupled to the informal correctional code that can be set out as follows:

Even if a prisoner is not able to cope with prison life, he has to act as if he is; he should not snitch on a fellow prisoner, regardless of what is happening may it be an assault, rape or murder, he should not say anything and should not get involved; furthermore, he should avoid doing anything that will make other prisoners think he is gay, effeminate or weak (Sabo *et al.*, 2001:10).

Another reason for the underreporting of sexual assault and rape in correctional centres is the no-win situation it represents for the victim. Although the victim has four

options available to prevent the abuse, each has a negative consequence (Cotton & Groth, 1982:49-50):

- The victim may try to escape by going into protective segregation. This will however confine him to his cell, restrict activities, for example, attending school in the correctional centre and reducing privileges he may have in the correctional centre such as taking part in recreational programmes.
- The victim may defend himself by fighting back. The consequences of this action are twofold. Firstly, the victim may suffer severe physical injury and secondly, there is the risk of a disciplinary action against the victim for violating the institutional rules.
- The victim may submit to sexual assault, but for the remainder of his sentence he will have a reputation of being weak, making him vulnerable to further assault. This offender will be stigmatised as a “punk” and may be forced to “hook up” (provide sexual services) to one inmate in exchange for protection from other potential sexual aggressors.
- The victim may endure the sexual exploitation and rape in silence and secrecy. The consequence of this action is that the victim will not seek medical or psychological treatment and may therefore experience long-lasting after-effects.

Because of to the dark figure, it is difficult to determine the true extent of male-on-male sexual assault and rape in correctional centres. Information concerning the practice of coercive sexual activity in correctional centres is mainly collected by means of self-report surveys and interviews conducted with offenders.

An overview of research conducted in the USA on this phenomenon follows: Pioneer work on sexual coercion and aggression in male correctional facilities was conducted from 1966 to 1968 by Davis at a Philadelphia correctional facility. A total of 3 304 male offenders were interviewed during this time. Davis found that nearly 1 in 20 inmates (4,7%) experienced sexual assault over the period of twenty-six months. The main areas where the sexual assault occurred were identified by the research participants to be the housing units and the vehicle which transports inmates to and from court. Davis

postulated that these reported figures were only the “tip of the iceberg”, and he estimated that the number of sexual assaults in this particular facility was closer to 2 000. More than 60% of all inmates had therefore been sexually assaulted but never reported the assault to the authorities (Goyer, 2003:18; Hensley & Tewksbury, 2002:237; Knowles, 1999:268; Robertson, 2003:425).

The next significant research on coerced sexual activity in corrections was conducted by Lockwood from 1974 to 1975 on New York state prisoners. Lockwood conducted interviews with men who had been identified by correctional officials as possible targets of sexual assault. He also studied the inmates’ historical data. Of the 107 participants he interviewed, 28% reported that they had been the victims of sexual assault. Two years after Lockwood’s research separate studies were conducted by Carroll and Toch, which focused on the characteristics of both the victims and the perpetrators of sexual assault. Both researchers found that blacks were more likely to be the sexual aggressors and whites the targets of sexual victimisation (Hensley & Tewksbury, 2002:237 – 239).

Wooden and Parker (1982:5) conducted a research project during 1979 and 1980 in a medium security prison in California. Out of the 200 inmates interviewed, 1 in 7 (14%) reported that they had been sexually victimised. However, this should be interpreted with caution since this is a facility to which “known” homosexuals were sent because of the single cell accommodation, which reduces the risk of sexual assault. Since 1990 only four studies have been conducted namely by Hensley, Tewksbury and Castle; Saum *et al.*; Struckman-Johnson *et al.* as well as Struckman-Johnson and Struckman-Johnson, on coerced sexual activities in male correctional centres. The most recent study in 2002 by Hensley and his colleagues focused on the characteristics of both the victims and the perpetrators of prison sexual assault. Interviews were conducted with inmates in three Oklahoma male correctional facilities. Of the 174 inmates interviewed, 13.8% of the participants reported having been the victims of a sexual threat during their incarceration. Only two incidents of actual sexual victimisation were reported (Hensley & Tewksbury, 2002:237 – 240).

On the African continent large scale research was conducted by Jolofani and DeGabriele ([sa]:4 – 9) in three of the largest prisons in Malawi, namely Zomba Central Prison (ZCP), Chichiri Prison and Maula Prison. The research was conducted for Penal

Reform International, and focused on two general themes namely the transmission of HIV in prison and the care of prisoners with HIV/Aids. Since the information gathered from ZCP was the most fruitful, reference will only be made to findings from this particular prison. ZCP houses all long term inmates (longer than five years). The prison consists of five housing blocks, namely long term offenders (A and B block), first offenders, female offenders and juvenile offenders. Many of the respondents reported that homosexual activity was very common, and especially the juvenile offenders admitted to being the victims of sexual assault. The respondents indicated that 10% to 60% of prisoners participated in sex, and about one third of these have regular sexual partners. Overcrowding was indicated to be one of the main reasons for male-on-male sex in ZCP, with forty-three prisoners cramped into a communal cell designed to house 20 prisoners. Other reasons for same sex sexual activities included the lack of females working in the prison, and inmates who do not receive visits and are in need of commodities will exchange sex for a blanket, soap or food from other inmates. In Malawi homosexual activities are regarded as an “unnatural offence”, and are punishable with a prison sentence of fourteen years, which may contribute to sexual activities in prisons being underreported. Also in Malawi, as with the studies conducted in the USA, the prisoners who engage in sexual activities with other men regard themselves as heterosexual and will continue with heterosexual relationships after their release from prison.

It is difficult to ascertain the true extent of sexual assault and male-on-male rape in South African correctional centres. The DCS does not draw together statistics on reports or incidents of rape. Provincial departments and individual correctional centres also lack any statistical information on the sexual assault and rape of inmates (Farren, 2000:33). However, social workers at Westville Medium B Correctional Centre estimate that more than half of the offenders engage in anal sex, either voluntarily or because of threats and coercion (Goyer & Gow, 2000:15).

1.3.2. The transmission of STI's, HIV and Aids

Concerns about STI's and HIV/Aids in correctional centres are twofold: The risk of transmission and the spread thereof in society once the offender is released from the correctional centre.

Minnie, Prins and Van Niekerk (2002:51) stated that the first offender in South Africa was diagnosed with HIV/Aids in 1987, and he died soon afterward. Since then the number of people entering correctional centres and the number of people infected with HIV are increasing (Goyer & Gow, 2000:14). The DCS provides the following information in its Annual Report (2001/2002:77) regarding the number of known HIV/Aids cases in South African correctional centres as at 31 December of each year:

Table 1: The extent of HIV/Aids in South African correctional centres from December 1998 to December 2001
(Annual Report of the Department of Correctional Services for 2001/2002)

Year	Number of HIV/Aids cases
1998	1 865
1999	2 536
2000	3 397
2001	4 720

From this table it can be deduced that the number of HIV/Aids cases in South African correctional centres has more than doubled in four years.

Currently mandatory HIV/Aids testing is not conducted by the DCS on offenders upon admission into the correctional centre. Therefore the statistics given by the DCS as displayed in Table 1 cannot be a true reflection of the HIV/Aids infection rate inside correctional centres. One of the explanations for the reluctance to conduct HIV testing on offenders could be that if the results are positive the offender must, according to his basic human rights, have access to costly medicine. It is postulated that anti-retroviral (ARV's) drugs such as AZT, 3TC and Crixivan could reduce the risk of HIV by eighty percent. However the cost of these drugs were R1 300 per month in 2001 and the victim needs to take the drugs for at least three months (Francis, 1999:71). It would therefore have cost the government R3 900 per offender to pay for the anti-retroviral drugs for 3 months. According to the DCS 4 720 offenders were infected with HIV/Aids in 2001, that amounts to R18 million for that year only.

The previous Minister of Correctional Services, Ben Skosana, attributed the incidence of HIV/Aids in correctional centres to the following factors (Minnie *et al.*, 2002:52):

- Consensual sex;
- Male-on-male rape;
- The prevailing culture of violence in correctional centres (including sexual violence);
and
- Overcrowding of correctional centres.

Gear (2001) found that in Malawi, Nigeria and South Africa, sexual activity is the most common cause of HIV infection during incarceration. This may be due partly to the damage that is done to the epithelial lining (lining in the inside of the rectum) during anal penetration, making it easier for the semen of the host to enter the bloodstream of the victim. The mother of a seventeen-year-old awaiting-trial detainee at Johannesburg Correctional Centre, in Gauteng, is convinced that her son contracted HIV while he was incarcerated and as a result died due to complications caused by the disease. The family of Tebogo Mtonga heard evidence of him being locked up with adult offenders who repeatedly sodomised him. An x-ray showed Tebogo's anus severely bruised and torn (Prison rape killed my son, 2001:8). The presence of sores from existing STI's also makes the spread of HIV easier during sexual intercourse (Goyer & Gow, 2000:16).

One cannot discuss STI's and HIV/Aids in correctional centres without referring to the availability of condoms. The majority of national as well as international correctional facilities prohibit condom possession or distribution among offenders. Currently offenders have access to condoms only after they have seen a social worker or a doctor or nurse at the hospital section in the centre (Goyer, 2002; Lazarus, 2002:83). However, it is unlikely that an offender will take this route because of possible stigmatisation as either a rapist or a homosexual. It is put forward by Knowles (1999:268) that even if condoms were issued there are still two potential problems. Firstly, condoms are not designed for anal penetration and manufacturers state this on the packaging. Secondly, it is unlikely that the rapist will stop in the process of rape to put on a condom.

1.3.3. The involvement of correctional officials in sexual assault and rape

It is postulated by Scacco (1982:15) that a certain number of official involvement is present in the occurrence of sexual assault and rape in correctional centres. This involvement can either be direct by means of encouragement and active involvement, or indirect through tolerance or silence. Regarding the liability of correctional officials to prevent prison rape the USA Supreme Court, in the influential case of *Farmer v. Brennan*, established that for claims against correctional officials in prisoner rape litigation to be successful, an inmate must show that correctional officials knew that he was at risk to be raped and acted with *deliberate indifference* to that threat. The Supreme Court defined deliberate indifference by a correctional official as follows (Man & Cronan, 2001:132 – 133, 135):

(a member who) knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Thus, deliberate indifference occurs if a correctional official acted or fail to act despite knowledge of risk or harm to an inmate's health or safety.

In the *Farmer v. Brennan* case the Supreme Court found the correctional official liable for the sexual assault and rape that Farmer suffered while incarcerated. Below follows a description of the physical features as well as the nature of his criminal act. Based on this the correctional official should have foreseen that he may be at risk of sexual assault (Man & Cronan, 2001:137).

Dee Farmer was a 21 year old transsexual who had breast implants, had taken female hormones, and had a youthful and feminine appearance when she was placed in the general male population at a high-security prison. Farmer also was a non-violent offender. The Supreme Court appropriately recognized that a jury could infer from those facts that prison officials must have known that Farmer was at risk.

The Supreme Court further stated that a correctional official need not know the precise risk to an inmate's health or safety, only that there is a risk. If an official is aware of a risk "it is irrelevant to liability that the officials could not guess beforehand precisely who would attack whom" (Man & Cronan, 2001:135). Thus if a correctional official is

informed that an inmate is planning to sexually violate another inmate, the official can be held accountable for not investigating and confirming the suspected assault.

After the *Farmer v. Brennan* case, courts in the USA have found that deliberate indifference can be inferred from, amongst others, the following circumstances (Man & Cronan, 2001:140 - 143):

- officials raping or sexually assaulting inmates;
- officials setting inmates up to be raped or sexually attacked by other inmates as a form of discipline;
- knowingly placing an inmate with a HIV positive inmate who has a history of engaging in prison rape;
- failure to consider the rape victim profile when placing an inmate in the general prison population;
- officials witnessing a rape and not doing anything to stop it;
- failure of correctional officials to patrol the correctional facility, especially at night; and
- allowing inmates to obstruct vision into their cells or their beds by hanging sheets.

Thus the *Farmer v. Brennan* case set the guidelines for determining the liability of correctional officials in the USA regarding the sexual assault and rape of inmates in their custody.

In South Africa, Grootvlei Correctional Centre in Bloemfontein was the focus of media attention involving corruption by correctional officials. This scandal paved the way for the establishment of the Jali Commission of Inquiry into corruption, maladministration, nepotism, intimidation and other improper conduct in the main Management Areas of the DCS. The Commission found evidence of the sale of young offenders for sex with

older offenders and that a sodomy ring involving juvenile offenders existed among correctional officials. One of the cases investigated at Grootvlei Correctional Centre was where a juvenile was sodomised repeatedly by a correctional official. The juvenile alleged that he was promised All Starr running shoes and food in return for sex. It was also brought to the attention of the Commission that a correctional official sold a juvenile for R25,00 to an older inmate and that the juvenile received R10,00 for participating in the sexual act with the inmate (Convict tells of sex for shoes in Grootvlei, 2002; Jali Commission of Inquiry, 2002).

Grootvlei Correctional Centre is not the only correctional facility where this type of direct involvement by correctional officials occurs. Louis Karp, who was awaiting trial in Pretoria Local Correctional Centre (PLCC) reported being repeatedly raped over a period of time. According to Karp he was sold by a correctional official to four members of the Big Five gang who used him as their sex slave. He was also forced to perform oral sex on the correctional official who sold him. However, Karp challenged the correctional system when he wrote a report depicting his ordeal and submitted it to the internal Social Services Department of the centre, the then Commissioner of the Department Correctional Services, Linda Mti and the previous Minister of Correctional Services, Ben Skosana. To date, Karp has not received a letter acknowledging his plight. A case docket was opened by Karp against the perpetrators at the Pretoria Central Police station (Taljaard, 2003:49).

In another incident a fifteen year-old awaiting trial detainee at Johannesburg Correctional Centre was sold by correctional officials to adult sentenced offenders. This happened regardless of the Correctional Services Act (Act 111 of 1998) that states that juveniles should be kept separate from adults and awaiting-trial detainees and from sentenced offenders to protect them from potential dangerous situations such as rape (Lehrer, 2001:24). It can be deduced from the above cases that the DCS neglected their basic duty of providing safe custody to all offenders in their care. In the view of the researcher the DCS should be held legally accountable for the above stated acts of sexual violence which occurred in their correctional centres.

This belief of the researcher that DCS should be held liable for the sexual violence that occurs in their centres is shared by Louis van der Merwe, a lawyer from Lawyers for Human Rights (LHR), who represented a juvenile offender who was sold for sex to an

adult offender by a correctional official for R50,00. Van der Merwe describes his experience with the SAPS and DCS as follows (De Vos, 2003:26):

I investigated the case (the rape of a juvenile) and found that no police docket has been opened in the case and I pursued the matter with the provincial commissioner of police. They gave me excuse after excuse and eventually claimed that they had conducted an internal enquiry and that there had been no rape, but only consensual sex between two prisoners. I disputed this vigorously and pointed out that in terms of the law a juvenile cannot consent to sex. They promised to look into the matter again but nothing came of it. In the end the adult prisoner was convicted for indecent assault but to this day the Department of Correctional Services claims that nothing untoward ever happened.

From the above discussion the researcher concludes that the victim of prison rape in South Africa can be seen as the “forgotten victim” of both the community and the State, including the SAPS, DCS and criminal justice system.

1.4. MOTIVATION FOR THE STUDY

The researcher’s interest in this topic emerged during a life-skills program she offered to awaiting-trial detainees. During a session one of the detainees pointed to another inmate who had been raped the previous week. The researcher noticed that he was withdrawn, did not take part in any activities and seemed nervous. There also seemed to be a “hopelessness” about him. The researcher approached him and asked him how he is coping in prison to which he replied that everything is fine and that he has no complaints. This led the researcher to ponder about the nature of sexual assault in a correctional facility and the consequences of such an incident on the victim. After an Internet search on prison rape and the subsequent reading of the articles, the researcher came to the conclusion that the “signs” displayed by the detainee were similar to that of the victims described in the articles. What stood out from the articles was the fact that the victims had nowhere to turn for help and no means of escaping the abusive situation.

In view of this the researcher decided to do a literature search of research conducted in South Africa on this phenomenon, and found that the first study was conducted in 1996. Subsequent studies published from 2000 – 2005 mainly focused on the risk factors in the prison culture surrounding HIV/Aids transmission. The only other research that specifically focused on coerced sex in corrections *per se* was published

by the Centre for the Study of Violence and Reconciliation (CSV) in 2003. A general lack of knowledge regarding the sexual assault and rape of male offenders and detainees and the impact of these acts on the victims exists.

1.5. AIMS OF THE STUDY

Based on the above problem statement the following aims are formulated for the study:

- To describe the nature of sexual activities in a male correctional centre.
- To investigate the extent of sexual assault and rape in a male correctional centre.
- To describe the perceptions of research participants regarding the sexual activities which occur in the correctional centre.
- To describe the participants' experience of personal sexual assault and rape in the correctional centre.
- To explore the involvement of gangs in male-on-male sexual assault and rape.

1.6. OVERVIEW OF THE STUDY

To give a clear demarcation of this study, the following structure will be followed: In Chapter 2 the existing research pertaining to male-on-male sexual assault and rape will be outlined. This includes a discussion of both the offender of sexual victimisation in a correctional centre and the victim of sexual assault. The researcher will also describe the victimisation process followed by an explanation on how a perpetrator selects and victimises a fellow inmate. Furthermore the causes of male-on-male rape will be addressed, with specific reference to the involvement of gangs, overcrowding, power and control, the sexual orientation of both the perpetrator and the victim and finally the involvement of correctional officials in the sexual assault and rape of inmates. In this chapter an overview of the causes of male-on-male rape in a correctional environment will be explored. Chapter 3 consists of the theoretical explanation of sexual assault and

rape in a male correctional centre. The theories encompass victimological and criminological theories. The research methodology is set out in Chapter 4. For this study the researcher used Creswell's dominant-less-dominant model in which both qualitative and quantitative research methods are utilised. The reason for the mixed methodology is that both qualitative and quantitative methods can be used to describe respondents' experience of sex and rape in the correctional centre. Chapter 5 focuses on the analysis and interpretation of both the qualitative and the quantitative data. Chapter 6 consists of the limitations of the study, the achievement of the study aims and recommendations. This chapter also includes the Offender Sexual Assault Protocol that was designed by the researcher. Recommendations with regard to prison rape are also made in this chapter.

1.7. CONCLUSION

In the preceding section relevant concepts were operationally defined, namely sexual assault, rape, sodomy and masculinity. For the definitions of sexual assault and rape the researcher referred mainly to the Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act 32 of 2007). According to this Act males have been formally perceived to be the victims of rape since the commencement of this Act during December 2007. It is opined that male offenders and detainees should be made aware of the change in the legislation in order to empower them to lay formal charges against perpetrators. The concept of sodomy, although no longer a crime in South Africa, is also defined as it is a general term still used in correctional environments by both correctional officials and inmates. Since many male victims feel that they have lost their "manhood" after a sexual assault or rape it was deemed important to also define the concept "masculinity".

The social as well as institutional problems regarding male-on-male sexual assault in correctional centres were also addressed in this Chapter. It has been stated that male-on-male prisoner rape largely remains a secret since inmates are ashamed to talk about the abuse. The prison code of silence furthermore discourages them from formally complaining to the authorities. As a result the dark figure surrounding this crime is high and the true extent unknown. The transmission of STI's and HIV/Aids following rape was also addressed, and the importance of condoms in the prevention of STI's and HIV/Aids was questioned by the researcher. The reasons for this are twofold,

namely that a condom is not designed for anal penetration and it is unlikely that a rapist will put on a condom before he sexually assaults another inmate. An institutional concern is the direct or indirect involvement of correctional officials in the male rape of offenders and detainees. Examples of direct involvement by correctional officials in South African correctional centres include cases of juveniles being sold by correctional officials to adult inmates. These and other cases of corruption, intimidation and improper conduct were investigated by the Jali Commission of Inquiry.

The next Chapter consists of a discussion of the existing research on sexual assault and rape of male offenders and detainees.