

# THE RHETORIC OF RAPE: AN EXTENDED NOTE ON APOLOGISM, DEPOLITICISATION AND THE MALE GAZE IN *NDOU V S*

JOEL M MODRI\*

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Who knows what the black woman thinks of rape? Who has asked her? Who cares?<sup>1</sup>

Woman herself is never at issue in these statements: the feminine is defined as the necessary compliment to the operation of male sexuality, and more often, as a negative image that provides male sexuality with an unfailingly phallic self-representation.<sup>2</sup>

## I INTRODUCTION

In this extended note, I provide a critical reading of the recent Supreme Court of Appeal (SCA) judgment in *Ndou v S*<sup>3</sup> against contemporary feminist theories of rape and specifically, feminist engagements with the concepts of ‘consent’ and ‘force’. This reading aims to explore, analyse and expose the ‘rhetoric’ or discourse of rape employed in the *Ndou* judgment. In other words, it aims to question what rape mythology and normative theory of sex and gender relations was at work in the judge’s decision to *reduce the sentence* of life imprisonment that the appellant had originally received after being found guilty of raping his 15-year-old stepdaughter? What was the broader gender-cultural source of the implicit assumptions that generated the factors the judge identified as constituting the substantial and compelling circumstances that warranted such a reduction?

The primary concern here is not to claim that the judicial decision was technically and legally ‘incorrect’; rather the aim is to examine how a certain rape mythology and rape discourse – one ideologically grounded in patriarchy and male normativity – undergirds the language, reasoning and outcome of the judgment. Because of law’s indeterminacy, and sometimes, its incoherence as well, I do not support claims about the possibility and justifiability of a self-generated, self-revealing ‘correct’ legal outcome. My interest lies in how this particular judgment resolves the problem of indeterminacy and what moral,

\* Researcher and Lecturer in Jurisprudence, Faculty of Law, University of Pretoria. My thanks to Anton Kok, Cara Furniss, Koketso Lediga and Alfred Moraka for reading the piece and for offering useful comments. The *SAJHR* reviewers also offered instructive suggestions.

1 A Walker ‘Advancing Luna – and Ida B. Wells’ in *You Can’t Keep A Good Woman Down* (1981) 93.

2 L Irigaray *This Sex which is not One* (1977) 70.

3 2014 (1) SACR 198 (SCA).

social and political views it calls upon in doing so.<sup>4</sup> Accordingly, the view of legal interpretation through which I will be analysing the *Ndou* judgment takes its cue from Robert Cover's central insight that 'legal interpretation takes place in a field between pain and death'.<sup>5</sup> More specifically, I will be looking at the way in which the 'legal interpretive acts' performed in this judgment could be said to have occasioned the imposition of violence against the complainant (and by extension, all other women and rape survivors).<sup>6</sup> As Cover also writes:

*Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence.*<sup>7</sup>

In this reading of the judgment, I will argue that the relationship between legal interpretation and violence comes into operation by the judge's subscription to, and use of, 'rape myths' in reaching the final decision. By rape myths, I mean to denote 'prejudicial, stereotyped, or false beliefs about rape, rape victims and rapists'.<sup>8</sup> Kimberly Lonsway and Louise Fitzgerald add to this definition that although such rape myths 'are generally false', they are still 'widely and persistently held' and 'serve to deny and justify male sexual aggression against women'.<sup>9</sup> The problems posed by rape myths are three-fold. First, they are inaccurate and non-factual presumptions and accounts that deny, minimise or misrepresent existing knowledge on sexual assault gained through empirical studies as well from victims' and perpetrators' testimonies.<sup>10</sup> Second, they frequently manifest deeply sexist and misogynist

4 A note on style: Throughout the article, I refer to the author-judge (Shongwe JA) not so much in order to accuse him of anything but to make a broader claim about (the politics of) adjudication, namely that judges are implicated by, and responsible for their judgments. They cannot hide behind taken-for-granted formalist orthodoxies of our legal culture. To be true to the demands of substantive political and legal transformation of South African society, they too need to examine their assumptions and beliefs and the ways in which these come to play in the decisions they make (especially given the material impact and jurisprudential endurance of such decisions). My view is that although the decision was structurally determined by and through a comfortable support from a heteropatriarchal conservative legal and social culture, this does not prevent judges from pursuing alternative paths of adjudication. Moreover, that the judge(s) in this case chose to resolve the indeterminacy problem in a deliberate and specific way can also be seen from the contrast between the *Ndou* decision and the SCA judgment in *Bailey v S* (454/11) [2012] ZASCA 154 (1 October 2012) – issued a few days after *Ndou* – in which a different panel of judges faced with the same legal question resolved it quite differently and without recourse to rape myths.

5 R Cover 'Violence and the Word' (1986) 95 *Yale LJ* 1601.

6 *Ibid* 1601.

7 *Ibid*, my emphasis.

8 M Burt 'Cultural Myths and Supports for Rape' (1980) 38 *J of Personality & Social Psychology* 217.

9 K Lonsway & L Fitzgerald 'Rape Myths: In Review' (1994) 18 *Psychology of Women Quarterly* 133.

10 C Albertyn et al 'Women's Freedom and Security of the Person' in E Bonthuis & C Albertyn (eds) *Gender, Law and Justice* (2007) 310 citing L Kelly 'Routes to (In)justice: A Research Review on the Reporting, Investigation and Prosecution of Rape Cases' (2001) 4 <[http://www.hmcpai.gov.uk/documents/reports/CJJI\\_THM/BOTJ/Rapelitrev.pdf](http://www.hmcpai.gov.uk/documents/reports/CJJI_THM/BOTJ/Rapelitrev.pdf)> .

themes – drawing from archaic, patriarchal and pornographic notions of women and sexuality.<sup>11</sup> Third and more pertinently, they present a crucial problem of gender justice, namely ‘androcentrism’. Androcentrism, as defined by Nancy Fraser, entails the:

authoritative construction of norms that privilege traits associated with masculinity and the pervasive devaluation and disparagement of things coded as ‘feminine,’ paradigmatically – but not only – women.<sup>12</sup>

Their deployment in a judicial decision shows also that:

[t]hese androcentric norms [which in this case are expressed in the form of rape myths] do not operate only at the level of cultural attitudes ... [r]ather, they are institutionalized, both formally and informally.<sup>13</sup>

These rape myths typically include notions that sexual assault is mainly committed by strangers; that real rape involves violent force or a weapon; that a rape victim will always have physical injuries; that women ‘ask for’ rape somehow through their actions or behaviours and that if the rape really did happen, the complainant would always report it as soon as possible.<sup>14</sup> Coupled with these basic myths are more elaborate assumptions based on rigid binary constructions of male sexuality as aggressive and conquering in contrast to female sexuality as passive and always available as well as approaches that fail to distinguish between sex and rape, thereby questioning the trauma of rape as though it were not a violation in and of itself. Together, these myths and assumptions about rape work to define rape in terms narrower than the applicable legal rules and more so than women’s experiences of rape. I will be arguing in this note that all of these myths and assumptions, or ones resembling or alluding to them, and some others, feature, implicitly or explicitly in the rhetoric and hidden politics that constitutes and composes the judgment.

Although this reason alone explains why the *Ndou* judgment by itself is problematic and in need of serious feminist analysis and criticism, it is more the SCA’s role as the second highest institution responsible for the elaboration of the meaning and ethical, social and political content of the ‘new’ ‘post’-apartheid legal order underwritten by the supremacy of the Constitution of the Republic of South Africa, 1996 that motivates this note. It is specifically the complete denial of an expanded, ethical understanding of gender equality, one that would enhance women’s sexual autonomy and

11 K Crenshaw ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color’ (1991) 43 *Stanford LR* 1241, 1267.

12 N Fraser ‘Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation the Tanner Lectures on Human Values’ (1996) 16.

13 Ibid 16, my addition.

14 Albertyn et al (note 10 above) 311–2.

bodily integrity, one attentive to the concreteness of lived experience and its relation to power and difference, that I will want to take issue with here.<sup>15</sup>

Some related feminist notions thus come into play. These are: the political call that *feminist work in law must take as its starting point the knowledge, lived experience and viewpoints of women, not the doctrinal categories and definitions of law* – particularly since this epistemological standpoint may reveal something of law’s limits and its exclusions.<sup>16</sup> Closely related to the above is also the revelation of law’s inherently masculine complexion.<sup>17</sup> As Ngaire Naffine writes:

[W]hile the law may appear to offer roughly equal rights to men and women, in truth the law organizes around a particular individual who is both male and masculine. The legal person is still very much a man, not a woman, and the law still reserves another place for women: as the other of the man of law.<sup>18</sup>

The use of rape myths by judges offers the most vivid illustration of Catharine MacKinnon’s claim that law is jurisprudentially male as they lend legal credibility to socially male beliefs about sex, gender and sexuality. This is what MacKinnon means when she states that ‘... the law sees and treats women the way men see and treat women’.<sup>19</sup> In the present case of a judgment dealing with rape, an investigation of its rhetorical structure and background gender politics facilitates a broader examination of the gender bias in the legal understanding of rape, and in the content of the rules and the jurisprudence on rape. I will be revisiting the central feminist argument that the ideologically male perspective which determines the legal and social construction of rape, is instrumental in the normalisation of sexual violence against women. My

- 15 See, for example, K van Marle ‘Equality – an “Ethical” Interpretation’ (2000) 63 *THRHR* 595–607, ‘Some Feminist Perspectives on Equality and Difference’ (2000) 15 *SA Public Law* 461–76, ‘“The Capabilities Approach”; “the Imaginary Domain”; and “Asymmetrical Reciprocity”: Feminist Perspectives on Equality and Justice’ (2003) 11 *Feminist Legal Studies* 1–24, ‘To Revolt Against Present Sex and Gender Images: Feminist Theory, Feminist Ethics and a Literary Reference’ (2004) 15 *Stellenbosch LR* 247–67. Although space does not permit further elaboration, I should briefly mention that this case note is set against the contemplation of a critical feminist theory for ‘post’-apartheid South Africa. For now I want to highlight the need for a feminism that challenges law’s universalisation of the male worldview (see R Braidotti *Nomadic Subjects Embodiment and Sexual Difference in Contemporary Feminist Theory* 2 ed (2011); and L Irigaray *An Ethics of Sexual Difference* (1993), *Je, Tu, Nous Towards a Culture of Difference* (1993), and *To Be Two* (2001)). I specifically wanted to connect rape law to post-apartheid feminist jurisprudence in order to consider the possibilities of a rape law that enables, or at least does not constrict, the ‘elucidation of Her-story such that feminine “reality” can be written’ and a feminist theory of law that develops the language and critical standpoint through which women’s harms could be signified and expressed (see D Cornell ‘Feminism always Modified: The Affirmation of Feminine Difference Rethought’ in *Beyond Accommodation Ethical Feminism, Deconstruction and the Law* (1999) 119–64, ‘The Doubly-Prized World: Myth, Allegory and The Feminine’ in *Transformations Recollective Imagination and Sexual Difference* (1993) 57–111, and ‘What is Ethical Feminism’ in S Benhabib, J Butler, D Cornell & N Fraser *Feminist Contentions A Philosophical Exchange* (1995) 75–106).
- 16 See S Dahl ‘Taking Women as a Starting Point: Building Women’s Law’ (1986) *Int J of the Sociology of Law* 239 and the follow-up S Dahl *Women’s Law An Introduction to Feminist Jurisprudence* (1987).
- 17 N Naffine *Law and the Sexes* (1990) 7–8.
- 18 N Naffine ‘In Praise of Legal Feminism’ (2002) 22 *Legal Studies* 71, 72.
- 19 C MacKinnon *Toward a Feminist Theory of the State* (1989) 161–2.

concern with the rhetoric in this judgment and with law and legal rhetoric in general<sup>20</sup> is with how it creates and authorises justificatory schemas, and ways of seeing, that normalise the sexual subordination of women either by discursively downplaying the issue or by constructing and representing women in particular ways to ensure their governability and violability.<sup>21</sup>

The note continues in part II with a detailed discussion and outline of the facts of the case and ruling of the judge with the aim of describing the general tenor of the judgment and also highlighting specific aspects of its rhetoric that stood out as problematic. Thereafter, through drawing on radical and postmodern feminist theoretical contributions, and specific feminist critiques of the notions of ‘consent’ and ‘force’, I will attempt to excavate and expose the ‘rhetoric of rape’ being affirmed by the judgment. Specific attention will be paid to the three central functions of this rhetoric, namely to espouse an apologetic and tolerant posture with regards to rape, to depoliticise the issue of rape by separating it from issues of structural power and gender inequality, and to centralise maleness and the male gaze as the normative point of reference and standard of legal analysis. In conclusion, I will reflect on the broad implications of the judgment.

## II READING *NDOU*: FACTS, JUDGMENT AND HIDDEN ASSUMPTIONS

The *Ndou* case deals with an appeal to the SCA against the imposition of a sentence of a life imprisonment by the appellant Mr Edson Ndou who had been found guilty and was convicted of raping his 15-year-old stepdaughter in the Limpopo High Court. The life sentence was handed down in terms of s 5(1) of the Criminal Law Amendment Act 105 of 1997,<sup>22</sup> which prescribes a mandatory sentence of life imprisonment as the minimum sentence for rape of a minor. The appellant based his appeal on the contention that, in the circumstances, life imprisonment was a grossly inappropriate sentence. The appellant further argued that the High Court erred in its finding that there existed no substantial and compelling circumstances that warranted a lesser sentence. He argued that the High Court should have taken into account that there was no physical violence or dangerous weapon used to force the complainant to submit to have ‘sexual intercourse’ with him and further that the complainant accepted money and gifts from him. There was also, according to the appellant, no evidence of the complainant suffering from any post-traumatic stress after the incident.<sup>23</sup>

20 On law as/and rhetoric, compare JB White *Heracles' Bow: Essays on the Rhetoric and Poetics of Law* (1985); TR Kearns & A Sarat (eds) *The Rhetoric of Law* (1994); and M Constable *Just Silences: The Limits and Possibilities of Modern Law* (2005).

21 See MJ Frug ‘A Postmodern Legal Manifesto (an Unfinished Draft)’ (1992) 105 *Harvard LR* 1050 (arguing that legal rules (such as rape laws) sexualise female bodies and constructs them primarily through the terms of either sexual availability and desirability, or sexual violability or vulnerability. This is one way in which legal discourse supports and produces patriarchal meanings of gender).

22 *Ndou* (note 3 above) para 1.

23 *Ibid* para 2.

In response, the state argued that the determination of an appropriate sentence lies within the ambit of the sentencing court's discretion. A court of appeal may only interfere in cases where there is misdirection with regard to the law or the facts. This is an important point because in an appeal on sentence, the merits of the case are not at issue; it is simply whether the sentence is appropriate. That the appellant raped his 15-year-old stepdaughter is (or in this case, should have been) a foregone conclusion. More substantively, the state argued that rape of a 15-year-old falls under Part 1 of Schedule 2 to the Act for which the prescribed minimum sentence of life imprisonment applies. Should an appeal court deviate from this prescribed sentence, it would undermine the objects of the Act, which are primarily directed at combatting sexual violence against women and children.<sup>24</sup>

Shongwe JA for the SCA (with Mpati P, Lewis JA, Van Heerden JA and Erasmus AJA concurring) begins the judgment by stating that although an appeal on sentence is not an inquiry into merits, there is a need to revisit the facts in order to evaluate the sentence that was handed down; since it was, after all, based on such facts. In brief, Shongwe JA narrates the complainant's testimony as follows: she was sleeping in a bedroom with her two sisters when, in the middle of the night, the appellant entered the bedroom, laid down next to her and inserted his penis into her vagina. The appellant, we are told, did not scream or cry. She intended to tell her mother in the morning. When she did tell her mother, she also mentioned that this was not the first time the appellant had done this to her.<sup>25</sup> The judge then proceeds to compare the complainant's testimony with that of her mother. The mother testified that the appellant, her husband, came back home from drinking, took off all his clothes and slept in their bedroom next to her. She states that sometime in the middle of the night, she woke up to discover that he was not in the bed. She then woke up and went to the children's bedroom where she found the appellant having what Shongwe JA calls 'sexual intercourse with the complainant'.<sup>26</sup> Seeing this, she asked him what he was doing to which he replied that he was waking the children up so they could go and urinate. She went back to the room and slept but later that day reported the matter to the police who then arrested the appellant while the complainant was taken to hospital for medical examination.

Shongwe JA, for reasons not immediately clear, notes a disparity between the complainant's account and her mother's: whereas the mother claims she found the appellant still busy 'having intercourse' with the complainant, the complainant alleges that he was drunk and fast asleep by then.<sup>27</sup> He then goes on to mention other aspects of the facts in this case that he deems to be significant, namely that:

24 Ibid para 3.

25 Ibid para 4.

26 Ibid para 5.

27 Ibid.

... the complainant testified that *it was not for the first time that the appellant had sexual intercourse with her*. On the previous occasion the appellant had bought her sandals, panties and had also given her some money. He had threatened to kill her if she divulged the rape. He also told her not to inform her mother about what had happened; indeed she did not inform her mother. On the occasion which forms the subject of the present rape charge, it would appear that there were no threats of violence by the appellant.<sup>28</sup>

When the case came before the court *quo* for sentencing, Hetisani J for the High Court found the conviction to be just. He relied on a triad of factors relevant to sentencing as established in the *Zinn* case:<sup>29</sup> the personal circumstances of the appellant, the seriousness of the offence and the interests of society, to reach the conclusion that there existed no substantial and compelling circumstances that justifies a lesser sentence than the prescribed minimum sentence of life imprisonment.

It is against this background that Shongwe JA had to consider the main legal issue in the case, namely whether on the specific facts of this case, the sentence of life imprisonment was appropriate; that is, whether there exist compelling and substantial circumstances that justify a lesser sentence. This returns us to the question of whether misdirection exists as to the facts or the law in the High Court ruling that entitles the appeal court to consider the sentence afresh. Shongwe JA finds such a factual misdirection in the High Court's statement that:

the rape [in this case] was continuous when it was done, the day that it was discovered was not the first day, there had been *previous occasions* when this abuse had been going on.<sup>30</sup>

Shongwe JA takes issue with this formulation and with the suggestion that the rape had been continuous, in other words that there had been earlier *previous occasions* on which the appellant had raped the complainant. For Shongwe JA, this view constitutes a misdirection in the first place because the appellant has only been charged and convicted for one count of rape and in the second place because the complainant testified only about one 'previous *occasion*' (not 'occasions' as the High Court phrased it). The judge then proceeded to consider the role of the courts in exercising discretion. Drawing from the *Malgas*<sup>31</sup> and *Dodo*<sup>32</sup> cases, Shongwe JA confirms that a sentencing court does indeed have discretion to deviate from the prescribed minimum sentence, particularly in cases where the circumstances so justify. Such discretion is particularly important as it safeguards the offender's right not to be treated or punished in a manner that is cruel, inhuman, or degrading.<sup>33</sup> Thus, the sentence must be proportionate to the offence, the offender and the needs of the community. If there are circumstances that cause the prescribed minimum

28 Ibid para 7, my emphasis.

29 *S v Zinn* 1969 (2) SA 537 (A).

30 *Ndou* (note 3 above) para 10, my emphasis.

31 *S v Malgas* 2001 (1) SACR 469 (SCA).

32 *S v Dodo* 2001 (1) SACR 594 (CC).

33 Constitution s 12(1)(e).

sentence (in this case, of life imprisonment) to be disproportionate to the crime, it is in the interests of justice that the court consider a lesser sentence.

It is to the judge's elaboration of these 'circumstances' that I shall now turn. Shongwe JA begins by conceding to the severity and seriousness of the offence in question, namely the rape of a minor female by her stepfather.<sup>34</sup> He noted also that the appellant occupied a position of authority and influence over the complainant whom he had abused. Although no evidence was led as to the effects of the rape on the complainant, the judge states that this should not be construed as an absence of post-traumatic stress. Indeed, Shongwe JA writes, 'it would be unrealistic to think there was none'. But he continues:

*On the other hand the complainant did not suffer any serious physical injuries. She submitted to the sexual intercourse on the occasion in question without any threat of violence. The fact that she had accepted gifts and money from the appellant must have played a role in her submitting to the sexual intercourse. When she was asked whether she had screamed for help, she said that she had not resisted or screamed but simply waited for the appellant to finish what he was doing. She also confirmed that the appellant was drunk and fell asleep next to her after the rape. Thus the degree of the trauma suffered by her cannot be quantified. All these factors must be taken into account in considering whether in this case the ultimate sentence of imprisonment for life is proportionate to the crime committed by the appellant. A balance must be struck on all the factors to avoid an unjust sentence. In my view the sentence imposed is disproportionate to the crime committed and the legitimate interests of society.*<sup>35</sup>

The introduction of this extremely loaded paragraph with the words 'on the other hand' already gives the impression that the judge sees himself as being involved in a neutral and objective exercise of weighing up and balancing different factors to reach what he will ultimately come to justify as a more cogent legal outcome. The first factor he identifies is the fact that the complainant suffered no 'serious' physical injuries which to me suggests that the judge takes serious physical injury to be a necessary element in rape – that without physical injury, the rape loses its bite, its seriousness. This factor is then supported by the second, namely the fact that the complainant 'submitted' to the 'sexual intercourse' without a prior threat of violence and with no resistance. It is implied within the second factor that prior threats of violence, use of force and the expression of utmost resistance by the complainant would have made the rape more serious – and conversely, that without them, the rape is less legitimate. The second factor in addition is amplified by the third factor: that the complainant accepted money and gifts from the complainant. This, Shongwe JA writes, 'must have played a role in her *submitting* to the *sexual intercourse*'.<sup>36</sup> In other words, her acceptance of money and gifts from the appellant plays the role of creating the impression of consent in the mind of the appellant. Each of these factors constitutes the compelling and substantial circumstances that render the High Court's compliance with the prescribed

34 In this regard, he cites *S v Chapman* 1997 (3) SA 341 (SCA).

35 *Ndou* (note 3 above) para 13, my emphasis.

36 *Ibid* para 13, my emphasis.

minimum sentence ‘unjust’.<sup>37</sup> Thus Shongwe JA agrees with the appellant that the Court erred in not taking these factors into account.

Later on in the judgment, Shongwe JA again notes that rape of a minor is a very serious offence and also that it deserves severe punishment. ‘However’ the circumstances under which it took place, seen through the three factors enumerated above, are still relevant in determining whether a sentence is appropriate or not. As he writes:

There is no doubt that there is a public outcry to stop the scourge of rape. The appellant was 46 years of age when he committed this offence. He is the step father of the complainant. He is a first offender and self-employed. In my view the circumstances in this case are such that a sentence of life imprisonment is disproportionate to the crime. I therefore find that there are substantial and compelling circumstances justifying a lesser sentence than the one prescribed.<sup>38</sup>

Here it is unclear what the judge is trying to say. Is he suggesting that the age of the appellant, the fact that he was the stepfather of the complainant and the fact that he is self-employed and a first offender is an aggravating circumstance or a mitigating one? Is it that his age and the fact that he was the complainant’s stepfather are aggravating factors while the fact that he is self-employed and is a first offender are mitigating factors? The relevance (the substantiality and compellingness) of, in particular the appellant’s exact age and his status as a self-employed man is unclear unless its aim is to construct a particular idea or profile of the appellant that makes his offence escape the sentence of life imprisonment.

There is also a striking lack of flow between the three main elements of this paragraph. The judgment moves unproblematically from a concession that there is a ‘scourge of rape in society’ to then listing the age, employment status, relationship to the complainant and criminal history of the appellant and finally reaching the conclusion that the sentence of life imprisonment is disproportionate to the crime.<sup>39</sup> This lack of flow can only be understood in the context of the outcome of the judgment which was to, in the end, uphold the appeal against the High Court judgment and reduce the sentence to 15 years.<sup>40</sup> In what follows, I read this lack of flow, as well as the general rhetorical structure of the judgment through a feminist lens that I think provides a better vocabulary for interrogating the legal and political problems of this judgment.

### III CRITICALLY READING *NDOU*: FEMINIST REFLECTIONS (OR ‘FINDING THE MAN’ IN THE JUDGMENT)<sup>41</sup>

That men as a class should benefit from the present rape law is not surprising. There is no doubt as to whose law this is and whose interests it serves primarily, even when the law is infringed.<sup>42</sup>

37 Ibid para 13.

38 Ibid para 16, footnotes omitted.

39 Ibid para 16.

40 Ibid paras 17–8.

41 Here I am paraphrasing the title of Wendy Brown’s essay ‘Finding the Man in the State’ in *States of Injury: Power & Freedom in Late Modernity* (1995) 166.

42 C Hall ‘Rape: The Politics of Definition’ (1988) 105 *SALJ* 67, 82.

In what follows, I survey feminist theoretical contributions and jurisprudential critiques focusing on the relationship between rape, law and society and juxtapose them against the *Ndou* judgment.

### (a) Feminism(s) on rape

In general, the feminist concern with rape centres around a *politicisation* of rape as not simply a matter of criminal law or law of delict as it is currently treated but as an issue of sex and gender inequality.<sup>43</sup> Under this view, the social inequality between men and women, an imbalance that places men in a dominant position, needs to be taken into account in the definition, treatment and adjudication of rape and sexual assault. In this way, rape can be understood as a form of sex discrimination against women, a harm based primarily on their group membership (that is, a harm women experience *because* they are women), and thus also, a practice of systemic sexual subordination.<sup>44</sup> Echoing this view, Colleen Hall writes that rape:

... is ... an act of violence and oppression against women. It is a sexual attack which expresses male dominance and contempt for women. Rape is not one form of attack, but a category of behaviour which is structurally generated (by the power imbalance between the sexes) and culturally sustained (in a male supremacist ethos). It constitutes only one of the many forms of violence against women ... The origins of rape are anchored in the structured imbalance of power between men and women as social groups, that is, in their political relationship.<sup>45</sup>

To the extent that rape law is a site of feminist struggle,<sup>46</sup> this shift in focus from rape as merely an infringement of criminal law codes or as a case of delictual liability to an act of violence, power and oppression remains politically necessary for feminists to underscore rape as a grave wrong against women that is all too often ignored, trivialised, mischaracterised and legitimised within the legal system. *Ndou* is presented as a criminal case dealing with the ‘neutral’ exercise of ascertaining the appropriateness of a sentence, but through a critical reading of Shongwe JA’s judgment we can see that ‘ignoring’, ‘mischaracterising’ and ‘legitimising’ feature prominently as rhetorical techniques.

The earlier claim of rape raised in the complainant’s testimony was rendered irrelevant, ignored, by the judges’ vehement refusal to accept the High Court’s contention that the complainant had been continuously ‘raped’ by the appellant. More alarmingly, this refusal was based on a minor semantic disagreement over whether the rape took place on a ‘*previous occasion*’ (that is, previous to the specific occasion that is the subject of the court case) or on

43 C MacKinnon *Sex Equality* (2007) 742.

44 See IM Young *Justice and the Politics of Difference* (1990) 61–3 (violence as a medium of group-based oppression and a system of social injustice).

45 Hall (note 42 above) 81. See also *S v Baloyi* 2000 (2) SA 425 (CC) para 12.

46 Ibid 82. See also S Estrich ‘Rape’ (1986) 95 *Yale LJ* 1087–184; M Torrey ‘Feminist Legal Scholarship on Rape: A Maturing Look at one form of Violence Against Women’ (1995) 2 *William & Mary J of Women & Law* 35–49; AJ Cahill *Rethinking Rape* (2001); C Smart *Feminism and Power of Law* (1989) 26–49; and especially L Artz & D Smythe (eds) *Should We Consent? Rape Law Reform in South Africa* (2008).

'previous occasions'. By overemphasising this small detail over how many times (once or more than once) the complainant had been sexually violated by the appellant, Shongwe JA obfuscates an important anti-formalist element in the decision of the High Court which was to emphasise that although 'technically' only one incident of rape formed the subject of the present rape charge, it was necessary to take into account the history of sexual exploitation by the appellant of the complainant in the determination on sentencing. Shongwe JA ignores this history, opting instead to rely on the 'fact' that there is 'only' one charge of rape at hand, which in other words means that although the complainant had been raped more than once by the complainant and had been threatened with violence before, the extant legal rules and principles of evidence 'constrain' Shongwe JA to 'see' only one count of rape. This is a classic example of the erasure of women's experience in favour of legal categories and formal structures of reasoning.<sup>47</sup>

This first rhetorical move (of ignoring) gives rise to the second, namely mischaracterisation. In the *Ndou* judgment, there are approximately eight instances in which the judge refers to the act in question not as rape but as 'sexual intercourse' or 'intercourse'. None of these instances appear to be random as they are used interchangeably with the word 'rape' which to me means the specific choice on when to use the word 'sexual intercourse' and when to use the word 'rape' is not totally accidental. This is a trite claim, as feminist legal theorists in particular have always placed a strong emphasis on 'naming' women's reality. Such naming is important because language and law are never neutral and certainly more so when they are used together, when language is being used in law. Recall for example, MacKinnon's insistence that in naming violations against women, the feminist approach to rape should unapologetically claim women's perspective instead of attempting to present an objective definition.<sup>48</sup> For her, the problem with an objective and neutral viewpoint is not simply that it does not exist but that it is actually the male perspective in legal disguise: '[r]ape is defined according to what men think violates women ...'.<sup>49</sup> Words reflect and construct a particular gendered view of the world, and so it is a necessary task of feminist analysis to enquire into the mischaracterisation of rape as 'sexual intercourse'.<sup>50</sup> In the judgment, sexual intercourse replaces rape when the judge is explaining the lack of force in the perpetration of rape, in recalling the 'differing' accounts of the two women (the complainant and the complainant's mother) about what happened on the night of the rape. It is also used in the references to the earlier rape

47 See generally Smart *ibid* 4–25, 26–49.

48 C MacKinnon *Feminism Unmodified: Discourses on Life and Law* (1987) 86. Although Wendy Brown (*Edgework: Critical Essays on Knowledge and Politics* (2005) 83–97) has specifically warned of MacKinnon's work that we should heed the dangers and exclusions of ontologising women's experience and presenting women's socially-constructed and situated perspective as 'Truth'.

49 *Ibid* 87.

50 On the relationship between rape and language, see S Marcus 'Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention' in J Butler & JW Scott (eds) *Feminists Theorize the Political* (1992) 391.

incident and also when describing the ‘submission’ of the complainant to the appellant’s insertion of his penis into her vagina after receiving money and gifts.

To be clear, I am reading the moments in Shongwe JA’s judgment where ‘rape’ becomes ‘sexual intercourse’ to perform important ideological and rhetorical functions. In the first place, they appear to register a certain suspicion and doubt at the fact that this is an issue of rape *at all*. Given that this case deals with an appeal on sentencing and not merits, the fact that a *rape* occurred should have been an established and incontrovertible fact. Secondly, it would appear that the interchangeable use of the two words works to blur the important distinction between sex and rape – so as to euphemise rape and render it legally indistinguishable from sex. Here is Susan Brownmiller:

The real reason for the *law’s everlasting confusion* as to what constitutes an act of rape and what constitutes an act of mutual intercourse is the underlying cultural assumption that it is the natural masculine role to proceed aggressively towards the stated goal, while the natural feminine role is to ‘resist’ or ‘submit’. And so to protect male interests, the law seeks to gauge the victim’s behaviour during the offending act in the belief that force or the threat is not conclusive in and of itself.<sup>51</sup>

But let us expand this for a moment into a broader critique of the legal construction of rape. Under s 3 of the Sexual Offences and Related Matters Amendment Act 32 of 2007 rape is defined as ‘the *sexual* penetration of a victim without consent’. In this definition, as with most social and legal understandings, rape is constructed as ‘sexual’, as a non-consensual *sexual* encounter. This assumes that both the perpetrator and victim experience and perceive the event in primarily sexual terms. Feminists have objected to this sexualisation of rape and eroticisation of male domination by showing ‘that most victims do not experience rape as a sexual encounter but as a frightening, life-threatening attack’; as a moment of immense powerlessness and degradation.<sup>52</sup>

Constructing rape in such terms treats rape as sex gone too far, or sex minus consent or sex misunderstood – but still as *sex*. But for most feminists, rape, understood as the intrusive expropriation of a woman’s sexual wholeness<sup>53</sup> and as a practice of sexual dehumanisation is incompatible with ‘sex’, at least in the sense that to have sex, people must appear to each other as human beings of equal worth. Rape militates precisely against that appearance because it is premised on the objectification of women and disregard for their autonomy, bodily integrity and dignity.<sup>54</sup> Returning now to the curious use of the words ‘sexual intercourse’ in a case (dealing with sentencing) where ‘rape’ had already been clearly established, we can see now why this choice of words is loaded with a gendered (read: male) viewpoint:

51 S Brownmiller *Against our Will Men, Women and Rape* (1975) 384–5.

52 Hall (note 42 above) 73; MacKinnon (note 48 above) 87.

53 MacKinnon *ibid* 87.

54 See P Smith ‘Book Review: Rape and Equal Protection: A Review of Stephen J Schulhofer’s *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard University Press, 1998) and Andrew E Taslitz’s *Rape and the Culture of the Courtroom*’ (2004) 19 *Hypatia* 152–7.

'Rape' is precisely what the victim does *not* experience, but she has no other name with which to describe the event. The victim is forced to use the language of the dominant group (with its encoded male bias) to interpret and make sense of the event. Without a language, she has no power to name the event for herself, and her experience and perception of it cannot be verified. On the contrary, they are invalidated by the dominant reality.<sup>55</sup>

The dominant legal rhetoric and social reality of rape which views rape as a 'sexual' event is encoded in past and present definitions of rape in South African criminal law and it is re-circulated in the judgment. Through this encoding and re-circulation, it is disguised as an objective and universal truth, as a taken-for-granted explanation of rape when it is actually a social construct that is part of the patriarchal ideology that is perpetuated through the practices of law and language.<sup>56</sup> This does not mean that rape does not have a relation to sexuality and gender<sup>57</sup> (as Louise du Toit correctly notes, 'rape is the violent abuse of power in a sexual way'<sup>58</sup>). It simply means that rape is primarily 'sexual' only to the One, the Man, who rapes.<sup>59</sup>

Indeed, the aim of most post-first wave feminist theories of rape is to invite us to see 'rape as a problem of sexism, a problem of the inequality between men and women' and of course, also as a problem of sexual difference and identity.<sup>60</sup> This conception of rape locates it within the logic and operation of the system of male power, as central to the disciplinary apparatus of patriarchy and as a means to control women.<sup>61</sup> This then raises perhaps a more general problem with the treatment of rape as a crime and thus by implication, as a deviant, aberrational act. Feminist theorisations of rape, as well as statistics on crime that have led to the labelling of South Africa as the 'rape capital of the world' in which a woman gets raped every 26 seconds according to women's organisations,<sup>62</sup> show that far from being a deviant, rare and exceptional act, rape and the fear of rape is a common experience in the lives of women.<sup>63</sup> Rape of a 'woman' in this sense is paradigmatic, not anomalous – it is the outcome of a systemic reflection of a patriarchal society's view of relations between

55 Hall (note 42 above) 73–4, footnotes omitted.

56 Hall *ibid* 74.

57 See K Millet *Sexual Politics* (1970) 69–70; A Lorde *Sister Outsider Essays & Speeches* (1984) 120; MacKinnon (note 43 above) 773; Albertyn et al (note 10 above) 299.

58 L du Toit 'A Phenomenology of Rape: Forging a New Vocabulary for Action' in A Gouws (ed) *(Un)thinking Citizenship Feminist Debates in Contemporary South Africa* (2005) 253.

59 MacKinnon (note 43 above) 757–8.

60 Provisionally stated, radical feminism would place an accent on rape as the enactment of pornographic fantasy and the perpetuation of male sexual domination (see MacKinnon (note 48 above) 81) while postmodern feminism focusing on sexual difference and subjectivity would view rape as the violent assertion of phallic sovereignty and the symbolic erasure of women's selfhood and Otherness (see L Du Toit *A Philosophical Investigation of Rape The Making and Unmaking of the Feminism Self* (2009)).

61 B Hooks 'Whose Pussy is This: A Feminist Comment' in *Talking Back Thinking Feminist, Thinking Black* (1989) 134–42.

62 See <<http://www.news24.com/SouthAfrica/News/SA-remains-world-rape-capital-20120921>>; <<http://www.voanews.com/content/south-africa-leads-world-in-rape-cases/1580500.html>>; and <[http://www.artlink.co.za/news\\_article.htm?contentID=32030](http://www.artlink.co.za/news_article.htm?contentID=32030)>.

63 Brownmiller (note 51 above) 254–5; Du Toit (note 58 above) 253–4; C Scahffer & M Frye 'Rape and Respect' in M Vetterling-Braggin et al (eds) *Feminism and Philosophy* (1977) 333–4.

men and women.<sup>64</sup> Although committed in multiple and diffuse contexts by individual men, rape is central in maintaining and reinforcing women's oppression, and conversely enhancing the group power of men.

Bringing this back to *Ndou*, in which the central question turned on whether there existed circumstances related specifically and individually to the appellant that were substantial and compelling enough as to warrant the reduction of his sentence, we can note precisely this attempt to evade the systemic and structurally male origins of rape as a form of sexual violence. Let us listen again to the judge's words:

I have already mentioned that rape is a very serious offence, especially when perpetrated against a minor. It deserves severe punishment. However, the circumstances under which it took place are relevant in the consideration of an appropriate sentence. There is no doubt that there is a public outcry to stop the scourge of rape. The appellant *was 46 years of age when he committed this offence. He is the step father of the complainant. He is a first offender and self-employed.* In my view the circumstances in this case are such that a sentence of life imprisonment is disproportionate to the crime. I therefore find that there are substantial and compelling circumstances justifying a lesser sentence than the one prescribed.<sup>65</sup>

The rhetorical effect of this reference to the appellant's 'circumstances' above seems to me to be that of constructing the image of a good, hardworking family man who made a mistake. Clearly the judge is relying on the false presumption that rape is committed only by 'psychopaths', sex-starved 'degenerates' and 'perverts', immoral men or men with mental and psychological disorders. As we now know, most studies on this topic have indicated the contrary: that rape is committed by normal men, in the normal mode of a patriarchal society, within the routine conventions of male sexual expression; men in traditional masculine, patriarchal roles (such as husbands, fathers, uncles, boyfriends, male co-workers and employers).<sup>66</sup> As Ntozake Shange's choreo-poem dramatically illustrates, rape is most often committed by 'the stranger who never [shows] up'.<sup>67</sup>

I want to briefly extend this analysis further to consider how the judgment addresses two central concepts in rape law namely: (1) the requirement of non-consent and the inevitable determination as to what consent is; and (2) the requirement that rape must be accompanied by force and the corollary contention that the victim must physically manifest some form of resistance. For our purposes, apart from how these concepts manifest in Shongwe JA's *Ndou* judgment, it should be noted that these concepts are central to the general legal, and also social, construction of rape which remains predicated on a 'male centred reality'.<sup>68</sup>

64 See generally A Dworkin *Our Blood Prophecies and Discourses on Sexual Politics* (1976), *Letters from a War Zone* (1988), *Life and Death Unapologetic Writings on the Continuing War Against Women* (1997).

65 *Ndou* (note 3 above) para 16.

66 See Albertyn et al (note 10 above) 302 and the sources cited there.

67 N Shange *For Coloured Girls who have Considered Suicide/When the Rainbow is Enuf* (1997) 31.

68 See N Naylor 'The Politics of Definition' in Artz & Smythe (note 46 above) 22–51 (arguing that historical and contemporary definitions of rape are rooted in patriarchal assumptions).

## (b) Consent and force

### (i) Consent

In *Ndou*, one of the circumstances raised by the judge as being compelling and substantial enough to justify a departure from, and reduction of, the minimum prescribed sentence of life imprisonment was that the complainant ‘submitted’ to the ‘sexual intercourse’ without any threat of violence and also that her acceptance of money and gifts from the appellant ‘must have played a role in her submitting ...’.<sup>69</sup> I am reading this as suggesting that the ‘submission’ of the complainant to the appellant’s rape of her, due to the lack of violence and the acceptance of money and gifts, *reduces* the degree of non-consent present in the case. As a consideration in favour of the appellant, it implies that the absence of violence and the prior acceptance of money and gifts played a role in her ‘submission’ to the rape (what the judge calls ‘sexual intercourse’) and thus in the appellant’s perception of her *consent*. For if to ‘submit’ is to allow oneself to be subjected to some kind of treatment, the logical implication of Shongwe JA’s inclusion of these as mitigating factors relevant to sentencing is that the complainant, by accepting the money and the gifts, allowed herself to be raped and that is something for which the appellant cannot be held completely responsible – that, we are told, would be unjust.

The framing of rape as ‘sexual intercourse minus consent’ means that the only legally significant factor that distinguishes acts of normal sexual encounter from rape is the victim’s consent, her subjective state of mind. As transpired in *Ndou*, the immediate problem that arises with the legal requirement of ‘non-consent’ is that it turns the tables on the victim by focusing on her consent or non-consent rather than the perpetrator’s acts of compulsion and coercion. This leads to her behaviour being scrutinised, and her moral credibility being questioned in a role-reversal described by Drucilla Cornell as follows:

... the plaintiff is turned into the defendant through the use of sexual humiliation. The plaintiff is put in the position of having to defend herself against the ‘charges’ that are made against her. Rather than charging the defendant she is the one who becomes charged. What is her crime?: her very ‘sex’.<sup>70</sup>

As a variation of the ‘she asked for it’ rape myth, Shongwe JA’s claim that ‘she submitted to the sexual intercourse’ and that her acceptance of the money and gifts (which even included underwear!) must have played a role in that submission can be interpreted as a form of victim-blaming,<sup>71</sup> an apportionment of blame for rape that has a well-known history of rendering some women ‘unrapeable’ either by virtue of race (being black), marriage (viewed as permanent consent and sexual availability to the husband), or in this case, certain actions or behaviours (accepting gifts and having had ‘sexual intercourse’ with the perpetrator before). Instead of the previous ‘sexual’

69 *Ndou* (note 3 above) para 13.

70 D Cornell ‘Civil Disobedience and Deconstruction’ (1991) 13 *Cardozo LR* 1309, 1311.

71 MacKinnon (note 43 above) 750.

encounter being proof of a clear history of child sexual abuse and exploitation, it appeared to the judge as proof of the complainant's inclination to 'submit' to the appellant. Instead of the initial threat of violence and intimidation being seen as an endemic feature of that exploitative sexual relation, its absence in the present case is used as an indication of willingness on the part of the complainant.

Another problem with the emphasis on consent is that it conceives of consent as agreement to already existing and established terms, terms traditionally set by the male standard.<sup>72</sup> But for consent to have any meaning or value, it would need to take place in a context where dissent and difference are real possibilities. In other words, consent requires not only agreement to certain terms but active involvement by all parties in the drafting of those terms.<sup>73</sup> The problem with this dominant conception of consent that is implicitly at work in this judgment is that it figures men as the active sexual subject who initiates and controls sexual contact, while portraying women as passive, being only in the limited position to either refuse or accept. Apart from effecting a severe repression and denial of women's sexual agency and choice,<sup>74</sup> it also treats consent as women's default state.<sup>75</sup> In other words, as the dividing line between sex and rape, it presumes that there is *always* consent *unless* the woman refuses it on the specific occasion.

A brief detour into the work of two feminist critics of liberalism and social contract theory, Carol Pateman and Wendy Brown, is instructive here. Pateman's revisionist account of contractarianism reveals that consent generally also requires an eligible party – literally figured as socially male – endowed with the capacity to consent.<sup>76</sup> On this view, women's capacity to consent is constrained, if not completely vitiated, not only because of the unequal conditions in which any form of choice or consent is exercised but more fundamentally because, consequent to the systemic misrecognition of women in social, political and legal life, they are disqualified from occupying the position of consenting subjects in the first place. In Brown's exposition of the masculinism inherent in liberalism, consent – by definition – involves agreement to the desires of another or acquiescence to something whose terms are not determined by the consenting party.<sup>77</sup> Thus consent always marks an unequal power relation between the initiator/proposer and the consenting party; it maintains and reflects that power hierarchy rather than redress or dismantle it. Consequently, the act of consent necessarily issues from a position of subordination: the one consenting always concedes to a power understood as greater than she is. As Brown puts it 'men are seen to

72 K van Marle 'The Politics of Consent, Friendship and Sovereignty' in R Hunter & S Cowan (eds) *Choice and Consent: Feminist Engagements with Law and Subjectivity* (2007) 75.

73 Ibid 75–6.

74 See Du Toit (note 60 above).

75 Hall (note 42 above) 74.

76 C Pateman *The Sexual Contract* (1988), 'Women and Consent' (1980) 8 *Political Theory* 152–5.

77 W Brown 'Liberalism's Family Values' in Brown (note 41 above) 135–65.

do sex, while women *consent* to it'.<sup>78</sup> Taken together, Pateman and Brown's account point out how the very language of consent as the designation for non-coerced mutual agreement is inherently subversive of and limiting to radical democratic and feminist forms of equality and autonomy, and also of sexuality, mutuality and desire. Put differently, the requirement of consent in rape law does not concern itself with whether a woman actually desired, wanted or even enjoyed sex, but on whether she acceded or refused when it was pressed upon or demanded from her.<sup>79</sup> Accordingly, '[c]onsent is ... a response to power – it adds or withdraws legitimacy – but is not a mode of enacting and sharing power'.<sup>80</sup>

In any event, how can the complainant be said to have submitted to 'sexual intercourse' in a room where her sisters were sleeping and in the same house where her mother, the appellant's wife, was sleeping? Moreover, how can the complainant, let alone anyone else, be said to have 'submitted to sexual intercourse' when she was asleep and woke up to the feeling of her stepfather thrusting his penis into her vagina? It may be in this sense that Louise du Toit has powerfully argued that rape law simultaneously requires and undermines women's consent. Because South Africa is a rape-prone society that inherently denies and subverts women's sexual subjectivity and selfhood, the very conditions for women's consent, she argues, are not in place.<sup>81</sup> Developing this line of argument further, Du Toit has recently argued that the retention of the requirement of consent in the 2007 amendment is problematic in how it fails to 'protect' and respect women's sexual autonomy. She suggests instead that it be replaced with a focus on a range of 'coercive circumstances' that look into the material and symbolic conditions needed for meaningful consent to take place.<sup>82</sup> The relationship between the appellant and the complainant is such a case where 'meaningful consent' is not only absent but impossible because of a myriad of reasons: her age; his abuse of his power and authority as stepfather, and most obviously, the fact that she was asleep when he raped her. The possibilities of her dissent and refusal were precluded and the material and symbolic conditions in which she could have consented were thoroughly vitiated.

Yet by relying on a certain conception of consent, the rhetoric in this judgment tries almost desperately – and with illogical consequences – to attach to this relationship of rape, sexual violation, incest and ageism, features of a normal relationship in order to ultimately create confusion about whether it was rape or sex.

78 Ibid 162–3.

79 Ibid 163.

80 Ibid.

81 L du Toit 'The Conditions of Consent' in Hunter & Cowan (note 72 above) 58–64.

82 L Du Toit 'From Consent to Coercive Circumstances: Rape Law Reform on Trial' (2012) SAJHR 380–404. See also S Box *Power, Crime and Mystification* (1983) 123 cited in Hall (note 42 above) 75.

*(ii) Force*

We are also told in *Ndou* that the complainant's 'submission' to the rape (what the judge calls 'sexual intercourse') was not accompanied by violence and that she did not suffer any physical injuries as a result.<sup>83</sup> The judge also includes the complainant's statement that during the rape 'she had not resisted or screamed but simply waited for the appellant to finish what he was doing'.<sup>84</sup> According to the judge all these 'factors' needed to be considered in determining whether the sentence of life imprisonment was proportionate to the crime committed by the appellant. This reveals that the judge interprets 'force' to mean only physical force (or the threat of it) and also that he believes that the use of physical force or violence is a necessary part of rape. Now since force is not a legal requirement in South African rape law, its relevance can only be discerned through its relationship with consent.<sup>85</sup> In other words, what the judge means to say by his reference to the absence of force by the appellant (and the absence of resistance by the complainant) is that it implies some degree of consent. Further, the judge also seems to be suggesting that the lack of physical injuries (a result of the absence of violence or force) makes the rape less traumatic and conversely, makes the sentence of life imprisonment against the appellant 'unjust' and 'disproportionate to the crime and the legitimate interests of society'.<sup>86</sup>

It must be recalled that earlier in the judgment, it was also noted that there had been occasions prior to the one that forms the subject of this case, where the appellant raped the complainant (or in the judge's words had 'sexual intercourse' with her).<sup>87</sup> On that previous occasion, the appellant had bought the complainant shoes and underwear and also gave her money. *He threatened to kill her if she divulged the rape and instructed her not to tell her mother about it* – which she did not. The judge nevertheless hastens to add that '... [on] the occasion which forms the subject of the present rape charge, it would appear that there were no threats of violence by the appellant'.<sup>88</sup> When looking at force, the judge wrongly assumes that (1) the threats need to be repeated in order to be effective and to make every occasion of rape legitimate; (2) that the gifts and money given to the complainant are not forms of control and economic coercion (which is why they are used to support the argument about lack of force); and (3) that force is separate from and of greater importance than coercion. Based on these assumptions, it is easy to reach the strange conclusion that even though threats of violence were used to secure the complainant's 'submission', the 'sexual intercourse' in this case can still be seen as somewhat consensual (but for the fact that the complainant is below the age of consent).<sup>89</sup>

83 *Ndou* (note 3 above) para 13.

84 *Ibid.*

85 See generally R West 'A Comment on Consent, Sex and Rape' (1996) 2 *Legal Theory* 233.

86 *Ndou* (note 3 above) para 13.

87 *Ibid* para 7.

88 *Ibid.*

89 West (note 85 above) 233.

In order to challenge this over-emphasis on ‘force’ as a constituent element of rape, we need to revisit briefly feminist insights about rape as centrally an issue of sex inequality, women’s oppression and power imbalances between the genders. Claudia Card, for example, has argued that every act of rape has two victims: the direct victim (the woman/women actually being raped) and the indirect victims (the women to whom the message is sent).<sup>90</sup> Thus the proliferation of rape incidents causes all women to scrutinise and then regulate their choices and behaviour to avoid being grouped with the bad girls who are said to deserve the rape in some way or another. Rape in this sense is systemic and structural. If we pay attention to the power imbalances between men and women and specifically between young women and older men living in the same household, we can see that ‘physical force’ need not be a necessary element of rape – especially in a context where a combination of economic coercion, differentials in authority between stepfather and stepdaughter, fears of sexual shaming, a 30-year-age disparity and threats of death are equally effective.<sup>91</sup> Such power imbalances severely restrict the woman’s choice to refuse the man’s sexual advances, especially where the man’s social power and position enables him to impose threats or sanctions for her refusal.

Thus, by focusing on the absence of force (narrowly construed in ‘physical’ terms) rather than on the broader issue of the presence of coercion, the judgment downplays the emotional, psychological, economic and social harms of rape on women and also overlooks completely the fact that rape is not just an interpersonal expression of individual male power or aggression; it also serves the broader social, structural and symbolic function of promoting gender hierarchies and maintaining male dominance.<sup>92</sup> In a patriarchal society such as ours, what reason did the complainant have to believe that the appellant would not enforce his earlier threat of killing her if she refused to have ‘sex’ with him or if she later reported the incident? If her family was economically dependent on the appellant is it not reasonable that she may have been seized by the apprehension that her mother, herself and her sisters would be left destitute and poor if he left or went to jail? In a context where most young girls and women know what rape is, and also know that women who refuse or resist are often killed, beaten or mutilated, why would the judge expect her to wait for him to use physical violence or for her to resist his advances in a way that would produce physical injury? In a culture that distrusts victims of rape and where they are shamed and humiliated and treated as ‘damaged goods’ and ‘seductive whores’, why does her ‘submission’ to the rape appear as permission when it more appropriately indicates her subjugation, violation and the inaudibility of her suffering?

This failure to see rape as embedded within the historical and social practices of male culture is also what prevented the judge from focusing on the many other constraints, contextual factors and broader structural forces that vitiate

90 C Card ‘Rape as a Terrorist Institution’ in R Frey & C Morrison (eds) *Violence, Terrorism and Justice* (1991) 296–319. See also Albertyn (note 10 above) 306.

91 See MacKinnon (note 43 above) 779.

92 Albertyn (note 10 above) 305; Estrich (note 46 above) 1105–20.

consent as opposed to the narrower question of force. The requirement of *visible injury-inducing physical force* is clearly incompatible with the feminist view of society as objectively structured by male supremacy because it incorrectly assumes, as a rule, the existence of equality in physical strength and power relations between women and men. It also unduly privileges corporal injury at the expense of other equally severe harms caused by rape namely: loss of bodily integrity, denial of sexual autonomy and agency, loss of self-esteem, distorted self-perception, as well as mental and psychological illness.

#### IV STRUCTURAL DETERMINISM: RAPE APOLOGISM, DEPOLITICISATION AND THE MALE GAZE

In looking at how completely out of step the judgment is with feminist knowledge and with general criminological, psychological and sociological studies on the topic, we should bear in mind that the underlying sexual ideology of heteropatriarchy that runs throughout the judgment lies within and is tolerated by the legal culture and is not simply the effect of a single judge's idiosyncrasies. Although the judgment does tell us something about the gender politics of the SCA judges, it is also not unique to them: it reflects more broadly cultural assumptions about how men view women and how this view takes on the guise and *force* of law. The heavy, uncritical and unproblematised reliance on rape myths in this judgment is evidence of how male normativity, patriarchal beliefs and sexism are available for use as resources of legal interpretation and judicial decision-making, as ways of seeing, understanding and interpreting facts, evidence and legal rules. They reside within the structures of legal reasoning and thus can be used in the determination of legal outcomes. It is legal language, or legal rhetoric, that provides the assertions made and conclusions reached in this judgment with an appearance of normality and obviousness.

Feminist scholarship on rape helps us problematise this appearance and also aids us in seeing how rape apologism, depoliticisation and the male gaze prevail in and through the judgment. *Rape apologism* features in the judgment in two ways. Firstly, by making the rape appear less serious and less legitimate by focusing on how the victim responded rather than on what the perpetrator did; and secondly, by being discursively animated by a concern for ensuring that the male perpetrator is not unjustly and unfairly sentenced rather than with recognising and redressing the harms suffered by the victim – which implies that the law still values the rapist over the victim/survivor of that rape.<sup>93</sup> *Depoliticisation* can be observed in the judgment's silence on the

93 MacKinnon (note 43 above) 749. Here I am very sensitive to Brown's (note 41 above) criticism of feminist projects that appeal to the state, a traditionally masculine institution, for protection from, and remedy for, injury as well as Angela Davis' (*Are Prisons Obsolete* (2003)) criticism of the racism of the prison system and its role in heightening illegitimate power structures (through black male hyper-incarceration and institutionalising racist presumptions about black criminality) in racially stratified societies such as the United States and South Africa. See also A Gruber 'Rape, Feminism and the War on Crime' (2009) 84 *Washington LR* 581–657.

question of how the issue of rape is imbricated with relations of power and male dominance and its treatment of the case as purely a matter concerning an individual (a '46-year-old', 'self-employed' 'first offender' who is the 'stepfather of the complainant'). And the *male gaze* in/of the judgment can be discerned throughout by the judge's reliance on standards and assumptions that feminists have taught us to recognise as being based on a socially and ideologically male world-view and thus as inevitably male-centred.<sup>94</sup> The sexually powerful male subject who initiates sex; the passive woman whose sexuality exists only to serve men, the liberal (masculine) conception of the rational, willing, autonomous and consenting subject; together with the image of the cheap and money-hungry yet seductive whore who lures and traps men – and thus also taints the unquestioned virtue of manliness – are some of the tropes that frame the judgment's rhetoric. It is in this sense that the judgment can be said to be structurally determined by a patriarchal, rape-prone social context.<sup>95</sup>

The rhetorical structure of this judgment is complicated and has many aspects to it, but if it can be summarised into one single argument it would be Susan Estrich's claim that the legal construction of rape operates centrally by positing one single idea of what constitutes 'real' or 'legitimate' rape.<sup>96</sup> In this respect, the judgment of Shongwe JA quite transparently develops its own account of what a 'real' rape is, and also of how a 'real' rape victim acts. For him a 'real' rape – one deserving of the minimum prescribed sentence – would be one with the following features: (1) it would be committed by a criminally insane stranger (perhaps one who was also unemployed and was a repeat offender); (2) it would cause visible and serious physical injury to the complainant; and (3) substantial and violent force and constant threats would be used repeatedly. Ultimately the basis for his decision to reduce the sentence is the view that the 'rape' in this case did not possess the features of what he perceives as a 'real rape' and thus, was not as legitimate.

Within the idea that there exists such as thing as a 'real rape' is also the distinction between 'good girls' and 'bad girls'<sup>97</sup> – and its attendant implication that only 'good girls' can be raped. This distinction operates in law through measuring the experience, testimony and response of the actual victim against narrow, moralistic and patriarchal norms of sexual conduct.<sup>98</sup> In this case,

94 C MacKinnon *Women's Lives, Men's Laws* (2005).

95 Had space allowed, further analysis would have also enquired into the aspect of 'gendered racism' or 'psycho-sexual racism' in the judgment. It would ask in what ways 'race' (and specifically racial stereotypes of black women as wild and hypersexual) plays a role in intensifying the legal-rhetorical practice of rendering some women unrapeable by virtue of their actions, the nature of the rape or their relation to the rapist. For examples of such analyses, see LV Graham *State of Peril Race and Rape in South African Literature* (2012); TD Sharpley-Whiting & R White *Spoils of War Women of Colour, Culture and Revolution* (1997) 45–8; A Davis *Women, Race and Class* (1981) 82, 172; Crenshaw (note 11 above) 1267–85; J Wriggins 'Rape, Racism and the Law' (1983) 6 *Harvard Women's LJ* 103; MacKinnon (note 43 above) 749–50, 779.

96 S Estrich *Real Rape* (1987).

97 Albertyn et al (note 10 above) 306.

98 Crenshaw (note 11 above) 1270.

the sexual history of the complainant – which to me is a history of sexual violation by her stepfather – is curiously cited to suggest that because she has had ‘sexual intercourse’ with the appellant before, she must have consented or ‘submitted’ in the case at issue as well. Also, according to the judge, a ‘good girl’, a true victim, would not ‘accept’ gifts and money from her rapist and would also probably not wait that long to report such an incident to her mother. Her failure to refuse the gifts and report the rape timeously thus further diminishes the ‘realness’ of the rape and thus makes her less rapeable.

I have already alluded to my suspicion that had the appeal nature of this case not constrained the judge to accept that a crime of rape had taken place, the arguments and reasons he puts forward for the reduction of the sentence could, in a different context (for example where the complainant had been above the age of consent), quite easily have had the outcome of exonerating the appellant of the charge of rape completely.

Child rape has the effect of ‘womanizing’ young girls, and in this judgment, the rape myths traditionally applied *against* fully-grown women are used against a 15-year-old girl.<sup>99</sup> So, as Anna Majavu argues, not simply does the *Ndou* judgment fail all women, it specifically also fails vulnerable girl-children.<sup>100</sup> In her view, the judgment undermines the plight of ‘incest victims who keep quiet about their ordeals after being threatened with death or given tokens by their abusive father figures’.<sup>101</sup> She too regards the reasons relied on by the judge to overturn and reduce the High Court sentence as ‘dubious’ and ‘subjective’. Another important argument she makes focuses on the living conditions of poor and working-class black women and girls who live in underdeveloped and insecure townships. Such conditions, she argues, give rise to police negligence when it comes to using rape kits and investigating complainants of sexual abuse and also create a climate of violence, deprivation and precarity that is conducive to the sexual assault and killing of women living in those townships. For all these reasons, the judgment is deserving of Majavu’s criticism as well as the one I have launched here.

## V CONCLUDING REMARKS

And when their eloquence escapes you  
Their logic ties you up and rapes you.<sup>102</sup>

Let us retrace our steps in order to surmise the basic ‘thrust’ of the judgment. Firstly, the judge cleared the way for the SCA’s intervention by finding that the High Court had factually misdirected itself. This was done on the basis of a spurious distinction between ‘previous *occasions*’ and ‘previous *occasion*’. Secondly, he then claimed that the fact that the young girl had taken money and gifts from the complainants played a role in her submitting to the ‘sexual

99 See MacKinnon (note 43 above) 754.

100 A Majavu ‘How a Rape Judgment Fails Vulnerable Children all over South Africa’ (2012) *SACISIS* 26 November <<http://www.sacsis.org.za/site/article/1502>>.

101 *Ibid.*

102 The Police ‘De Do Do Do, De Da Da Da’ (song) in the album *Zenyatta Mondatta* (1980).

intercourse'. In strengthening this argument, the judge added that she sustained no physical injuries and did not scream or cry during the rape. He also added that no violence or threats were used against the complainant. Finally, the judge then relies on these 'factors' to argue that there are compelling and substantial circumstances that warrant departure from, and reduction of the imposed prescribed minimum sentence of life imprisonment. In order to grasp this judgment, we need to understand the neutralising and legitimating effects of law and the accompanying rhetorical force of legal language. It is legal rhetoric – which in this case takes the form of clothing subjective, culturally-situated and gendered assumptions in the formal language of law and judicial authority – that aided in making these assertions appear as normal, coherent and objective even as they would be regarded as deeply offensive, suspect, and illogical in any other context. In this concluding part, I want to deepen this critique with two closing reflections: the first, on the judgment as a 'mirror of rape'; and the second, on the problem of the use of the concept of 'compelling and substantial circumstances' in rape law.

### (a) The mirror of rape<sup>103</sup>

Diana Russell, chronicling the experiences and stories of rape survivors, under the heading 'fathers, husbands and other rapists' recalls one young woman's testimony:

From the time I was fourteen, I guess till almost 17, whenever my mother was gone, I'd find my stepfather by my bed at night. He would make advances, and when I ended up in tears sometimes he'd say, 'Well, what difference does it make? You've had all this before. Why should it bother you?'<sup>104</sup>

These words, apart from their factual similarity to the case at hand, register the terrible horrors of sexual violation of women in the world today.<sup>105</sup> But they could also be telling us something about the overall rhetorical structure of the judgment. Was the judge not also essentially saying to the complainant: 'Well, what difference does it make? You took his money and gifts before and have had "sexual intercourse" with him before. *Why should it bother you?*' If so, how are we to interpret the homology between the words of Russell's rapist-stepfather and Shongwe JA's judgment? I want to suggest that when rape myths are deployed in legal decision-making, institutional responses to rape and in our social discourse, they (the legal decisions, institutional responses and social discourse(s)) mirror and replicate, echo and reinforce, the rape itself. They become themselves *rapist* in orientation. In this 'mirror of rape', women appear in the judgment as they do in the rapist imaginary

103 My understanding of the mirroring effect of this judgment comes from W Brown 'The Mirror of Pornography' in Brown (note 41 above) 77–95.

104 D Russel *The Politics of Rape: The Victim's Perspective* (2003) 23.

105 On the persistence of sexual violence in 'post'-apartheid South Africa, see among others, H Combrinck 'The Dark Side of the Rainbow: Violence Against Women ten Years after Democracy' in C Murray & M O'Sullivan (eds) *Advancing Women's Rights: The First Decade of Democracy* (2005) 171–99.

(as available for sexual violation, as asking for it through their actions, as being partly responsible for their own rape). In the judgment, as in the rapist imaginary, the harm of rape is perceived only in terms of physical injury, the absence of which is said to indicate pleasure and consent. In the judgment, as in the rapist imaginary, consent is conceived in ways that reinforce male sexual power rather than encourage mutuality and desire; no room is made for safeguarding women's subjectivity and selfhood. And so, in this mirroring, the judgment, and indeed the law itself, participates in the chain of rape that it was initially called upon to end.

Given the tight connection between the proliferation of rape myths and social tolerance for rape and sexual assault against women, such myths cannot simply be dismissed as misguided beliefs. When given judicial endorsement in the SCA,<sup>106</sup> they have material effects and impact negatively on survivors – further entrenching the belief that the law is no place for women's voices to be heard and for their harms to be redressed – let alone for teenage girls. More problematically, it also undoes years and years of feminist and women's rights research and activism, undercutting the gains that have been made to combat sexual violence, specifically in the family.

**(b) The problem with the current law on rape: 'compelling and substantial circumstances'**

In this note I aimed to highlight the three main problems with the judgment, namely its affirmation of an apologist stance with relation to rape, its comfortable reliance on the depoliticising discourse of law, and its deployment of a male gaze and perspective. This was done through an examination of the rape myths and gendered assumptions that proliferate the judgment, as well the mechanisms of victim-blaming and denialism that they produce. I then drew from diverse strands of feminist theory in order to challenge the claims made in the *Ndou* judgment – specifically regarding the nature of the phenomenon of 'rape' and the way in which the requirements of consent and force were deployed. I ultimately concluded that the judgment represents a mainstream ('malestream') idea of rape – one incompatible with existing research and feminist knowledge on the topic.

However, this case has also revealed a deeper problem with rape law in South Africa. Apart from the consent requirement, serious dangers also lie in the provision that courts can depart from the minimum prescribed sentence for rape if there are 'compelling and substantial circumstances',<sup>107</sup> because that inevitably raises the question of what circumstances could possibly be compelling and substantial enough to make rape *less* punishable. Because of the vagueness and lack of guidelines with regard to the meaning of 'compelling and substantial circumstances', the discretion exercised by judges can easily

106 For other SCA cases involving rape myths in the sentencing process, see *S v A* 1994 (1) SACR 602 (A); *S v Mahomotsa* 2002 (2) SACR 435 (SCA); *S v Abrahams* 2002 (1) SACR 116 (SCA); *S v Mvamvu* 2005 (1) SACR 54 (SCA).

107 Criminal Law Amendment Act s 51(3)(a).

occasion the redrawing of the dichotomy between aggravated/serious rape and trivial/simple rape – with rape myths functioning as the rubric for allocating which case of rape falls into one of the two categories.<sup>108</sup> The problematic way in which the concept of ‘compelling and substantial circumstances’ is interpreted confirms the radical feminist contention that law actually regulates rather than prohibits rape. Even though much has changed since the 1957 rape law, the framing of rape in law (especially the requirement of non-consent and the meaning of ‘compelling and substantial circumstances’) still needs to be continually problematised and evaluated in light of feminist theoretical developments.

*So when the child regained consciousness, she was lying on the kitchen floor under a heavy quilt, trying to connect the pain between her legs with the face of her mother looming over her.*<sup>109</sup>

108 Albertyn et al (note 10 above) 318. See also A van der Merwe ‘In Search of Sentencing Guidelines for Child Rape: An Analysis of Case Law and Minimum Sentence Legislation’ (2008) 71 *THRHR* 589; NJ Kubista “‘Substantial and Compelling Circumstances’: Sentencing of Rapists under the Mandatory Minimum Sentencing Scheme’ (2005) 77 *SACJ* 77; Y Hoffman-Wanderer ‘Sentencing and Management of Sexual Offenders’ in Artz & Smythe (note 46 above) 228–38.

109 T Morrison *The Bluest Eye* (1970) 129.