

Challenges and debates in the use of psychological expert evidence in rape trials: a case study  
(of the expert psychological evidence led in S. vs. Zuma (2006))

Megan Barber  
Department of Psychology  
University of Cape Town

Supervisor: Anastasia Maw and Colin Tredoux

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## ABSTRACT

Rape is a controversial issue in contemporary society, which extends into the trial procedure. Psychological expert testimony aims at reducing rape myths and aids the judge in making a decision; however it has been found that the use of such court testimony is problematic, as a diagnosis of PTSD is often used. A case study of the *S. v. Zuma* (2006) highlights many of these debates. An archival study was conducted using the official trial transcript and associated documents to establish how psychological expert testimony was used to counter the common myths and stereotypes that are prevalent in rape cases and how psychological expert testimony was led in the South African context. It was found that all nine rape myths, as laid out by Torrey (1990), were evident in this particular trial. An analysis of the case law indicated that although sexual assault legislation has changed, rape myths are inherent in the case law that was used in this particular trial, which guided the final judgment. The prosecution's psychologist, Dr Friedman, was unable to dispel commonly held rape myths as the defense expert, Dr Olivier, discredited the majority of her findings, in what became a conflict over expert testimony. Dr Friedman used her clinical skills to make a diagnosis of PTSD, which was discredited by Dr Olivier due to the lack of psychometric tests. This ultimately led to the one expert discrediting the other. Hence this study highlights the problematic issues that arise from leading expert psychological testimony and attempts to suggest solutions to counter these.

### Keywords:

Archival Research; Expert witness; Jacob Zuma; Psychological Expert Testimony; Rape Myths; Rape trials.

Studies show that rape is one of the most under-reported crimes (Jewkes & Abrahams, 2002; Koss, 1993) and suggest that in South Africa, only 55 000 alleged female rapes are reported annually out of an estimated 495 000, resulting in approximately 15 convictions (Boeschen, Sales, & Koss, 1998; Brekke & Borgida, 1988; Rape Statistics, 2008; Seedat, Van Niekerk, Jewkes, Suffla, & Ratele, 2009).

Prosecution psychological expert testimony is intended to assist courts by addressing common misconceptions about rape (rape myths), for example how rape survivors will react. Trowbridge (2003) suggests such testimony will increase the conviction rates in rape trials, as when rape survivors do not respond in the 'expected' way, their behaviour can and has been used by the defense, who may also introduce their own expert to cast doubt on their complaint (Boeschen et. al., 1998; Brekke & Borgida, 1988) and achieve an acquittal (Adler, 1987). Expert testimony may range between making a diagnosis, usually post traumatic stress disorder (PTSD) using the Diagnostic Statistical Manual (DSM-IV-TR), or to educating the court (Trowbridge, 2003). Furthermore such testimony can weaken the state's case as it can violate the rape shield law (Schwikkard, 2008) and introduce reasonable doubt (Boeschen, et. al., 1998; Brodsky, 1991; Faigman, 2008; Maw, Womersley, & O'Sullivan, 2008; Norris, 1992).

The matter of psychological expert testimony is complicated by the theoretical position of each expert (Maw, et. al. 2008), as opposing opinions may create conflicting views, serving to discredit one another and confuse the court. This study highlights these debates and investigates the usefulness of psychological experts within the South African courts, through the lens of the *S. v. Zuma*, (2006).

## **BACKGROUND**

Rape was unacknowledged as a major problem within society up until 30 years ago and much controversy still accompanies it into the courtroom. Second wave feminism initially created a public awareness of gender based violence by examining the reactions of survivors.

Consequently this study relies on an underlying feminist theoretical framework by utilizing existence of rape myths (Kiguwa, 2004; Stefan, 1994).

A popular defense for rape trials is “to discredit the victim as this is seen as the most effective way of ensuring an acquittal” (Adler, 1987, p.15), which is often done by relying on rape myths.

## **Rape Myths**

Haywood and Swank (2008, p. 373) define rape myths as a “set of beliefs and narratives that explain why rape occurred in a fashion that absolves the perpetrator of guilt and rests the source of the problem on the victim.” Attributing blame to the victim enables people to maintain a safe view of the world, by reducing the degree to which rape is viewed as an uncontrollable crime, (Burt,1980; Franjuk, Seefeldt, Cerpress & Vandello, 2008; Lonsway, & Fitzgerald, 1994; Schechary & Iclisis, 2006).

Thus, in terms of these rape myths, the behaviours’ of rape survivors may appear strange and counter-intuitive. Torrey (1990) proposed nine commonly held beliefs or rape myths: ‘no’ means ‘yes’; provocative clothing encourages rape; actions before the rape e.g. going home with a man, provide legitimate reasons for rape; promiscuous history predisposes vulnerability to rape; rape is always reported immediately; as rape is physically violent there should be signs of resistance; women are vengeful and claim rape to harm men and to explain pregnancy or feelings of guilt surrounding their actions and lastly, rape is committed by strangers. (Boeschen, et. al., 1998; Brekke & Borgida, 1988; Brownmiller, 1975; Burt, 1980; Hockett, Saucier, Hoffman, Smith & Craig, 2009; Lonsway, & Fitzgerald, 1994; Newcombe, Van den Eynde, Hafner, & Jolly, 2008 Torrey, 1990). These beliefs result in a narrow understanding of rape and ignore other circumstances, i.e. when the perpetrator is known to the victim or when non-violent rape occurs (Peterson & Muehlenhard, 2004).

## **Psychological Expert Testimony in Rape Trials**

Expert testimony during a rape trial can take four forms; educating the court to the counter intuitive behaviour demonstrated by rape survivors, hence dispelling rape myths; using the symptoms exemplified by either Rape Trauma Syndrome (RTS) or Post Traumatic Stress Disorder (PTSD) to educate the court about common reactions to rape; demonstrating the

psychological impact of the event and comparing the complainant's reaction in relation to these two syndromes and lastly providing a diagnosis, either RTS or PTSD, after an assessment of the complainant (Boeschen, et. al., 1998; Brekke & Borgida, 1988; Foster, 1990; Hansson, 1993b; Maw, et. al., 2008; Temkin, & Krahe, 2008; Trowbridge, 2003; Sommer, 2009).

### ***Rape trauma syndrome (RTS) in rape trials.***

Rape trauma syndrome (RTS), a term coined by Burgess and Holmstrom (1974), was characterized by feminists to explain reactions to rape and was subsequently used by psychological experts in trial (Kiguwa, 2004; Stefan, 1994). It was designed to explain the frequent two phase reaction of women who experienced rape: the acute and the reorganization phase (Burgess & Holmstrom, 1974; Stefan, 1994).

Testimony involving this syndrome was used in court to counter the stigma attached to rape and relies on three principles; its scientific status; its measure of helpfulness in expertly educating the court and its non prejudicial effect - the extent to which the testimony is non-judgmental. How these principles are represented and upheld impacts on the reliability of such testimony (Frazier & Borgida, 1985; Godden & Walton, 2006; Trowbridge, 2003), as RTS explains a general reaction to rape, however there is no universal agreement on particular symptoms that are experienced by all survivors (Trowbridge, 2003).

This lack of universality resulted in its exclusion from the DSM, which raised validity challenges in court, as RTS was seen to be unscientific, inconsistent and only offering minimal additional understanding. Lastly the use of the term 'rape' in RTS automatically implied that rape had to have occurred, creating a bias towards rape survivors. Hence its use is judgmental and unsatisfactory, as the defense can find flaws in its arguments (Boeschen, et. al., 1998; Hansson, 1993b; Stefan, 1994).

### ***The use of post traumatic stress disorder (PTSD) in rape trials.***

PTSD appeared in the DSM III in 1980 (Psychiatric Disorders, 2009) as a new psychiatric diagnosis arising from the social context of returning Vietnam War Veterans. The key diagnostic criterion is exposure to a) traumatic event(s), involving a further five diagnostic criteria summarized here; b) re-experiencing; c) avoidance symptoms; d) increased arousal; e) all the aforementioned should occur at a clinically significant level and f) have been evident for at least

one month (American Psychiatric Association, 2002; Boeschen, et. al., 1998; Fact Sheet, n.d.; Murdoch, et. al., 2003; Trowbridge, 2003).

Clinical professionals consider RTS to fall under the umbrella diagnosis of PTSD and as PTSD is included in the DSM-IV-TR, it is accepted as a valid 'scientific' diagnosis (Maw et. al., 2008). PTSD describes the symptoms that can be experienced by the rape survivor and it has been shown that sexual violence is one of the highest predictors of PTSD (Murdoch et. al., 2003). This diagnosis allows a description that goes beyond the lay-person's knowledge of rape reactions and thus is helpful when used to educate the court. It is also seen as a neutral term as the name gives no indication that a rape had to have occurred (Boeschen et. al., 1998; Hansson, 1993a). Consequently the majority of testifying psychologists use a diagnosis of PTSD instead of RTS, as it is less prone to criticism, meeting more of the criteria discussed above (Frazier & Borgida, 1985).

### **Difficulties Regarding Psychological Expert Testimony**

Although the expert may be able to explain and dispel rape myths, there is no psychological test which can prove rape, as opposed to consensual intercourse. Thus expert testimony is just one facet of evidence in the trial procedure (Shuman & Greenberg, 2003) and although psychological expert testimony attempts to assist courts, there are several legal difficulties relating to both its use and the use of a diagnosis of PTSD (Fishman, 2004; Hansson, 1993a; Trowbridge, 2003).

#### ***The question of validity.***

A diagnosis of PTSD used during expert testimony must withstand scrutiny from a 'beyond reasonable doubt' perspective and although PTSD is a listed clinical disorder in the DSM-IV-TR, different traumatic events could precipitate it; rape not being the sole traumatic event in the South African context (Seedat et. al., 2009). Further, there are no psychological tests to absolutely prove the existence of PTSD as they all are reliant on self-report measures to varying degrees (Boeschen, et. al., 1998; Brodsky, 1991; Faigman, 2008; Norris, 1992). Thus skeptics claim that the diagnosis is prone to complainants malingering (Boeschen, et. al., 1998; Maw, et. al., 2008).

The lack of absolutes in psychological expert testimony raise limitations when ascribing a specific etiology to a client, especially in the legal setting (Brodsky, 1991; Faigman, 2008; Matarazzo, 1990; Maw, et. al., 2008) this must be considered carefully before such testimony is led by the prosecution. In sum PTSD is not a litmus test for rape and this, along with other inherent weaknesses in the diagnosis, which are beyond the scope of this paper (see Eagle, 2002; Bracken, Giller, & Summerfield, 1995; Herman, 1997) become particularly evident during a trial.

### ***Violation of the rape shield law.***

Rape shield law protects the complainant from testifying and being cross-examined on her past sexual history, so eliminating possible prejudice against her. However the judge can rule such questioning admissible. With the introduction of a PTSD diagnosis in a rape trial, the defense can argue for such an application as this diagnosis simply requires a person to have experienced a traumatic event, which may be one other than the alleged rape. Thus use of expert psychological evidence can be detrimental to the prosecution case, by introducing scope for 'reasonable doubt', as was seen in *S. v. Zuma*, (2006) (Bartol, & Bartol, 1994; Schiwikkard, 2008; Wrightsman, Nietsel, Fortune, 1994).

### **Psychological Expert Testimony in South Africa**

In the United States and Britain for example, a forensic psychologist is used when expert evidence is required in a court proceeding and is trained to make a particular argument that withstands the intense scrutiny of cross examination (Brodsky, 1991; Dowdle, 2003). In Section 210, 211 and 212 of the South African Criminal Procedure Act 51 1977, expert testimony is admissible providing it meets the criteria of relevance and introduces information beyond common knowledge (Burchell, & Milton, 2005; Meintjes – van der Walt, 2001; South African Law, 1977; Temkin, 2002; van der Merwe, 2009); "it is the function of the judge to decide whether the witness has sufficient qualifications to be able to give assistance" ( Zeffert, Paize, & Skeen, 2003, p. 302).

However, suitable psychological expert presence is difficult as the South African Professional Board of Psychology does not include forensic psychology on its listing, as it is not

an acknowledged category in the profession. This leaves many psychologists ill prepared for such legal encounters (South African Psychology Board, 2003; Artz & Smythe, 2008; Campbell, et. al., 1999; Hansson, 1993a; Naylor, 2008; Pithey, 2008; Trowbridge, 2003; Zeffert, et. al., 2003).

Furthermore whilst relevance and introduction of information beyond common understanding are the admission and evaluative criteria applied to expert evidence in South Africa, the Daubert Test has become the standard for reliability and relevance in the United States. This is based on four criteria; testability – has the theory been falsified; error rate – with what degree of certainty can this theory be applied; peer review – has it been scrutinized by fellow experts and general acceptance – the degree to which this theory has been accepted within the field (Clifford, 2008; Dahir, et. al., 2005; Godden, & Walton, 2006; Slobogin, 2003). Although this test is more difficult to implement by attorneys, it is a far better method for evaluation of expert testimony (Goodman-Delahunty, 1997)

## **RATIONALE FOR RESEARCH**

Due to the relatively low rape conviction rate in South Africa it is necessary to examine the use of expert testimony to establish its role and effectiveness in local courts so that its use will be better understood.

The *S. v. Zuma*, (2006) was atypical as it received extensive international and local media coverage and involved many political and social issues. However it typified the manner in which psychological expert testimony is presented and also served to highlight issues related to rape mythology and the complexity of leading expert evidence in a rape trial. Because of this it provided suitable material for this case study (Jackson, 2006).

In the light of the issues discussed above, this study aimed to investigate if rape myths were present in the *S. v. Zuma*, (2006); the ways in which rape myths were presented to the court; the presence of rape myths in the applicable case law; the effectiveness of psychological expert testimony in dispelling rape myths and the effect of these testimonies on the judgment.



## METHOD

### Design, Participants, Materials, and Procedure

This is a qualitative, archival case study, using the *S. v. Zuma* (2006) court transcripts, the forensic report submitted by the defense psychologist, Dr. Olivier and the *amici curiae* (Friend of the court) (see attached CD) that was submitted by three organizations *Tshwaranang Legal Advocacy Centre*, *Centre for the Study of Violence*, and *Reconciliation Centre for Applied Legal Studies* (Ely, Anzul, Friedman, Gorner, & Steinmetz, 1991; Willig, 2001). This approach is best suited to meet the aims of the project as stated above, as it allows a rich, in-depth analysis.

An instrumental, explanatory single case study design was implemented because this particular case is representative of some of the key difficulties and challenges faced by prosecution led expert psychological evidence in rape trials. Analysis of the expert evidence led in this trial offers an opportunity to consider some of the key debates that are raised in the literature with regards to psychological expert evidence. This particular case study provides an example where many of these issues were raised in the literature (Yin, 1984).

Case study methodology frequently relies on the use of multiple sources of data in order to allow for in-depth analysis (Creswell, 1998; Yin, 1984). In this case, in addition to careful analysis of the documents, an interview was conducted with expert and feminist activist Ms. Lisa Vetten, currently working at the *Tshwaranang Legal Advocacy Centre: to end violence against women*. Ms Vetten was part of the team which applied to the court to be joined as *amicus curiae* in the case of *S. vs. Zuma* (2006) in order to provide the court with additional evidence that was not presented by the litigating parties. Despite the court refusing this application, it appears to provide additional evidence related to the issue of psycho-social information and as such provides a different perspective on the use of expert testimony.

The interview with Ms Vetten was able to give a broader understanding of the context of rape and an alternative method for leading psychological expert testimony. A semi-structured interview schedule was used to gather answers to specific questions, as this was the only suitable technique that would allow for the collection of such information (Willig, 2001). These questions were intended to determine what evidence would have been led had the application been accepted, thus determining alternative ways in which expert testimony in rape cases could

be used, (see appendix A). Due to her expertise and knowledge within the field Ms Lisa Vetten was already placed in the more powerful knowledge position, thus addressing this matter is unnecessary (Parker, 2005).

### **Data Collections and Analysis**

The transcripts were obtained through the *Human Science Research Council* (HSRC) library. Dr Oliviers's forensic report was obtained via the Friends of Zuma website (<http://www.friendsofjz.co.za/documents/Forensic%20report.pdf>). Ms. Lisa Vetten provided a copy of the *amici curiae* documents submitted. The evidence submitted by Dr Friedman, the prosecuting psychologist was more difficult to obtain, as various people were unable to give them to me for personal reasons. In addition, after four months of effort, including 6 weeks of consistent biweekly phone calls to the public prosecutions office in Johannesburg, I was still unable to obtain them, as parties claimed they could not find them.

The interview with Ms Vetten was conducted after written consent was received from her. She was given written information regarding the research project and the focus of the interview (see appendix B), during which she was informed of the aims and theoretical positions inherent in the project and the issues raised when using psychological expert testimony in rape trials, with the focus being the testimony led in the *S. v. Zuma* (2006).

As Ms. Lisa Vetten was based in Johannesburg, a telephonic interview was conducted, which lasted for approximately 45 minutes. After the interview a copy of the transcript was sent to her to verify that what was recorded reflected what she said (Oakley, 1998; Willig, 2001).

After extensive investigation into analysis methods, none was found that suited this particular project. Hence it was decided after consultation, that a close reading and investigation into the themes that presented themselves through the documents were required. This was influenced by thematic analysis as laid out by Braun and Clarke (2006, p. 79), which "is a method for identifying, analyzing and reporting patterns (themes) within data."

The analysis constituted four steps; initial reading of all the transcripts and related documents; identification of themes such as conflicting expert opinions and the inherent rape myths in the documents; evaluating the literature to investigate these themes; re-reading the

documents in the context of this literature to categorise each theme found in the documents to those found in the literature.

## **ETHICAL CONSIDERATIONS**

Few ethical concerns need to be addressed in this study, but one is the ethical and legal consideration of using secondary data, which is “the re-use of data for purpose other than which it was collected [for],” (Heaton, 2004, p. 73). Using a court transcript is legally permissible as it is a matter of public record, and per the South African Constitution Chapter 2 Human Rights, no. 32, “...everyone has the right of access to any information held by the state” (Devenish, 2005) Furthermore, at no point does this study cause harm. Due to the fact that this was such a high profile case, there have been social and academic debates surrounding the trial proceedings and the intent is simply to contribute to this. The study is not questioning the verdict, but rather investigating the use of psychological expert testimony within this context.

Regarding the ethics of obtaining the *amici curiae* document, as it was submitted to the courts and was part of the public record, Ms. Lisa Vetten was happy to pass it on. Her signed consent was obtained prior to the interview and during the interview, permission was given by Ms Vetten to use her name.

In summary, although there are a few minor ethical considerations, these have all been addressed appropriately and sufficiently (see attached ethical approval).

## **RESULTS AND DISCUSSION.**

### **Overview of the *S. v. Zuma Rape Trial (2006)*.**

On November 4<sup>th</sup> 2005 Jacob Gedleyihlekisa Zuma, then vice president of South Africa, was accused of raping a 31 year old woman. The complainant was the daughter of a friend of Zuma’s and during her testimony she indicated that she regarded the accused as a father like figure, following the death of her own father. On 2<sup>nd</sup> November 2005 she was on her way to Swaziland and, after discussion with the accused, went to visit him instead and subsequently spent the night at his home. It was here that the alleged rape took place. However the two sides

of the story differed as to whether rape or consensual intercourse took place (*S. v. Zuma*, 2006, p. 1 - 304).

During the complainant's testimony, the prosecution applied for leave to lead questions regarding prior sexual history, thus violating the rape shield law (*S. v. Zuma*, 2006, p. 45 - 55). This was shortly followed by the same application by the defense (*S. v. Zuma*, 2006, p. 56 - 85). Both these applications were accepted by the judge, Mr Willem van der Merwe (*S. v. Zuma*, 2006, p. 55; 86 – 90; Wrightman, Nietzel, & Forture, 1994) and, in addition to laying the foundation for the defense's case, his decision caused much public debate around gender and rape victims rights (Gobodo – Madikizela, 2006 March 19; Gobodo-Madikizela, 2006 May 24; Greenbaun, 2008; Marumo, 2006; Morna, n.d.; Motsei, 2007; Robins, 2008). In response, Judge van der Merwe quoted one media report, saying "This trial is more about sexual politics and gender relations than it is about rape," (*S. v. Zuma* 2006, p. 3).

Another prominent issue that arose concerned HIV/AIDS and unprotected sex, as the complainant and Zuma were aware that she was HIV positive. This caused an outcry as Zuma was the AIDS spokesperson for the African National Congress (ANC) (Marumo, 2006). Due to space limitations, such issues cannot be discussed here, but contextualize the public nature of the trial, which in many respects became a trial for the people as opposed to a 'simple' matter of rape (Skeen, 2007)

### **Investigation of Rape Myths in the *S. v. Jacob Zuma*, 2006**

Research has repeatedly disproved the veracity of rape myths, however these stereotypical beliefs persist. The aim of acknowledging these provides women with the facility whereby their word takes precedence over their actions, thus dispelling the belief that rape is a result of non-verbal cues from women to the alleged rapist. In other words, 'no' truly does mean 'no,' despite dress or other behaviour that might erroneously indicate otherwise (Brownmiller, 1975; Burt, 1980).

The perpetuation of Torrey's (1990) nine rape myths are evident to some degree, within both the prosecution and defense arguments in the *S. v. Zuma*, (2006). These are treated independently below, although it is their combined web that frequently obstructs the prosecution's case in trial proceedings (Adler, 1987).

***'No' means 'yes'***

This rape myth indicates that women often say 'no' to sexual intercourse, when in fact others think that they actually means 'yes', giving the rapist spurious grounds to believe that her non-verbal behaviour overrides what she says. In the *S. v. Zuma*, (2006) the complainant claimed to say no three times prior to the actual intercourse; once when the accused entered her room, again before he started massaging her and the third time while he was massaging her. To quote from *S. v. Zuma*, (2006)

My uncle then said: I thought I would come to tuck you in, I thought I would come to massage you.

Wait. What was your reaction to that? --- And then I said ... No Malume [Zulu word for uncle] I am already asleep. I will see you tomorrow...

He said: I can even massage you whilst you are sleeping.

And what was your reaction to that? --- And then I said: No Malume I am already asleep...

... he instantly started to massage my shoulders and then at the same time, like instantly moments later he, when he was massaging me, I just said: No Malume. And after I said this he did not stop massaging me. (p. 30-31)

Adherence to the belief that 'no' means 'yes' enables the perpetrator to ignore the woman's verbal refusal to a sexual encounter, instead incorrectly believing that non verbal cues indicate her unspoken consent. This is illustrated during the cross examination of the complainant by Mr. Kemp (*S. v. Zuma*, 2006)

... why didn't you just sit up and say to him: Malume I do not want you touching me, please leave my room? --- I do not know why I did not. I do not know. I had already said twice that I was sleeping and he should not massage me... (p. 160)

This issue of consent is the fundamental predicament in rape trials, as the defense and prosecution argue for opposing positions, which places reliance on one person's word against the other. However, as rape myths have been constructed from feminist ideology they automatically favour the complainant, but it is beyond the scope of this paper to investigate this matter further.

### ***Rape is physically violent***

The belief persists that rape takes place only if there are injuries on the survivor, indicating that physical violence and resistance occurred, showing a lack of consent. This negates all the non-violent instances of rape and instead places the expectation on women to fight, scream and try to escape during a rape. The lack of such resistance proved to be in the defendant's favour during the *S. v. Zuma*, (2006) as the extracts below show.

The first instance was during the prosecution's questioning of the complainant, in which she explained why she did not try and attract attention even though there was a policeman 10 metres away "I was just shocked. I was just in a total daze and then I just could not move and I could not do anything. I was just shocked" (*S. v. Zuma*, 2006, p. 34).

During cross-examination of the complainant, Mr. Kemp indicated that there was nothing stopping her from running away as she was facing the door, through which she could have escaped (*S. v. Zuma*, 2006, p. 163). He later compared the physical strength of the accused and the complainant (*S. v. Zuma*, 2006).

Let me put it to you this way, according to the medical report you weighed 85 kilograms at the time. You were 1.64 or 65 metres and you were 31 years of age. --- Hmm.

And the accused weighted at the time approximately 90 kilograms, 63 years of age. Are you saying that he just managed to hold both your hands with one hand? --- Yes he did.

Did you try and move your hands? --- No I did not at that point, no.

Not at all? --- No I did not. No I did not.

Why not? --- I just did not move. I just froze at some point when I saw he was naked.

From that point I did not move at all. (p. 167)

It is clear from this that the defense expected the complainant to physically react to this event, the lack of which supported the misconception of her consent.

### ***Provocative clothing encourages rape***

The belief exists that some men cannot control their sex drive and that if a woman is wearing revealing clothing she is at risk of rape (Eyssel, Bohner, & Frank, 2006). During several testimonies the matter of clothing was brought up. Duduzela (Zuma's daughter) considered it inappropriate that the complainant walked around the house without underwear, only wearing a kanga (a sarong type of cloth that is wrapped around the body) (*S. v. Zuma*, 2006, p. 1061).

This was discussed further during the accused's testimony in which he referred to her change in dress style on this particular visit (*S. v. Zuma*, 2006).

... she used to come to my place dressed in pants, but on this occasion she came dressed in a skirt. And the way she was sitting in that lounge was not the usual way that I know her to be sitting. That was not usual for her, that is why I say the way she acted was not similar to the way that she used to be. And at the stage when she came to me in the study dressed in a kanga that also indicates to me, because she has never done it in the past. (p. 982)

On further questioning regarding the skirt Zuma said it was "an ordinary skirt... up to the knee level" (*S. v. Zuma*, 2006, p. 983). During the complainant's testimony an exact description and measurements of the kanga were presented, as well as the way it was wrapped around her body (*S. v. Zuma*, 2006, p.284 – 286). This extensive focus on the clothing she wore indicates the

importance that the defense attached to this rape myth; the way the complainant presented herself and the impact of this on subsequent events.

### ***Actions before the rape and prior sexual history***

The belief exists that the conduct of a survivor prior to a rape played a part in causing it. There are several distinct categories to consider regarding the actions of the complainant in this case. Firstly her behaviour at the home of the accused – i.e. the way the accused claimed she was sitting prior to the incident and the fact that she slept over at the house. Although the matter of who initiated the sleep over invitation was debated between the two sides, the decision to stay could only have been hers. Arguments by the defense, in keeping with rape mythology, implied that the complainant stayed over with the intention of having sexual intercourse (*S. v. Zuma*, 2006, p. 20; 108-110).

Secondly the communication between the complainant and the accused; prior to the alleged rape, the complainant would often send smses to the accused. According to the accused, this had changed and many sexual undertones were used in the more recent smses (*S. v. Zuma*, 2006).

And why do you say the trend changed? ---Because the way of communication in fact changed.

How did it change? --- Well she would end the conversation maybe those words love, hugs, kisses and she did not end her conversations in the past like that. (p. 961)

Thirdly, the complainant's previous sexual history; although viewing herself as lesbian, she admitted having prior sexual encounters with men. She also claimed to have been raped several times prior to this incident (*S. v. Zuma*, 2006, p.222 – 284). This is particularly pertinent in this case where the complainant's prior rape accusations were called into court to testify (*S. v. Zuma*, 2006, p.222 – 284) implying that she had a history of falsely accusing rape. This formed the basis of the defense's case. Although the propriety of premarital sex is no longer taboo, if a complainant is seen as promiscuous it is commonly believed that this can justify a sexual encounter as being normal as opposed to rape, thus supporting the defense's case.



***Pleading rape is an act of vengefulness***

This myth relates to women possessing an inherent tendency to be spiteful and accuse men of rape, to punish them. During the *S. v. Zuma*, (2006) the complainant was cross examined about accusing Mr. Jacob Zuma of rape, as part of a political conspiracy (*S. v. Zuma*, 2006)

... did you realize that your action of charging the accused with rape would be very popular with the anti-Zuma camp at the political level? ---What I realized was that my rape would be turned into a political issue and joined in with the conspiracy against Malume Zuma at some point. (p. 289)

This idea of alleging rape for malicious intent was raised by the defense expert psychologist, Dr. Olivier, suggesting reasons why a woman would lay a false charge. The reasons could range from organic malfunctions leading to forms of delusional psychopathology to the allegation of rape as punishment of the accused (*S. v. Zuma*, 2006, p. 1276 – 1278; Dr Olivier's Forensic Report, 2006, p. 20)

***Women crying rape to explain pregnancy, or guilt surrounding their actions***

This myth suggests why women, after agreeing to consensual sex, then allege rape – purportedly to protect their reputation. For example in the *S. v. Zuma* (2006) it was put to the complainant that she viewed the accused as a father figure and would have felt guilty for having had consensual intercourse with someone of his stature. Hence she called it rape, alleviating these emotions (*S. v. Zuma*, 2006, p. 93-94). The defense suggested that another reason for alleging rape was to protect her status as an HIV activist, as evidenced below (*S. v. Zuma*, 2006)

One of the reasons [to see the doctor] that there was a possibility of pregnancy not so? ---

Yes that is one of the reasons, yes.

And that would not have been a very good idea to necessarily have a child at that stage for you. --- No I did not want to be pregnant.

And if people found out that you as an HIV activist have unprotected sex what would their reactions be? --- Firstly of all I have to say that there is a difference between just having unprotected sex and being raped, number one. Number two, the stance that I take as an activist and as educator is that people living with HIV have still got a right to have sex and if their partners knows their status ...

Now was it an easy explanation for whatever problems and fall out there may be as a result of you having sex with the accused to say that you had been raped? – No it was not Well if you had consensual unprotected sex with him it would have brought about certain consequences, not so? --- I did not have consensual unprotected sex with him. (p. 199)

The above excerpt highlights two possible motives for alleging rape; to assuage her guilt after having sex with a father like figure and in case she became pregnant. The latter would result in public knowledge that, as an HIV positive woman, who is an advocate for safe sex, she had had unprotected sex, which would taint her image and credibility. According to the defense, claiming rape would protect her from such allegations.

### ***The survivor not reporting rape or seeking help immediately***

It is commonly believed that survivors of rape will seek help and report it immediately, however this is not the case as only a small minority of rapes are reported (estimated at one in nine) (Seedat, et. al., 2009). In this instance although the alleged rape was reported, it was only done two days after the alleged incident (*S. v. Zuma*, 2006, p. 38)

Similarly, it is expected that rape survivors will seek help by telling others about it immediately. During the trial the complainant testified that she had sent several smses in the early hours of the following morning that suggested that the accused had been looking at her with sexual intent, however she did not mention that she had been raped. "... the sms that you sent, and this was after the alleged rape says nothing about rape does it? --- No it does not" (*S. v. Zuma*, 2006, p. 129). Despite contact with people she did not name the experience as rape at that

stage, which supported the defense case, indicating the possibility that it might not have been rape.

***Rape is only committed by strangers***

The final rape myth is the belief that rape can only be committed by a stranger, whereas in reality rape takes place within family structures. In the *S. v. Zuma*, (2006, p. 9-14). The complainant testified to the long standing connections between her family and that of the accused along with the fact that she saw the accused as a father figure and called him, ‘Malume’, which indicated the wrongfulness of his actions (*S. v. Zuma*, 2006, p. 9)

What was the nature of your relationship with him during the rest of 2005 after this August visit? – Our relationship remained the same. I saw him as a father, treated him as a father and he treated me like his daughter. (*S. v. Zuma*, 2006, p. 14)

However the defense testified to the contrary – that she was not that close to the family and, as such, implied that sex was agreed to and was acceptable as the complainant wasn’t ‘part of the family’.

**Psychological Expert Testimony Led in the *S. v. Jacob Zuma*, 2006, Rape Trial**

It is clear from the transcript that the defense built their case, relying on expected stereotypical behaviour in which the complainant did not engage. Although this is a common method of defense in rape trials, it perpetuates rape mythology and psychological expert testimony attempts to normalize these behaviours, and dispel such thinking.

***Overview of the evidence led by Dr Friedman – prosecution psychologist.***

Dr Friedman was asked to give an overview of her curriculum vitae and was then required to review her report. To assess the complainant she had used two clinical interviews and the two official statements made by the complainant. There were two aspects to Dr Friedman’s

testimony; normalizing the complainant's behaviour after the alleged rape and using the diagnosis of PTSD to show the impact of the event.

Dr Friedman explained the complainant's behaviours as being a 'normal reaction to rape'. Thus she attempted to dispel five of the total nine rape myths present in the transcript – 'no' means 'yes'; rape is physically violent; actions before the rape; rape is always reported immediately; rape is only committed by strangers. Dr Friedman's attempted to dispel the 'no' means 'yes' rape myth by indicating that the complainant said 'no' twice, according to her report (which differs to court testimony by the complainant), which should have been adequate refusal, (*S. v. Zuma*, 2006, p. 336). Secondly, she explained that the complainant freezing during the alleged rape was a way of dissociating from the event; a response that goes "beyond the fight or flight" (*S. v. Zuma*, 2006: 337).

Thirdly, she indicated that the accused tucking the complainant into bed was consistent with a 'father daughter relationship', thus it was understandable that the complainant did not see this conversation as being sexually charged. Fourthly, the complainant's delay in reporting the alleged rape could be explained by her need to process and label the event before taking steps to seek help and report it. Dr Friedman referred to the fact that the majority of rape goes unreported so that this cannot be held against the complainant (*S. v. Zuma*, 2006, p. 339).

Freezing and submitting during the course of the rape and confusion, inability to take decisions, great distress and avoidance of initial help seeking, including reporting to the police after the rape, are both entirely consistent with what may be expected from someone who is exposed to this kind of traumatic experience. (*S. v. Zuma*, 2006, p. 340-341)

Dr Friedman explained this counter-intuitive behaviour and indicated that such responses were what can be considered normal reaction after rape. Although she addresses five of the nine rape myths, she spends most time dealing with the fact that this rape was not violent.

The second aspect of Dr Friedman's testimony was aimed at explaining and proving that the complainant had PTSD as a result of the rape. She did this by reviewing the various symptoms of PTSD using the DSM-IV-TR. Dr Friedman felt she was unable to measure the

impairment of daily functioning (the 6<sup>th</sup> diagnostic criterion) due to the fact that the complainant had been in witness protection, thus not maintaining her daily routine which made it hard to measure the impact of the event on her daily life. However under the *International Statistical Classification of Disease (ICD-10)*, the criteria of significant impairment is not required to make a diagnosis, thus Dr Friedman could diagnose the complainant with PTSD, using the diagnostic criteria from the ICD-10, as all the other five criteria were met.

During cross examination Dr Friedman was questioned on her methods used to assess the complainant, i.e. the lack of psychometric tests to measure; organic problems, the complainant's tendency to dissociate, her inability to concentrate and the possibility of malingering. She was questioned by Mr. Kemp regarding the causative link between PTSD and this alleged rape, as the complainant has been raped several times before this incident. He also questioned Dr Friedman about her normalizing the complainant's behaviour as she had no previous forensic experience and criticized her for not using psychometric tests to validate her findings, simply relying on self-report clinical interviews in comparison to the complainant's official statements (*S. v. Zuma*, 2006, p.356 – 425).

***Overview of the evidence led by Dr Olivier – defense psychologist.***

After summarizing her credentials in which she indicated that she was a forensic psychologist, Dr Olivier indicated how to conduct a forensic psychological assessment using a battery of psychometric tests (the Wechsler Adult Intelligence scale, Sexual Adaptation Function, SKID, Millen Clinical Multi Actual Inventory, etc.) and a full mental health examination - which includes family history, medical history, romantic involvements, work record, interests and pleasures. These enable the identification and evaluation of pre-existing organic problems or long standing pathology (*S. v. Zuma*, 2006, p. 1255 – 1260).

Prior to the trial, Dr Olivier was denied access to assess the complainant; hence all her opinions were based on Dr Friedman's previous testimony and other court testimony. Dr Olivier made a clear distinction between clinical work and forensic work in the field of psychology (*S. v. Zuma*, 2006),

in clinical work when a patient comes to you, I am not going to ask my patient, if the patient tells me she was raped I am not going to ask is it valid or is it not, because it is

the perception of the patient, it might not be valid but in clinical work we work with the perceptions and how that impacts on the patient. In forensic setting this is something quite different because in a forensic setting it has to do with what is the reality base of the perception of that person. So forensic evaluation would be quite different from when a patient comes to you in a clinical practice and wants therapy. (p. 1262)

Towards the end of Dr Olivier's testimony she indicated why a woman might lay a false charge of rape against a man; reasons ranged from personality disorders to a severe pathology that impacts on perceptions, inclusive of revenge (*S. v. Zuma*, 2006, p.1376).

In sum, due to the fact that Dr Olivier was unable to assess the patient and conduct multiple psychometric tests, the aim of her testimony was to show methodological flaws in Dr Friedman's testimony, regarding both her attempt to normalize the behaviour as well as diagnosing her with PTSD. These different conclusions drawn by the experts resulted in one discrediting the testimony of the other.

### **Rape Myths in the Judgment**

In reaching a not guilty verdict, Judge van der Merwe, spent the majority of his time summarizing the evidence that was presented by the various witnesses (*S. v. Zuma*, 2006, p. 5 – 150). From the judgment it is evident that the psychological expert testimony was unable to dispel the effect of rape myths used by the defense to support their case. Dr Friedman attempted to dispel five rape myths but she was unsuccessful. Hence all nine rape myths affected the judgment to varying degrees.

#### ***'No' means 'yes'***

It is evident that the judge perceived the complainant's failure to say 'no' at an earlier stage during that night to be a hindrance towards her case (*S. v. Zuma*, 2006), despite her later objections.

[the accused] would come and see her in her room sometime during the evening. The complainant did not object to this. She did not object when he came to her room. She also did not object when he said that he would come later again. The complainant who is an experienced person in life did not find these arrangements strange at the time or recognized any of the sexually charged remarks. (p. 159).

Despite Dr Friedman's opinion to the contrary, the judge viewed her lack of a 'no' at the time when her clothes were removed and her vagina was touched (*S. v. Zuma*, 2006, p. 160) as weakening her case.

### ***Rape is physically violent***

This rape myth is prevalent in the judgment as the judge spends a fair amount of time discussing it in relation to other matters (*S. v. Zuma*, 2006, p. 151, 156, 160).

As far as the rape itself is concerned there are a few very strange and odd features. The complainant is not in any way threatened or physically injured. Her clothes are not damaged in any manner. At no stage did the accused resort to physical violence or any threat. The accused knew that he was in danger of contracting HIV if he had to forcefully have sexual intercourse with the complainant.... The complainant was at least a reasonably fair match physically for the accused, being 31 years old herself and weighing 85kg compared with the accused who was at the time 63 years old and weighing 90kg. (*S. v. Zuma*, 2006, p. 160).

This quote talks directly to the myth of physical violence being necessary to prove rape, despite Dr Friedman's testimony regarding the complainant's dissociative episode. The judge further questioned the fact that a policeman was 10 metres away, yet the complainant did not call for help, (*S. v. Zuma*, 2006, p.60).

### ***Provocative Clothing***

The judge does refer to the complainant wearing a kanga without underwear, as being inappropriate (*S. v. Zuma*, 2006, p. 159), which upholds the rape myth.

### ***Actions before the rape***

The judge saw the conversations leading up to the alleged rape as being “sexually charged” (*S. v. Zuma*, 2006, p.159). This upholds the rape myth. He makes no comments about other actions and refers to the dispute about the invitation to sleep over as being unresolved.

### ***Prior sexual history***

This rape myth informed the majority of the defense’s case. The judge observed that the complainant could easily use the word rape, as evidenced by the defense presenting a number of men who had been accused of raping her at different times (*S. v. Zuma*, 2006, p. 163).

The judge also stated that “...the complainant was of loose morals. The evidence was led to show that the complainant was inclined to falsely accuse men of having raped or attempted to rape her” (*S. v. Zuma*, 2006, p.165). Thus, in keeping with the rape myth, the complainant’s previous sexual history counted against her.

### ***Pleading rape as an act of vengeance.***

It is clear that the judge understood the behaviour of the complainant to be pathological as she was “still receiving psychological treatment. It is therefore very strange that the complainant refused to undergo a psychological evaluation from an expert psychologist engaged by the defense where it could have revealed sexual pathology giving rise to false rape allegations,” (*S. v. Zuma*, 2006: 161). Based on this the judge accepted Dr. Olivier’s testimony regarding potential reasons for laying false allegations of rape. This appears to uphold the rape myth that women falsely claim rape.

### ***Women cry rape to explain pregnancy or feelings of guilt***

The judge suggested that following consensual intercourse the complainant might have experienced “feeling[s] of guilt, resentment, anger and emotional turmoil” (*S. v. Zuma*, 2006,



p.172). Thus to counter these emotions she alleged rape, due to the fact “that she perceives any sexual behaviour as threatening” (*S. v. Zuma*, 2006, p.172). This upholds the above rape myth.

### ***Rape not being reported immediately or help not being sought immediately***

Due to her history of accusing men of allegedly raping her, the judge states, “if one looks at the allegations about rape and attempted rape in the complainant’s past she was clearly not slow to report such incidents and to resist” (*S. v. Zuma*, 2006, p. 161). In this instance, the judge noted the fact that the complainant took two days to report the alleged rape but it is not clear to what degree this affected his judgment.

### ***Rape is only committed by strangers***

Although the two families knew each other and had ties in the past, it was disputed that the complainant was regarded by the accused’s family as a close friend. As the judge states “ I am not prepared to accept the complainant’s evidence that there was a father/daughter relationship between her and the accused” (*S. v. Zuma*, 2006, p.152). Although Dr Friedman testified to the existence of a father/daughter relationship this had no impact on the judgment.

In sum there are rape myths evident in the judgment, although each may appear in a different manner. The most prominent are those of rape necessarily being physically violent and leaving injuries, and the victim being expected to resist the rapist and attempt to flee the situation. What is evident is that the judge accepted this line of thinking (Robins, 2008; Skeen, 2007).

## **Examination of Rape Myths in the Case Law used in the Judgment**

It has been suggested that rape myths are inherent in many societal institutions including the law (Burt, 1980). Investigation found that if a victim is known to the accused, as opposed to being a stranger, it is more likely that a jury will give greater credence to rape myths, resulting in fewer convictions (Gray, 2006; Temkin, & Krahe, 2008).

After examination of the judgment it is evident that rape myths affected it, and consequently are inherent in the law. Despite the fact that South Africa has one of the most progressive constitutions, there is still a relatively low rape conviction rate (Staton, Lochrenberg,

& Mukasa, 1997). To establish the extent to which such beliefs may be inherent in case law, the 26 cases referred to in this trial were examined. Of these, only nine directly concerned rape and of those, four discussed the introduction of previous sexual history and the violation of the rape shield law, but will not be discussed further. The other five cases (*R v Mosago and Another*, 1935; *R v Z*, 1960; *S v. S*, 1971; *S v. J*, 1989; *S. v. Jackson*, 1998) were all heard in the Supreme Court, from where only new legislation can overthrow such decisions. Four of these five cases examine the issue of consent, exemplified as follows.

The consent of a women can be inferred from her acts, and if her acts induce the accused honestly to believe that she consents then he has no *mens rea* [the criminal intent to commit a crime], if he has connection with her he is not guilty of rape (*R v Mosago and another*, 1935, p. 32).

Thus there is scope for the ‘no’ means ‘yes’ and ‘rape is physically violent’ myths to be perpetuated.

The fifth case; *S v. Jackson* (1998) examines the cautionary rule, which implies that if the accused is known to the complainant then the court should be wary of false charges. However the *S. v. Jackson* (1998, p. 984) states that, “the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable.” This indicates a change in stereotypical thinking that rape is only committed by strangers, however it is the judges’ prerogative whether to apply this rule or not. Although the judge in the *S. v. Zuma*, (2006, p. 149) used this rule, it did not evidently impact sufficiently to change his judgment.

In examining the new sexual offense legislation 2004, there appears to be no rape mythology included, however, old case law, whose judgments could be tainted by rape mythology, is permitted to be utilized unless it explicitly contradicts the new legislation. Thus tainted case law would magnify the onerous task of the expert psychologist, in attempting to counter such thinking.

### **Implications for the Psychological Expert's role in Rape Trials; A closer look at *S. v. Jacob Zuma*, 2006.**

Why Dr Friedman attempted, unsuccessfully, to dispel only five of the nine myths evident in the trial may be explained by her lack of forensic experience and her reliance on the brief given by the public prosecutor. She was unable to dispel them as there were two psychological experts, whose testimony conflicted; due in part to the use of the diagnosis of PTSD and the inherent problems therein.

#### ***Conflict in the expert testimonies***

The expert testimony presented by Dr Olivier, focused on discrediting the evidence submitted by Dr Friedman (*S. v. Zuma*, 2006, p. 1262). This approach creates a dilemma regarding the use of such testimony, as one expert's methodology can simply be discredited by another's when they question each other, in order to give the court an opportunity to assess the validity of the evidence (Meintjes – van der Walt, 2001). This is done by the expert witnesses because attorneys are often unable to probe the scientific validity of each testimony. However these actions cast doubt on the scientific validity of the profession, as there are many opposing schools of thought, in part due to the fact that psychology is a 'soft science' (Meintjes-van der Walt, 2001). This renders any such testimony vulnerable to attack and is a problem commonly encountered. Due to this, Dr Olivier was able to discredit Dr Friedman on her choice of method; firstly by using a clinical interview as opposed to a forensic evaluation, and secondly introducing the diagnosis of PTSD.

#### ***Forensic psychology versus clinical psychology.***

From Dr Olivier's testimony, it is clear that she views clinical and forensic work as profoundly different. A forensic evaluation is made up of a battery of psycho-metric tests and a full mental health examination. A complete profile of the complainant should be created, indicating the state of the person before and after the event. Comparison between the two time frames is vital to measure the impact of the alleged rape on the survivor. In matters of rape, Dr Olivier emphasizes that sexual history is vital to contextualizing the event as well as to test for malingering.

These techniques were very different to those of Dr Friedman, which relied solely on a clinical interview, albeit where the complainant showed consistency with her official statements made earlier.

It is relevant that the *Health Professions Council of South Africa* does not yet recognize forensic psychology as a legitimate category, which calls into question the admissibility of Dr Olivier's qualification to the court. In addition, as South African courts do not implement the Daubert test on expert evidence, it is difficult for courts to judge the merit of this; the judge being relied on to make the decision (Clifford, 2008; Godden, & Walton, 2006).

Jackson (2006) in direct response to *S. v. Zuma*, 2006, questions the feasibility of conducting a full mental health examination for use in court, because reliance is placed on self-report measures by the complainant. Although psychometric tests are seen as a valid psychological measure, often the results require subjective interpretation by the examiner. Again, these matters relate to the fact that psychology aims, at times unsuccessfully, to understand the unpredictability of human nature, where certainty is not an absolute.

In sum, juxtaposing the forensic and clinical branches of psychology in the court room highlights the internal debates within the field, but may do little to aid the judge in making a finding, as he is either forced to make his own judgment of the evidence, thus discarding the testimony of one expert over the other, (as happened in the *S. v. Zuma*, 2006) or simply use neither. Both these options could confuse the court proceedings, wasting time and money. Thus this emphasizes the need for these matters to be addressed in South Africa.

### ***Complications with a PTSD diagnosis.***

The use of a PTSD diagnosis in court, is also problematic as it pathologises trauma, has high rates of comorbidity, and it is culturally specific (Eagle, 2002; Bracken, Giller & Summerfield, 1995; Herman, 1997). In addition PTSD is not a litmus test for rape, therefore does not prove that rape occurred, whilst other traumas can result in the same diagnosis, as was evident in *S. v. Zuma*, (2006). The complainant claimed rape on multiple prior occasions, causing the etiology of the PTSD diagnosis to be questioned by Dr Olivier. Use of PTSD introduces past sexual history as the defense is entitled to investigate prosecution evidence "... matters raised in cross-examination may be taken further by the defense and made the subject of separate and perhaps contradictory evidence called as part of the accused's case." (*S. v. Zuma*, 2006, p. 30). Thus the

defense led evidence regarding the complainant's prior sexual history, violated the rape shield law and also showed that the complainant had many traumatic experiences in her past (*S. v. Zuma*, 2006, p. 95).

Dr Friedman said that "her [the complainant's] symptomatology was directly reflected of the experience that she had in this event and so for me it was really significant that it was this event that was causing the PTSD." (*S. v. Zuma*, 2006, p. 359 -360). Nevertheless, her evidence was rejected due to lack of psychometric testing, which appeared to make the diagnosis of PTSD questionable. The judge regarded Dr Olivier's testimony as pertinent and found her credentials acceptable. "It is not necessary to refer to her curriculum vitae. It is an impressive curriculum vitae." (*S. v. Zuma*, 2006, p. 135). This questions which criteria should be employed to judge psychological expert testimony. Is it enough to simply look at the curriculum vitae of the expert or should for example, the Daubert test be used? (Clifford, 2008; Godden, & Walton, 2006) Due to space limitation this can not be fully addressed in this paper.

Thus the role of psychologist testimony in rape trials needs to be reconsidered, as its initial aim of reducing the negative effect of rape myths in trial proceedings resulted in conflicting expert testimony that reduces its effectiveness.

## **ALTERNATIVES**

It is apparent that commonly held rape myths infiltrate the legal system, clouding testimony and judgment. Although recent legislation has strengthened the rights of women and the gravity of the offense of rape, case law riddled with various rape myths, which pre-dates these recent changes, can be applied. These complicate the job of the expert psychologist.

Furthermore appropriate forensic psychological training is not required in South Africa. Hence opposing psychological experts, both unqualified in legal matters, challenge and discredit each others' testimony, doing little to aid a fair judgment.

It has been suggested that the expert should educate the court instead of acting as a clinician by making a diagnosis of the complainant. Although it is ultimately the prosecutor's task to present a specific narrative of the complainant, a testifying psychologist can aid the court's understanding of complainant behaviour, acting as a court educator (Maw et. al., 2008; Stefan, 1994). Contextualizing rape is a much better starting point for testimony than diagnosing

the complainant, as the latter opens internal debates within the discipline of psychology that can then be used to confound the evidence submitted (Ms. Lisa Vetten, 2009).

Thus having an expert act in an educational capacity will decrease the defense's ability to counter prosecution arguments and would ultimately lead to a more coherent and productive manner in which psychological expert testimony is led (Maw, et. al., 2008). This was clearly illustrated in the interview with Ms. Lisa Vetten and an examination of the *Amici Curiae* document.

## CONCLUSION

It is important to acknowledge that *S. v. Zuma*, (2006), whilst typifying problems inherent in psychological expert testimony, was also an unusual case due to its high profile and controversial nature. Rape myths inherent in case law impact on the outcome of rape trials, by complicating psychological expert testimony. Although the new sexual assault legislation in South Africa acknowledges rape in its entirety, judges are still able to use old case law which contains rape myths. This ultimately influences the judgment, as is exemplified in the *S. v. Zuma*, 2006.

In sum the problems surrounding the use of psychological expert testimony are complex. The initial aim of leading such testimony was to reduce the effect of commonly held rape myths prevalent in most societies. However within the South African context, leading such testimony raises issues that have further legal consequences; following diagnosis of the complainant, the defense expert appears easily able to contradict the prosecutions' expert opinion, as was clearly illustrated in the *S. v. Zuma* (2006).

Thus, it is necessary for testifying psychologists to be versed in court procedures to best address misconceptions surrounding rape, as well as aid the trial proceeding. Hence a re-evaluation in the way psychologists should testify must be considered, i.e. by educating the court as opposed to making a clinical diagnosis.

Although this study highlights the expert evidence debate, it does little to address it. Therefore future research is required to investigate using psychologists as educators of the court and implementing a classification for forensic psychologist, with appropriate training.

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## **APPENDIX A- INTERVIEW SCHEDULE AND TRANSCRIPT**

### **1) Reason behind submitting the Amicus Curiae document?**

We could see that the defense was taking a cliché typical route in their defense, and the prosecution wasn't developing an appropriate argument in contextualizing rape.

### **2) Why did you feel that such a submission was necessary or appropriate?**

Prosecution was weak and you could see that they had little experience doing rape. Thus they were unable to pick up on the familiar stereotypes that one needs to counter and anticipate. They should have anticipated the use of the complainant's history. Friedman should have been left to do a full history.

The prosecution dropped the ball, as the false allegations stopped 10 years ago, therefore it has become evident that the complainant was able to tell the difference between rape and consensual sex.

Judge also had very old-school ideas.

The prosecution led Merle Friedman's evidence at the wrong time, they should have led her directly after the complainant or the complainants friends. I don't think they should have used the mother as a witness as she was unable to add anything and only helped to frame them as being slightly mad.

The prosecution didn't really have a flow to their argument.

### **3) Regarding the judges old school ideas**

The judge has antiquated thoughts, inbuilt bias in this trial.

### **4) Bias inherent in the law? S. vs. Jackson**

Yes Cautionary rule, hue and cry, definition of consent.

S. vs. Jackson – one is unable to apply the cautionary rule the same to all cases. There is a loop whole that Judge van der Merwe was able to seize and applied it to this case.

This is a problem inherent in the law

### **5) The use of psychological experts in rape cases?**

They can do good and harm, there is a place for them but how you use them needs to be carefully considered.

They have two used

- 1) speaking on behalf of the victim, this can be dangerous as it can silence them
- 2) educational role – but the psychologists must be weary and stay away from pathologising the victim. They can through the educational role widen the understanding of rape and normalize certain behaviours and place them in the right context.

### **6) Use of PTSD in court.**

The diagnosis itself is problematic –dangerous.

Then many survivors do suffer from it, but not all do. Therefore it can question the credibility of those people that do not develop PTSD... were they actually raped? It can also cause the judge to give the accused a lesser sentence as the complainant didn't seem badly affected by the incident if the survivor doesn't develop PTSD.

Psychologists can also shift the influence of the case onto the results of the event. Therefore the judge might forget that rape is wrong  
Psychological expert testimony is double edged sword.

### **7) Talk about the focus on the survivors of rape apposed to the patriarchal society.**

Historically rape was not a big deal – rape was trivialized. In order to counter this feminism looked at the survivors of rape to show the horrific results of rape.

It is also maintained that PTSD is culturally bound. Therefore some people may simply slip through the cracks.

### **8) Are amicus usually received?**

In criminal trials it is very difficult. We have attempted 3 times only 1 successful. It's much easier with the civil claims. This is a problem with the legal system.

### **9) What exactly would you have led as evidence has you been accepted?**

Looked at rape in the ANC camp, and the way in which the TRC silenced it.

Make a point regarding the fact that the complainant was under the age of consent for many of the prior 'rape' experiences.

Present research that indicates the fact that if you have been raped once it elevates your risk of being raped again

Provide an alternative explanation of past and show that she has moved on (idea that the last allegation was 10 years prior)

### **10) Battle between the psychological experts Olivier's claim that re-victimisation does not happen (Friedman vs. Olivier).**

Judge preferred Olivier. The prosecution should have asked her to present research.  
Dr Olivier presented no research but made some hefty claims.

Problem also lies in the fact that psychology is not certainty as dealing with human behaviour can be unpredictable and uncertain. However the law deals with certainty.

### **11) What is the possible impact that you think that the amicus could have made?**



Possibly might have been able to soften the negative inferences he (the judge) drew about the complainant.

It is clear that he (the judge) was being influenced by the media due to the fact that he was annoyed by people criticizing him regarding the decisions he made

Context of the trial was incredible important.

How you position and present things are very important to

Educate the broader public around the issue of rape

### **12) Value of the amici, referring to what the judge says about it being a method of gaining public awareness.**

Judge picked up on the prosecutions hostile and anger toward the application. Prosecution was not interested. The trial seemed about reputations for everyone and the intervention sharpened these feelings.

There are many different strategies that can lead to change, eg demonstrating, which is an excluded position outside the system. However to make changes one needs to go inside the system.

Less about the law more about the context, politics and process, begins to enter an academic debate.

In rape there is no legal representative for the victim. The prosecutor is either a victim witness or for some represents the victim. However there is no legal representative that holds the interests of the survivor.

How do you represent the survivors interest –affiliation prosecutor, solely to protect the complainant, and represent her, object during cross examination etc.

### **13) It appears to me that the Zuma trial is trying to be swept under the carpet and ignored (difficulty finding documents).**

It's a crucial period, which holds lots of scars. When, I (Lisa Vetten) was testifying in the recent trial of Julius Maleme, which arose out of the context of the Zuma rape trial. There was a tendency to shift away from it (the Zuma trial).

As a country we need to discuss it objective.

### **14) Discussion regarding the Dr Olivier's testimony**

The idea of references in her evidence that was submitted.

The judge decided who to believe in terms of the psychological expert.

## APPENDIX B: CONSENT FORM

Challenges and debates in the use of psychological expert evidence in rape trials: a case study (of the expert psychological evidence led in S. vs. Zuma (2006))

### 1. **Invitation and Purpose**

You are invited to take part in a research study about the examination of psychological expert testimony use in the Zuma rape trial (2006). I am researcher from the Psychology Department at the University of Cape Town.

### 2. **Procedures**

If you decide to take part in this study, I will ask you to participate in an interview, either telephonically, electronically or face-to-face depending on what is more convenient for you. The questions will be related to the use of psychological expert testimony used in rape trials, with a few questions asking your views on such evidence presented in the Zuma rape trial. It will take roughly an hour to an hour and a half, and you may skip any question you do not wish to answer.

### 3. **Risks, Discomforts & Inconveniences**

This study poses a low risk of harm to you. The interview will be kept anonymous unless you allow the use of your name in this research project. Should you allow your name to be used in the study, your opinions may be published on completion of the study.

The questions that you will be asked are mainly theoretical and rely on your expertise in the field, this should not cause any discomfort. The inconvenience that you may experience will be the time that is given to answering the interview questions.

Other than the above mentioned possible discomforts, there are no other foreseeable harms that might occur in participating in this study.

### 4. **Benefits**

This study is aimed to benefit the use of psychological expert testimony in rape trials, as it intends to address the challenges and debates within this field. A possible benefit to you, as a participant, should you allow your name to be published; your expert opinion can be expressed within this field. Your contribution may allow the development of better psychological expert testimony use within rape trials, which might enable a fairer trial process in rape cases where such testimony is required.

### 5. **Alternatives (Other Options)**

You do not have to participate in this study—it is up to you.

6. **Privacy and Confidentiality**

In terms of confidentiality, due to the fact that the information that I anticipate I will gain from the interview will be useful in my study, I intend to use it for such reasons. So the information will not be confidential, however you have the choice of anonymity. Should you choose to remain anonymous, you will be referred to as an expert within the field, concealing your true identity. If you chose to allow your name to be used then you will be referred to in the paper as your true identity.

However the rest of the information that is gathered, that is not directly used in the write up will be kept privately and remain confidential.

7. **Money Matters**

You will not be paid anything to participate in this study.

8. **Questions**

If you have questions, concerns, or complaints about the study or questions about a research-related problem, please contact Anastasia Maw, (021) 650 3420 at the Psychology Department of the University of Cape Town.

If you should wish to contact the researcher regarding questions and information relating to the research question, please contact Megan Barber 082 697 7926 or e-mail BRBMEG001@UCT.ac.za

