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“THE DEFENCE OF CONSENT IN
SEXUAL OFFENCES WORKSHOP”**



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“THE WORKSHOP SPEAKERS”



“ THE PARTICIPANTS ”



“ THE VENUE ”



THE DEFENCE OF CONSENT IN SEXUAL OFFENCES WITH SPECIFIC REFERENCE TO ADJUCATING MATTERS IN SEXUAL OFFENCES

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I have been requested to address you at this workshop and to introduce the topic of defence of consent in sexual offences and to focus on the development of the elements of the crime of rape and consensual defence through case law and the role of the courts in this regard.

However, this paper is not intended to be used as a precedent, nor as a principle of the law in the adjudication of cases in sexual offences.

In this paper, I deliberately decided not to deal with any specific case nor with the elements of the sexual offences per se, less at the risk of being academic.

I have tried, in this paper, as far as I could, to be practical and realistic with the clear knowledge and conscious understanding of the fact that I am addressing men and women of vast knowledge and experience in law.

As a starting point, rape or any form of sexual offence, is the worst invasion of one's right to dignity and privacy. These offences bring a lot of hardship, uncertainty, mental and psychological trauma and in these days, it leaves a victim, wondering if she has not been imposed with a painful and silent death sentence. You all know what I am talking about.

The sad thing about this is the escalation and prevalence of these offences against defenceless and innocent women and children of our society.

Those who commit offences of this nature, or any offence for that matter, firstly, do not believe that they would be caught. Secondly, they believe if caught, they would not be found guilty.

From this, one can accept that criminals or offenders undermine the effectiveness of our law enforcement agencies to track them down. Proper investigation is the key in combating crime. I am deliberately using the word "combating" as I believe that those who have the thought of committing crimes would think twice before succumbing to temptation of committing crimes if they know that the chances are very slim that they would not be caught. Secondly, proper investigation must also be accomplished by a proper and effective prosecution. In my years of practice, I have seen offenders been freed or acquitted either due to poor investigation or prosecution or both.

There are presently two available defences in sexual offences. It is either a bare denial of sexual activity or it is a consensual sex. I am still to live to see a situation, where the only defence available in sexual offences, would be consent. This kind of a defence, being the only defence feasible, not by law, but by choice, would only be undermined, if a proper investigation in each and every sexual offence is conducted.

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I always, find it hard and sometimes angered by failure on the part of our law enforcement agencies, to collect DNA evidence once a rape case is reported to the police. You can just imagine, what will happen in each rape case, where DNA evidence is collected with diligent and preciseness. This will force every accused person in a rape case to plead consent.

Of course, DNA evidence alone, forcing an accused person to a plea of consensual sex, would not in itself be sufficient to secure a conviction. As it is always the case, in rape cases, you are unlikely to be presented with evidence, where a complainant is corroborated by direct evidence. You are either presented with circumstantial evidence or evidence which tends to show consistency, in the evidence of a complainant, for example, medical evidence mostly in the form of J88. You will of course, find that J88, in the face of a defence of consensual sex becomes less weighty to the state case. For example, the fact that the hymen is broken would not necessarily suggest sexual intercourse without consent. The fact that there are some injuries on the private parts of a complainant in sexual offences would not necessarily be a proof beyond reasonable doubt, that there was no consent. In each case, a presiding officer relies on the cogency of evidence presented before him.

However, in my view, more could still be done, in getting other forms of evidence where consensual sex is a defence. Of course, the first issue is when a defence of consent is raised. It is for this reason that, the law enforcement agencies, investigating rape cases, needs to be proactive. For example, when a suspect is questioned and he discloses a defence of consent, immediately, more evidence could be collected with a view to disprove or prove this allegation. In most cases, it is unlikely that an accused person, who raises a defence of consent, that he would allege a once off sexual activity with the complainant. Should an accused person, for example, allege a standing relationship, in the same manner as a defence of an alibi is investigated, the police can verify such a relationship by interviewing those persons said to be aware of the relationship as might have been disclosed by the suspect. However, a complainant would always be the source of information. For example, who were with the complainant just before the alleged rape? Who had seen the complainant with the suspect? How were the complainant and the accused conducting themselves towards one another when they were last seen?

I am not suggesting for a moment, that rape is committed by strangers. However, even in cases of people who might be close to each other, you would still need some sort of information that would tend to go either way. All of these would only be before a presiding officer, if a proper investigation was conducted. I think examples are not exhaustive.

Proper investigation, without skilled prosecution, might be turned into a futility. Successful prosecution, whilst is dependent on successful and proper investigation, it is also dependent on a skilled prosecution. I had seen so many cases which are properly investigated, but which are so poorly prosecuted that they tend to bring the administration of justice into disrepute. The wheel of the law against criminals is driven by proper investigation and prosecution. Any one of this lacking, would tend to encourage offenders to take chances. It is a pity that we still have to see that kind of cooperation between the investigative unit and the prosecution. These two organs of the state compliment each other. Their cooperation and interaction at the initial stage of a case, is the key to the ultimate successful prosecution.

Rape cases are of course very difficult cases to investigate and to prosecute. Firstly, a complainant who reports a rape case is in most cases emotionally traumatized. These

emotions are recharged, when a trial resumes. Firstly, it is not the kind of an offence where one would want to talk about. It is a degrading commission of an offence against an innocent person. With all of these, we are always reminded as presiding officers, to be sensitive to the plight of victims in sexual offences and rightly so.

However, as judicial officers, we are always guided by the fact that we are referees and not empires who take no sides. We are impartial and called upon to evaluate facts of each case according to the acceptable rules of evidence. There are no fast rules inasmuch as each case is unique. We cannot do more than to act within of the parameters of fairness to both the prosecution and defence. The discretion to call witnesses as a court's witness is limited particularly before conviction. One may for example, call a witness as a court witness in terms of Section 186 of the Criminal Procedure Act. But as you will know, such discretion should of course be exercised sparingly and judicially and should not be seen as taking a lead in making a case against an accused person.

I am therefore, in no way to suggest any method of adjudicating on a particular case.

I also want to discuss in brief other legislative framework which might be brought about as set out in the Criminal Law Sexual Offences Amendment Bill.

Before that, as you all know, the only sexual offence in terms of a statute is the outlawed sexual intercourse with a girl under the age of 16 years in contravention of the provisions of Sexual Offences Act 23 of 1957.

Clearly, the Legislature's intention in enacting this piece of legislation was a noble one. Those under the age of 16 years should be assumed to be incapable of giving a valid consent to sexual intercourse. Understandably so, because in my view, such victims are not matured enough to properly understand what they actually consent to. A defence which is normally raised in this regard in addition to consent is lack of knowledge about the age of a victim. Seldom, a defence of consent where a victim is obviously under the age of 16 years is raised. Normally, in obvious young children of under the age of 16 years, an accused person will be charged with common law rape and in the alternative with statutory rape in contravention of the provisions of Act 23 of 1957.

However, where a defence of consent in a statutory rape coupled with lack of knowledge about the age of the victim is raised, once more it becomes a factual dispute. Firstly, it is expected that the state would lead evidence proving the age of the victim, secondly, the state would want to show that either the accused knew of the age of the victim or that the victim is such that it could not reasonably have been believed by the accused that the victim was above the age of sixteen years. Again, a presiding officer is guided by the nature of the evidence presented before him. Really, there is no formula in judging and evaluating the facts in the form of evidence presented before a presiding officer. A number of factors will have to be considered. For example, the way witnesses conducted themselves when giving evidence i.e. the demeanour of witnesses. In a defence of consent, under statutory rape, an accused person may as well, raise a defence that he did not know, that it was an offence to have sexual intercourse with a girl under the age of sixteen years. A presiding officer again in this regard, will be guided by a number of factors. For example, the actual age of the victim, would still be of paramount importance and the physical structure of such a victim.

Coming back to the Bill I referred to earlier in this paper, it appears the intention of the legislature is firstly to do away with the common law rape, secondly, to do away with the statutory rape in terms of Act 23 of 1957 and then to fuse the two in one legislative frame work. Lastly, and most importantly, to extend the definition of rape, as to include also anus rape. This is important because if the Bill was to be passed, we would no longer be talking about only a "she" as the only victim in a rape case. Men who are anully penetrated would also be entitled to lay a charge of rape against a penetrator.

It is not my intention in this paper, to deal in detail with the relevant provisions of the Bill in question. The purpose of the Bill is contained in the Preamble. Amongst others, it is to afford complainants of sexual offences, the maximum and least traumatizing protection that the law can provide, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of the proposed Act and to strengthen the state's commitment to eradicate the pandemic of sexual offences committed in the Republic or elsewhere by its citizens. Women and children in terms of the proposed Act, would however, in terms of the preamble, still be seen as the most vulnerable to sexual offences including prostitution. This, seems so, as it would appear from the sections of the proposed Act.

A person who unlawfully and intentionally commits an act which causes penetration, to any extent whatsoever by the genital organs of that person into or beyond the anus or genital organs of another person or any act which causes penetration to any extent whatsoever by the genital organs of another person into or beyond the anus or genital organs of the person committing the act, is guilty of the offence of rape. (See Section 2(1) of the proposed Act. Subsection 2 of Section 2 gives a description of an act of penetration which is prima facie unlawful falling within the definition under subsection 1. Sections 3 and 4 of the proposed Act, for example, introduce offences referred to as "sexual violation" and "oral genital sexual violation" respectively.

From this brief overview of the provisions of the proposed Act, one can actually see that when the Bill becomes the law if ever it would be, a wide definition of rape would be put in place. I expect that during your workshop you would be discussing the Bill in detail. If not, I can only advise that it is worth knowing each and every provision of the Bill. Personally I believe that this could be an important piece of legislation which could be hailed as a break through in the crack down of the sexual offenders.

However, for now, as judicial officers, we are guided in sexual offence cases by what is presented before us at common law and in terms of Act 23 of 1957.

Before I forget, although I mentioned earlier that there is seldom direct evidence of corroboration in sexual offences, it is important however, to remind ourselves that cautionary rule requiring some sort of corroboration in sexual offences had outlived its usefulness. Such a rule is not only dispensed with in cases of sexual assault, but also in all cases where act of sexual nature is an element of the offence, such as incest. However, a presiding officer, in sexual offence cases like in any other case, is still required to be satisfied about the guilty of an accused person beyond reasonable. In my view, more often than not when a finding of no proof beyond reasonable is made, is either because of poor investigation or prosecution or both.

Of course one may say, it is very difficult to investigate and prosecute in sexual offences where a defence of consent is raised. This might be so, however, until such time that there is a way

of dealing with and or treating victims in sexual offences immediately after the commission of sexual offences, during the pending case so reported and also just before the trial begins, it would often be difficult to secure satisfactory results in sexual offence cases. Proper assessment and evaluation of evidence in each case including sexual offences where a defence of consent is raised, is paramount.

I now turn to deal with sentencing. This is not part of my brief, but I think it is important to say something about it. Sentencing is a very important stage in criminal proceedings. It is not only important, but is as well difficult and taunting. It is sad to see how often practitioners and prosecutors ignore to place important factors either it being aggravating or mitigating before the court. It is difficult because as a presiding officer, one should for example consider on an equal basis the seriousness, magnitude and effect of the crime, interest of the society, personal circumstances of an accused person and the circumstances under which an offence was committed.

It is important also, because having considered all relevant factors; justice should be seen to have been done. If that is done, then confidence in the justice system would be gained. For, in my view, unless there is confidence in the system, firstly, we will see less of sexual offences being reported, secondly, people might tend to take the law into their own hands.

It will actually be a sad day if we were to see less and less cases of sexual offences being reported because victims do not believe that proper administration of justice would be adhered to. Those who report cases, firstly, believe that those who are reported would be arrested and found guilty and if found guilty they would accordingly be punished. However, judicial officers in the adjudication of cases are guided by what is permissible or not permissible both in law and procedure and when they do, they will not please everybody. This is the nice thing about the independency of the judiciary.

During sentencing, a judicial officer is entitled to be more active. Whilst is the duty and obligations of practitioners and prosecutors to place mitigating and aggravating factors before the court, when this is not done, a presiding officer should be more proactive in seeking such information as would appropriately enable him to consider sentence. This remind me of matter which I recently dealt with in Tzaneen during circuit. It was a matter which was brought before me under Section 52 of Act 105 of 1997, commonly known as the Minimum Sentence Act. After having confirmed the conviction, I expected parties to present evidence and or fully address me on sentence. The prosecutor started by indicating that there was a Victim Impact report which he wanted to hand in. When it transpired that the defence did not consent to the handing in of such a report, the prosecutor decided to withhold the report. It emerged later that the probation officer or social worker who prepared the report was actually in court.

Two things worried me. That either the report was favouring the defence in which event I expected the defence to prove the report or at most, consent to the handing in thereof or that the report was against the accused in which event I would have expected the state to lead evidence. When neither party led evidence on the report, I then *mero motu* called the social worker who was throughout sitted in court.

The report was diligently done. It became clear during her evidence also as set out in the report, that the victim was seriously affected by the commission of the offence. Clearly, if the social worker was not called, there would have been serious miscarriage of justice due to insufficient information placed before court. Of course, there can never be a blanket calling of

witnesses by the court during sentencing. A presiding officer during sentencing should always still remain calm and impartial to both parties.

Presently, the court's discretion to impose sentences in the sexual offences is somewhat curtailed in terms of the "Minimum Sentence Act" referred to earlier in this paper. For example, life sentence on conviction of rape involving female under the age of 16 years i.e. rape falling under Part I Schedule II of the Act and ten years in respect of sexual offences falling under Part III Schedule 2 of the Act. A court will only be entitled to depart from the prescribed sentence if it was to find existence of compelling and substantial circumstances justifying a lesser sentence, in which event a court will then assume its discretion in imposing any sentence that it might deem fit.

It becomes therefore even more imperative as a result of the Minimum Sentence Act that enough information should be placed before the court to enable the court to decide whether or not there are compelling and substantial circumstances. Failure to do this by the parties, it becomes then incumbent on the court to do so.

Again there are no fast rules as to what one may do and may not do. It depends entirely on the circumstances of each case. The golden rule however is that a presiding officer must always act impartially, fairly and judicially in each case.

Lastly, I kept this to my chest, Section 227(2) of the Criminal Procedure Act. In my view, even in the absence of a statutory provision one would still in certain cases, and I am cautious about what I want to say. Where a character of a witness in sexual offences like in any other case becomes an issue, the court will consider the following:

- The interest of justice in general.
- The society's interest in encouraging reporting of sexual offence cases.
- Whether or not such evidence relating to character would have reasonable prospect of assisting the court to arrive at a just decision.
- A need to remove from fact finding process any discriminatory belief or bias,
- A risk that evidence may unduly arouse sentiments of prejudice, sympathy or hostility.
- Any potential prejudice to the complainant's personal dignity and right to privacy,
- Right of complainant and of every individual to personal security and to full protection and benefit of law.
- And any other factor that a presiding officer considers relevant.

Therefore, a court has a wide discretion in an application that might be brought before it in terms of Section 227 of Act 51 of 1977.

Court would normally grant an application under Section 227 to adduce evidence about previous sexual experience or conduct of a complainant if it is satisfied that such evidence or questioning:

- Relates to specific instance or instances of sexual activity relevant to fact in issue.
- Is likely to rebut evidence previously adduced by the prosecution.
- Is likely to explain presence of semen or source of pregnancy or disease or any injury to complainant where it is relevant to fact in issue.

- Is not substantially outweighed by potential prejudice to the complainant's personal dignity or right to privacy or
- Is fundamental to the accused's defence (see S v M 2002 (2) SACR 411(SCA))

If for example, proposed questions merely seek to establish that complainant has had sexual experience with other men, whom she was not married to; presiding officer will exclude such evidence. Questions going simply to discredit a witness will seldom be allowed. If questions are relevant to the issue in a trial, they are likely to be admitted.

I hope all of these, would be of assistance to you during your two days of the workshop.

Thank you very much.