



Expert Report

In the matter: *Embrace Project NPC and Others v Minister of Justice and Correctional Services and Others* (CASE NO. 2022/048656)

Held at The High Court of South Africa, Gauteng Division, Pretoria

Compiled for the Centre for Applied Legal Studies

1. I was approached by the Centre for Applied Legal Studies (CALS) to act as an expert in the above matter in which they are an intervening party. CALS is a civil society organisation, focusing on public interest litigation, advocacy, and research in various areas of human rights law, including, of relevance to this report, a programme focused on gender and the law.
2. I am an Associate Professor in Public Law at the University of Cape Town. My field of expertise in teaching and research is criminal justice, with a specific focus on sexual offences. I have a doctorate from the University of Cape Town which focuses on procedural barriers to complainant participation in South Africa's criminal justice system, and the impact on sexual offence victims in particular. A copy of my curriculum vitae is attached, marked "**JO1**".
3. I tender evidence as an expert in this matter objectively and impartially. I have no personal interest, or prior knowledge of this case, or personal relationship with any interested party. My expert report addresses the discriminatory impact that the inclusion of consent as a definitional element in rape and other sexual offences contained in the

Criminal Law (Sexual Offences and Related Matters) Amendment Act ('Sexual Offences Act')¹ has on complainants of sexual offences.

4. Most international scholarship uses the term 'victim'. More recently, literature has referred increasingly to 'survivor', as an acknowledgment of the agency of the victim. I will use the term 'complainant' as far as possible, as this is a technical term to describe the person who lays a criminal complaint, or who has the locus standi to lay a complaint. Where appropriate, I use the term 'victim' to describe the person against whom the offence was committed. The use of such a term does not intend to attribute any notions of 'victimhood' onto the complainant.
5. While it is widely acknowledged that men and boys can and are victims of sexual violence, the vast majority of incidences of sexual violence are perpetrated against women and girls. While gender-neutral language will be used where possible, at times I may reflect women as the predominant victims of sexual violence.
6. The umbrella term 'sexual offences' is used throughout. It should be understood to include any sexual offence, including:
 - 6.1. 'Rape' as defined in section 3 of the Sexual Offences Act; and
 - 6.2. 'Sexual Assault' as defined in section 5 of the Sexual Offences Act.
 - 6.3. Where a specific sexual offence is referred to, that will be made clear (that is, where for example, rape is specifically being addressed and not sexual offences generally).
7. This report addresses the extent to which the inclusion of 'consent' as a definitional element in several sexual offences in the Sexual Offences Act creates a discrimination against that class of victims, namely, sexual offence complainants. The report focuses on two aspects: first, the development of consent in South African Criminal law; and secondly, consent as a definitional element that distinguishes sexual offences from other types of assaults.

¹ Act 32 of 2007.

THE DEVELOPMENT OF CONSENT IN SOUTH AFRICAN CRIMINAL LAW

8. Prior to the enactment of the Sexual Offences Act, rape and other sexual offences were governed by the Common law, which in turn was adopted from English law.² The definition of rape, for example, required the unlawful, intentional sexual intercourse by a man (with his penis) to a woman (in her vagina) without her consent. The definition was therefore gender-specific and only included penile penetration of the vagina.
9. With respect to the definition of consent under the Common law, consent was focused on the conduct of the complainant (at that time, a woman) in demonstrating that the sexual activity was ‘without her consent’.³
10. In 1999, the South African Law Commission recommended a change to the substantive law definition of certain offences, including, rape, sodomy, incest and sexual harassment. The primary consideration was whether to redefine rape away from ‘absence of consent’ to ‘coercive circumstances’.⁴ This recommendation was not implemented at the time.
11. In 2001, the Commission again considered the definitions of sexual offences in its discussions of relevant procedures.⁵ The final Commission report recommended the new definition of ‘oral genital sexual violation’.⁶ The final report included a draft Bill named the ‘Sexual Offences Bill’ which contained several important proposed reforms to the substantive and procedural laws on rape. The primary proposed substantive amendments included the replacement of ‘sexual intercourse’ with ‘sexual penetration’.

² Nikki Naylor ‘The politics of a definition’ in Lillian Artz & Dee Smythe (eds) *Should we Consent? Rape Law reform in South Africa* (2008) 22 – 23; Pamela J Schwikkard ‘Getting somewhere slowly – The revision of a few evidence rules’ in Lillian Artz & Dee Smythe (eds) *Should We Consent? Rape Law Reform in South Africa* (2008) 72.

³ Jonathan Burchell *Principles of Criminal Law* 5th ed. (2018) Cape Town: Juta and Company at 209 – 210.

⁴ South African Law Commission Discussion Paper 102 (Project 107) *Sexual Offences: Process and Procedure* (2002).

⁵ Ibid.

⁶ Naylor op cit note 2 at 46.

12. Importantly, the proposal for redefining rape and sexual penetration as gender neutral was made. Although absence of consent was retained in the definition of the offence of rape, the proposal by the Commission does define the absence of consent in terms of the presence of any coercive circumstances.⁷
13. Since the enactment of the Sexual Offences Act, not only were the definitions of rape and sexual assault (inter alia) rendered gender neutral and broadened to include violation by other objects as well as violation of the anus and mouth,⁸ ‘consent’ was defined. Section 1 of the Sexual Offences Act defines consent as ‘voluntary or uncoerced agreement’.⁹
14. Consent understood as the absence of coercion is a progressive move forward, demonstrating that rape is a crime ‘involving the coercive exercise of power, including emotional, psychological, economic, social, and institutional power, over another person’.¹⁰
15. Notwithstanding this important development, consent remains a deeply contested issue. First, it is usually the primary point of contention in a rape case. Secondly, while the guidelines describing situations that would entail coercion, including, the use or threat of force or harm, an abuse of power, fraudulent misrepresentations, or where the victim is incapable of consenting, are comprehensive, it does not address frequently occurring violations between people who know each other (known as ‘acquaintance rape’) where the alleged perpetrator continued with the sexual act without clear agreement by the victim, giving rise to the defence of mistaken belief in consent.

⁷ Coercive circumstances in the Bill include force, threat of force, abuse of power, false pretences and situations where the complainant was incapable of appreciating the nature of the sexual act. Smythe argues that this means that the burden on the prosecution to prove the absence of consent on the part of the complainant is minimised because the presence of coercive circumstances establishes ‘prima facie unlawfulness’. See Dee Smythe *Underestimating Institutions: A critique of the South African Law Commission’s Recommendations for Improving Police Responses to Rape Complainants* (unpublished LLM thesis, Stanford University, 2004) at 63.

⁸ Section 3 and section 5 of Act 32 of 2007.

⁹ Section 1 of Act 32 of 2007.

¹⁰ South African Law Commission *Sexual offences: Substantive law* (Project 107) Discussion Paper 85 (1999) at para 9.4.7.3.14.

16. In other words, situations where the law would have previously likely found that there was no real consent have been clarified, while the more common ‘he-said-she-said’ situations are no clearer than before and therefore are adjudicated using legal precedent developed under the Common law.¹¹

CONSENT AS A DEFINITIONAL ELEMENT THAT DISTINGUISHES SEXUAL OFFENCES FROM OTHER TYPES OF ASSAULTS

17. While consent is defined broadly as the absence of coercive circumstances, the burden to prove beyond a reasonable doubt that consent was absent is borne by the prosecution. If the prosecution fails to discharge this burden, one of the elements of the offence will not be proven and the accused must be acquitted. This places significant pressure on the complainant to present evidence of their refusal, and further, it opens the door to the inclusion of character and prior sexual history evidence which is prohibited.¹²
18. While the emphasis in disputes of consent should centre on whether there were any coercive circumstances which negate consent, once that ‘checklist’ of coercive circumstances is ruled out, the parties and the court revert to an assessment of whether the perpetrator knew at the time that the complainant was not consenting. In other words, the age-old test of the absence of consent.

¹¹ For example, in the case of *Coko v S* 219/2020) [2021] ZAECHGHC 91; [2021] 4 All SA 768 (ECG); 2022 (1) SACR 24 (ECG) (8 October 2021). The Court agreed that one cannot rely on body language to override active words expressing that there was no consent, but the Court went further to say that in this case, the matter was approached from a perspective of ‘tacit consent’ where the complainant only raised that there was no consent after the act had been concluded. The Court implies that consent to one sexual act implies consent to any other. Most importantly, the Court found that because of the activity to which the complainant had consented, the accused could not have been expected to know that the complainant was not consenting to penetration (that is, that he could rely on the defence of putative consent or mistaken belief in consent). This assessment of the facts relies on the existing problematic patriarchal norms that prioritise men’s sexual pleasure as entitlement, relegating women’s sexual and bodily integrity to secondary concerns.

¹² Section 227 of the Criminal Procedure Act 51 of 1977. Jameelah Omar ‘South Africa’s rape shield: Does section 227 of the Criminal Procedure Act affect an accused’s fair trial rights?’ (2016) 1 *South African Journal of Criminal Justice* 1–23. Sheena Swemmer ‘Justice denied: Prosecutors and presiding officers’ reliance on evidence of previous sexual history in South African rape trials’ (2020) 69 *South African Crime Quarterly* at 45–56.

19. The emphasis on proving the absence of consent fundamentally affects the rhetoric of sexual violence and the possibility of proving a sexual offence in court. Unlike other types of assaults, such as common assault or other grievous types of assaults, sexual assault is effectively deemed to be lawful but for the lack of consent.¹³ This means that in sexual assault cases the starting point is that the ‘conduct’ (that is, the sexual activity)¹⁴ is lawful unless the allegation that it was ‘without consent’ can be proven beyond a reasonable doubt. In other words, but for the lack of consent, the conduct would be lawful.
20. Consent has therefore been described as ‘magic’ that can turn reprehensible behaviour into conduct that is deemed lawful through its justification (Hurd 1996, 121).
21. The infringement of the victim’s dignity and bodily integrity through the inherently violent sexual violation distinguishes it completely from what we understand as healthy and lawful sexual activity (between consenting adults).
22. The retention of consent as a definitional element is because of the misconception that rape and sex are two sides of the same coin, divided only by consent:

‘It is, however, inappropriate to consider rape to be otherwise lawful sexual intercourse, rendered unlawful through lack of consent. Rape is forced or coerced sex, where coercion need not be direct, explicit or through physical force. The unlawful conduct is therefore not consent-less sex but a forced assault’.¹⁵

23. This is a public policy choice, one heavily influenced by historical and social factors and (mis)understandings of gender, sex, sexuality and a general patriarchal approach that is so visible in the law of sexual offences. Although any offence could have consent as a

¹³ Vanessa E Munro ‘Shifting sands? Consent, context and vulnerability in contemporary sexual offences policy in England and Wales’ (2017) 26 *Social Legal Studs* at 418.

¹⁴ J Milton ‘Re-defining the crime of rape: The Law Commission’s proposals’ (1999) 12 *South African Journal of Criminal Justice* at 366.

¹⁵ Jameelah Omar ‘Clarity, consistency and community convictions: Understanding the defence of consent in South African criminal law’ 35 (2022) 2 *South African Journal of Criminal Justice* at 148.

definitional element inserted, it is telling that it is almost exclusively sexual offences that do. Cowan says that consent as an element:

‘...signals, as it does in the law of sexual offences generally, that because the behaviour has, usually positive social value (or, is deemed sufficiently unharmed to be of neutral value), the criminal law should not discourage it; it is prima facie lawful, unless consent is absent’.¹⁶

24. Du Toit argues that the retention of consent ‘reinforces the traditional view of normal or normative heterosexuality, thereby masculinising the implied rapist and feminising the implied victim of rape, whether or not these persons are in fact sexed male or female’.¹⁷ Schwikkard, while acknowledging the deep problematic nature of consent, argues that the removal of consent as a definitional element is unlikely to materially affect how rape trials are conducted.¹⁸
25. There have been global calls arguing for the removal of consent from the definition of rape.¹⁹ MacKinnon contends that:

‘[R]ape should be defined as sex by compulsion, of which physical force is one form. Lack of consent is redundant and should not be a separate element of the crime’.²⁰

26. MacKinnon’s approach would force a greater focus on the conduct of the accused, rather than on how the victim responded. Focusing on the accused would also mitigate the impact of the over-emphasis on whether the perpetrator could genuinely have believed

¹⁶ Sharon Cowan 'Offences of sex or violence? Consent, fraud, and HIV transmission' (2014) 17 *New Criminal Law Review* 135 at 144.

¹⁷ Louise du Toit 'From consent to coercive circumstances' (2012) 28 *SAJHR* 380 at 383.

¹⁸ Pamela J Schwikkard 'An unreasonable belief in consent should not be a defence' 34 (2021) 1 *South African Journal of Criminal Justice* at 81 – 82.

¹⁹ Catharine MacKinnon *Toward a Feminist Theory of the State* (1989) Cambridge, MA: Harvard University Press. Michelle J Anderson 'Negotiating Sex' (2005) 78 *Southern California Law Review* 1401–1438. Victor Tadros 'Rape without consent' (2006) 26 *Oxford Journal of Legal Studies* 515.

Charnelle van der Bijl 'Rape as a materially-defined crime: could “any act which causes sexual penetration” include omissions?’ 23 (2010) 2 *South African Journal of Criminal Justice* at 224.

²⁰ MacKinnon op cit note 19 at 245.

there was consent if their behaviour in potentially coercing the victim were under greater scrutiny.

27. Anderson, a primary proponent for the removal of consent in the definition, argues for active consultation between sexual partners, what she refers to as the ‘negotiation model’.²¹ Such an approach:

‘...would protect the values that rape law should be designed to protect. It would maximize autonomy and equality and minimize coercion and subordination. It would require people to treat their sexual partners with respect and humanity’.²²

28. There is no other assault for which the absence of consent must be proven beyond a reasonable doubt. For common assault, for example, defined as the unlawful, intentional applying of force to the person of another, or inspiring the belief in the other person that force is to be immediately applied.²³ The distinguishing feature between the two types of assault is that the *boni mores* of society and therefore the law, approach sexual assaults as morally acceptable unless there was no consent, while it approaches other assaults as automatically morally blameworthy. This goes back to the misconception that sexual violence is just sex gone wrong, rather than an act of criminality.
29. Removing consent as a definitional element would therefore provide greater consistency and coherence. It would relieve the prosecution of proving as an element of the crime that the victim did not consent. The accused would still be able to raise a defence to unlawfulness, including of relevance, a defence that the complainant had consented,²⁴ or at least that the accused had a genuine belief in the putative defence of consent (that is, a genuine but mistaken belief that there was consent, which would negate the fault element if it raised reasonable doubt).

²¹ Anderson op cit note 19 at 1421.

²² Anderson op cit note 19 at 107.

²³ Burchell op cit note 3 at 591.

²⁴ Milton op cit note 14 at 367.

30. Criticism that such an approach would interfere with the rights of the accused and the presumption of innocence cannot be sustained as it does not reverse the burden onto the accused, it only requires an evidentiary onus as with all other defences that an accused may raise.²⁵ As the authors of the Sexual Offences Commentary indicate:

‘This is not a reverse onus as it is precisely what a defence team needs to do in any criminal trial, in order to successfully rely on a defence, by suggesting reasonable doubt as to the existence of one of the elements of a crime through adducing evidence’.²⁶

31. MacKinnon says that ‘the law sees and treats women the way men see and treat women. ... The state's formal norms recapitulate the male point of view on the level of design’.²⁷ Despite women being the significant majority of victims of sexual violence in South Africa and elsewhere, the law continually defers to the innocence of men who purportedly cannot be expected to ensure that a sexual partner is actively consenting. Men, as the primary perpetrators, are protected from the supposed harm of false or unfair reports of rape. By doing so, the law further entrenches the deep power disparities in favour of men, infringing women’s access to equal protection of the law.

32. The Constitutional Court in *Tshabalala v S, Ntuli v S*,²⁸ said:

‘[F]or far too long rape has been used as a tool to relegate the women of this country to second-class citizens, over whom men can exercise their power and control, and in so doing, strip them of their rights to equality, human dignity and bodily integrity. The high

²⁵ SE Van der Merwe ‘Redefining rape: Does the Law Commission really wish to introduce a reverse onus?’ 14 *South African Journal of Criminal Justice* (2001) 60. Lillian Artz Helene Combrinck ‘A wall of words’: Redefining the offence of rape in South African law: General principles of criminal liability and specific offences’ *Acta Juridica* 1 (2003) at 85 – 87.

²⁶ Kelly Phelps, Dee Smythe and Jameelah Omar ‘Chapter 2 section 3: rape’ in Bronwyn Pithey and Dee Smythe *Sexual Offences Commentary* (2021) Cape Town: Juta and Company at p22.

²⁷ MacKinnon op cit note 19.

²⁸ 2020 (5) SA 1 (CC).

incidence of sexual violence suggests that male control over women and notions of sexual entitlement feature strongly in the social construction of masculinity in South Africa'.²⁹

33. The retention of consent in the definition of rape and other sexual offences signifies that despite significant legal development, the law on sexual offences remains patriarchal.³⁰ The Supreme Court of Appeal in *S v Chapman* said that:

‘[T]he courts are under a duty to send a clear message to the accused, to other potential rapists and to the community. We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights’.³¹

34. Rape trials will continue to centre on the conduct of the victim rather than the perpetrator, so long as consent is centred in the definition. Unless there is a clear departure from consent as an element of the offence that must be proven absent, there will be continued and repeated injustice through the arm of the law, perpetrated against those most vulnerable in society.



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²⁹ *Tshabalala v S; Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC) (11 December 2019) para 1.

³⁰ Jennifer M Denbow ‘The pedagogy of rape law: Objectivity, identity and emotion’ 64 (2014–2015) 1 *Journal of Legal Education* at 17. Jennifer Temkin & Barbara Krahe *Sexual Assault and the Justice Gap: A Question of Attitude* (2009) Hart Publishing at 31. Michelle O’Sullivan and Christina Murray ‘Brooms sweeping oceans? Women’s rights in South Africa’s first decade of democracy’ (2005) *Acta Juridica* at 32.

³¹ 1997 (3) SA 341 (SCA) para 345C–D.