



Commission for Gender Equality
A society free from gender oppression and inequality

**SUBMISSION TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON VIOLENCE
AGAINST WOMEN**

**REPORT ON RAPE AS A GRAVE AND SYSTEMIC HUMAN RIGHTS VIOLATION
AND GENDER-BASED VIOLENCE AGAINST WOMEN**

20 MAY 2020

For queries, contact:

Ms M Van Niekerk

Director: Legal Services

Email: Marissa@cge.org.za

Tel: 011 403 7182



Commission for Gender Equality
A society free from gender oppression and inequality

1. The Commission for Gender Equality (CGE) is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa, 108 of 1996. Chapter 9 institutions such as the Commission are vested with powers and functions necessary to support democracy.¹ CGE is an independent statutory body, and its mandate is to promote respect for, protect, develop and attain gender equality within all spheres of South Africa.²

2. The CGE aims to transform society by 'exposing gender discrimination in laws, policies, and practices. It also advocates for change in attitudes and gender stereotypes and instils respect for women's rights as human rights. With regard to domestic violence, this mandate translates to:
 - Monitoring the effectiveness of laws, policies, and programs that are geared towards combating domestic violence;
 - Monitoring institutions that are constitutionally tasked with implementing the aforementioned;
 - Protecting victims of domestic violence and assisting them in accessing justice;
 - Investigating cases of domestic violence;
 - Conducting research into the area to try and understanding domestic violence and some of its social, political and cultural drivers.

¹ Section 181 of the Constitution of the Republic of South Africa (1996, as amended), and the Commission for Gender Equality, CGE Act (39 of 1996, as amended).

² As above



3. Violence against women (VAW) has been defined as any act of gender-based violence that results in or is likely to result in physical, sexual, or mental harm or suffering to women.³ It includes threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public, or in private life.⁴ VAW affects several human rights of women including the right to equality, freedom and security of the person, right to liberty, right to health, right to dignity and others that have all been enshrined in several Human Rights instruments.

4. The CGE, in fulfilment of its mandate to promote respect for, protect, develop and attain gender equality within all spheres of South Africa, hereby makes this submission in relation to rape as a grave and systemic human rights violation.

Definition and scope of criminal law provisions

1. Please provide information on criminal law provision/s on rape (or analogous forms of serious sexual violence for those jurisdictions that do not have a rape classification) by providing full translated transcripts of the relevant articles of the Criminal code and the Criminal procedure code.

Sexual Offences Amendment Act defines 'Rape as committing an unlawful and intentional act of sexual penetration with another person, without their consent'.⁵ Penetration may be through male genitalia, the use of objects or body parts (other than penis)

³ United Nations Declaration on the Elimination of Violence Against Women (1993).

⁴ As above

⁵ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007



Commission for Gender Equality
A society free from gender oppression and inequality

amongst other things listed under the definitions section.⁶ The Act also emphasises the criminality of all forms of coercion including non-violent ones, the inability to consent when very drunk or unconscious, and criminalises consensual sex with minors (under 16) and people with mental disabilities.⁷ The Act further provides for the offence of Compelled rape where a person unlawfully and intentionally compels a third person, without their consent to commit an act of sexual penetration with a complainant without the consent of the complainant.⁸ Rape is also criminalised under section 51 of the Criminal Law Amendment Act⁹ and Section 261 of the Criminal Procedure Act¹⁰.

2. Based on the wording of those provisions, is the provided definition of rape:

- | | |
|---|------|
| a. <u>Gender specific, covering women only</u> | NO |
| b. <u>Gender neutral, covering all persons</u> | YES |
| c. <u>Based on the lack of consent of victim</u> | YES |
| d. <u>Based on the use of force or threat</u> | YES |
| e. <u>Some combination of the above</u> | YES |
| f. <u>Does it cover only vaginal rape?</u> | NO |
| g. <u>Does it cover all forms of penetration?</u> | YES. |

⁶ As above

⁷ As above

⁸ As above

⁹ Republic of South Africa Criminal Law Amendment Act, 1997 (Act No. 105 of 1997)

¹⁰ Republic of South Africa Criminal Procedure Act No. 51 of 1977.



Commission for Gender Equality
A society free from gender oppression and inequality

If yes, please specify

'Sexual penetration' as per the CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT 32 OF 2007 includes any act which causes penetration to any extent whatsoever by (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person; (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or (c) the genital organs of an animal, into or beyond the mouth of another person, and 'sexually penetrates' has a corresponding meaning.

- h. Is marital rape in this provision explicitly included? NO
- i. Is the law silent on marital rape? NO
- j. Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included? YES
- k. Is marital rape excluded in the provisions, or is marital rape not considered as a crime? NO

3. Are there any provisions excluding criminalisation of the perpetrator if the victim and alleged perpetrator live together in a sexual relationship/have a sexual relationship/had a sexual relationship? If so, please submit it.

NO



Commission for Gender Equality
A society free from gender oppression and inequality

4. What is the legal age for sexual consent?

16 years

5. Are there provisions that differentiate for sexual activity between peers? If so, please provide them.

Yes

Section 15 of CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT 32 OF 2007

Acts of consensual sexual penetration with certain children (statutory rape)

(1) A person ('A') who commits an act of sexual penetration with a child ('B') who is

12 years of age or older but under the age of 16 years is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child, unless A, at the time of the alleged commission of such an act, was-

(a) 12 years of age or older but under the age of 16 years; or

(b) either 16 or 17 years of age and the age difference between A and B was not more than two years.

(2) (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the Director of Public Prosecutions if A was either 16 or 17 years of age at the time of the alleged commission of the offence and the age difference between A and B was more than two years.



Commission for Gender Equality
A society free from gender oppression and inequality

(b) The Director of Public Prosecutions concerned may delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.

Section 16 of CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT 32 OF 2007

Acts of consensual sexual violation with certain children (statutory sexual assault)

(1) A person ('A') who commits an act of sexual violation with a child ('B') who is 12 years of age or older but under the age of 16 years is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child, unless A, at the time of the alleged commission

of such an act, was-

- (a) 12 years of age or older but under the age of 16 years; or
- (b) either 16 or 17 years of age and the age difference between A and B was not more than two years.

(2) (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the relevant Director of Public Prosecutions if A was either 16 or 17 years of age at the time of the alleged commission of the offence and the age difference between A and B was more than two years.

(b) The Director of Public Prosecutions concerned may delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.



Commission for Gender Equality
A society free from gender oppression and inequality

6. Provide information on criminal sanctions prescribed and length/duration of such criminal sanctions for criminalised forms of rape.

The Criminal Law (Sexual Offences And Related Matters) Amendment Act 32 Of compels courts to impose minimum sentences for certain crimes unless compelling circumstances justify a lesser sentence. The Act sets the prescribed minimum sentence of life imprisonment for crimes related to aggravated murder, aggravated rape and aggravated compelled rape.⁹ First-time rape offenders (without any aggravating factors) will receive a minimum sentence of 10 years. Second offenders will receive a minimum of 15 years, with that number increasing to 25 years for third offenders.¹¹

7. What does the legislation in your country provide in terms of reparation to the victim of rape and/or sexual violence after conviction of the perpetrator?

None

Aggravating and mitigating circumstances

8. Does the law foresee aggravating circumstances when sentencing rape cases? If so, what are they?

Yes, the Criminal Law Amendment Act lists aggravating circumstances to include: where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice: by more than one person. Where such persons acted

¹¹ Republic of South Africa (n 5 above) section 51



Commission for Gender Equality
A society free from gender oppression and inequality

in the execution or furtherance of a common purpose or conspiracy, by a person who has been convicted of two or more offences of rape but has not yet been sentenced in respect of such convictions: or a person knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus, where the victim is a girl under the age of 16 years; is a physically disabled woman who due to her physical disability is rendered particularly vulnerable or is a mentally ill woman as contemplated in section 1 of the Mental Health Act 18 of 1973, or involving the infliction of grievous bodily harm.

a. Is rape by more than one perpetrator an aggravating circumstance?

YES

b. Is rape of a particularly vulnerable individual an aggravating circumstance, or the imbalance of power between alleged perpetrator and victims? (for example, doctor/patient; teacher/student; age difference)

YES

c. Is rape by spouse or intimate partner an aggravating circumstance?

No.

Section 56 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 only states that marital status is not a defence it being an aggravating circumstance is not stated.



Commission for Gender Equality
A society free from gender oppression and inequality

9. Does the law foresee mitigating circumstances for the purposes of punishment? If yes, please specify

YES. South African criminal law does make provision for both aggravating and mitigating circumstances that may be considered for the purposes of sentencing.

10. Is reconciliation between the victim and the perpetrator allowed as part of a legal response?

NO

a. Regardless of the law, is reconciliation permitted in practice and what is the practice in this regard?

YES, it is allowed, but there is no specific practice in this regard.

11. Is there any provision in the criminal code that allows for the non-prosecution of the perpetrator? If yes, please specify.

YES.

When the complainant or the prosecution, withdraws the case, for whichever reason. The Sexual Offences Amendment Act provides the manner in which sexual offence cases should be dealt with in general, including the circumstances in which a charge may be withdrawn, or a prosecution stopped.



Commission for Gender Equality
A society free from gender oppression and inequality

a. If the perpetrator marries the victim of rape?

NO. It can still be prosecuted.

b. if the perpetrator loses his "socially dangerous" character or reconciles with the victim?

NO. It can still be prosecuted.

Prosecution

12. Is rape reported to the police prosecuted ex officio (public prosecution)?

YES

13. Is rape reported to the police prosecuted ex parte (private prosecution)?

NO. The law does however make provision for private prosecution should public prosecution not be done.

14. Are plea bargain or "friendly settlement" of a case allowed in cases of rape of women?

YES



Commission for Gender Equality
A society free from gender oppression and inequality

15. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of children?

YES

16. Please provide information on the statute of limitations for prosecuting rape.

There is no statutory limitation (prescription) on rape in South Africa. Under section 18 of the Criminal Procedure Act¹², rape is provided for as one of those offences that cannot be prescribed.

17. Are there provisions allowing a child who was the victim of rape and to report it after reaching adulthood?

YES

18. Are there mandatory requirements for proof of rape, such as medical evidence or the need for witnesses? If yes, please specify.

No there is not any mandatory requirements, however in terms of law of evidence, certain aspects may be necessary for a successful prosecution.

19. Are there rape shield provisions aimed at preventing judges and defence lawyers from exposing a woman's sexual history during trial?

¹² Criminal Procedure Act 59 of 1997



Commission for Gender Equality
A society free from gender oppression and inequality

YES, the Criminal Procedure Act states that 'no evidence as to any previous sexual experience or conduct of any person against or in connection with whom a sexual offence is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced.¹⁴ Further, the Act states that 'no evidence or question in cross-examination regarding such sexual experience or conduct, shall be put to such person, the accused or any other witness at the proceedings pending before the court unless- (a) the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such question; or (b) such evidence has been introduced by the prosecution.'

20. Are there procedural criminal law provisions aimed to avoid re-victimisation during the prosecution and court hearings? If yes, please specify.

Yes there are, for example the NPA/SAPS victims charter and allowing child victims to testify in camera. The victimisation lies in the defence strategy.

Section 66 of the Sexual Offences Amendment Act describes the way that sexual offence cases should be dealt with in general, including the circumstances in which a charge may be withdrawn, or a prosecution stopped. The SAPS National Instruction 3/2008: Sexual Offences contains guidelines for police to provide victim-



Commission for Gender Equality
A society free from gender oppression and inequality

friendly services to victims of sexual offences, with respect to their role in the investigation of such offences.

War and/or conflict

21. Is rape criminalised as a war crime or crime against humanity?

NO

22. Is there a statute of limitations for prosecuting rape in war or in conflict contexts?

There is not a statute of limitations on the prosecution of rape, however, South African legislation is not aimed at war / conflict situations.

23. Is there explicit provisions excluding statutes of limitation for rape committed during war and armed conflict?

South Africa does not have law on rape during war or armed conflict. However, there is no statute of limitation on rape cases.

24. Has the Rome Statute of the International Criminal Court (ICC) been ratified?

YES



Commission for Gender Equality
A society free from gender oppression and inequality

Data

25. Please provide data on the number of cases of rape that were reported, prosecuted and sanctioned, for the past two to five years.

The police recorded 41,583 rape cases in 2018/19, up from 40,035 rapes in 2017/18. The crime statistics further illustrated that in 2014/15 43,195 were reported, 41,503 reported in 2015/16, in 2016/17 39,828 and finally 40,035 in 2017/18.¹³¹⁵

Other

Please explain any particular and additional barriers to the reporting and prosecution of rape and to the accountability of perpetrators in your legal and social context not covered by the above.

In the matter of *Tshabalala v S; Ntuli v S*¹⁴, the Constitutional Court handed down judgment in an application for leave to appeal against the convictions and sentences handed down by the High Court of South Africa, Gauteng Division, Johannesburg (High Court). The High Court convicted the applicants together with their co-accused of various charges including the common law crime of rape on the basis of common purpose. This application concerned the proper application of the doctrine of common purpose to the common law crime of rape.

¹³ <https://www.saps.gov.za/services/crimestats.php>

¹⁴ *Tshabalala v S; Ntuli v S* [2019] ZACC 48; 2020 (3) BCLR 307 (CC)



Commission for Gender Equality
A society free from gender oppression and inequality

On 20 September 1998, a group of young men – the applicants together with their co-accused – went on a rampage in the Umthambeka section of the township of Tembisa in Gauteng. The men broke into houses and caused malicious damage to property. The terror that poured out onto this community was well orchestrated and meticulously calculated and during all this, the men raped eight women occupants. Some of the women were raped repeatedly by members of the group. The youngest victim was a 14-year-old girl. Whilst some of the men raped the women, the others stood as look-outs.

The applicants, sought leave to appeal from the High Court which was refused. Mr Tshabalala unsuccessfully petitioned the Supreme Court of Appeal for leave to appeal against his convictions and sentences. Mr Phetoe, who was one of the co-accused, was granted leave to appeal his convictions and sentence to the Full Court of the High Court.

The Full Court held that the doctrine of common purpose cannot be applied to crimes that can be committed only through the instrumentality of a person's own body. Therefore, the doctrine could not apply to the common law crime of rape. Consequently, the Full Court altered his conviction to one of being an accomplice in respect of the common law crime of rape. Dissatisfied with this outcome, Mr Phetoe applied for and was granted special leave to appeal to the Supreme Court of Appeal.

On appeal, the Supreme Court of Appeal reversed the findings of the High Court on the application of common purpose, disagreeing with the High Court that members of the group had a prior agreement to commit the crimes. The Supreme Court of Appeal upheld the appeal and set aside



Commission for Gender Equality
A society free from gender oppression and inequality

the conviction of being an accomplice to rape. Spurred on by the successful appeal of Mr Phetoe, the applicants applied to the Constitutional Court for leave to appeal against their convictions and sentences.

In the Constitutional Court the applicants contended that the doctrine of common purpose does not apply to common law rape because the common law crime of rape requires the unlawful insertion of the male sexual organ into the female sexual organ. On the applicants' submissions, it was simply impossible for the doctrine to apply, as by definition, the causal element cannot be imputed to a co-perpetrator as the instrumentality of one's body is required for the commission of the crime. The respondent submitted that the instrumentality argument is wrong when a prior agreement has been proved because the conduct of each accused in the execution of that purpose is imputed to the other.

The Court received input from two amici; the Commission for Gender Equality (CGE) and Centre for Applied Legal Studies (CALs). The CGE argued that our law already allows for the doctrine to apply to common law rape and that the instrumentality approach is artificial as there is no reason why the use of one's body should be determinative in the case of rape but not in the case of assault or murder. CALs argued that the Trial Court was correct, that common purpose applies to the common law rape. CALs engaged with the patriarchal roots of the common law concerning rape and sexual violence.

The main judgment held that the instrumentality approach is flawed. There is no reason why the use of one's body should be determinative in



Commission for Gender Equality
A society free from gender oppression and inequality

the case of rape but not in the case of other crimes such as murder and assault. The instrumentality argument has no place in our modern society founded upon the Bill of Rights as it perpetuates gender inequality and promotes discrimination.

The main judgment held that the applicants knowingly and with the requisite intention participated in the activities of the group and fully associated themselves with its criminal designs. It is disingenuous to now contend that because they did not penetrate the complainants they should not be found guilty on the basis of the doctrine. That argument, the main judgment continued, loses sight of the fact that the main object of the doctrine is to bring into the net and criminalise collective criminal conduct and in the process address societal needs to combat crime committed in the course of joint enterprises. It is because of that reason that the causal prerequisite in consequence crimes such as murder, robbery and assault was found to be ineffectual.

The main judgment bemoaned the fact that for 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 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. Some men view sexual violence as a method of reasserting masculinity and control over women

The main judgment further noted that the rape scourge has reached alarming proportions in South Africa and that joint efforts by the courts,



Commission for Gender Equality
A society free from gender oppression and inequality

society and law enforcement agencies are required to curb this pandemic. One way in which the Judiciary can do this is by disposing of the misguided and misinformed view that rape is a crime purely about sex. Continuing on this misguided trajectory would implicate the Constitutional Court and courts around this country in the perpetuation of patriarchy and rape culture.

The main judgment held that the High Court's application of the doctrine cannot be faulted and the applicants' appeal must therefore fail.

The second judgment noted that rape is often mischaracterised as an act of non-consensual sexual intercourse when it is more aptly understood as a violent and gendered imposition of power. Being able to describe rape in the correct terms is vital in the ability to understand the violation at its core.

In addition, the second judgment noted that the pervasive statistics of rape in this country indicate that the country's current rhetoric which presumes that rape is committed by sexually deviant monsters may not capture the full scale of the problem. Rape is committed by fathers, brothers, uncles, husbands, lovers, mentors, bosses and colleagues. This illustrates that rape is not rare, unusual and deviant. It is structural and systemic. While those that commit rape act abhorrently and grotesquely, the search for an identifiable "monster" may miss the fact that a rapist cannot be identified simply by recourse to their physical appearance, their standing in the community or their relationship to the victim or survivor. The second judgment concluded that it would be irrational to not apply the doctrine of common purpose to the common law crime of rape.



Commission for Gender Equality
A society free from gender oppression and inequality

The third judgment embraced some concepts in feminist legal theory that had been raised during oral argument and the influence of international law in the development of our common law as it relates to the common law crime of rape. The third judgment noted that, historically, our jurisprudence demonstrates a number of embedded patriarchal gender norms in the law, such as the procedural rules of evidence in relation to rape. The acceptance of the doctrine of common purpose in this case marks the eradication of one of the remaining obstacles to rape convictions, through the infusion of constitutional values to common law.

The third judgment noted further that the various international instruments to which South Africa is a party illustrate the universal importance of protecting and enhancing domestic laws that protect the most vulnerable members of our society. These international instruments place an obligation on the State, including the Constitutional Court, to develop domestic laws to ensure that women are protected from sexual violence.

This is a victory for the development of South African Law in that accountability is ensured, even for those who did not physically engaged in the rape.