# South Africa's rape shield: Does section 227 of the Criminal Procedure Act affect an accused's fair trial rights?

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**ABSTRACT**

Rape shield laws are a critical aspect of the protection of rape complainants during the criminal justice process. The rationale of rape shield laws is to protect complainants from having their sexual reputation or behaviour used to reduce their credibility, particularly as the inferences drawn are based on historical prejudices against women, and do not actually assist with the fact-finding role of the court. This article will argue that Section 227 of the Criminal Procedure Act 51 of 1977 aims to finding the correct balance between the protection of the complainant's rights to privacy and dignity, while upholding an accused's right to a fair trial, including the right to adduce and challenge evidence. However, the sparse case law related to section 227 raises questions about its successful implementation by courts.

## 1 Introduction

The evidence that a rape accused may lead in his own defence – particularly as it pertains to the character and conduct of his accuser – has been a matter of fierce debate over the past decades. Prior to the enactment in 1989 of section 227 of the Criminal Procedure Act ('section 227'), there was no 'rape shield' available to protect rape complainants and evidentiary rules were governed by the common law.[1] The statutory enactment of the rape shield law in the Criminal Procedure Act has since faced amendment by the Criminal Law (Sexual Offences and Related Matters) Amendment Act ('SORMA')[2] in order to bring it more in line with South Africa's constitutional dispensation. The primary purpose of its enactment is to prevent irrelevant information from being admitted as evidence.[3] A further rationale, albeit an ancillary one, is to protect a complainant in a

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1 Criminal Procedure Act 51 of 1977.

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

3 South African Law Commission (Project 45) 'Women and Sexual Offences in South Africa' (1985).

sexual offence matter from secondary victimisation during the trial as far as possible,[4] by restricting the type of evidence that is admissible and the circumstances under which such evidence can be found to be admissible.

There has been no challenge to the constitutionality of section 227 before a court yet, but the importance of the fair trial rights of an accused means that section 227 may always have the potential to be constitutionally challenged in so far as section 227 restricts the evidence which can be raised in defence of an accused. More importantly, the sparse case law in relation to section 227 in the high court raises questions about the efficacy of section 227's use in the magistrates' courts where the bulk of sexual offence cases are heard but the judgments are unreported. The absence of reported judgments cannot lead to the assumption that section 227 is being properly implemented,[5] however, the efficacy of implementation of section 227 in the magistrates' courts is beyond the scope of this article but is an area that requires more research.

In this article it will be argued that there is no infringement of an accused's right to a fair trial because prior sexual history evidence will generally be irrelevant and therefore not protected under the right to adduce and challenge evidence as contained in section 35(3)*(i)* of the Constitution.[6] This author will begin by setting out the purpose of rape shield laws in order to understand their legitimate role in our law and the continued need for a rape shield. This author will interpret the scope of the right to challenge and adduce evidence to show that limiting the inclusion of prior sexual history evidence does not unconstitutionally infringe an accused's fair trial rights. Besides making the argument that section 227 does not generally infringe the right to a fair trial, this author will also consider individual sub-provisions of section 227 for potentially problematic implications.[7]

## 2 The purpose of rape shield laws

It is impossible to engage with the constitutionality of section 227 without first discussing the rationale behind rape shield laws in

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4 D Haxton 'Rape shield statutes: Constitutional despite unconstitutional exclusions of evidence' (1985) 5 *Wisconsin LR* 1219 at 1220.

5 Case law that does exist shows that section 227 remains inconsistently applied, see *S v Katoo* 2005 (1) SACR 522 (SCA).

6 Constitution of the Republic of South Africa, 1996.

7 The author uses gender-specific language in this article. The reason for this is two-fold. Firstly, for ease of writing, and secondly, and more importantly, under the common law definition of rape, only women could be raped, and at present the majority of reported sexual offence complainants remain women. That does not discount the fact that men can be raped and are victims of sexual offences.

general. The myths relating to rape and gender are inextricably bound within the legal system.[8] This is evidenced from the way laws are drafted, and more poignantly, by the way they are implemented by judicial officers.[9] Research has shown that there is a relation between the acceptance of rape myths and other forms of prejudice, such as sexism, racism and religious intolerance, and that all these constructs are connected as part of a unitary belief system.[10] Stereotypical beliefs about victims can affect the judgment of those involved in decision-making at different stages of the criminal justice process.[11] Rape myths are prejudicial, and people who believe rape myths are more likely to attribute blame to the victim, holding that she could have avoided the incident by modifying her own behaviour.[12]

Even where rape shield laws do exist, they are not always properly implemented or are ignored.[13] Even after the 2007 amendment of section 227, case law in South Africa suggests that section 227 is not properly implemented.[14] The nature of sexual offences is such that they often occur in private. When the word of one person is set against the other, there may not always be sufficient evidence to point to a clear verdict. Other factors, such as credibility, will then become more important in determining the truth – and character evidence

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8 MJ Anderson 'Understanding rape shield laws' *Violence Against Women Net* (2004), available at *www.Vawnet.org/Assoc_Files_VAWnet/rapeShield.pdf*, accessed on 20 October 2010 at 1. Anderson argues that the law of rape has historically encouraged moral judgement of women who are or have been sexually active. This rests on the premise that an unchaste woman is unlikely to have been a victim of rape.

9 S Moreland 'Talking about rape - and why it matters: Adjudicating rape in the Western Cape High Court' (2014) 47 *SA Crime Q* 5 at 7.

10 AK Clarke and KL Lawson 'Women's judgments of a sexual assault scenario: The role of prejudicial attitudes and victim weight' (2009) 24 *Violence and Victims* 248 at 250.

11 J Temkin and B Krahe *Sexual Assault and the Justice Gap: A Question of Attitude* (2009) 31. M O'Sullivan and C Murray 'Brooms sweeping oceans? Women's rights in South Africa's first decade of democracy' 2005 *Acta Jur* 32.

12 Clarke and Lawson op cit (n10) 249. Women who are raped are often believed to have deserved it or asked for it. K Wood, H Lambert and R Jewkes '"Showing roughness in a beautiful way": Talk about love, coercion and rape in South African youth sexual culture' (2007) 21 *Medical Anthrop Q* 277. H Moffett '"These women, they force us to rape them": Rape as a narrative of social control in post-apartheid South Africa' (2006) 32 *J Sthn Afr Studs* 129 at 138.

13 Department of Women (NSW) *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault and the Crimes (Rape) Act* (1996) 223.

14 *S v M* 2002 (2) SACR 411 (SCA); *S v Katoo* supra (n5); *S v Rapogadie* (36/2010) [2012] ZAWCHC 15 (24 February 2012). In *S v Mkhize* 2012 (2) SACR 90 (KZD), while the court correctly applied the factors in section 227 and excluded evidence of prior sexual history, the court nonetheless considered separately the 'relevance' of the evidence.

can be the deciding factor of a decision as to credibility.[15] The danger is that lifestyle choices are attributed to whether there was consent in a particular case or not.[16] Unfortunately, once character and prior sexual history evidence is admitted, there is very little that can be done to prevent negative inferences being drawn from it. Rape shield laws are intended to militate against the inference that a non-virginal woman is a promiscuous woman, what Anderson calls the chastity requirement.[17] When evidence of prior sexual history is admitted, collateral issues may become the central focus of the trial and there is the danger of misuse of the evidence.[18] Rape shield laws thus seek to prevent the prior sexual history being admitted as evidence at all unless there is a valid reason for its inclusion. At its essence then, rape shield laws endeavour to protect the truth-seeking process itself.[19] Moreover, it is argued that cross-examination of a sexual offence complainant, besides increasing the traumatisation and humiliation of the victim, does not elicit any relevant evidence.[20] At most it establishes a propensity to have sexual intercourse.[21] There is no reason why this

[15] For example, under the English Law of evidence (which was adopted in South Africa), prior sexual history evidence was used to show that a woman who had a sexual past outside of marriage was indecent. This then plays a role in the perceived credibility of the complainant. This tradition continued in South Africa where evidence of a rape complainant's previous acts of chastity were considered relevant to consent. JRL Milton *South African Criminal Law and Procedure* 2ed (1982) 450.

[16] *S v Rapogadie* supra (n14). MS Raeder 'Litigating sex crimes in the United States: Has the last decade made any difference?' (2009) 6 *International Commentary on Evidence* 1 at 12. In sexual offence cases, particularly those in which consent is in dispute, the role that defence attorneys take on is to divert attention from the alleged offence in question and attempt to show that the complainant had provoked the sexual acts by the way she was dressed, where she was or how promiscuous she has been in the past, inferring that she was contributorily negligent. Raeder op cit (n16) 12.

[17] Anderson op cit (n8).

[18] SJ Odgers 'Evidence of sexual history in sexual offence trials' (1986–1988) 11 *Syd LR* 73 at 76.

[19] MJ Anderson 'From chastity requirement to sexuality licence: Sexual consent and a new rape shield law' (2002) 70 *George Wash LR* 51 at 104.

[20] South African Law Commission (Project 45) op cit (n3). PJ Schwikkard 'The evidence of sexual complainants and the demise of the 2004 Criminal Procedure Act' (2009) 1 *Namibia LJ* 1 at 22.

[21] D Smythe, B Pithey and L Artz *Sexual Offences Commentary Act 32 of 2007* (2011) 23-12. Odgers op cit (n18) 81. It is unfounded that a woman's reputation for a propensity to consent can show that she will consistently consent to sexual intercourse with other persons in other situations.

evidence ought to be admitted as relevant in sexual offences, since propensity evidence in other cases is considered inadmissible.[22]

Although objection may be taken to it,[23] rape shield laws are also aimed at limiting the discretion of judicial officers. Unfettered discretion allowed to presiding officers can be dangerous in an area of the law where intuitions and social prejudices are biased against women and critical of their sexual autonomy.[24] Further, it is clear from case law that judges often do not properly exercise discretion to reject irrelevant character evidence of the complainant.[25]

Another purpose of rape shield laws is to protect sexual offence victims from the degradation of having to disclose intimate and embarrassing details about their private lives.[26] This secondary trauma, while real and severe, is not the *legal* purpose of rape shield laws.[27] The legal purpose is to prevent decisions being based on unfair, prejudicial and often irrelevant evidence of a complainant's sexual history.[28] This is consistent with the general rules of the law of evidence.[29] The legislative objectives behind rape shield laws are also aimed at a number of social rationales. One of these is to protect sexual offence victims from victimisation under the legal process as the court experience for a complainant is often intimidating, humiliating and

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22 P-J Schwikkard 'Getting somewhere slowly – the revision of a few evidence rules' In L Artz and D Smythe *Should We Consent? Rape Law Reform in South Africa* (2008) 95; P-J Schwikkard 'A critical overview of the rules of evidence relevant to rape trials in South African law' In S Jagwanath, P-J Schwikkard and B Grant (eds) *Women and the Law* (1994) 204.

23 The independence and integrity of the judiciary is one of the primary reasons for maintaining unfettered discretion of judicial officers. However, judicial objectivity is not absolute. L du Plessis *An Introduction to Law* 3ed (1995) 91.

24 Anderson op cit (n8) 96; J Temkin 'Regulating sexual history evidence – the limits of discretionary legislation' (1984) 38 *Int'l Comp LQ* 942 at 964. Another objective is to change attitudes to sexual offences; much of the history of prejudice against women is carried over from the common law cautionary rule and the perception of women as less believable. Hon, Neville Wran, Premier of NSW, HSW Hansard, Legislative Assembly, 18 March 1981 at 4758, as quoted in *Heroines of Fortitude* op cit (n13) 223. Even in recent cases, there is a tendency of presiding officers to look for 'corroborative' evidence and not rely on the complainant's version. This is illustrated in the case of *S v Koopman* (SS05/2011) [2012] ZAWCHC 109 (16 February 2012).

25 S v *Balhuber* 1987 (1) PH H22 (A); *S v N* 1988 (3) SA 450 (A); *S v M* supra (n14); *S v Rapogadie* supra (n14); *S v Katoo* supra (n5).

26 J McDonough 'Consent v credibility: The complications of evidentiary purpose rape shield statutes' (2006) *Law and Soc'y J at UCSB* 1; C van der Bijl and PNS Rumney 'Attitudes, rape and law reform in South Africa' (2009) 73 *J Crim L* 414 at 418.

27 Anderson op cit (n19) 104.

28 Anderson op cit (n19) 110.

29 In *Stevens v S* [2005] 1 All SA 1 (SCA) at para [1], the court said that 'care should be taken to ensure that evidentiary rules and procedural safeguards are properly applied and adhered to'.

degrading. Rape shield laws also promote the administration of justice by ensuring that the complainant's constitutional rights to dignity and privacy are properly respected,[30] and to prevent a complainant from becoming so distraught that she is unable to give effective testimony.[31] In the case of *S v Mothopeng*,[32] it was held that it is for the proper administration of justice that witnesses should not feel fear of retribution if choosing to testify.

Related to mitigating secondary victimisation is to increase the reporting of sexual offences.[33] In the case of *S v Staggie*,[34] it was held that greater assistance ought to be provided for women who report sexual offences, as this would encourage more women to report sexual offences and become witnesses in these proceedings if they saw that they would be protected from wide-scale humiliation and embarrassment.[35] There are many reasons why women choose not to report sexual crimes, for example, lack of confidence in the police, confusion as to whether the sexual encounter actually constitutes an offence, fear of the perpetrator, to name but a few. But at least some women fail to report because of fear of having their past sexual experiences being brought to light in court.[36]

> 'So what if a woman might have had sex with 60 men, 4 times a night for the past five years, what's that got to do with whether she consented to these three accused on this night …?'[37]

This is precisely the purpose of section 227, to reduce the kind of inferential reasoning that a woman is likely to have consented because of sexual activity in her past. The prejudice that rape can be justified[38] is perpetuated by these inferences and is what section 227 seeks to prevent. The purposes of rape shield laws are numerous and important in nature. Whether these rationales are justifiable in light of the accused's right to adduce and challenge evidence will be investigated in section 4 of this article.

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30 In *S v M* 1999 (1) SACR 664 (C) at 673h-j, the court emphasised the importance of the complainant's right to dignity in a sexual offence matter and stated that 'the protection of the dignity of a rape victim raises an area of reasonable and justifiable limit to an accused's right of silence'.

31 D Smythe 'Moving beyond 30 years of Anglo-American rape law reforms: Legal representation for victims of sexual offences' (2005) 18 *SACJ* 167 at 183.

32 1979 (2) SA 180 (T).

33 Raeder op cit (n16) at 12.

34 2003 (1) BCLR 43 (C) at 44.

35 Ibid.

36 CL Kello 'Rape shield laws – Is it time for reinforcement?' (1987–1988) 21 *U Mich J LRef* 317 at 327.

37 *Heroines of Fortitude* op cit (n13) 266.

38 MJ Anderson 'Rape in South Africa' (1999–2000) 1 *Georgetown J Gender & the Law* 789 at 811.

## 3 Section 227

The first rape shield statute was passed in Michigan, United States of America, in 1974.[39] South Africa saw enactment of its first rape shield law in 1989. Prior to enactment, there was no rape shield available to protect sexual offence complainants and evidentiary rules were governed by the common law. It was admitted by the South African Law Commission that the common law position was a relic from an era when it was generally accepted as truth that 'no decent woman had sexual intercourse outside marriage'.[40] The general rules of evidence in relation to relevance were insufficient to deal with these social prejudices.[41] In fact, the Appellate Division admits this in the case of *R v Matthews* where it stated that 'relevancy is based on a blend of logic and experience lying outside the law'.[42] Thus, on the recommendations of the South African Law Commission, section 227 of the Criminal Procedure Act was enacted in 1989 so that evidence relating to the sexual conduct of the complainant outside of the conduct complained of became inadmissible, as well as making cross-examination of such matters impermissible.[43]

The most recent amendment of section 227 came into effect through the process of discussion and recommendations by a more recent South African Law Commission project.[44] Because the 1989 amendment still left open very wide discretion to judicial officers, in 2002 the Law Commission was persuaded by pressure from academics as well as the lobbying efforts of women's groups,[45] that further amendments were necessary.[46] The amendment to section 227 was brought to legislative life in SORMA.[47]

## 4 The challenges to section 227

The potential constitutional challenge to section 227 in general is that by restricting the kind of evidence that is allowed to be admitted

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39 Michigan Penal Code Act 328 of 1931; amended 1974: s 750.520j. Anderson op cit (n8) 81.

40 SA Law Commission op cit (n3).

41 T Ilsey 'Sexual history evidence in South Africa: A comparative enquiry' (2002) 15 *SACJ* 225 at 239.

42 *R v Matthews* 1960 (1) SA 752 (A) at 758 A-B.

43 E du Toit et al *Commentary on the Criminal Procedure Act* (Revision service 44) (2010) 2, 24-100B.

44 South African Law Commission Discussion Paper 102 (Project 107) 'Sexual Offences: Process and Procedure' (2001) Chapter 32.

45 *Inter alia*, Rape Crisis, the Women's Legal Centre.

46 Schwikkard in Artz and Smythe op cit (n22) 95.

47 Relevant portions of section 227 will be quoted in section 4 of this article.

into evidence or restricting the line of questioning that is allowed, the accused's rights to adduce and challenge evidence are infringed. Section 35(3) of the Constitution entrenches the right of every accused person to a fair trial. For current purposes, the most relevant component is 35(3)*(i)*, which embeds the right to adduce and challenge evidence:

> '*(3)* Every accused person has the right to a fair trial, which includes the right –
> (i) to adduce and challenge evidence.'

On first appearance section 227 does to some extent limit the right to adduce and challenge evidence. Whether there is in fact a justifiable limitation of the right or not, can only be determined by interpreting section 35(3)*(i)* with regard to its scope.[48] Certain individual aspects of section 227 have also been criticised for their potential constraint on judicial discretion[49] and the arguable over-reaching of subsection (5) and its conflict with subsection (6).

## 4.1 Interpreting section 35(3)*(i)*

In relation to section 39(1) of the Constitution the interpretation of the Bill of Rights can be understood by means of four principles, namely, looking to the actual 'text', using a 'purposive interpretation', which is both 'generous' towards the right itself and cognisant of the 'context'.[50] The starting point for interpreting a provision of the Bill of Rights is the language of the text itself. In the Constitutional Court judgment *S Zuma*,[51] the Court said:

> 'While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. The Constitution does not mean whatever we might wish it to mean … the language … must be respected.'[52]

In the case of section 35(3)(*i*) the language used is very concise and unspecific. Included in the broad right of an accused's right to a 'fair trial' is the right to 'adduce' and 'challenge' evidence.[53] The golden rule of interpretation is to look to the 'plain words' used and to give

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[48] Questions regarding how much infringement is required before it can be said that the right to adduce and challenge evidence is sufficiently adversely affected to require a limitations analysis under section 36 of the Constitution are raised. S Woolman and M Bishop *Constitutional Law of South Africa* 2ed (Revision service 6) (2014) 51-165.

[49] Op cit (n28).

[50] I Currie and J de Waal *The Bill of Rights Handbook* 6ed (2013) 136.

[51] *S v Zuma* 1995 (2) SA 642 (CC).

[52] *S v Zuma* supra (n51) at para [17].

[53] Section 35(3)*(i)* of the Constitution.

them their ordinary meaning.[54] Applying the golden rule to 'the right to adduce and challenge evidence', the right includes both the capacity to introduce new evidence before the court and to test evidence that has been presented. The literal meaning of the text does not provide a clear indication of its denotation nor indicate the extent of the right.

The literal meaning of the text in isolation is not always sufficient to understand the true scope of a constitutional provision. Even where the literal meaning appears self-evident, other interpretive tools ought also to be employed to give a proper interpretation to a provision.[55] The Court in *S v Makwanyane* summarised the approach to the proper interpretation of the Bill of Rights:

> 'Whilst paying due regard to the language that has been used, [an interpretation of the Bill of Rights should be] "generous" and "purposive" and "give … expression to the underlying values of the Constitution".'[56]

Aligning the two seemingly contradictory approaches by the Constitutional Court in *Zuma* and in *Makwanyane*, Currie and de Waal suggest that a reconciled approach is to accept the literal meaning of the text if it accords with a generous and purposive interpretation that takes due account of the underlying values of the Constitution. It is clear that the purpose of section 35(3)*(i)* is to constitutionally entrench the accused's rights to a fair trial. What is not clear is whether the purpose is to extend the rights beyond their meaning at common law. The 'right to adduce and challenge evidence' is ambiguous and does not give any indication of the scope or limitation of the right. On face value, it appears that the right extends to adducing and challenging *all* evidence. It is therefore necessary to apply a purposive approach to determine the scope of the right.

> 'Purposive interpretation is aimed at understanding the core values that underpin the listed fundamental rights in an open and democratic society, based on human dignity, equality and freedom, and then to prefer an interpretation of the provision in question which best complies with those values.'[57]

Once the purpose of the right has been identified, it is possible to then determine the scope of the right.[58] Purposive interpretation recognises that the interpretation of the Bill of Rights involves a value judgment, but does not prescribe how the value judgment is to be made, as well

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[54] L du Plessis *Re-Interpretation of Statutes* (2002) 103.

[55] Currie and de Waal op cit (n50) 136.

[56] *S v Makwanyane* 1995 (3) SA 391 (CC) at para [9].

[57] Currie and de Waal op cit (n50) 136.

[58] Currie and de Waal op cit (n50) 137.

as emphasising that this value judgment should not be construed as the importation of public opinion.[59]

This author will consider the right to introduce new evidence and the right to challenge evidence separately as the objects of these two elements are clearly distinguishable. The law of evidence is governed by the common law and by statute, both of which include evidentiary rules that limit the kind of evidence that an accused may adduce or challenge.[60] The general rule of the law of evidence is that only evidence that is relevant is admissible.[61] There is no reason to believe that by including the right to adduce evidence in the Constitution, the drafters intended to endow the accused with the right to adduce irrelevant evidence. Therefore, arguably, on a purposive interpretation, the general common law rule with regard to relevance remains. The only difference is that the right has constitutional protection. The scope of the right to adduce evidence thus extends only as far as relevant evidence.

In the case of *S v Shabalala*,[62] it was said that if the weight of evidence 'is so inconsequential and the relevance accordingly so problematical, there can be little point in receiving the evidence'.[63] Ordinarily, evidence regarding a complainant's prior sexual history will not assist the court in reaching a decision on the actual issues in dispute,[64] and is therefore irrelevant and inadmissible. The right in section 35(3)*(i)* cannot be read as extending the accused's right to adduce evidence to allowing irrelevant prior sexual history evidence. Such an interpretation is in accordance with the underlying values of the Constitution, in particular human dignity. The Constitution clearly protects the right of the accused to a fair trial, but if this extended to allowing irrelevant evidence, of which the prejudice to the complainant outweighed its probative value, the complainant's right to dignity and privacy would be infringed.[65]

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59 Currie and de Waal op cit (n50) 137.

60 Hearsay evidence is a good example of this, and is governed by section 3 of the Law of Evidence Amendment Act of 1988.

61 Section 210 of the Criminal Procedure Act 51 of 1977.

62 *S v Shabalala* 1986 (4) SA 734 (A).

63 *S v Shabalala* supra (n62) at 743F.

64 Personal beliefs can inform whether evidence is considered relevant or not. In the leading Canadian case of *R v Seaboyer* (1991) 2 S.C.R. 577, 83 DLR (4th) 193 at 228, the Court stated that 'the content of any relevancy decision will be filled by the particular judge's experience, common sense and/or logic … There are certain areas of enquiry where experience, common sense and logic are informed by stereotype and myth … This area of the law [the admissibility of sexual history evidence] has been particularly prone to the utilisation of stereotype in determination of relevance'.

65 Ilsley op cit (n 41).

A further question in dispute is how the right to challenge evidence aligns itself with the right to cross-examine. Cross-examination is an essential part of an adversarial system, and is the stage at which the defence's version should be introduced.[66] The court has no right to prevent cross-examination, even where the purpose is to protect the witness.[67] The right to adduce and challenge evidence includes the right to confront one's accuser and to cross-examine them.[68] The purpose of cross-examination is to elicit favourable facts to the cross-examiner's case and to challenge the accuracy of the witness's version.[69] 'The scope of cross-examination is wider than examination-in-chief. The cross-examiner is also not restricted to matters covered by the witness in his evidence-in-chief'.[70] However, there are limits to what may be cross-examined.[71] The court retains the discretion to disallow questioning which is 'irrelevant, unduly repetitive, oppressive or otherwise improper'.[72] 'Inadmissible evidence may not be put to or elicited from a witness', and where such evidence is elicited, this evidence does not become admissible.[73]

As with adducing evidence, there seems to be no reason to believe that the constitutional entrenchment of the right to challenge evidence has become sufficiently wide to allow the eliciting of inadmissible evidence during cross-examination. Thus, the scope of the right to adduce and challenge evidence does not extend to adducing and eliciting inadmissible evidence. This author would argue that when the defence questions a complainant about her prior sexual history, without prior or subsequent evidence being tendered in that regard, there is no evidence that is being challenged. In fact, new evidence is being elicited, without allowing the opportunity for the other side to challenge this evidence. This is a circumventing of the general rules related to the admission of evidence. Thus, cross-examination that seeks to elicit new evidence regarding the complainant's prior sexual history does not fall under the protection of 'challenging evidence' as contained in section 35(3)*(i)*.

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66 P-J Schwikkard and SE van der Merwe *Principles of Evidence* 3ed (2009) 366.

67 Schwikkard and Van der Merwe op cit (n66) 366.

68 MH Cheadle, DM Davis and NRL Haysom *South African Constitutional Law: Bill of Rights* 2ed (2005) 29–37.

69 Schwikkard and Van der Merwe op cit (n66) 366.

70 Ibid.

71 Cheadle, Davis and Haysom op cit (n68) 29–37.

72 *Klink v Regional Court Magistrate NO* 1996 (3) BCLR 402 (SE) at 410A-B.

73 Schwikkard and Van der Merwe op cit (n66) 368.

## 4.2 Individual provisions of section 227

### *4.2.1 Subsection (1)*

> '(1) Evidence as to the character of the accused or as to the character of any person against or in connection with whom a sexual offence as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is alleged to have been committed, shall, subject to the provisions of subsection (2), be admissible or inadmissible if such evidence would have been admissible or inadmissible on the 30th day of May, 1961.'

Section 227(1), for all intents and purposes, maintains the approach to character evidence as was the position at common law. This means that the primary test for character evidence is relevance.

There are two categories of character evidence, namely, evidence of general reputation and evidence of a general disposition to think or act in a particular way.[74] The law of evidence does not place an emphasis on the importance of evidence of general reputation, however, under South African law, disposition evidence is often considered relevant because it may be an indicator of future conduct.[75] Precisely because of this, disposition evidence can be dangerous because of the prejudice that would arise from relying on past behaviour to determine the accuracy of the claim before the court at present. There are strict rules relating to the admission of similar fact evidence, but where its only purpose is connected to character or propensity reasoning, the evidence ought to be excluded.[76]

The general rule is that a complainant can be cross-examined in order to expose her credibility, or lack thereof. However, evidence as to character or the general disposition of the complainant was not considered relevant to credibility.[77] An exception to this rule was that when the matter related to a sexual offence, evidence as to the complainant's bad reputation for lack of chastity was allowed to be adduced.[78] The admissibility of bad reputation for lack of chastity has been removed from our law by the enactment of section 227 in 1989 as well as its latest amendment in 2007. Evidence related to lack of chastity would be included in 'prior sexual experience or conduct' as contemplated in section 227(2). The problem is that section 227 does not define what kind of character evidence is admissible or not admissible. The only indication of limitation are the words 'subject to the provisions of subsection (2)'. This means that character evidence related to or stemming from a complainant's prior sexual history

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74 Schwikkard and Van der Merwe op cit (n66) 59.

75 Ibid.

76 *R v Matthews* 1960 (1) SA 752 (A).

77 Schwikkard and Van der Merwe op cit (n66) 65.

78 Schwikkard and Van der Merwe op cit (n66) 65-66.

would be inadmissible unless a court specifically allowed it after application was made under section 227.[79] For example, evidence that a complainant consented to every offer of sexual intercourse ever made to her would not be admissible under subsection (1) because it elicits prior sexual history evidence. Application to have this evidence admitted would have to be made under subsection (2).

There are other matters of character that were admissible in the past, that are still admitted now, such as the appearance of the complainant.[80] The problem is that certain kinds of character evidence are admitted because it is considered 'normal' to admit them.[81] This is dangerous, because these are not properly admitted as character evidence but inferences as to a complainant's character and promiscuity are made.[82] An example is questioning the complainant about why she was out alone at night, or why she was at a bar in a bad part of town.[83] The amount of makeup a woman was wearing at the time of the incident is an issue that has been raised by the defence in showing that the accused's belief that there was consent was reasonable.[84] The purpose of distorting the image of the complainant is to create the impression that the complainant was dressed provocatively and therefore partly at fault for the incident.[85] Instead of focusing on the sexual character of the accused, the character of the complainant is focused on, cloaking the true issue at stake in the trial: the guilt of the accused.

This kind of evidence may be admitted without a problem, as it is not properly understood by presiding officers as character evidence.[86] Attorneys are therefore able to allow inferences to be made, just by how a sexual offence complainant was dressed. This kind of evidence is considered not to be important enough to require application to the court to have it admitted. However, whether consciously or not, it is accepted that 'appearances have meanings',[87] and are crucial in how

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79 In *R v Matthews* supra (n76), the court relying on the 1923 case of *R v Julius* 1923 CPD 118 stated that 'evidence of bad character may not even be suggested indirectly'.

80 *S v Zuma* supra (n51).

81 V Bronstein 'The rape complainant in court: An analysis of legal discourse' (1994) *Acta Jur* 217.

82 In *S v Balhuber* supra (n25), the complainant is asked about her illegitimate child, and also if she had previously seen a man naked. Bronstein op cit (n81) 213 and 216.

83 In the court transcript from *S v Balhuber*, the complainant is asked by the defence attorney: 'Now you have got around Hillbrow walking around in the early hours of the morning?' Extract quoted in Bronstein op cit (n81) 216.

84 C Shen 'Study: From attribution and thought-process theory to rape shield laws: The meaning of victim's appearance in rape trials' (2003) 5 *J Law Fam Studs* 435 at 442.

85 S Lees *Carnal Knowledge: Rape on Trial* (2002) 141.

86 Clarke and Lawson op cit (n10) 249.

87 Shen op cit (n84) 435.

people are judged, even during the criminal justice process.[88] It is undeniable that the appearance of a witness or the accused at the trial can sway the presiding officer's mind as to general credibility – our court etiquette requires being dressed neatly and formally. It is not inconceivable, therefore, that hearing an account of the complainant's appearance at the time of the incident may hold similar strength in the mind of the presiding officer in reaching a decision. When clothing items of the victim are introduced as evidence in a rape trial, legal rules of evidence are drawn on, as well as cultural meanings of dress in determining its relevance.[89] The intention of the complainant in dressing in a particular way is inferred from the kind of clothing worn.[90]

Many people believe that by a woman dressing provocatively in public, she is inviting an attack through her appearance.[91] A woman is considered at least partially responsible for being raped if she was wearing revealing clothing.[92] This means that the perpetrator is then judged as less morally and criminally blameworthy. Although evidence as to appearance might not seem as essential to prevent as evidence related to past sexual encounters, in practice its effect is substantial. For example, in the *Zuma* case,[93] there was much reference made to the fact that the complainant was attired in a 'kanga with no underwear'.[94] The accused's daughter testified that the complainant was dressed inappropriately.[95] The way the complainant was dressed, albeit not in isolation, was certainly a factor which the court took into account in determining that the complainant was not a credible witness in terms of truth-telling.

The consumption of alcohol is a common means of discrediting a rape complainant. With regard to women, alcohol carries the taint of immorality and promiscuity.[96] A complainant's alcohol consumption is used in two ways to discredit her. The first is to suggest that alcohol

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88 Lees op cit (n85) 133.

89 Shen op cit (n84) 436.

90 Shen op cit (n84) 444.

91 Shen op cit (n84) 436. D Vali and ND Rizzo 'Apparel as one factor in sex crimes against young females: Professional opinions of US psychiatrists' (1991) 35 *Int J Offender Therapy & Comp Crim* 167.

92 Temkin and Krahe op cit (n11) 33. BA Babcock et al *Sex Discrimination and the Law: History, Practice, and Theory* 2ed (1996) 1410. EM Edmonds and DD Cahoon 'Attitudes concerning crimes related to clothing worn by female victims' (1986) 24 *Bull Psychonomic Soc'y* 444.

93 [2006] 3 All SA (8) (W).

94 *S v Zuma* supra (n51) at 58.

95 Ibid.

96 Lees op cit (n85) 145. Van der Bijl and Rumney op cit (n26) 422.

unleashes a woman's sexuality and lowers her inhibitions.[97] The second is to imply that a woman under the influence of alcohol is more likely to act vindictively and lay a false charge.[98] Both of these means suggest that it is likely that the complainant consented to the sexual advances of the accused, and that it was not unwelcome by the complainant at the time. [99]

### 4.2.2 Subsection (5)

Subsection (5) reads as follows:

'In determining whether evidence or questioning as contemplated in this section is relevant to the proceedings pending before the court, the court shall take into account whether such evidence or questioning –

*(a)* is in the interests of justice, with due regard to the accused's right to a fair trial;
*(b)* is in the interests of society in encouraging the reporting of sexual offences;
*(c)* relates to a specific instance of sexual activity relevant to a fact in issue;
*(d)* is likely to rebut evidence previously adduced by the prosecution;
*(e)* is fundamental to the accused's defence;
*(f)* is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy; or
*(g)* is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue.'

Section 227(5) instructs that when a court is determining whether prior sexual history evidence is relevant or not, the court 'shall' take the outlined factors into account. 'Shall' constitutes mandatory language, which means that a court *must* consider the factors that are outlined. Such an approach was criticised in the past for creating categories which would leave open situations which have not been foreseen, and therefore evade the recognised categories.[100] However, the factors are extremely useful as they make mandatory the considerations that have to be considered in determining the relevance of the evidence or questioning.[101]

This justification leads to another potential criticism that can be levelled against subsection (5). That is, that it constrains judicial

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[97] Lees op cit (n85) 145.

[98] Lees op cit (n85) 146.

[99] In *S v Balhuber* supra (n25), alcohol is used to try and discredit the complainant. The defence attorney states, 'You were offered a lager with a glass – you just took the bottle. You continued dancing and drank it rather quickly.' Bronstein op cit (n81) 211.

[100] Du Toit et al op cit (n43) 24-100D.

[101] Ibid.

discretion in determining whether evidence is relevant or not,[102] particularly because it makes use of mandatory language. The factors as set out in section 227(5) do need to be considered by a court. However, there is nothing to suggest that it is a closed list. Guidelines do not displace judicial discretion, but rather guide it. The considerations listed are the types of factors a court ought to take into account in any event. The evidence apparent from case law is that presiding officers continue not to properly exercise their discretion in determining the relevance and admissibility of prior sexual history evidence.[103]

The Legislature chose to adopt an approach that did not entirely prohibit prior sexual history evidence, since this could have the effect of eliminating relevant evidence that is necessary to the defence of an accused. Hence, it chose, on the one hand, to uphold the right to adduce and challenge evidence, and by extension, the accused's right to a fair trial. On the other hand, it recognised the danger in leaving the determination of relevance entirely in the hands of judicial officers. A balanced approach is to set out a list of the circumstances in which prior sexual history evidence is admissible, while still leaving it to judicial discretion on a case-by-case basis. There is no substantial infringement of judicial discretion. The ultimate decision of the admissibility of evidence lies with the presiding officer. This is not an undue constraint or limitation on judicial discretion, and therefore does not raise any problems, constitutional or otherwise.

It is necessary to consider how these factors are meant to be read. Even if it is assumed that all the factors have to be considered, the rights of the accused will have to take precedence. The policy reasons behind encouraging reporting and minimising secondary victimisation of the complainant cannot be used to override the constitutionally enshrined right of an accused to a fair trial.[104] On a correct reading of subsection (5), not all the factors need to be read together, only one factor need be fulfilled in a given case. As this author sees it, paragraphs (*a*), (*c*), (*d*), (*e*) and (*g*) are factors that pertain to the rights of the accused to adduce and challenge evidence, while paragraphs (*b*) and (*f*) contain considerations relevant to the complainant's protection. The interests of society in encouraging the reporting of sexual offences (paragraph *b*) and the requirement that the admission of sexual history evidence should not be overly prejudicial to the complainant (paragraph *f*), can be used to test the probative value of the evidence that is sought to be adduced against the accused's fair trial rights.

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[102] Du Plessis op cit (n23) 91.

[103] S v *Balhuber* supra (n25); *S v N* 1988 (3) SA 450 (A); *S v M* supra (n14); *S v Rapogadie* supra (n14); *S v Katoo* supra (n5).

[104] Du Toit et al op cit (n43) 24-100E.

In some cases it will be clear that the evidence is relevant. For example, where a complainant alleges that the accused raped her and she contracted HIV, it is logical that evidence that her usual sexual partner is HIV positive would be admissible to rebut such evidence, and it would be unnecessary to consider either paragraph *(b)* or *(f)* in reaching that decision. It depends on the scenario in each case individually. On this analysis, subsection (5) presents no potential constitutional challenges. By reading the list of factors as an open list which does not unduly restrict judicial discretion, and by allowing an understanding that each circumstance can be considered on its own, without having to consider all of them and pit the interests of the accused against the complainant in each and every case, it is apparent that subsection (5) would pass constitutional muster.

### *4.2.3 Subsection (6)*

Subsection (6) contains the following provision:

> 'The court shall not grant an application referred to in subsection 2*(a)* if, in its opinion, such evidence or questioning is sought to be adduced to support an inference that by reason of the sexual nature of the complainant's experience or conduct, the complainant-
> *(a)* is more likely to have consented to the offence being tried; or
> *(b)* is less worthy of belief.'

On the plain meaning of this section, it is notable that the discretion available to the judicial officer only extends so far as to determine the purpose for which the evidence is sought to be tendered or questioned. Once such a purpose has been found to fall under section 227(6)*(a)* or *(b)*, there is no discretion available to the judicial officer. He is forced to exclude the evidence. This has the effect of creating an exclusionary rule.[105]

It seems that the evidence is inadmissible because of the *purpose* for which the evidence or questioning is sought to be adduced, and does not consider how the court itself would use the evidence.[106] A court cannot therefore consider the probative value for any other permissible inference.[107] However, it is difficult to think of a scenario in which some other inference, which did not fit under the listed factors in subsection (5), would otherwise be admissible were it not for subsection (6). Propensity reasoning is generally inadmissible,[108] and

[105] Du Toit et al op cit (n43) 24-100E.
[106] Ibid.
[107] Ibid.
[108] Schwikkard and Van der Merwe op cit (n66) 51.

there seems no reason why it ought to be allowed in sexual offence cases.

In this author's view the use of the word 'support' has the effect of widening the ambit of the apparent exclusionary rule.[109] This means that even where the evidence or questioning would form part of a larger body of evidence which the court would consider together and not just where the evidence or questioning is sought to establish the inference, the evidence or questioning is excluded.[110] Even where there may be a range of evidence to support the inference, the evidence or questioning regarding prior sexual history will be inadmissible. Exclusion of inferential evidence in the scenario explained above is logical and legally sound. If there are other pieces of relevant evidence available to point to an inference, then the court ought to make use of those without relying on otherwise inadmissible evidence to assist in making a judgment about the possibility of a complainant having consented or a complainant's believability. Alternatively, if it is the only evidence available upon which an inference as to consent or believability can be drawn, then it should definitely be inadmissible, as its prejudice to the complainant manifestly outweighs its probative value. Section 227 was enacted in order to prevent these very inference-based conclusions being drawn.

It has been argued that the use of the words 'by reason of the sexual nature of the complainant's sexual experience or conduct' and not the words 'by reasons only' opens up an ambiguity.[111] It is unclear whether the court ought to refuse to admit the evidence if it is adduced to support an inference that the complainant is more likely to have consented or less worthy of belief, by reason of the *sexual nature of the offence*, or *some other aspect of the evidence* that has nothing to do with the sexual nature.[112] Is 'by reason of' sufficiently specific to allow the implied reading of 'only' into the section?[113]

Subsection (6) is substantially similar to section 276(1) of the Canadian Criminal Code. This section has been constitutionally challenged, and has withstood that challenge in the case of *R v Darrach*.[114] The court in that case stated that:

> 'The phrase "by reason of the sexual nature of the activity" in section 276 is a clarification by Parliament that it is inferences from the sexual nature of the activity, as opposed to inferences from other potentially relevant features of the activity, that are prohibited. If evidence of sexual activity is proffered

[109] Ibid.
[110] Ibid.
[111] Du Toit op cit (n43) 24-100F.
[112] Ibid.
[113] Ibid.
[114] [2000] 2 S.C.R. 443, 2000 SCC 46.

> for its non-sexual features, such as to show a pattern of conduct or a prior consistent statement, it may be permitted.'[115]

Arguably, subsection (6) is capable of reading in the word 'only'. However, the ambiguity outlined above is not necessarily the most problematic. Rather, the ambiguity that needs to be cleared up is whether this evidence can be adduced or questioned where it is to support the kind of inference prohibited, but is also for some other purpose. Therefore 'only' ought to be read-in in the following way: 'The court shall not grant an application referred to in subsection 2*(a)* if, in its opinion, such evidence or questioning is sought to be adduced *only* to support an inference that by reason of the sexual nature of the complainant's experience or conduct, the complainant'. This reading ensures that evidence that is sought to be adduced or cross-examined must be intended for some purpose other than mere propensity reasoning. Subsection (6), therefore, does not restrict subsection (5). Only where there is no purpose other than to show that the complainant is more likely to have consented or is less worthy of belief will the application be refused. This maintains the balance between the accused's right to adduce and challenge evidence, while protecting the complainant from unfair and irrelevant evidence.

There is evidence to suggest that the courts will read subsection (6) in this way. In the *Zuma* case,[116] the court allowed evidence of the complainant's history of having (allegedly) falsely accused men of rape in the past. Although the 2007 amendment was not yet in force, Van der Westhuizen J did consider it, albeit not in-depth. The effect of the evidence would support an inference that the complainant was less worthy of belief. However, it was also perceived as necessary to the accused's defence. Likewise, in *S v Mkhize*, the Court considered an application under section 227 and denied it on the basis that the evidence was for the purposes of supporting an inference that the complainant's evidence of the rape was not believable.[117] Therefore, it seems that where there is another reason besides the support of an inference as contemplated in subsection (6), the evidence sought to be adduced or questioned will not fall under the 'exclusionary rule'.[118] There is some evidence to suggest that this approach was possible

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[115] *R v Darrach* supra (n114) at 35.

[116] *S v Zuma* supra (n51).

[117] *S v Mkhize* supra (n14) at 95.

[118] On the other hand, it is argued that admitting evidence of prior false accusations of rape is often to the detriment of the complainant as the perception that false accusations are common is widely believed. BE Applegate 'Prior (false?) accusations: Reforming rape shields to reflect the dynamics of sexual assault' (2013) *Lewis and Clark LR* 889 at 900–901.

pre-section 227,[119] and there is no reason to read section 227 in any other way.

It has been suggested that subsection (6) was drafted because it was envisaged that it would render evidence inadmissible that is in fact relevant.[120] On a correct understanding of the general purpose of section 227, it is possible to read the purpose of subsection (6) entirely differently. Section 227 was enacted largely because sexual offence complainants were treated differently by the court to other complainants in other criminal matters, in that evidence that was irrelevant was allowed to be adduced or at least open to cross-examination.[121] This trend comes from a long history of prejudice against the sexual autonomy of women.[122] Section 227 was therefore enacted to ensure that a similar pattern was not maintained. Against this backdrop, subsection (6) serves to prevent propensity and inferential reasoning being used to sway the court against the complainant, where propensity and inference is the only purpose behind adducing such evidence. The presumption of innocence and the accused's fair trial rights generally are not put in danger, since this kind of reasoning is ordinarily inadmissible in any event. If there is some other reason besides an inference being drawn, the court will consider that purpose under subsection (5) and it no longer falls under the 'exclusionary rule' arguably created under subsection (6).

Another criticism which could be levelled against this section, as well as subsection (2), is that in the situation where the accused and the complainant were involved in a relationship, either in the past or immediately preceding the alleged incident, evidence as to their sexual history is inadmissible without leave from the court. It could be argued that evidence of a past consensual sexual relationship is always relevant and admissible. There may be circumstances in which the evidence is relevant, including to explain the presence of semen on clothing or pregnancy. However, this is already an accepted exclusion

[119] In *R v M* 1970 (1) SA 323 (RA), evidence from a male witness regarding the complainant's approach to sexual intercourse was admitted. The evidence was tendered to rebut the prosecution's claim that she was rendered asexual as a result of an operation. It is true that this evidence would support an inference that, by reason of the sexual nature of the complainant's conduct, she was less worthy of belief. However, it was clearly also tendered to rebut evidence raised by the prosecution.

[120] Du Toit et al op cit (n43) 24-100F.

[121] In *S v Mkhize* supra (n14), the court strangely conducted an analysis under section 227 and after ruling out that evidence, proceeded to consider the 'relevance' of the evidence. The court found that the line of questioning ought not to be allowed because it was not relevant, however, if courts are still interpreting relevance as requiring a different standard to the factors in section 227(5), the section is not properly understood.

[122] See section 2 of this article.

to the general admissibility under subsection 5*(g)*. Another reason for its relevance may be that the accused genuinely and reasonably believed that the complainant had consented. For instance, the parties may have had an understanding that a message asking the other to come over was always an offer of sexual intercourse. Such evidence may be necessary to show that the accused did believe that there was consent. However, this is also provided for in subsection 5*(e)*, in that it is fundamental to the accused's defence.

It cannot be upheld that evidence of a past sexual relationship between the accused and the complainant is *always* relevant.[123] At most, such evidence points only to a propensity to engage in sexual intercourse with the accused, which is an inference prohibited by subsection 6*(a)*. Furthermore, if evidence of a sexual relationship was always admissible, this would have the effect of negatively affecting those complainants who are raped by their boyfriends or husbands,[124] because it would always create the assumption that the complainant did consent, or that the accused believed that she did consent. The former is prohibited, and the latter has to be proven after application to admit it is made in terms of subsection (2). Evidence related to a past relationship between the parties has no bearing on the truth of the allegation before the court at present, unless it can be shown that it is relevant according to one of the factors contained in subsection (5). Therefore, expecting the accused in such a situation to make application to the court before being able to adduce such evidence or question the complainant accordingly is not unreasonable.

## 5 Conclusion

In the recent case of *S v Matyityi*,[125] the Supreme Court of Appeal emphasised the importance of adopting a more victim-centred approach across the criminal justice system.[126] The protection of the complainant is a legitimate and important purpose which is foundational to the rationale underlying rape shield provisions, and more importantly, the rights in the Bill of Rights protect not only accused persons,[127] but enshrine the right to dignity and privacy of the complainant.

In a South African context, sexual offences are prevalent. Yet, reporting rates are extremely low, a fact which can be partly attributed

[123] SJ Wallach 'Rape shield laws: Protecting the victim at the expense of the defendant's constitutional rights' (1996–1997) 13 *New York L Sch J Hum Rts* 485 at 514.

[124] It would be a partial reversion to the old approach where 'marital rape' was not considered rape prior to the enactment of the Domestic Violence Act 116 of 1996.

[125] (695/09) [2010] ZASCA 127; 2011 (1) SACR 40 (SCA).

[126] *S v Matyityi* supra (n125) at para [16].

[127] *Prinsloo v Bramley Children's Home* [2006] JOL 17236 (T) at 19.

to various problems within the criminal justice system, including low rates of prosecutions of sexual offences, low conviction rates and a general lack of faith in the system.[128] Another reason for the low rates of reporting is the stigma and humiliation that complainants experience throughout the process.

Prior to the enactment of South Africa's rape shield provision, the trauma that the complainant suffered during the trial was disregarded. It has now become generally accepted that it is important to offer some protection to a complainant even though, in protecting the rights of the accused, complete protection cannot be offered to a complainant.[129] The court in the case of *De Beer v The State,*[130] succinctly commented on the growing realisation that the myths that are historically bound within the law, have to be thwarted:

> 'Rape is a topic that abounds with myths and misconceptions. It is a serious social problem about which, fortunately, we are at last becoming concerned. The increasing attention given to it has raised our national consciousness about what is always and foremost an aggressive act. It is a violation that is invasive and dehumanising. The consequences for the rape victim are severe and permanent. For many rape victims the process of investigation and prosecution is almost as traumatic as the rape itself.'[131]

Rape shield laws aim to prevent evidence that inherently reinforces these myths and prejudices from forming part of the evidence that a court draws on to reach a decision. The need to prevent, in particular, the gendered bias that forms part of our law through a history of prejudice cannot be overemphasised.

There is another purpose that underlies the rationale for rape shield laws, that of ensuring that only relevant facts are placed before the court. In this author's view, this is the primary need for rape shield laws. Generally, evidence of prior sexual history is not directly relevant to proving the allegation. Such evidence merely creates assumptions and ancillary issues, which detracts from the truth-finding mission of the court. The common law of evidence contains the general rules of relevance and admissibility. However, due to the history of prejudice aimed at rape complainants, these general rules are not successful in the area of sexual offences. Section 227 serves the function of creating specific guidelines for the issue of prior sexual history evidence, to ensure that only sexual history evidence that is genuinely relevant will be admitted. This rationale is the most important in showing that section 227 does not unjustifiably limit the fair trial rights of the

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[128] D Smythe *Rape Unresolved: Policing Sexual Offences in South Africa* (2015) 213.

[129] *S v Mothopeng (1)* 1979 (2) SA 180 (T).

[130] *Stephen Bryan de Beer v The State* (121/04) (Delivered on 12 November 2004) (Unreported judgment of the Supreme Court of Appeal).

[131] *Stephen Bryan de Beer v The State s*upra (n130) at para [18].

accused. The rights of the accused do not extend to being allowed to raise evidence that is irrelevant and inadmissible. To allow this in the context of sexual offences, but not for other offences, would be to favour certain groups of accused persons over others depending on the type of crime committed, which is illogical and legally incorrect.[132]

> 'It has been said that the victim of a sexual assault is actually assaulted twice – once by the offender and once by the criminal justice system.'[133]

While this article argues that section 227 is an important step in changing the level of secondary victimisation experienced by a complainant, more work is needed on the use of section 227 in the courtroom in order to evaluate its efficacy and true success.

[132] Section 9(1) of the Constitution: 'Everyone is equal before the law and has the right to equal protection and benefit of the law.'

[133] *State v Sheline* 955 S.W. 2d 42, 44 (Tenn. 1997).