Rethinking the sexual offences exception to previous consistent statements: An evaluation of sections 58 and 59 of SORMA

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ABSTRACT

This dissertation examined whether the rules contained in sections 58 and 59 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA) could be reconciled with the aims and objectives of the legislation. It also considered whether these rules improved the position that previously existed under the common law. These provisions enable the first report made by a complainant in a sexual offence matter to be admitted into evidence at trial and constitute a statutory exception to the general rule that previous consistent statements are inadmissible.

The methodology adopted in this investigation was a desktop review of secondary literature and reported cases. This dissertation analysed case law relating to the common law exception which existed prior to the enactment of SORMA and case law following the implementation of SORMA. This analysis makes it clear that the common law sexual offences exception was based on antiquated and misogynistic thinking about sexual offences and the behaviour of women.

This dissertation ultimately determined that SORMA has not had the desired impact of reforming the common law on prior complaints as envisioned by the drafters. Instead, the analysis indicates that the undesirable common law position has been codified. It is argued that this can be attributed, in part, to the ambiguous drafting of sections 58 and 59 which do not clarify whether the prior complaint must have been made at the first reasonable opportunity, as was required under the common law. The analysis of case law demonstrates that this uncertainty has led to the timing of a complaint often being a central issue in sexual offence cases. This further perpetuates the anomaly which existed under the common law.

This dissertation concludes that the failure by the legislature to expressly abolish the common law requirement that a prior complaint be made at the first reasonable opportunity is not congruent with the aims and objectives of SORMA. It is recommended that SORMA be amended to include an express provision that prior complaints in sexual offence cases are admissible regardless of the timing of the complaint. This would ensure that legal reform corresponds with social science evidence on the psychology of rape and the difficulties of disclosure.

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CHAPTER ONE: INTRODUCING THE PROBLEM

I INTRODUCTION

> *'…victims of sexual offences, be they male or female, often need time before they can bring themselves to tell what has been done to them; that some victims will find it impossible to complain to anyone other than a parent or member of their family whereas others may feel it quite impossible to tell their parents or members of their family.'*[1]

It is well known that the rate of incidences of sexual offences in South Africa is an alarmingly high one. Recently, the Constitutional Court has commented that South Africa has been:

> plagued by a scourge of gender-based violence to a degree that few countries in the world can compare.[2]

In contrast with this scourge of gender-based violence, the number of offenders who are successfully apprehended, convicted and sentenced is abysmally low. Criminal justice in South Africa is based on an adversarial system which pits the state against the accused and relegates the role of the victim to that of an ordinary witness for the state. This has resulted in a criminal justice system which can be alienating to victims and cause secondary victimisation.

Secondary victimisation occurs after the initial offence has been committed and is a result of unsympathetic responses to victims of sexual offences by the criminal justice system.[3] Secondary victimisation can be experienced in different scenarios within the criminal justice system: from the treatment of victims by personnel in the criminal justice system; from acts and omissions such as decisions not to prosecute and not updating victims of progress on their cases and; from the quality of assistance given to victims.[4] Secondary victimisation can occur in the courtroom when facing the accused, when testifying and during cross-examination.[5] It has been held that when police services neglect to act in accordance with a victim-centred approach to criminal justice this infringes a victim's right to dignity, equality and freedom from violence as well as undermining the constitutional obligations of the state to eradicate gender-based violence.[6]

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[1] *R v Valentine* [1996] 2 Cr App R 213 quoted in K Singh 'Evaluating the ''first report'': The persistent problem of evidence and distrust of the complainant in the adjudication of sexual offences' (2006) 1 *SACJ* 37 at 44.
[2] *AK v Minister of Police* [2022] ZACC 14 para 2.
[3] H Combrinck 'Claims and entitlements or smoke and mirrors? Victims' rights in the Sexual Offences Act' in Artz & Smythe (eds) *Should We Consent? Rape Law Reform in South Africa* at 267-268.
[4] R Campbell & S Raja 'Secondary Victimization of rape victims: Insights from mental health professionals who treat survivors of violence' (1999) 14 *Violence and Victims* 261 at 262-263.
[5] Combrinck op cit note 3 at 267-268.
[6] *AK v Minister of Police* supra note 2 para 65.

The South African legislature passed the Criminal Law (Sexual Offences and Related Matters) Amendment Act[7] (SORMA or the Act) in 2007 which introduced significant and necessary reforms to the existing law governing sexual offences. Notably, SORMA repealed the common law definition of rape and provided a new, expansive definition to cover a multitude of situations, many of which previously only met the common law definition of assault and not rape. One of the listed objectives of SORMA is to protect complainants from secondary victimisation within the criminal justice system.[8]

SORMA also introduced reform to the common law rules of evidence governing sexual offences, such as expressly abolishing the cautionary rule that was applicable to sexual offence victims[9] and amending section 227 of the Criminal Procedure Act.[10] This amendment introduced a range of factors to be taken into account when deciding whether to grant leave to adduce evidence of a complainant's prior sexual history.[11] Another important reform introduced by SORMA was the prohibition negative inferences being drawn only from the absence of a previous consistent statement regarding the commission of a sexual offence or a delay in the reporting of a sexual offence.[12]

The latter amendment is the focus of this dissertation. This dissertation will critically evaluate the rules contained in sections 58 and 59 of SORMA, consider the interpretation and application of these sections by courts and explore whether it is effectively the same or different from the common law rule it sought to improve. It will then be considered whether sections 58 and 59 in their current form should be retained, amended or abolished.

Section 58 enables the state to admit into evidence a prior statement made by a complainant which is sufficiently similar to the complainant's oral testimony in court.[13] The section further provides that the court may not draw a negative inference only from the absence of a prior complaint being admitted into evidence. Section 59 makes it clear that the court also may not draw a negative inference only from a delay in the reporting of a sexual offence. The two sections read as follows:

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[7] Act 32 of 2007.
[8] Section 2*(d)* of SORMA supra.
[9] Section 60 of SORMA supra note 7.
[10] Act 51 of 1977.
[11] Schedule to SORMA supra note 7 which amended section 227 of Act 51 of 1977.
[12] Sections 58 and 59 of SORMA supra note 7.
[13] PJ Schwikkard 'Getting somewhere slowly - the revision of a few evidence rules' in Artz & Smythe (eds) *Should We Consent? Rape Law Reform in South Africa* at 89.

> 58 Evidence of previous consistent statements
> Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: Provided that the court may not draw any inference only from the absence of such previous consistent statements.
>
> 59 Evidence of delay in reporting
> In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.

II RESEARCH QUESTION AND AIMS

This dissertation considers the question of whether the rules contained in sections 58 and 59 of SORMA, which allow previous consistent statements made by a complainant in a sexual offence matter to be admitted into evidence, can be reconciled with the aims and objectives of SORMA?

The aims and objectives of SORMA are listed in section 2. The Act aims to:

> afford complainants of sexual offences the maximum and least traumatising protection that the law can provide, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act and to combat and, ultimately, eradicate the relatively high incidence of sexual offences committed in the Republic…

It is clear that a primary objective of the legislation is to ensure that the substantive and procedural law relating to sexual offences are able to protect victims from secondary victimisation within the criminal justice system and that antiquated rules are abolished.

One of the listed ways in which SORMA seeks to afford victims with the maximum and least traumatising protection is to promote the spirit of *batho pele* (the people first) in service delivery within the criminal justice system through more effective and efficient investigations and prosecutions of sexual offenders[14] and giving proper recognition to victims' needs.[15] SORMA envisages a victim-centred approach to criminal justice and this is clear in its aim to protect not only victims but also their families from secondary victimisation by implementing an 'effective, responsive and sensitive criminal justice system relating to sexual offences'.[16]

This dissertation will also address whether sections 58 and 59 of SORMA do in fact meet the intended aim of amending the common law rule relating to the admission of evidence of previous consistent statements in sexual offence cases (the common law rule is discussed in

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[14] Section 2*(e)*(i) of SORMA supra note 7.
[15] Section 2*(e)*(ii) of SORMA supra.
[16] Section 2*(d)* of SORMA supra.

the following paragraph). This will be determined through an analysis of case law and academic debates.

The general rule in the common law is that if a witness has made a previous consistent statement which supports their testimony in court, such prior statement is inadmissible.[17] The overarching reason for the exclusion is that prior consistent statements are considered irrelevant and lacking probative value.[18] Some of the reasons for its exclusion are: that there is a risk that the evidence is fabricated as a lie can be told as many times as a truthful statement can; it merely repeats evidence already presented by a witness; and there is a rule which precludes self-corroboration.[19]

However, within the common law exists an exception specifically for sexual offence cases. This exception allows evidence of a prior consistent statement to be admitted into evidence provided that it was reported by the complainant within a reasonable period after the commission of the offence.[20] If the statement was not made within what the court considered to be 'the first reasonable opportunity', then the court could draw a negative inference with respect to the credibility of the complainant.[21]

The origins of this common law exception date as far back as 13th century England and is underpinned by the archaic and sexist idea that complainants in sexual offences matters must be treated with suspicion and are more likely to lie than other complainants.[22] Previous consistent statements were allowed to be admitted as evidence in order to counter this suspicion.[23] Consequently, the origin of this rule was not to support the complainant with their testimony, but to decide whether the complainant's testimony should be viewed with suspicion. Due to the historical development of the rule which is out of date with modern legal systems, constitutional rights and social science evidence, this research will consider whether the exception relating to sexual offences should be retained at all.

When SORMA was enacted, sections 58 and 59 of SORMA aimed to eliminate the negative inferences that courts often drew from late reporting of sexual offences by victims. It is unclear from the wording of these sections whether the 'first reasonable opportunity' requirement was eliminated and courts have not adopted a uniform approach to the continuing

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[17] PJ Schwikkard & SE Van der Merwe *Principles of Evidence* 4 ed (2016) at 112-13.
[18] Ibid 113.
[19] Ibid 113-14.
[20] Ibid 116.
[21] Ibid 117.
[22] PJ Schwikkard 'Previous consistent statements – the sexual offence anomaly' (2022) 35 *SACJ* 58 at 59.
[23] Ibid.

existence of this requirement.[24] Schwikkard explains that one reason for the diverse interpretations by courts is the inherent tension in requiring the offence to be reported at the earliest opportunity, but also requiring no inference to be drawn from a late reporting of the offence.[25] This dissertation aims to examine the various interpretations and possible meanings of sections 58 and 59, and evaluate its impact and influence on the adjudication of sexual offence cases.

III METHODOLOGY

This research is based on a desktop review of articles in journals, chapters in academic books, textbooks on the law of evidence, commentaries on SORMA, and reported case law from South African courts and foreign jurisdictions. It is acknowledged that the facts of many of these cases are very explicit and upsetting to read. Such is the nature of the crime of rape. Books and articles available electronically have also been utilised. SORMA is the primary legislation under analysis in this dissertation as well as the common law rules relating to the admissibility of evidence in sexual offences cases. No empirical research has been conducted.

A limitation of this study is that the analysis of the application of sections 58 and 59 of SORMA by magistrate's and higher courts in South Africa is limited to cases which have been reported. A majority of criminal cases are prosecuted in magistrates' courts and these cases are not reported unless they go on appeal to a high court. Thus, empirical research would be needed in order to ascertain trends in the application of sections 58 and 59 of SORMA by magistrates in practice and is a question worthy of research in the future.

Whilst this is not a comparative study, chapter 5 makes reference to the approach adopted in Canada due to its constitutional similarity with South Africa, as well as the approach adopted in England. This is due to the historical basis of the South African law of evidence being rooted in English law.

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[24] Schwikkard & Van der Merwe op cit note 17 at 123-4 & Schwikkard op cit note 22.
[25] Schwikkard op cit note 22 at 63.

IV LITERATURE REVIEW

In the context of sexual offences law reform broadly, Artz & Smythe argue that SORMA can be viewed as a 'legislative compromise'.[26] The authors explain that during the law reform process, it was evident that some of the objectives and aims for a new sexual offences law were at odds with each other.[27] Whilst the reform process intended to focus on improving the treatment of victims in the criminal justice system, ultimately the legislation which was enacted focused more on expanding the bounds of criminal liability (substantive criminal law), rather than focusing on improving procedural mechanisms to reduce the occurrence of secondary victimisation.[28] Artz and Smythe explain that whilst SORMA has introduced positive improvements to the law on sexual offences, it also missed out on the opportunity to improve the experiences of victims of sexual offences.[29]

There is considerable academic commentary and debate on the admissibility of previous consistent statements in sexual offence cases. PJ Schwikkard has written on various occasions on this topic and is critical of the legislature's approach in SORMA. Schwikkard argues that when drafting SORMA, the legislature adopted a reductionist approach to the law. The South African Law Commission (SALC) preferred a normative approach to legislative drafting which would enable the legislation to operate as a tool for training and education. This reductionist approach which relies on a belief that judicial officers are adequately equipped to apply broad legal principles to changing and complex factual scenarios.[30]

Schwikkard appreciates that sections 58 and 59 of SORMA recognise the prevailing social science research which indicates that complainants may delay reporting the commission of the offence for various reasons and that complainants should not be prejudiced by late reporting.[31] However, Schwikkard is of the view that the same effect could have been achieved without codifying and amending the common law rule, but simply by abolishing the common law exception relating to sexual offences and relying on the general exceptions which allow evidence of previous consistent statements to be admitted into evidence.[32] Schwikkard argues

[26] L Artz & D Smythe 'Introduction: Should we consent?' in Artz & Smythe (eds) *Should We Consent? Rape Law Reform in South Africa* at 2.
[27] Ibid at 1.
[28] Artz & Smythe op cit note 26 at 2.
[29] Ibid at 10.
[30] Schwikkard op cit note 13 at 73.
[31] Ibid at 89.
[32] Ibid.

that if previous consistent statements are considered irrelevant in relation to other types of offences it is unclear why it is considered relevant in sexual offences cases only.[33]

In a later article, written several years after the implementation of SORMA and with the benefit of examining case law on sections 58 and 59 of SORMA, Schwikkard argues that the wording of sections 58 and 59 are incompatible with the preamble of SORMA and that these sections effectively codify the prior common law position.[34]

In contrast, Karam Jeet Singh argues that the SALC, in narrowing its focus on prohibiting the drawing of negative inferences, did not go far enough in addressing the difficulties with the common law rule.[35] Singh argues that evidence of previous consistent statements should be admitted into evidence not to merely demonstrate consistency, but as evidence of truth of the statement.[36]

Zeffertt, Paizes and Grant are of the view that sections 58 and 59 of SORMA are admirable provisions but that the implementation of these provisions is imperfect and has in fact made matters worse.[37] The authors have doubts about the constitutional validity of section 58 of SORMA and found there to be 'textual difficulties and inadequacies in its drafting'.[38] They argue that the admissibility of previous consistent statements by a complainant has the potential to discriminate against an accused person as the state would have the option to admit a previous consistent statement into evidence whilst the accused would not be entitled to the same right.[39] This argument can easily be rebutted as the accused would be able to admit a previous consistent statement into evidence if one of the common law exceptions to the general rule is met, and thus no prejudice to the accused would result.

Zeffertt, Paizes and Grant are not convinced that these provisions in SORMA pass constitutional muster and have concerns about trial unfairness. They are of the view that SORMA has widened the scope of the common law exception and that there is the potential for an innocent accused person to be convicted on the basis of a prior consistent statement.[40] Zeffertt, Paizes and Grant are ultimately of the view that sections 58 and 59 of SORMA, as well as the common law exception, are discriminatory to the accused.[41]

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[33] Ibid.
[34] Schwikkard op cit note 22 at 61.
[35] Singh op cit note 1 at 45.
[36] Singh op cit note 1 at 55.
[37] DT Zeffertt, AP Paizes & JS Grant 'Complaints in sexual offences' (2008) *SALJ* 642 at 643.
[38] Ibid.
[39] Ibid at 645.
[40] Ibid.
[41] Ibid at 647.

Temkin considers the position in English, Canadian and Australian law, which differs from the South African legal position, regarding the admissibility of previous consistent statements in sexual offences matters.[42] Temkin argues that the sexual offences exception should be retained as the Canadian law abolition of the sexual offences exception is tantamount to 'throwing the baby out with the bathwater'.[43] She argues that this is because abolishing the sexual offences exception does not cure the mischief it sought to address (that is, the prejudice and stereotypes underlying the common law exception) as it robs complainants of an opportunity to adduce evidence which may support their credibility. Temkin explains that complainants continue to be regarded with suspicion despite legal systems taking steps away from the archaic roots of the common law exception.[44] Temkin also argues that the preoccupation of courts on late reporting of sexual offences by victims is unjustifiable and a further barrier to prosecuting rape cases.[45]

It is clear that the various authors hold a wide range of views regarding the place of previous consistent statements in sexual offences cases and there are many sides to the debates.

V CHAPTER SYNOPSIS

This dissertation consists of six chapters, including this chapter 1 which introduces the research question and aims of the study, sets out the background to the topic, discusses the methodology used and provides a literature overview of academic debates.

Chapter 2 sets out the history of the common law exception for sexual offences and explain its 13th century English law origins. The legal requirements for the admissibility of a previous consistent statement at common law are set out. The rule as applied by courts in South Africa prior to the enactment of SORMA is discussed and analysed.

Thereafter, chapter 3 explains the need for specialised sexual offences legislation and the law reform process which led to the enactment of SORMA. The scope of sections 58 and 59 of SORMA is canvassed.

Chapter 4 is an overview of case law applying these two sections. Specifically, this chapter looks to answer whether these sections of SORMA have an influence in the prosecution of sexual offences cases, whether admitting evidence of previous consistent statements under

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42 Jennifer Temkin *Rape and the Legal Process* 2ed (2002).
43 Ibid at 191.
44 Temkin op cit note 42 at 191.
45 Ibid at 190.

these sections meets the aims and objects of SORMA, and lastly, whether these two sections have resulted in a change from the prior common law position.

Chapter 5 explores possible changes to the sexual offences exception, with guidance from foreign law. It considers the legal rules regarding admissibility of previous consistent statements in sexual offences in other jurisdictions to see what lessons can be gleaned for any further law reform in South Africa. English law is considered as the common law exception has its origins in the archaic English law rule; thus it is prudent to ascertain the current legal rules in English law which govern the admissibility of previous consistent statements. The position in Canadian law is also considered. South Africa's Constitution is similar to that of Canada and subsequently both jurisdictions have the benefit of learning from jurisprudence of the other. The options of retention, amendment or complete eradication of the sexual offences exception to previous consistent statements are discussed in chapter 5. These possibilities are discussed with reference to academic commentary and the analysis of case law from chapters 2 and 4.

Lastly, chapter 6 provides a recommendation on the fate of sections 58 and 59 of SORMA and determines whether these provisions have, or are able to, meet the aims and objectives of SORMA.

CHAPTER TWO: HISTORICAL ORIGINS OF THE SEXUAL OFFENCES EXCEPTION AND RECEPTION INTO THE COMMON LAW

I INTRODUCTION

This chapter will examine the common law rules of evidence relating to previous consistent statements, with a focus on the sexual offences exception prior to its amendment by SORMA. The historical roots of the rule will be explained, the requirements for admission into evidence will be set out and the application of the rule in case law will be critically examined.

II PREVIOUS CONSISTENT STATEMENTS IN THE LAW OF EVIDENCE

A previous consistent statement is defined as an oral or written statement which a witness has made prior to testifying at trial, and such statement is similar to and supports their testimony at trial. [1] The general rule of evidence is that these previous consistent statements are inadmissible because they are irrelevant and lack probative value.[2] This is often referred to as the 'rule against narrative'.[3] Some reasons underlying the rule against narrative are that a lie can be repeated just as easily as the truth and that there is a danger that evidence could be manufactured.[4] Zeffertt and Paizes argue that because of this risk of easily manufacturing evidence, constitutional development allowing for previous consistent statements to be admissible is undesirable.[5] Additionally, allowing evidence of prior consistent statements in all cases would be a time-consuming process and result in collateral issues being explored. Furthermore, all a previous statement does is duplicate evidence already provided by a witness and may be considered superfluous.[6] Cross and Tapper[7] argue that these statements are superfluous as the testimony of a witness is to be accepted as true until there is a particular reason for impeaching their statements as false. The rule of evidence which prohibits self-corroboration means that the probative force accorded to a previous consistent statement is very little, and for this reason, such statements are usually held to be inadmissible.[8]

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[1] PJ Schwikkard & SE Van der Merwe *Principles of Evidence* 4 ed (2016) at 112.
[2] Ibid 112-113.
[3] Ibid 113.
[4] Ibid 113.
[5] DT Zeffertt & A Paizes *The South African Law of Evidence* 3 ed (2017) at 476.
[6] Schwikkard & Van der Merwe op cit note 1 at 114.
[7] C Tapper *Cross & Tapper On Evidence* 12 ed (2010) at 300.
[8] Ibid.

However, as with most general rules of evidence, there are exceptions to the rule which allow previous consistent statements to be admitted into evidence in certain circumstances. The dominant view espoused by most authors is that there is a *numerus clausus*, or closed list, of exceptions to the rule[9], contrary to the statement enunciated by Satchwell J in the Witwatersrand High Court decision of *Holtzhauzen v Roodt*[10] that there is no *numerus clausus*. The statements upon which Satchwell J relied were merely *obiter* remarks by Rumpff CJ in *S v Burgh*[11] and it is incorrect to say that in all cases where previous consistent statements are relevant that they are admissible.[12] The common exceptions which enable evidence of previous consistent statements to be admitted include rebutting a suggestion of recent fabrication; refreshing a witness's memory; and in sexual offence cases.[13]

III THE SEXUAL OFFENCES EXCEPTION

In sexual offence trials, evidence of a prior complaint made by the complainant to another person was admissible under the common law (up until the end of 2007 when SORMA came into force and the rule developed a statutory basis).[14] The historical development of this exception originates from the 'hue and cry rule' which applied in the Middle Ages. The 'hue and cry rule' finds its origins in medieval English law and was recorded as early as the 13th century by de Bracton[15]. It was essential for a successful rape prosecution that the complainant:

> go at once and while the deed is newly done, with hue and cry, to the neighbouring townships and there show the injury done her to men of good repute, the blood and clothing stained with blood, and her torn garments…[16]

This ancient English rule applied to South Africa by virtue of the incorporation of the English law of evidence into our own law.[17] The English law of evidence as it stood on 30 May 1961 was incorporated into South African law when South Africa became a Republic on 31 May 1961.[18] The 'hue and cry' rule initially did not only apply to rape cases but to all violent

[9] Schwikkard & Van der Merwe op cit note 1 at 115 and Zeffertt & Paizes op cit note 5 at 476.
[10] [1997] 3 All SA 551 (W).
[11] 1976 (4) SA 857 (A).
[12] Zeffertt & Paizes op cit note 5 at 476.
[13] Schwikkard & Van der Merwe op cit note 1 at 115.
[14] Ibid 116.
[15] PJ Schwikkard 'A critical overview of the rules of evidence relevant to rape trials in South African law' in Jagwanth, Schwikkard & Grant (eds) *Women and the Law* (1994) at 200.
[16] H de Bracton *On the Law and Customs of England* (1968) translation by SE Thorne quoted in PJ Schwikkard 'Previous consistent statements – the sexual offence anomaly' (2022) 35 *SACJ* 58 at 59.
[17] Schwikkard & Van der Merwe op cit note 1 at 27.
[18] Ibid at 28.

criminal offences, though by the 19th century the application of the rule was confined to sexual offences only.[19]

The old 'hue and cry rule' emanating from medieval English law provides the historical basis for the common law rule, though the South African common law exception applies to both male and female victims and is not restricted to cases where the absence of consent is an essential element of the offence.[20] Despite the initial purpose of admitting a prior complaint being to negate consent, in the English case of *R v Osborne*[21] it was settled that prior complaints are admissible in all sexual offences matters even when lack of consent is not disputed.[22]

Sexual offence laws often contain different requirements compared with other criminal offences because of a belief that sexual offences have unique features.[23] These features, so the argument goes, make it difficult to prove that sexual offences did not occur and make it difficult for an accused to refute a claim against them. Prior complaints were not admitted as proof of the truth of its contents nor as corroboration, but merely to demonstrate consistency[24] and an absence of consent.[25] However, Zeffertt and Paizes argue that admitting previous consistent statements into evidence is confined to the limited purpose of demonstrating consistency.[26] Despite the oft provided reason[27] that these statements are admissible because they can prove consistency and negate consent, the latter is not the purpose of the rule. Without further evidence from the complainant regarding consent, the previous consistent statement alone cannot negative consent.[28] This view was supported by the Supreme Court of Appeal in *S v Hammond*[29] where Cloete JA held that prior complaints admitted into evidence do not negate consent themselves, but only support the credibility of the witness who is testifying.[30]

In medieval England, it was a defence to a prosecution for rape that the complainant did not 'raise the hue and cry' immediately after the offence occurred.[31] By as late as the 18th century, it was still considered a strong, though not conclusive, defence that a woman did not make a complaint about the offence within a reasonable time thereafter.[32] The victim's silence

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[19] Schwikkard *A critical overview* op cit note 15 at 200.
[20] Schwikkard & Van der Merwe op cit note 1 at 116.
[21] As cited in Zeffertt & Paizes op cit note 5 at 478.
[22] Zeffertt & Paizes op cit note 5 at 478.
[23] Schwikkard *A critical overview* op cit note 15 at 198.
[24] Cross & Tapper op cit note 7 at 303.
[25] Schwikkard *A critical overview* op cit note 15 at 199.
[26] Zeffertt & Paizes op cit note 5 at 480.
[27] See *S v R* 1965 (2) SA 463 W.
[28] Zeffertt & Paizes op cit note 5 at 480.
[29] [2007] ZASCA 164.
[30] Ibid para 16.
[31] Zeffertt & Paizes op cit note 5 at 477.
[32] Ibid.

after an assault was effectively equated with a prior inconsistent statement that would enable the defence to impeach the credibility of the complainant.[33] Zeffertt and Paizes explain that the practice of adducing evidence of an early complaint was so heavily entrenched in legal proceedings that this rule survived the development of the hearsay rule and the prohibition against self-corroboration.[34] The historical rationale for the rule was that a woman who was truly assaulted by a man would complain about the assault immediately.[35] Thus, evidence of the first complaint was admissible to demonstrate that the complainant had behaved in a manner that a real victim would.[36]

This peculiar sexual offences exception, with its antiquated roots which can be argued to be misogynistic, misplaced and irrational, has been criticized widely.[37] Criticisms differ in form with some authors arguing that the rule is discriminatory to sexual offence victims[38], while others argue that the rule is prejudicial to an accused who is barred from leading evidence of their own previous consistent statements at trial.[39] The rule was also considered to be unduly technical, unsatisfactory and an anomaly.[40]

Schwikkard explains why this exception is retained right until the 21st century. It was grounded in the belief that the exception was a product of centuries of judicial experience which had demonstrated that the evidence of a complainant in a sexual offence case must be regarded with suspicion.[41] Prior consistent statements were allowed to be admitted into evidence in order to overcome this suspicion.[42]

IV COMMON LAW REQUIREMENTS FOR ADMISSION

The requirements for the admission of a previous consistent statement under the common law were that: (a) the complaint was made voluntarily; (b) the complainant testifies at trial; (c) the complaint must have been made at the first reasonable opportunity; (d) the complainant was a victim of a sexual offence; and (e) the purpose of admitting the complaint was restricted to

[33] KM Stanchi 'The paradox of the fresh complaint rule' (1996) *Boston College Law Review* 441 at 446.
[34] Stanchi op cit note 33 at 446.
[35] Ibid at 442.
[36] Ibid.
[37] Schwikkard & Van der Merwe op cit note 1 at 116.
[38] Schwikkard *A critical overview* op cit note 15.
[39] Zeffertt & Paizes op cit note 5.
[40] Cross & Tapper op cit note 7 at 301.
[41] Schwikkard *A critical overview* op cit note 15 at 200.
[42] Ibid.

proving consistency.[43] The remainder of this chapter will explore the first three requirements with reference to case law which gives content to these requirements. The last two requirements have already been covered in this chapter.

(a) Voluntary complaint

It is essential for admission into evidence that the complaint was made of the victim's own volition and not as a result of leading or suggestive questions or by intimidation.[44] Schwikkard and Van der Merwe submit that courts retain a discretion to admit complaints which were responses to leading or suggestive questions.[45] In the English case of *R v Osborne*[46] it was held that the discretion to decide whether a prior complaint was made voluntarily resides with the presiding officer. If the surrounding circumstances indicate that there would not have been a complaint but for the questioning, then the complaint is not admissible.[47] However, if the question by the person to whom the offence was revealed merely pre-empted a statement which the complainant was going to make, then the complaint would still be admissible and considered voluntary despite being prompted by a question.[48]

In the case of *R v C*[49] both counsel for the accused and the presiding officer agreed that a complaint made by a five-year-old rape victim to her mother after being questioned by her mother was voluntary. In this case, a few days after the sexual assault the complainant had been displaying physical discomfort and her mother had asked her what was wrong. The complainant replied that she had injured herself on a pole. The mother had been skeptical of her reply and had asked her once more what had happened and asked her daughter to tell her the truth. The complainant then explained that 'the boy' had hurt her, and when asked which 'boy' had done so, the complainant identified the accused as the offender.[50] The mother testified that she had not threatened her daughter or spoken with anger, but instead had spoken to her gently. Caney J held that the mere fact that a complaint is made in response to questioning, which is not suggestive or leading in nature, does not affect the voluntariness of such complaint.[51]

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[43] Schwikkard & Van der Merwe op cit note 1 at 116.
[44] Ibid at 117 and *R v C* 1955 (4) SA (40) N.
[45] Schwikkard & Van der Merwe op cit note 1 at 117.
[46] [1905] 1 KB 551.
[47] Ibid and Schwikkard & Van der Merwe op cit note 1 at 117.
[48] Ibid.
[49] Supra note 44 at 41.
[50] Ibid 41.
[51] Ibid.

The Appellate Division case of *S v T*[52] is an instance where a previous consistent complaint was not admitted into evidence because it had been made as a result of intimidation. In this case, the complainant was an eleven-year-old child who had made no complaint to her mother until after the third occasion on which she alleged she had been sexually assaulted by the accused.[53] The accused's main ground of appeal to the Appellate Division was that he suffered from trial prejudice as a result of the admission into evidence of a prior complaint which should not have been admitted.[54] The mother testified at the trial that she had asked the complainant what had happened and threatened to hit the complainant with a stick if she did not tell her. The complainant started crying and said she would tell her mother about the assault.[55] Hoexter JA held that the complaint was not a voluntary one, but one disclosed because of a fear of being beaten.

The judge of appeal considered the English cases dealing with voluntary complaints and held that it was clear that a complaint could not be admitted where it was made as a result of intimidation as in this case where the mother was on the verge of beating the complainant with a stick.[56] Thus, the court concluded that the evidence of the prior complaint was wrongly admitted into evidence at the trial and that it was not able to conclude that the accused would inevitably have been convicted if the evidence of the prior complaint was excluded.[57] Importantly, the prior complaint was not the only consideration in reaching that conclusion. It was held that the trial court had misdirected itself regarding the evidence given by the accused and this also contributed to the Appellate Division's finding that the accused should not have been convicted.[58] This case demonstrates the importance of prior complaints by the complainant in obtaining a conviction against the accused and that the requirement that the complaint be made voluntarily is a crucial one. Complaints elicited by leading questions and intimidation will render prior complaints inadmissible, making it more difficult to secure a conviction against an accused in a sexual offence matter.

(b) The complainant must testify at trial

It is a precondition for the admission of a previous consistent statement that the complainant testifies at trial: neither the fact that the victim had made a previous consistent statement nor

[52] 1963 (1) SA 484 (A).
[53] Ibid at 486.
[54] Ibid at 485.
[55] *S v T* supra note 52 at 486.
[56] Ibid at 487.
[57] Ibid at 488.
[58] Ibid.

the contents thereof can be admitted into evidence if the victim is unable to testify. Consistency, which is the underlying reason for the admission of prior complaints, cannot be proven if the victim does not testify.[59] This requirement is not contentious as admitting a previous consistent statement into evidence without requiring that the complainant testify would violate the hearsay rule.[60]

In *R v Kgaladi*[61] the Appellate Division held that if the evidence of a prior complaint in a rape trial is not placed before the court, neither the fact that a complaint was made nor the contents thereof are admissible as evidence.[62] At trial, the complainant had not been called as a witness for the prosecution, but the judge ordered that the complainant be brought to court and questioned her in front of the jury.[63] The complainant was not sworn in, had not taken an affirmation, nor was she admonished.[64] Counsel for the accused was not able to cross-examine the complainant as she had not been called as a witness. The Appellate Division held that this was a grave irregularity which caused prejudice to the accused as inadmissible evidence had been admitted. It was held that if not for the prior complaint, the accused may have been acquitted. As a result of considering inadmissible evidence, there was actual and substantial prejudice to the accused which resulted in a miscarriage of justice.[65] Consequently, the accused's conviction and sentence were set aside.

Conversely, in the case of *S v R*[66] the evidence of the prior complaint was deemed admissible despite the complainant's inability to recall making the prior complaint. The complainant in this case was a chronic alcoholic who was receiving treatment for her addiction. On this particular occasion, the complainant had resumed drinking and of her own volition was being taken by ambulance to a nursing home.[67] The alleged sexual assault took place in the twenty-minute drive to the nursing home. The accused, who was the driver of the ambulance, alleged that the incident had been consensual whilst the complainant averred that the sexual intercourse had occurred against her will.[68] After the ambulance arrived at the nursing home, the witness (a nurse at the nursing home) saw the complainant pointing at the accused and heard her making accusatory remarks at him. The nurse testified that the complainant was

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59 Schwikkard & Van der Merwe op cit note 1 at 118 and Zeffertt & Paizes op cit note 5 at 480.
60 Schwikkard & Van der Merwe op cit note 1 at 120.
61 1943 AD 255.
62 *R v Kgaladi* supra note 61 at 255.
63 Ibid at 255.
64 Ibid at 258.
65 Ibid at 264.
66 *S v R* supra note 27.
67 Ibid at 463.
68 Ibid.

clearly distressed and in tears. Later the witness heard the complainant proclaim that, 'I am going to tell my husband to kill that man because he raped me'.[69]

However, due to her chronic alcoholism, the complainant suffered from amnesia and could not recall anything that had happened to her in the ambulance. Counsel for the accused objected that admitting evidence of the prior statements constituted hearsay as the complainant herself could not speak to the occurrence of these utterings.[70] Trollip J considered this objection and considered both English and South African authority on the matter and held that the hearsay objection could not stand as the complainant did in fact testify. Despite her amnesia and inability to recall the rape and what she said thereafter, the complainant at all times maintained that she could not have consented. It was held that since the statements had been made, and their contents were relevant, they were thus admissible to prove consistency and negate consent.[71] This case is a good example of the utility of previous consistent statements in proving consistency. Such a prior complaint would not have been admissible but for the sexual offences exception.

(c) The complaint must have been made at the first reasonable opportunity

This is arguably the most controversial requirement for admissibility and existing case law, especially that from the 20th century and before, demonstrates that dangerous assumptions and stereotypes are often employed. This requirement necessitates that the complainant tell someone else about the sexual offence they endured at the 'first reasonable opportunity' after the incident.[72] This did not mean that a victim must tell what had happened to her to the first person she encountered. What constituted the first reasonable opportunity under the common law differed from case to case, depended on the circumstances and was determined by the exercise of judicial discretion.[73] Some commentators list the availability of a person to whom the victim could complain to, the age of the victim and whether the victim understood that an offence had been committed as factors relevant in determining whether the prior complaint was made at the first reasonable opportunity or not.[74]

In the absence of a prior complaint made within a reasonable time, the court could draw a negative inference regarding the credibility of the complainant, though a delay in reporting

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[69] Ibid at 464.
[70] Ibid.
[71] *S v R* supra note 27 at 465. See also Zeffertt and Paizes' argument set out in section II of this chapter relating to negating consent.
[72] Schwikkard & Van der Merwe op cit note 1 at 121.
[73] Schwikkard *A critical overview* op cit note 15 at 199.
[74] Schwikkard & Van der Merwe op cit note 1 at 121 and Zeffertt and Paizes at 479.

was not inevitably fatal to obtaining a conviction.[75] Zeffertt, Paizes and Grant are of the view that judicial officers often drew negative inferences against complainants who made no prior complaint and against complaints who 'made a tardy complaint'.[76] In *S v Van der Ross*[77] the court drew a negative inference from the absence of a prior complaint being admitted.

In *R v Gannon*[78], counsel for the accused argued that the prior complaint of the victim should not be admitted into evidence as it would be 'extremely dangerous' to allow for periods of time to pass in rape cases, especially those concerning young children, as this might cause them to invent a story.[79] The court confirmed that whether there has been undue or unreasonable delay is for the judge to determine.[80] The facts of the case were that an eight-year-old girl had been raped, but did not understand what had happened to her. She was asked by the accused not to tell her mother what had happened and the accused had bribed her with sixpence.[81] The victim did not tell her mother about the rape for ten days, and only did so once she had developed an infection and her mother had asked her what caused her discomfort.[82] The court held that in the circumstances the victim had made the complaint at the earliest opportunity which could have been reasonably expected. The court went on to proclaim that this might not have been the case if the victim was slightly older or understood the nature of the offence.[83] The court cautioned that judges should be careful in admitting prior complaints into evidence as there was room for 'possible mischief'.[84] The court went on to state that in some cases, as little as an hour's delay may be unreasonable. [85]

The language used by the court demonstrated a practice that evidence of a prior complaint could be admitted after a period of time had elapsed, between the commission of the sexual offence and the first complaint, if the complainant was young and lacking in knowledge, though not if she was older and wiser.

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[75] Schwikkard & Van der Merwe op cit note 1 at 116 and 122.
[76] DT Zeffertt, AP Paizes & JS Grant 'Complaints in sexual offences' (2008) *SALJ* 642 at 643.
[77] (A1044/01) [2002] ZAWCHC 30 (31 May 2002).
[78] 1906 TS 114.
[79] *R v Gannon* supra note 78 at 115.
[80] Ibid at 116.
[81] Ibid at 117.
[82] Ibid.
[83] Ibid.
[84] Ibid at 117.
[85] Ibid at 118.

Similarly, in *R v C*[86] the defence objected to the admission of a prior complaint made by the victim, a five-year-old child, to her mother five days after she was raped.[87] Caney J explained that the complaint:

> Must have been made, without undue delay but at the earliest opportunity which, under all the circumstances, could reasonably be expected, to the first person to whom the complainant could reasonably be expected to make it.

In this case, the rape had occurred on a Thursday morning, and the defence argued that disclosing the offence to the victim's mother on the Tuesday thereafter, five days later, was not the earliest opportunity for the victim to speak to her mother.[88] Caney J in reaching a decision relied on the cases of *R v Gannon*[89] and *R v T*[90] where there were a lapse of ten days and six weeks respectively between the commission of the offence and the first report. The court considered the age of the victim and that she was not old enough to comprehend the nature of the offence committed. It was natural that she had only spoken to her mother about what had occurred once she had developed an infection as a result of the rape.[91] It was held that the delay was not undue and that the victim, as a five-year-old, did in fact disclose what had happened at the earliest opportunity she could. The court disallowed the defence's objections and admitted evidence of the complaint.[92] Whilst the previous consistent statements were admitted in this case and in that of *Gannon*, it is clear that the requirement that a complaint be made without delay is often contested by counsel for the accused in order to discredit the complainant.

Conversely, the court of appeal in *R v Du Plessis*[93] ruled that at trial the Magistrate had wrongly allowed a prior complaint to be admitted and that this caused trial prejudice resulting in the conviction being set aside. The victim was a girl under the age of sixteen who had been raped on three occasions: 10 August, 12 August and 11 September of 1921. The victim had only confided in her mother as to what had happened sometime between 11-20 September of that year. Wessels JP held that although prior complaints can be admitted, this is only if a complainant makes a statement 'immediately after she has been raped or on the very first occasion on which she can make the statement'.[94] It was held that the previous consistent

[86] *R v C* supra note 49.
[87] Ibid at 40.
[88] Ibid at 41.
[89] Supra note 78.
[90] 1937 TPD 389.
[91] *R v C* supra note 49 at 41.
[92] Ibid.
[93] 1922 TPD 153.
[94] Ibid at 154.

statement was not made within a reasonable time after the offence and that such evidence was inadmissible.[95] Counsel for the accused had argued that the statement was intended to prejudice the mind of the Magistrate. The court agreed and explained that there was a rule in sexual offences cases that if evidence is calculated to have prejudiced the accused, there is a presumption that the accused was prejudiced and the conviction should be set aside.[96]

The Supreme Court of Appeal in 2007, prior to the implementation of SORMA, were much more understanding in accepting evidence of a prior complaint made nineteen years after the offence occurred in *S v Cornick*.[97] The complainant was fourteen at the time the offence was committed and did not realize until her mid-twenties that what had been done to her constituted rape.[98] She had not told her mother or her grandparents what had happened to her. Although she confided in a psychologist after she realized that she had been raped, she did not tell anyone else.[99] The complainant only disclosed what had happened to her and attempted to lay charges against the accused after encountering him for the first time in almost 20 years when she was reduced to tears.[100] The Supreme Court of Appeal accepted that the prior complaints were made after a long period of time had lapsed, and understood and explained that the complainant had not been in a position to tell her elderly grandparents or her mother what had happened to her. The court stressed that sexual relations were not openly spoken about in the complainant's home and community and that sexual offences were not widely reported in the media and openly talked about as they are now.[101] The court confirmed the conviction in this case.

V EVALUATION OF THE COMMON LAW SEXUAL OFFENCES EXCEPTION

The sexual offences exception is underpinned by a belief that there is an inherent difference between a complainant in a sexual offence case and a complainant in another criminal offence.[102] There is an underlying idea that many complainants make false accusations about being raped and that accusations of rape require different treatment to combat these false

[95] Ibid.
[96] Ibid at 155.
[97] *Cornick & Kinnear v The State* [2007] SCA 14 (RSA).
[98] Ibid at 12.
[99] *Cornick & Kinnear v The State* supra note 97 at 14.
[100] Ibid at 16.
[101] Ibid at 55.
[102] K Singh 'Evaluating the ''first report'': The persistent problem of evidence and distrust of the complainant in the adjudication of sexual offences' (2006) 1 *SACJ* 37 at 39.

accusations.[103] Schwikkard argues that the negative inferences that can be drawn from the complainant's failure to make a complaint without undue delay is reflective of attitudes formulated in circumstances where there was a lack of understanding of the psychology of sexual offence victims.[104] Schwikkard explains that the reasons why rape survivors fail to report or delay reporting what has happened to them are multifaceted: there are psychological and social factors such as feelings of guilt, fear of the offender and concerns about testifying in court.[105] She concludes that consequently, the absence of a prior complaint cannot be a reliable factor in determining the credibility of the complainant. Temkin asserts that the emphasis on immediate complaints is unjustifiable and constitutes a further barrier to prosecuting rape cases and obtaining convictions.[106] Satchwell J in her judgment in *Holtzhauzen v Roodt*[107] acknowledged that the unique nature of rape as an offence had gone unstudied for many years and that the unique character of the offence had been underappreciated by the courts.[108] It was also recognized that rape was not likely a topic within the personal knowledge or experience of most judicial officers.[109] The judge explained that rape as a crime can trigger a range of emotional responses and the capacity for judicial officers to fully understand the experience of the rape victim, and also the offender, is limited.[110] Satchwell J acknowledged that rape is seldom discussed in the public domain and that victims often suffer in silence.[111] This case was not a criminal prosecution of a sexual offence, but rather a civil matter where a rape complainant was being sued by the alleged perpetrator for defamation and a large part of the judgment was dedicated to the admissibility of expert evidence. Nevertheless, Satchwell J's statements on previous consistent statements and the plight of rape victims remain pertinent.

In the judgment, Satchwell J quoted from an academic article[112] which explained that the evidentiary issues in rape trials cannot be properly addressed until it is recognized that 'not all rapes are the same.'[113] Each case needs to be assessed individually in light of its own

[103] Ibid.
[104] PJ Schwikkard 'Getting somewhere slowly - the revision of a few evidence rules' in Artz & Smythe (eds) *Should We Consent? Rape Law Reform in South Africa* at 88.
[105] Ibid.
[106] Jennifer Temkin *Rape and the Legal Process* 2ed (2002) at 190.
[107] *Holtzhauzen v Roodt* supra note 10.
[108] *Holtzhauzen v Roodt* supra note 10 at 560.
[109] Ibid at 560.
[110] Ibid at 561.
[111] Ibid at 560.
[112] Ibid at 561 and KK Baker 'Once a Rapist, Motivational Evidence and Relevancy in Rape Law' (1997) 110 *Harvard Law Review* 563.
[113] Ibid.

peculiar fact-set. Due to the highly personalized, intimate and solitary nature of rape as a crime, the experience of victims has been described as 'a scream from silence'.[114] It was recognized that sexual offences can result in devastating consequences for victims and that as a crime it strikes at the core of human dignity, privacy and personhood.[115] These observations underscore the need for a sensitive approach in the adjudication of sexual offences and highlight key factors which should be taken into account.

In the Constitutional Court case of *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others*[116] the court acknowledged that there are often delays in disclosing sexual offences and that many survivors suffer quietly and never disclose the offence or disclose after varying lengths of time after the offence was committed.[117] It was also emphasized that the reasons leading to late disclosure apply equally to children and adult survivors.[118] This case dealt with a challenge to the constitutionality of section 18 of the Criminal Procedure Act[119] which required that prosecutions for sexual offences be instituted within 20 years from the time the offence was committed.[120] The Constitutional Court held that the prescription period of 20 years was not cognizant of the difficult nature and process of sexual assault disclosure. Zondi AJ elaborated that some of the reasons why survivors report sexual offences after a lapse of time are: that their personal circumstances may have changed; they may only be able to process the trauma suffered after a length of time; they may seek psychological help which empowers them to enter the criminal justice system; or they may find a supportive partner later on who encourages them to report the offence.[121]

The court also recognized that sexual offences against women and children depend upon feelings of fear, shame and secrecy and that very often complainants fear the reaction from their communities.[122] It was emphasized that the nature of sexual offences can make it feel impossible for victims to tell what has happened to them even to their closest family and friends.[123] It was held that there was no rational basis for the right to prosecute to prescribe after 20 years in respect of sexual offences not including rape.[124]

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[114] Ibid at 561.
[115] Ibid.
[116] *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others* 2018 ZACC 16.
[117] Ibid para 13.
[118] Ibid para 12.
[119] Act 51 of 1977.
[120] *Levenstein* supra note 116 para 1.
[121] Ibid para 53.
[122] Ibid para 56.
[123] Ibid.
[124] Ibid para 59.

In most cases where previous consistent statements are questioned, the issue is not whether a prior a complaint was made, but the timing of the complaint.[125] It is clear from case law discussed earlier in this chapter and arguments by many commentators that the exception allows counsel for the accused to exploit a complainant's failure to complain within a reasonable period in order to undermine their credibility.[126]

On the other hand, there are arguments that the admission of prior complaints into evidence unfairly favours the complainant as the accused is not allowed to lead evidence of his previous consistent statements[127] and this provides the prosecution with an advantage which is not available to the accused.[128] It is submitted that these arguments are not persuasive as, it has been shown above, the admission of prior complaints by the complainant is underpinned by the idea that complainants may be lying and evidence other than their testimony in court needs to be admitted to validate their credibility. If there is a suggestion of recent fabrication, then the accused would likewise be allowed to adduce a previous statement into evidence. The stereotypes and myths underlying the sexual offence exception results in further hurdles for complainants and it is difficult to argue that complainants are advantaged by the exception.

VI CONCLUSION

It is evident that the sexual offences exception to the general rule disallowing previous consistent statements is just that: an anomaly and a peculiarity. Whilst some positives can be seen from case law, such as proving consistency and enabling the prosecution to convict the accused[129], there are also serious disadvantages. The common law rule has its roots in outdated, stereotypical and patriarchal ideas of the ideal rape victim which have no place in the constitutional era. The need for reform in the area of sexual offences laws broadly became evident leading to conversations about law reform in the form of sexual offences legislation.

The SALC in 2002 acknowledged that some rules of evidence applicable in sexual offences cases were inappropriate.[130] The SALC sought to determine, amongst other issues, whether the rules of evidence governing sexual offence trials assisted or hindered the truth-

[125] Schwikkard *Getting somewhere slowly* op cit note 104 at 89.
[126] Schwikkard *A critical overview* op cit note 15 at 200.
[127] Ibid.
[128] Zeffertt & Paizes op cit note 5 at 477.
[129] See *S v R* supra note 27 and *R v C* supra note 49.
[130] South African Law Commission, Discussion Paper 102, Project 107, Sexual Offences: Process and Procedure December 2001 at 48.

seeking functions of the court.[131] The SALC paid particular attention to the sexual offences exception, especially in relation to the negative inferences that could be drawn and the requirement that complaints be made without undue delay.[132] The SALC recognized that where complaints were not made at what was considered to be the first reasonable opportunity, the defence usually succeeded with arguments that a negative inference should be drawn regarding the complainant's credibility.[133] The rule was ultimately reformulated in sections 58 and 59 of SORMA, which will be considered in the following chapter.

[131] Ibid at 48.
[132] Ibid.
[133] Ibid at 55.

CHAPTER THREE: THE SPECIALISED SEXUAL OFFENCES LEGISLATION

I INTRODUCTION

The previous chapter set out the history of the prior complaints exception in sexual offences cases and the need for legal reform of the common law rule. This chapter will explain the law reform processes which led to the enactment of SORMA and the statutory reform to the common law exception. This chapter will canvass the scope of sections 58 and 59 of SORMA which provide the new statutory basis for the prior complaints exception in sexual offences cases.

II REFORM OF THE LAW RELATING TO SEXUAL OFFENCES

Initially, the SALC was tasked with investigating and proposing law reform relating to sexual offences by and against children.[1] During the investigation it became clear that the position of adults with regards to sexual offences also needed to be considered.[2] As a result, the SALC received an extended mandate to consider a complete overhaul of criminal justice with regard to its substantive laws and procedures relating to sexual offences.[3] More suitable procedural laws were needed in order to correct historically discordant procedures.[4]

The primary focus of the SALC's investigation was violence against women and children and issues relating to rape and sexual abuse.[5] The recommendations made by the Commission were aimed at encouraging victims of sexual violence to approach the criminal justice system; to provide assistance; and to improve the experience of victims within the criminal justice system while simultaneously upholding the constitutional rights of those accused of committing sexual offences.[6] Importantly, the SALC also made recommendations beyond law reform to respond to difficulties faced by victims of sexual offences and address social factors contributing to the high rates of sexual violence in South African society.[7] In its Sexual Offences Report, the SALC stated that the main objective of legal reform in this area is

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[1] South African Law Commission, Discussion Paper 102, Project 107, Sexual Offences: Process and Procedure December 2001 at 1.
[2] Ibid.
[3] South African Law Commission, Project 107, Sexual Offences Report December 2002 at 1.
[4] L Artz & D Smythe 'Introduction: Should we consent?' in Artz & Smythe (eds) *Should We Consent? Rape Law Reform in South Africa* at 1.
[5] Discussion Paper 102 op cit note 1 at 3.
[6] Ibid at 3-4.
[7] Ibid at 4.

to ensure its implementation at grassroots level. [8] It was explicitly recognised that legal reform alone is insufficient, and that action had to be taken decisively with regards to the non-legislative measures proposed by the SALC.[9]

Artz and Smythe argue that during the SALC's law reform process the various objectives underpinning a new law covering sexual offences were at odds with each other.[10] The authors explain that the emphasis on reform shifted over time from the initial aim of improving the treatment of victims within the criminal justice system to codifying substantive law on sexual offences into a single comprehensive statute.[11] Thereafter, there was a focus on procedural issues such as reporting, prosecuting and convicting and sentencing offenders as there was deep concern regarding the high rates of attrition within the criminal justice system.[12] Artz and Smythe are of the view that ultimately the reforms reflected in SORMA focused more on reforming the substantive law on sexual offences (creating new offences and expanding the definition of rape) rather than introducing sufficient procedural reforms, which many believed should have been the main focus of the legislation.[13]

SORMA was eventually assented to and took effect in December 2007. One of the objects of the Act is 'to afford complainants of sexual offences the maximum and least traumatising protection that the law can provide'.[14] SORMA was viewed by many critics as an instance of legislative compromise. However, the Act did make an important procedural change by definitively abolishing the cautionary rule applicable to victims of sexual offences.[15] The legislation acknowledges that complainants in sexual offences matters should not be treated differently from other complainants as there is no reasonable basis for believing that victims of sexual offences are less credible than victims of other offences.[16] Artz and Smythe note that SORMA seems to have missed an opportunity to improve the experiences of victims of sexual offences within the criminal justice system. Comprehensive protection measures which were contained in an earlier draft were replaced in the final legislation with a provision authorising the National Director of Public Prosecutions to issue directives to members of the National Prosecuting Authority.[17] Artz and Smythe argue that experience has shown that myths

[8] Ibid at 7.
[9] Discussion Paper 102 op cit note 1 at 7.
[10] Artz & Smythe op cit note 4 at 1.
[11] Ibid at 2.
[12] Ibid.
[13] Ibid.
[14] Section 2 of SORMA.
[15] Section 60 of SORMA and Artz & Smythe op cit note 4 at 9.
[16] Artz & Smythe ibid.
[17] Artz & Smythe ibid at 10 and section 66 of SORMA.

and stereotypes regarding sexual offences complaints are entrenched in South African society and require legislation and not only directives if these myths and stereotypes are to be eradicated.[18]

III SECTIONS 58 AND 59 OF SORMA: THE STATUTORY BASIS FOR THE PRIOR COMPLAINTS EXCEPTION

In its Discussion Paper 102, the SALC recognises that the disclosure of sexual offences committed against victims can be a slow and traumatic process for them.[19] It acknowledges that the circumstances under which disclosure of a sexual offence is made are not the same from person to person. Thus, prescribing in legislation when and how disclosure should occur is not practical.[20] The SALC specifically identified problems regarding the prior complaints exception in sexual offences cases. The Commission noted that if a previous consistent statement had not been made at the first reasonable opportunity, that the defence would usually succeed with the argument that a negative inference should be drawn regarding the credibility of the complainant.[21] The Commission explicitly recognised that there are various psychological and social factors which deter complainants from reporting sexual offences at the first reasonable opportunity.[22]

The SALC considered whether the existing rules of evidence which were applicable in sexual offences matters hindered or aided the court with its truth-seeking function and found that some of the rules of evidence were inappropriate in sexual offences matters. [23] The SALC considered the law in other jurisdictions and found three possible strategies for amending the prior complaints exception.

The first option was to remove the common law sexual offences exception altogether and only allow previous consistent statements to be admitted under the other exceptions to the general rule against previous consistent statements, such as to rebut an allegation of recent fabrication. This would be similar to the positions in Canada and Australia.[24] Another option considered was to allow evidence of a prior complaint to be admitted but to dispense with the requirement that the complaint must have been made at the first reasonable opportunity. If this

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[18] Artz & Smythe op cit note 4 at 10.
[19] Discussion Paper 102 op cit note 1 at 11.
[20] Ibid.
[21] Ibid at 55.
[22] Ibid.
[23] Ibid at 48.
[24] Ibid at 55-6.

position were adopted, it would mean that all previous complaints would be admissible.[25] This idea was drawn from section 6 of the Namibian Combating of Rape Act.[26] Despite allowing a late disclosure to be admitted, a judicial officer would still retain the discretion to draw a negative inference from a delay in reporting.[27] The third option was to make it clear in the new legislation that a negative inference cannot be drawn solely from the absence of a prior complaint or a delay in making a complaint. The SALC explained that this would retain the requirement that a complaint be made at the first reasonable opportunity in order for it to be admissible. It may result in evidence of late disclosures not being admissible, but it would likewise prevent the negative inference that could be drawn from such a late disclosure.[28]

The SALC preferred the third option as it believed that such a provision would address the problem with the common law exception without improperly interfering with the exercise of judicial discretion in the evaluation of evidence.[29] Section 58 of SORMA provides that evidence of a prior complaint made in relation to a sexual offence is admissible into evidence, provided that no negative inference be drawn only from the absence of a prior complaint.[30] Section 59 goes on to state that in sexual offences proceedings, a court may not draw an inference only from the length of any delay between commission of the offence and the disclosure thereof.[31] The effect of these two provisions is that a judicial officer is not prohibited from considering an absence of a complaint, or a delayed complaint together with other factors and drawing a negative inference from this myriad of factors.[32]

IV COMMENTARY

Academic authors have varied in their opinions on the utility of sections 58 and 59 of SORMA.

In chapter 1, the views of Zeffertt, Paizes and Grant were briefly set out. These authors argue that the aim of these provisions is admirable but that the execution of the provisions is not perfect and is arguably worse than the previous regime existing under the common law.[33] The authors find that section 58 of SORMA has 'vexing constitutional implications'[34] though

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[25] Ibid at 55-6.
[26] Act No. 8 of 2000.
[27] Discussion Paper 102 op cit note 1 at 55-6.
[28] Ibid.
[29] Ibid.
[30] Section 58 of SORMA.
[31] Section 59 of SORMA.
[32] DT Zeffertt, AP Paizes & JS Grant 'Complaints in sexual offences' (2008) *SALJ* 642 at 644.
[33] Ibid at 643.
[34] Ibid.

they do not elaborate on what they mean by this statement. It is difficult to imagine why the wording of section 58 would be thought to be constitutionally dubious, or entirely unconstitutional.

The meaning of sections 58 and 59 are also not considered to be entirely clear and can be interpreted in a variety of ways. Zeffertt, Paizes and Grant are of the view that section 58 enables the prosecution to adduce evidence of a previous consistent statement regardless of the circumstances under which it was made. Their concern is that a prior complaint which was made under duress, or one which was made late can be admitted to the detriment of the accused who cannot admit evidence of a previous consistent statement, and this could lead to the position of an accused person being convicted because of unequal treatment.[35] However, it is submitted that the common law requirement that a prior complaint be made voluntarily in order to be admitted into evidence is retained[36] and that statements made under duress or coercion will not be accepted by the court. It is regrettable that sections 58 and 59 are not clear about this as it can potentially lead to confusion. Schwikkard and Van der Merwe argue that the peremptory word 'shall' contained in section 58 must be read subject to the common law requirement that a complaint be made voluntarily.[37] Statements elicited out of coercion or duress are unreliable and would not carry sufficient probative value to establish the credibility of the complainant.[38]

The burden of proof rests on the state beyond a reasonable doubt, and thus cogent evidence is required to discharge the burden of proof. In sexual offences matters, the burden of proof can be difficult for the prosecution to discharge as sexual offences usually occur in private with no witnesses to the offence. As the complainant is most often a single witness, evidence of a prior complaint would assist with determining their credibility. The accused, meanwhile, is under no obligation to discharge the burden of proof and a previous consistent statement made by the accused could still be admitted in certain circumstances; that is, if it meets the requirements under any of the general common law exceptions. The court is not deprived of cogent evidence relevant to the accused's defence.

Zeffertt, Paizes and Grant also argue that section 58 further widens the scope of the common law exception as it is now applicable to all sexual offences (as defined in SORMA)

[35] Zeffertt, Paizes & Grant op cit note 32 at 645.
[36] This view is support by Schwikkard and Van der Merwe (see footnote 37 below) and Zakhele Hlophe et al. (eds) *Law of Evidence in South Africa: Procedural Law* 2 ed (2019) at 238.
[37] PJ Schwikkard & SE Van der Merwe *Principles of Evidence* 4 ed (2016) at 118.
[38] PJ Schwikkard 'Sections 58–60 and amendment in terms of s 68(2): Matters pertaining to evidence' in D Smythe & B Pithey *Sexual Offences Commentary* (2011) at 23-4.

which includes flashing and bestiality which were not covered by the common law.[39] The authors recommend that section 58 be repealed because this widening of the scope of the common law exception 'perpetuates the anomaly' and that the common law exception be abolished too.[40]

It is also unclear from the wording whether section 58 retains the common law requirement that a complaint be made at the first reasonable opportunity.[41] Schwikkard and Van der Merwe took the view that section 58 confirms that a previous consistent statement is admissible for the purpose of supporting the credibility of the complainant, but that it has removed the common law requirement that the prior complaint be made at the first reasonable opportunity.[42] The authors explain that such an interpretation takes into account the now widely accepted view that it is normal and reasonable for complainants in sexual offences matters not to disclose the offence immediately or soon thereafter. This is in keeping with the purpose of section 58 which is to facilitate proof of a prior complaint in a sexual offences case.[43] Zeffertt and Paizes also take the view that section 58 allows for prior complaints to be admitted into evidence regardless of the timing of the complaint; that is, there is no bar on late complaints.[44] Another ambiguity with section 58 is what is meant by the 'absence' of previous consistent statements. It could either mean that there was a complaint, which was not admitted, for example, if the complaint was not made voluntarily. Alternatively, it could mean that there was no previous complaint of the sexual offence concerned, which is unlikely as inevitably all sexual offence matters which are tried have been reported by the complainant.[45]

The word 'shall' in section 58 is also open to the interpretation that evidence of any prior complaint is admissible into evidence even if it is irrelevant and even if it amounts to hearsay should the complainant elect not to testify.[46] Schwikkard explains that courts may decide to interpret section 58 subject to the general common law rules that evidence must be relevant in order to be admissible and subject to the requirements for admitting hearsay evidence.[47] If not, then an accused would be confronted with potentially irrelevant and hearsay

[39] Zeffertt, Paizes & Grant op cit note 32 at 646.
[40] Ibid at 647.
[41] Schwikkard & Van der Merwe op cit note 37 at 123.
[42] Ibid.
[43] Ibid.
[44] DT Zeffertt & A Paizes *The South African Law of Evidence* 3 ed (2017) at 482.
[45] PJ Schwikkard 'Getting somewhere slowly - the revision of a few evidence rules' in Artz & Smythe (eds) *Should We Consent? Rape Law Reform in South Africa* at 89.
[46] Schwikkard *Sexual Offences Commentary* op cit note 38 at 23-3.
[47] Ibid at 23-4.

evidence, and this would compromise the accused's right to a fair trial.[48] It would have been preferrable if SORMA and the Law Commission were explicit on the exact ambit of section 58. Section 39(2) of the Constitution[49] requires a court, tribunal or forum when interpreting legislation to promote the spirit, purport and objects of the Bill of Rights. This requires an interpretation of section 58 be adopted which does not prejudice an accused's constitutionally protected fair trial rights.[50] Thus, it is very likely that section 58 will be interpreted in the manner suggested by Schwikkard as such an interpretation would protect the accused's right to a fair trial.

Schwikkard and Van der Merwe also submit that neither section 58 nor 59 have changed the common law requirement that evidence of a prior complaint is adduced for the limited purpose of proving consistency and that the admission of the complaint into evidence cannot prove the truth of its contents.[51] This view is supported by various other authors.[52] Zeffertt and Paizes have argued that if the statutory provisions were to allow previous consistent statements to be admitted to prove the truth of their contents, this would be a drastic change from the common law without being clearly contemplated in the wording of the sections.[53] They take the view that more careful drafting of the sections was required and that this question should not have been left open to judicial interpretation.[54] Schwikkard and Van der Merwe further elaborate that section 59 is merely a statutory confirmation of the correct approach with regards to drawing inferences and that it does not interfere with the exercise of judicial discretion.[55] This is because drawing a negative inference only on the basis of the length of the delay of a prior complaint is at odds with the general principle that inferences may not be drawn from select factors in isolation.[56]

V CONCLUSION

It is clear that the introduction of specialised sexual offences legislation was a necessity and is to be welcomed. It is also commendable that the common law exception has now been codified in statute and that the provisions explicitly recognise that adverse inferences may not be drawn

[48] Ibid.
[49] Constitution of the Republic of South Africa, 1996.
[50] These fair trial rights are contained in section 35 of the Constitution supra note 49.
[51] Schwikkard & Van der Merwe op cit note 37 at 124.
[52] Zeffertt & Paizes op cit note 44 at 482 and Hlophe op cit note 36 at 237.
[53] Zeffertt & Paizes op cit note 44 at 482.
[54] Ibid at 483.
[55] Schwikkard & Van der Merwe op cit note 37 at 128.
[56] Ibid.

solely from the absence of a prior complaint or because of a delay in the making of the prior complaint. This is in keeping with psychosocial evidence on rape and dispels the myth that a real victim would report a sexual offence immediately. However, the drafting of sections 58 and 59 are not perfect and the sections are open to interpretation. On the wording of these provisions alone, they do purport to meet the aims and objectives contained in section 2 of SORMA of providing complainants of sexual offences with protection and preventing further traumatisation within the criminal justice system. In the next chapter, it will be considered whether sections 58 and 59 of SORMA have in fact had a normative effect on the adjudication of sexual offences and whether the implementation of these provisions by the courts lives up to the aims and objectives of SORMA.

CHAPTER FOUR: TRENDS IN CASE LAW FOLLOWING THE ENACTMENT OF SORMA

I INTRODUCTION

The previous chapters set out the need for specialised sexual offences legislation and the need for changes to the common law exception. The scope of sections 58 and 59 which now form the statutory basis for the prior complaints exception was canvassed in Chapter 3. This chapter builds further on this analysis of the statutory provisions by examining case law dealing with previous consistent statements in sexual offences cases after the commencement of SORMA. It will be determined whether these sections of SORMA have a normative influence in the prosecution of sexual offences cases or whether it is more or less the same as under the common law, and whether admitting evidence of previous consistent statements under these sections meets the aims and objects of SORMA.

II AN OVERVIEW OF CASE LAW FOLLOWING THE ENACTMENT OF SORMA

The common law requirements for admitting a previous consistent statement into evidence in a sexual offence case were set out in Chapter 2. This chapter will explore some of these requirements again, but this time with reference to jurisprudence emanating from the courts after the introduction of SORMA.

(a) Voluntary complaint

From case law post-SORMA it is clear that the common law requirement that the complaint be made voluntarily has been retained. In *S v Ganga*[1] a prior complaint made by the victim was held to be inadmissible as the statement was obtained as a result of a threat.[2] This case was an appeal on one count of rape, one count of sexual assault and one count of attempting to commit a sexual offence under sections 3,5 and 5(1) of SORMA, respectively.[3] There were three different complainants for the three differing charges. On the facts, the third complainant's mother had heard people in the community discussing the rape of the first complainant by the

[1] *S v Ganga* 2016 (1) SACR 600 (WCC).
[2] Ibid para 37.
[3] Ibid para 1.

accused, and during the course of the discussion the third complainant (S)'s name came up. S's mother later asked S whether anything had been done to her by the accused and S denied that anything untoward had been done to her.[4] S's mother asked her again whether she was telling the truth and when she was not satisfied with S's responses, her mother threatened to hit her if she did not tell the truth. It was only at this point that S revealed what had been done to her by the accused.

In deciding the issue of whether S's first report of the offence to her mother could be admitted into evidence, the judge emphasized that the complainant must complain voluntarily.[5] If a complaint was made as a result of intimidation, suggestion or any conduct towards the complainant which negates the requirement of voluntariness, then the complaint will not be admissible.[6] The judge considered the fact that S was only nine years old at the time when the offence against her was committed and considered S's oral evidence that the reason she initially did not disclose what the accused had done to her was because she was afraid of what he might do to her if he knew that she revealed what he had done.[7] Riley AJ cautioned that when dealing with sensitive matters such as this, one should not strictly adopt the approach taken in the earlier case of *S v T*[8] (discussed previously in Chapter 2) where the prior complaint was deemed inadmissible because it was elicited by a threat from the complainant's mother.[9] Riley AJ explained that questioning the complainant does not automatically mean that the complaint was not made voluntarily, especially where it is a mother questioning her child and urging her to speak the truth.

However, where questions were leading or intimidating then it could be the case that the complaint was not made voluntarily.[10] The judge emphasizes that there is no closed list of factors to consider when deciding whether a complaint was given voluntarily or not and held that the court was not convinced that S's evidence should be excluded.[11] This is a positive interpretation of the requirement that a prior complaint be made voluntarily and one which is victim-centred and practical. It recognizes that it can be especially difficult for victims of sexual offences to disclose what has happened to them and often this is revealed in difficult circumstances.

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[4] Ibid para 13.
[5] *S v Ganga* supra note 1 para 31.
[6] Ibid.
[7] Ibid para 36.
[8] 1963 (1) SA 484 (A).
[9] *S v Ganga* supra note 1 para 37.
[10] Ibid para 38.
[11] Ibid para 39.

(b) The complainant must testify at trial

In *S v Mathikinca*,[12] the main issue on appeal was whether the contents of the prior complaint made by the complainant to her mother were admissible as evidence despite the fact that the complainant did not provide evidence at trial.[13] At trial, the prior complaint by the complainant to her mother was crucial evidence provided by the state in obtaining a conviction against the accused. This formed an essential part of the Magistrate's reasoning in reaching the finding that the accused's guilt had been proven beyond a reasonable doubt.[14] Fourie J relies on the earlier case of *S v Hammond*[15] in explaining that it is trite law that the fact of a complaint and its terms are admissible in sexual offences cases for the limited purpose of proving consistency and supporting the credibility of the complainant. However, this is only so if the complainant testifies at trial. If she elects not to provide evidence, then neither the fact that the complaint was made nor its terms can be admitted.[16] The judge continued explaining that it would be nonsensical to regard a prior complaint as being consistent with testimony that does not exist. Fourie J held that the provisions of section 58 were the same as the common law rules on this issue of admissibility.[17] The conviction and sentence of the accused were ultimately set aside as the court was not enlightened as to why the complainant was never called as a witness at the trial, and the remaining circumstantial evidence which was adduced by the state did not prove beyond a reasonable doubt that the accused had sexually assaulted the complainant.[18]

(c) The purpose of admitting the complaint is restricted to proving consistency

In *S v Ganga*, Riley AJ interpreted sections 58 and 59 of SORMA. The judge emphasised that the fact that a prior complaint had been made does not provide any corroboration for the complainant's testimony nor does it prove the truth of the contents of the statement.[19] Riley AJ referred to the earlier statement by the Supreme Court of Appel that such statements are admissible for two purposes only: to show consistency of the complainant's evidence and to negate consent.[20]

[12] *S v Mathikinca* 2016 (1) SACR 240 (WCC).
[13] Ibid at 243.
[14] *S v Mathikinca* supra note 12 at 243.
[15] [2007] ZASCA 164.
[16] *S v Mathikinca* supra note 12 at 243.
[17] Ibid at 244.
[18] Ibid.
[19] *S v Ganga* supra note 1 para 30.
[20] Ibid.

S v Peterson[21] was an automatic appeal from the lower court where the accused was sentenced to life imprisonment.[22] In this case, after the complainant had been raped by the accused, she proceeded to walk to her workplace. On the way there she stopped and asked a nearby gardener for directions. At this point, the accused was less than 25 metres away from the complainant and she did not report the incident to the gardener as the accused was within view and the complainant was afraid that if she confided in the gardener that the accused would carry out his earlier threats and hurt her.[23] Upon arrival at her place of work, the complainant broke down in tears and told her employer that she had been raped by a person unknown to her. The complainant's employer took her to a police station to file a report. In his defence, the accused claimed that he had known the complainant for at least six months prior to the sexual interaction and claimed that he had a relationship with her, and that the intercourse was consensual.[24]

In evaluating the evidence of the complainant, Tokota J stated that cases involving sexual offences will inherently involve the single evidence of the complainant. If the cautionary rule applicable to single witnesses were to be applied strictly, then:

> the complainant would be unfairly disadvantaged and her inherent right to dignity and the right to have such dignity respected and protected would be unduly strained and limited. In such cases any piece of evidence which tends to support the complainant's version should be treated as sufficient corroboration especially where the version of the accused is improbable.[25]

Thus, the court adopted a sensitive approach which recognised the difficulties in prosecuting sexual offence cases because of the private nature of these incidents. This statement by Tokota J in the Eastern Cape High Court, however, is indicative that the purpose of admitting prior complaint evidence may in some cases be to prove the truth of their contents and not only to demonstrate consistency.

(d) Section 59: must the complaint have been made at the first reasonable opportunity?

Some authors have suggested that sections 58 and 59 of SORMA removed the requirement that in order for a complaint to be admissible it must have been made at the first reasonable

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21 *S v Peterson* 2019 JDR 0248 (ECG).
22 Ibid para 1.
23 *S v Peterson* supra note 21 para 3.
24 Ibid para 6.
25 Ibid para 13.

opportunity. However, an examination of the case law at high court level demonstrates that this is not always the case.

In *S v Peterson*, the accused also argued that the complainant did not report the offence at the 'earliest available opportunity'.[26] Tokota J dismissed this argument as having no merit and referred to section 59 of SORMA. The judge emphasized that this section provides that a court may not draw any inference solely from the length of delay between the commission of an offence and its reporting.[27]

The two cases discussed in the following two paragraphs concerned conduct which occurred prior to the commencement of SORMA and consequently the common law was applicable. Nevertheless, these cases are discussed under this chapter as the matter had come to court after the commencement of SORMA and it is important to see if SORMA has had a normative effect on the superior courts' approach to the adjudication of sexual offences cases. In *S v Monageng*[28], the Supreme Court of Appeal considered an appeal of a conviction for rape of the accused of his then fifteen-year-old cousin.[29] On the issue of late disclosure, Maya JA explained that it was widely accepted that there are many reasons why rape victims do not immediately disclose what has happened to them and children who are sexually abused by family members very often remain silent about the abuse they have endured.[30] The judge explained further that many victims of child sexual abuse remain quiet even until adulthood for fear of the abuser, and feelings of shame, guilt, humiliation and complicity, as well as the social and familial consequences of disclosure.[31] Maya JA considered section 59 of SORMA and stated that:

> Raising a hue and cry and collapsing in a trembling and sobbing heap is not the benchmark for determining whether or not a woman has been raped. There was thus nothing unusual about the complainant's behaviour and her explanation for not immediately reporting the appellant is plausible.[32]

In *S v ZF*[33] the accused was charged in the regional court with five offences committed against his daughter, one of which was rape. At the trial, the accused was convicted on all five counts.[34] On appeal, it was stated the complainant reported two instances of rape, which

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[26] Ibid para 15.
[27] Ibid para 15.
[28] *S v Monageng* 2008 JDR 1240 (SCA).
[29] Ibid para 1.
[30] Ibid para 24.
[31] Ibid.
[32] Ibid.
[33] *S v ZF* 2015 JDR 2411 (KZP).
[34] Ibid para 1-3.

occurred in 2006, to her cousins after they asked her why she was crying.[35] The complainant was criticized for not reporting the offences until a great deal of time had elapsed.[36] The complainant's answer under cross-examination was that at the time she was still living with the accused who had threatened to hurt and kill her if she reported him. It was also established that when the accused did become aware that the complainant had disclosed what he had done to her, he lured her away from school and assaulted her again.[37] The court referred to the judgment in *S v Monageng* and held that the statements provided in that case applied equally to this case. It was held that it was more than understandable that the complainant had delayed in disclosing the offences and subsequently the appeal was dismissed.[38]

In *S v Zulu*[39] the issue considered on appeal was whether the complainant's evidence was satisfactory and whether the confession which the state relied on was admissible.[40] The complainant in this case lived with her mother and her grandmother. At a meeting with the complainant's teacher, her mother was informed that the complainant was not doing well at school. The complainant's mother questioned her whereafter the complainant disclosed that the accused had raped her. The complainant's mother and grandmother confronted the accused with these accusations, and he then confessed, though he later denied this at trial.[41] At the time the incident occurred, the complainant was only ten years old and was scared to disclose what had happened as she was afraid the accused would hurt her. The court held that the complainant's evidence was consistent and that she had not spontaneously reported the offence to anyone was understandable viewed against her fear of the accused.[42] The judge restated the applicable legal principles, and unfortunately made the remark that evidence of a prior complaint in a sexual offence matter which was made 'at the earliest opportunity'[43] is exceptionally admitted as evidence of consistency which relates to the credibility of the complainant. It is unfortunate that the judge used the phrase 'earliest opportunity' as it has been established under the common law, and also under SORMA, that this is not the standard required for admitting evidence of a prior complaint. Whilst the complainant's prior statement was admitted in this case and supported her credibility, it is lamentable that remarks of this nature, which echo relics of the past, had been made by the high court.

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[35] Ibid para 24.
[36] Ibid para 35.
[37] Ibid.
[38] *S v ZF* supra note 33 para 35 and 47.
[39] *S v Zulu* 2013 JDR 1413 (KZP).
[40] Ibid para 4.
[41] Ibid para 3.
[42] Ibid para 5.
[43] Ibid para 6.

The recent case of *S v TN*[44] dealt with an automatic review in terms of the Child Justice Act[45] concerning the conviction of three child offenders for rape.[46] At the trial court the four accused (one of which was an adult) were accused of rape by the complainant who was thirteen at the time of the offences. The complainant alleged that she and a friend had attended church on the night in question and that the friend had left the complainant alone outside the church and went home on her own.[47] The second accused had arrived and asked the complainant to accompany him to his home. The second accused was an ex-boyfriend of the complainant's whom she agreed to walk with. But thereafter, at the second accused's house, the complainant told him that she wished to return to the church.[48] He ordered the complainant to lie on the bed, slapped her and then proceeded to rape her. Thereafter, the second accused told the complainant to have sex with the first accused. She refused and the first accused also raped her.[49] At this point, the third and fourth accused entered the room and the fourth accused said that he would take the complainant home. The complainant, the third and the fourth accused left the second accused's home and the fourth accused took the complainant back to his house where he and the third accused proceeded to rape the complainant. The complainant later testified that she simply accepted what was happening to her at this stage because she was exhausted.[50]

After this horrific ordeal, the complainant went to her friend N's house where she spent the night, but she did not disclose what had happened as N's boyfriend was also present and the complainant felt embarrassed.[51] When the complainant arrived home the next day she did not tell her mother what had happened.[52] At trial, the complainant testified that she had been fearful of disclosing the offence committed against her to her mother because her mother was always warning her not to walk outside at night.[53] Later, the complainant did confess to N what had happened to her after she realised that N had already heard about the rapes.[54]

All four accused had testified that the sexual acts all occurred with the consent of the complainant.[55] On appeal, both the advocate representing the state and the trial magistrate stated that the conviction against the accused should stand as it was improbable that the

[44] *S v TN and Others* 2020 (1) SACR 633 (LP).
[45] Act 75 of 2008.
[46] *S v TN* supra note 44 para 1.
[47] Ibid para 4.
[48] *S v TN* supra note 44 para 4.
[49] Ibid para 5.
[50] Ibid para 5.
[51] Ibid para 6.
[52] Ibid para 7.
[53] Ibid para 8.
[54] Ibid para 8.
[55] Ibid para 15.

complainant at the age of thirteen could consent to consensual sexual penetration with four boys in the presence of one another.[56] Semenya J dismissed these arguments as going against the principle that a verdict must be based on the available evidence. The judge held that it was critical that the complainant's evidence in chief differed drastically from what she said during cross-examination and rejected the complainant's evidence in totality.[57]

Much attention was given in this case to the failure of the complainant to report the offences to her friend, N and to her mother. Semenya J focused on the differences between N's testimony of the first report of the offence and the complainant's testimony and held that these differences negatively affected the credibility of the complainant.[58] Semenya J adopted a curious interpretation of section 58 of SORMA and explained that:

> This section is stated in a way that grants courts discretion to draw an adverse inference in certain instances, depending on the reasons furnished by the witness for his/her failure to report and the circumstances of each case.[59]

The judge went on to state that the complainant had been ashamed of her behaviour and only disclosed the incident because many people were already aware of what had happened. The judge held that the 'lies' in the complainant's version were such that the court would be justified to draw an adverse inference against the complainant.[60] Ultimately, the convictions and sentences of the four accused were set aside.[61]

There are many critiques that can be levelled against the judgment of the court in *S v TN*, especially relating to the court's findings on consent and evaluation of the evidence. Schwikkard argues that this decision is reminiscent of the common law hue and cry rule.[62] The court ignored earlier judgments in which it was recognised that it was common for complainants not to report sexual offences committed against them until much later or not to make a report at all. The court did not consider the widely recognised arguments about the stigma and victimisation that victims of sexual offences face which deters them from reporting immediately.[63] Schwikkard further argues that the ambiguities in the scope of sections 58 and 59 of SORMA resulted in rape myths and the hue and cry requirement being applied by the

[56] Ibid para 17.
[57] Ibid para 21.
[58] *S v TN* supra note 44 para 23.
[59] Ibid para 24.
[60] Ibid para 24.
[61] Ibid para 26.
[62] PJ Schwikkard 'Previous consistent statements – the sexual offence anomaly' (2022) 35 *SACJ* 58 at 68.
[63] Ibid.

court in this case. Schwikkard also argues that this ambiguous drafting conflicts with the preamble of SORMA.[64]

Another curious judgment was handed down in the case of *S v Sithole*.[65] Here, the complainant did not report what had happened to her to anyone and explained to the court that the accused had threatened to kill her if she did talk to anyone.[66] Bam AJ ignored section 58 of SORMA entirely and only referred to section 59 in declaring that:

> Another bothering aspect is the complainant's failure to complain about it, or to inform anybody that the appellant had raped her…This is not a matter falling under the provisions of s 59 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) Act 32 of 2007, where the complainant's report of the rape was delayed for some or other reason. No evidence was adduced proving that the complainant reported the alleged rape at all.[67]

This is a clear misapplication and misinterpretation of SORMA as section 58 expressly provides that no adverse inference may be drawn only from the absence of a complaint, which is precisely what the court did. It is also not required by either section 58 or 59 that the complainant adduce evidence as to why she did not make a complaint or why she made a delayed complaint. This is once again reminiscent of the common law hue and cry requirement which assumes that the typical reaction is for a victim of a sexual offence to proclaim at once what has happened to her. Like with *S v TN*, the appeal was successful and the accused's conviction was set aside.[68]

These last two cases demonstrate the dangers inherent in the ambiguous wording of sections 58 and 59 of SORMA. It is not at all clear whether the requirement that the report be made at the first reasonable opportunity is retained as courts have been split on this requirement. Worryingly, some judges still seem to apply the standard that the complaint be made immediately and are quick to draw a negative inference against the complainant solely in the absence of a quick complaint.

III CONCLUSION

Unfortunately, the ambiguities in the wording of sections 58 and 59 of SORMA have meant that courts have had to deal with ancillary issues relating to interpretation and scope. This has shifted the focus from recognising social science evidence which negates rape myths and

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[64] Ibid.
[65] *S v Sithole* 2013 (1) SACR 298 (GNP).
[66] Ibid para 34.
[67] *S v Sithole* supra note 65 para 49.
[68] Ibid para 57.

recognises the difficulties victims of sexual offences face to whether the accused's fair trial rights are protected. It is not clear whether sections 58 and 59 have in fact changed the common law position as judges are still interpreting these sections as requiring disclosure to be made at the first reasonable opportunity (and incorrectly in *S v Zulu* as requiring disclosure be made at the 'earliest opportunity'[69]). This is despite the clear wording of the sections regarding adverse inferences. This is unfortunate and whilst the legislation is clear that negative inferences may not be drawn from the absence of a prior complaint or late disclosure alone, it would have been preferable if the legislation stipulated whether disclosure should have been made at the first reasonable opportunity in order to be admitted into evidence.

It would have been desirable if the legislation had stipulated that the first report need not have been made at the first reasonable opportunity and had explicitly noted that there are many reasons inhibiting victims of sexual offences from disclosing what has happened to them. The failure to do so has led to the timing of the complaint often being central in determining the weight to be attached to the prior complaint. The cases of *S v TN* and *S v Sithole* demonstrate that there is a lack of understanding amongst judicial officers regarding the nature of sexual offences as well as the meaning and ambit of sections 58 and 59 of SORMA. However, other cases like *S v ZF*, *S v Peterson* and *S v Ganga* indicate that since the implementation of SORMA some courts have adopted a sensitive and practical stance in sexual offences trials and have acknowledged that factors and rules developed under the common law might no longer be applicable given new knowledge on the psychology of rape. This is a positive indication.

From the case analysis conducted in this chapter, it appears that sections 58 and 59 fall short of meeting the aims and objects of SORMA and the SALC's intentions in reforming the law on prior complaints. This is clear from the adverse inferences that judges do draw from late complaints and from the lack of understanding of the meaning of sections 58 and 59. From the manner in which these provisions are applied in sexual offences cases it can be argued that secondary victimisation within the criminal justice system may be exacerbated and there is insufficient recognition of the needs of victims and the challenges they face.

In light of the shortcomings of sections 58 and 59, and its varied implementation by higher courts, the next chapter will consider options for reform.

[69] *S v Zulu* supra note 39 para 6.

CHAPTER FIVE: OPTIONS FOR REFORM IN LINE WITH THE AIMS AND OBJECTS OF SORMA

I INTRODUCTION

The need for amendments to the current formulation of sections 58 and 59 of SORMA was already established in Chapter 4. This chapter will focus on possible options to improve the position of sexual offence complaints with respect to the first report and evaluate whether these can be practically adopted in the South African context. It will also be considered which options best meet the objective and aims of SORMA. Regard will be had to Canadian law, and to a lesser extent English law.

II ABOLISH THE SEXUAL OFFENCES EXCEPTION

(a) Arguments for eliminating the exception entirely

Schwikkard argues that the same results intended to be achieved by the SALC in enacting sections 58 and 59 of SORMA could have been achieved simply by repealing the common law exception altogether.[1] Prior complaints by victims of sexual offences could still be admitted into evidence under the general exceptions to the rule against previous consistent statements, for example, to rebut an allegation of recent fabrication.[2] The benefits of this approach are that the evidence of sexual offence victims would be treated equally with the evidence of other victims. In cases where the complainant is treated with suspicion, evidence of the prior complaint could still be adduced in order to rebut allegations of recent fabrication and to validate the credibility of the complainant. Schwikkard explains that if previous consistent statements are irrelevant with respect to other types of offences it is difficult to justify why it would be relevant in the limited category of sexual offence cases.[3]

Zeffertt, Paizes and Grant argue that section 58 should be repealed because it perpetuates the common law anomaly which discriminates against an accused and in fact widens the scope of the exception.[4] The authors argue that the common law exception should have been abolished, and if this was done then there would be no need for legislative provisions

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[1] PJ Schwikkard 'Getting somewhere slowly - the revision of a few evidence rules' in Artz & Smythe (eds) *Should We Consent? Rape Law Reform in South Africa* at 89.

[2] Ibid.

[3] Ibid.

[4] DT Zeffertt, AP Paizes & JS Grant 'Complaints in sexual offences' (2008) *SALJ* 642 at 647.

to govern the use of prior complaints in sexual offence cases.[5] It is submitted that in their focus on potential prejudice to the accused, the authors fail to grasp that the origins of the common law exception was not to cause prejudice to an accused by conferring a benefit on the complainant, but because complainants were treated with suspicion and evidence was needed in order to overcome this suspicion. Abolishing the common law exception may not have the effect that complainants are more likely to be believed. The next paragraph will set out the legal position in Canada where the sexual offences exception was repealed.

(b) The Canadian Criminal Code

Amendments to the Canadian Criminal Code in 1983 resulted in the abolition of the sexual offences exception.[6] Academic commentators have had mixed views on the effect of this abolition, but the reform attempts can be commended for moving away from the idea that sexual offences require different treatment from other offences.[7] Following the abrogation of the exception, evidence of previous consistent statements in sexual offence matters are governed by the ordinary rules of evidence.[8] However, the reforms to the Canadian Criminal Code often makes it more difficult to ascertain the truth in sexual offence cases and it has been argued that sexual offence complainants are deprived of the chance to adduce evidence which might support their credibility in an environment where they are still treated with suspicion and disbelief.[9] It is also unclear whether a court can make any mention of a prior complaint or the timing thereof.[10] Fletcher argues that the reasoning behind the abolition of the rule was to de-emphasize the sexual aspect of sexual offences and to place emphasis on the assaultive aspect.[11] This is an admirable rationale underpinning the repeal of the rule, but it will only have this intended effect if courts similarly shift their focus away from interrogating sexual offences as peculiar and requiring different treatment than the adjudication of other offences.

Section 275 of the Canadian Criminal Code provides that rules of evidence relating to recent complaints in respect of certain offences are abrogated.[12] The exact wording of section 275 provides:

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[5] Ibid.

[6] E Craig 'The relevance of delayed disclosure to complainant credibility in cases of sexual offence' (2011) *36 Queen's L.J.* 551 at 551.

[7] K Singh 'Evaluating the ''first report'': The persistent problem of evidence and distrust of the complainant in the adjudication of sexual offences' (2006) 1 *SACJ* 37 at 48.

[8] D Fletcher 'The abrogation of recent complaint: Where do we stand now' (1984) 27 *Crim. L.Q.* 57 at 57.

[9] Singh op cit note 7 at 48.

[10] Fletcher op cit note 8 at 65.

[11] Ibid at 68.

[12] Criminal Code (R.S.C., 1985, c. C-46).

> The rules relating to evidence of recent complaint are hereby abrogated with respect to offences under sections 151, 152, 153, 153.1 and 155, subsections 160(2) and (3) and sections 170, 171, 172, 173, 271, 272 and 273.

Sections 271, 272 and 273 cover sexual offences, hence the recent complaint rule in relation to sexual offences is specifically repealed.[13] Craig argues that the introduction of section 275 of the Canadian Criminal Code has not had the intended effect of reducing inconsistencies in the treatment of sexual offence cases by the courts and that many courts still take the view that real rape victims will promptly disclose what has happened to them.[14] Craig describes the language of section 275 as 'vague and minimalistic'[15] and that this has resulted in a lack of clarity.[16] Dufraimont supports these assertions by arguing that the effect of the statutory amendment is unclear and that the nebulous drafting of the amendment left open the issue of whether evidence of late disclosure was admissible and whether negative inferences could be drawn from such late disclosure.[17] This is arguably similar to the resultant effects of the vague wording of sections 58 and 59 of SORMA. Whilst in section 59 SORMA is clear that negative inferences may not only be drawn from the fact that a complaint was reported late, it is unclear whether the requirement was retained that the disclosure must have been made at the first reasonable opportunity. Craig concludes that in Canada there still appears to be a presumption that victims who do not disclose quickly are less credible than victims who do report promptly.[18]

Craig explains that delayed reports in sexual offence cases continues to be a confusing and inconsistent area of law. She contends that one problem with the abrogation of the sexual offences exception was that the legal reform in this area, which occurred in 1983, was ahead of prevailing social beliefs at the time regarding the experiences of rape victims.[19] This meant that some courts continued to rely on the notion that late disclosures were less reliable because this was still deemed to be a valid social assumption.[20] She explains that abrogation has resulted in a gap, and that judges and juries often unconsciously fill these gaps with the same underlying social assumptions that were sought to be eliminated.[21] This is clearly an undesirable outcome. Dufraimont argues that the aspirations of legal reform to eliminate discriminatory reasoning

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[13] Criminal Code supra note 12.
[14] Craig op cit note 6 at 551.
[15] Ibid at 552.
[16] Ibid.
[17] L Dufraimont 'Myth, inference and evidence in sexual assault trials' (2019) 44:2 *Queen's LJ* 316 at 344.
[18] Craig op cit note 6 at 551.
[19] Ibid at 553.
[20] Ibid.
[21] Ibid.

patterns surrounding rape myths has been imperfectly realized and that more is required to eliminate stereotypes and prejudicial beliefs that find their way into the adjudication of sexual offences.[22] Dufraimont defines these stereotypes as false beliefs about sexual offences which 'distort the fact-finding process'.[23] In the case of *R v CMG*[24] the court held that myths and stereotypes are based on 'untested and unstated assumptions about how the world works'[25] and that victims are measured against an 'idealized standard of conduct'.[26] In the context of requiring evidence of the first complaint, this is underpinned by a belief that victims of sexual offences are uniquely more likely to lie.[27]

Canadian case law has been inconsistent since the amendment was effected in 1985. In *R v DD*[28] the Supreme Court of Canada held that it was a reversible error of law to rely on outdated assumptions regarding the behaviour of rape complainants in order to discredit them at trial.[29] The court determined that it was improper for courts to draw negative inferences about a complainant's credibility only on the basis of a late complaint.[30] A delayed complaint on its own carried no significance, but was a circumstance to be taken into account together with the rest of the factual matrix of a case.[31]

Despite this decision, in later cases, Craig argues that the courts have been found to 'bootstrap delay onto other discrediting factors'[32]. The Supreme Court of Canada found the credibility of a witness (not the complainant herself but a similar fact witness) to be questionable as she had delayed disclosing the rape committed against her by her ex-husband.[33] The delayed report coupled with the possibility of financial gain for the witness was held to discredit the witness.[34] In a British Columbia Court of Appeal case, a sexual assault conviction was overturned because the evidence of the complainant, who disclosed the sexual offence committed against her eight years after it had occurred, was considered to be weak.[35] The court found the circumstances under which the offences were disclosed to be suspicious and that the

[22] Dufraimont op cit note 17 at 318.
[23] Ibid at 331.
[24] *R v CMG*, 2016 ABQB 368.
[25] Ibid para 60.
[26] Ibid para 60.
[27] Dufraimont op cit note 17 at 331..
[28] *R v DD*, [2000] 2 SCR 275, 148 CCC (3d) 41 [DD].
[29] Ibid para 63.
[30] Ibid para 65.
[31] Ibid.
[32] Craig op cit note 6 at 570.
[33] *R v Handy*, 2002 SCC 56, [2002] 2 SCR 908 [Handy].
[34] Ibid.
[35] *R v Williams*, (2004), 2004 BCCA 207 183, CCC (3d) 510 [Williams].

complainant had reason to lie about the offences.[36] This decision has been criticized as the timing of the report was not a permissible factor for the court to have considered.[37] It was impermissible for the court to infer that the complainant was lying because of the late report.[38]

Craig argues that the hue and cry assumption continued to inform judicial reasoning even after the abrogation of the rule. The belief that a failure to complain promptly ought to discredit the complainant still prevailed.[39] In cases where the complainant had delayed in reporting the offence, judges would often feel compelled to explain why, despite the late disclosure, the complainant should nevertheless be treated as a credible witness.[40] This indicates that despite the repeal of the statutory rule, complainants who delayed in making a first complaint would still be treated with suspicion.

This demonstrates that abrogating the common law exception in South Africa may not have the intended result of reducing adverse inferences drawn against complainants or shifting the discussion away from the timing of the first report of the offence. A further shortcoming with section 275 of the Canadian Criminal Code is that counsel for the accused can still cross-examine a complainant on the failure to make an immediate complaint.[41] Temkin asserts that empirical research demonstrates that only the accused has benefitted from the introduction of section 275 and not the complainant or the prosecution.[42]

In contrast, in the relatively recent 2016 case of *R v CMG*[43] the Court of Alberta spent considerable time explaining the reasons for statutory reform. This case is a positive example of the impact of the abrogation of the recent complaints rule. The court explained that the Canadian legislature had explicitly recognized that all victims of crime should be subject to the same baseline standard for determining credibility.[44] Sexual offences complainants 'should not start from a deficit position or face the additional barriers of being discredited based on myths and stereotypes.'[45] In this case, the court had to consider whether the trial court had made an error of law in utilizing discredited prejudicial myths and stereotypes about the complainant in particular, and sexual offence complainants generally.[46] The court held that an

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[36] Ibid.
[37] Craig op cit note 6 at 573.
[38] Ibid.
[39] Ibid at 573 and 574.
[40] Ibid at 573.
[41] Jennifer Temkin *Rape and the Legal Process* 2ed (2002) at 192.
[42] Ibid at 193.
[43] *R v CMG* supra note 24.
[44] Ibid para 58.
[45] Ibid.
[46] Ibid paras 52 and 53.

error of law had been established and that the findings on credibility in the trial court were based on inappropriate prejudicial stereotypes and a new trial was ordered.[47]

Singh describes the Canadian Criminal Code reforms as regressive, especially when compared to the reforms in England, which will be canvassed in sub-section *(c)* below.[48] It is not necessarily the case that if the sexual offences exception was repealed in South Africa that the same consequences would flow as in Canada. This is because social assumptions in South Africa about the nature of rape and its impact on victims and society as a whole are currently ahead of the legal reform. There is plenty of research discrediting rape myths and prejudicial assumptions about sexual offences and this should ideally make it easier to deal with the general non-admissibility of previous consistent statements. Dufraimont explains that it is now accepted that majority of victims never report sexual offences to the police and that many others do not report immediately.[49] Immediate reporting is plainly not the norm, and it is incorrect and prejudicial to assume that a sexual offence which has been disclosed after a period of time has elapsed is more likely to be false.[50]

However, there is a very real and pressing concern that judicial attitudes have not caught up with current social beliefs about sexual offences and social science evidence on the psychology of rape (as demonstrated by the analysis of recent South African case law in chapter 4). Simply abolishing the common law exception and repealing sections 58 and 59 of SORMA may not result in the desired changes in the adjudication of sexual offences.

(c) English law: the Criminal Justice Act

In English law, section 120 of the Criminal Justice Act 2003 governs the admissibility of previous consistent statements. This section provides for the circumstances in which previous consistent statements can be admitted into evidence in criminal matters. The provision allows for previous statements to be admitted to rebut allegations of recent fabrication[51] and for a witness to refresh her memory.[52] The provision also enables previous statements to be admitted in other circumstances, provided that the witness testifies that she had made the prior statement and that it is true to the best of her belief, and that one of three conditions is met.[53] The first

[47] *R v CMG* supra note 24 paras 90 and 110.
[48] Singh op cit note 7 at 49.
[49] Dufraimont op cit note 17 at 344.
[50] Ibid.
[51] Section 120(2) of the Criminal Justice Act 2003.
[52] Supra section 120(3).
[53] Supra section 120(4)*(a)* and *(b)*.

two conditions are that the prior statement identifies a person, object or place[54] or that the statement had been made by the witness when the matter was fresh in her memory but that she subsequently does not remember them well enough to give oral evidence of them.[55] The third condition reads as follows:

> (a) the witness claims to be a person against whom an offence has been committed,
> (b) the offence is one to which the proceedings relate,
> (c) the statement consists of a complaint made by the witness (whether to a person in authority or not) about conduct which would, if proved, constitute the offence or part of the offence,
> (d) […]
> (e) the complaint was not made as a result of a threat or a promise, and
> (f) before the statement is adduced the witness gives oral evidence in connection with its subject matter.[56]

From this wording of section 120(7) it is clear that this provision is only available to the victim of the offence in question and if the prior statement relates specifically to the conduct constituting the offence. Importantly, this section relates to all offences and does not single out sexual offences.[57] The English legislature accepted the view that sexual offence cases should be prosecuted in the same manner as other cases as far as possible and expanded the reception of prior complaints to include all other criminal offences.[58] It is also clear that there had been a sub-section (d) which was subsequently repealed.

Section 120(7)(d) of the Criminal Justice Act 2003 previously enabled evidence of all previous consistent statements, not only in sexual offence matters, to be admitted if they were made 'as soon as could reasonably be expected'.[59] This provision was repealed by the Coroners and Justice Act 2009.[60] Thus, in current English law the position is that where prior complaints, in all cases and not only sexual offence cases, meet the criteria in section 120, these are admissible to prove both consistency and the truth of their contents and these statements need not have been made within a 'reasonable period'.[61] The 'first reasonable opportunity' requirement was abolished by this amendment.[62] The case of *R v O*[63] confirmed that previous

[54] Supra section 120(6).
[55] Criminal Justice Act supra note 51 section 120(6).
[56] Supra section 120(7).
[57] PJ Schwikkard 'Previous consistent statements – the sexual offence anomaly' (2022) 35 *SACJ* 58 at 71.
[58] R Munday *Cross & Tapper on Evidence* 13 ed (2018) at 307.
[59] Criminal Justice Act supra note 51 section 120(7).
[60] Ibid.
[61] Ibid and Schwikkard *Previous consistent statements* op cit note 57 at 72.
[62] *Cross & Tapper* op cit note 58 at 265.
[63] [2006] EWCA Crim 556.

consistent statements adduced in terms of section 120 are admitted to prove the truth of its contents and not only to demonstrate consistency.[64]

This is arguably recognition that making a delayed complaint does not necessarily mean the complaint has been fabricated, and that there is no 'reasonable' period within which complaints can be expected to be made. It is now recognized that prompt complaints, especially by sexual offence complainants, is the exception and not the rule.[65] Admission of previous consistent statements is still regulated to guard against the dangers of freely admitting such statements into evidence.[66] Importantly, it is required that the complainant testify so that they can be cross-examined on their previous complaint.[67]

Schwikkard is hesitant to endorse a similar legislative position being adopted in South Africa. She explains that if all previous consistent statements were always admissible this would create the likelihood that courts would constantly be subjected to irrelevant evidence.[68] The biggest difficulty that Schwikkard has with the English law position is that it requires judicial officers to simultaneously accept two conflicting views: that an early complaint makes the disclosure more likely to be true; but a late report does not make the disclosure less likely to be true.[69] These paradoxical statements illustrate that the broadening of the rule in English law is not a perfect formulation, and a more logical formulation would have been preferable. Schwikkard prefers the formulation in SORMA to the English law position[70], however she ultimately favours the abolition of the common law exception and the repeal of sections 58 and 59 of SORMA.[71]

Singh is in favour of the English formulation and considers it a positive move which overturned centuries worth of discriminatory rules.[72] The Law Commission of England and Wales determined that the main justification for disallowing evidence of previous consistent statements was the hearsay rule. However, concerns about violating the hearsay rule were found not to apply to a witness's own previous statement and thus the Law Commission expanded the ambit of admissible prior complaint evidence to apply to all offences.[73] The Law Commission took the view that early reports of a crime were more likely to be accurate in the

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[64] Ibid at 411.
[65] *R v O* supra note 63 at 308.
[66] Schwikkard *Previous consistent statements* op cit note 57 at 72.
[67] *Cross & Tapper* op cit note 58 at 308.
[68] Schwikkard *Getting somewhere slowly* op cit note 1 at 90.
[69] Ibid.
[70] Ibid.
[71] Schwikkard *Previous consistent statements* op cit note 57 at 73.
[72] Singh op cit note 7 at 49.
[73] Ibid at 49-50.

recounting of a crime and thus they should generally be admissible. The Law Commission did, however, reject submissions advocating that all previous consistent statements should generally be admitted, but did confirm that the general exclusionary rules still applied.[74] These provisions in the Criminal Justice Act 2003 were considered as innovations which marked a significant shift away from the traditional common law approach which placed emphasis on oral evidence being given in court as the provisions enabled due consideration to be given to prior statements made out of court.[75]

Singh argues that case law in England demonstrates that courts have been sensitive in dealing with delayed reports.[76] Singh's main reasons for preferring the English approach is that allowing prior complaints to be admitted for the truth of their contents and not only consistency is to be welcomed. He argues that this would have led to a different, better outcome in cases such as *S v Hammond*. Singh is also of the view that the SALC erred in concerning itself primarily with the issue of negative inferences as this ignored the fundamental problems with the common law exception which relate to the purpose for which the evidence is adduced.[77]

It could be argued that the repeal of this subsection is theoretically sound as it no longer requires a prior complaint to be made in a certain amount of time, and thus, prior complaints, whether made soon after the offence or many months or years later, are treated as equally truthful. This is in keeping with the empirical evidence on the experiences of rape victims. However, there is still the danger that if South Africa enacted a similar statutory provision, that courts would be inundated with irrelevant evidence of all previous consistent statements by victims in the prosecution of all criminal offences.[78] Thus, it may still be wise to restrict the application of such a rule to sexual offence cases only. This is not because sexual offence complaints should be treated with suspicion nor to prejudice the accused. Instead, this restriction is called for because sexual offences are difficult to prove in that these offences most often occur in private with no other witnesses. Moreover, in many cases the accused tends to dispute the credibility of the complainant. However, there is also the danger that accepting a prior complaint as confirming the truth of the complainant's in-court statement violates the rule against self-corroboration.[79] It would require a strong argument to recommend that this position

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[74] G Durston 'Previous (in)consistent statements after the Criminal Justice Act 2003' (2005) *Crim. L.R.* 206 at 208.
[75] Ibid at 214.
[76] Singh op cit note 7 at 50.
[77] Ibid at 45.
[78] Schwikkard *Getting somewhere slowly* op cit note 1 at 90.
[79] See PJ Schwikkard 'Sections 58–60 and amendment in terms of s 68(2): Matters pertaining to evidence' in D Smythe & B Pithey *Sexual Offences Commentary* (2011) at 23-3.

be adopted in the South African context as accepting a prior complaint as self-corroboration would almost certainly prejudice the accused's constitutionally entrenched fair trial right to challenge evidence.[80]

III RECOMMENDATIONS FOR LEGAL REFORM

Section II above has considered the law in Canada and England, both common law systems which inherited the hue and cry rule and which have enacted statutory reform to move away from reminisces of the old medieval rule. It can be argued that these two jurisdictions take entirely diverging views. In Canada, evidence of prior complaints in sexual offence cases are admissible under the general exceptions governing previous consistent statements; whereas in England previous consistent statements in all criminal matters are admissible, subject to meeting the statutory requirements for admissibility, for the truth of their contents and regardless of the timing of the complaint. Calls for equality of treatment of sexual offences with other categories of offences are commendable.[81] However, the reality is that despite specialized sexual offences legislation and despite prevailing social science evidence on the psychology of the rape victim, rape complainants are often treated with suspicion by the courts, as evidenced previously in chapter 4, and are subjected to more scrutiny than other complainants. Temkin argues that complainants in sexual offence matters will continue to be treated differently than other witnesses, and thus specialized rules which protect these complainants are crucial.[82] She argues that abolishing the sexual offence exception would place a further hurdle in the prosecuting of sexual offences and that if evidence of prior complaints could only be adduced under the general exceptions such as in Canada, such prior complaints would rarely be admitted in rape trials.[83]

Whilst authors such as Schwikkard and Zeffertt, Paizes and Grant argue (for differing reasons) that the common law sexual offences exception should have been repealed, the Canadian experience indicates that there are still anomalies despite placing the rules of evidence in sexual offence cases on the same footing as the rules applicable in all other cases. These anomalies, highlighted in section II above, are likely to find application in the South African context too. The Canadian experience after the amendment of the Criminal Code and

[80] Section 35(3)*(i)* of the Constitution of the Republic of South Africa, 1996.
[81] Schwikkard *Getting somewhere slowly* op cit note 1 at 89.
[82] Temkin op cit note 41 at 191.
[83] Ibid.

abolition of the prior complaints exception has made it clear that negative inferences are still drawn and references are still made to the timing of the complaint even when relying on a general exception under the common law. This is not a desired outcome. It is also submitted that the English position is not ideal either because admitting prior complaints as evidence of the truth of their contents violates the rule against self-corroboration and can lead to trial prejudice for an accused.

However, the repeal of section 120(7)(d) in the English Criminal Justice Act 2003 which dealt with a reasonable time period is commendable and I argue that the South African legislation should enact a similar amendment to SORMA which expressly abolishes the requirement that previous consistent statements in sexual offence cases be made at the first reasonable opportunity. The legislation itself should explain that there can be no prescribed time covering a reasonable period for a victim to disclose what has occurred because sexual offences cases differ from one to another and should not be treated alike when it comes to disclosure. Such an amendment would better uphold the aims of SORMA than the current formulation of sections 58 and 59 do. Requiring prior complaints to be made by complainants at the 'first reasonable opportunity' does not afford the maximum and least traumatizing protection that the law can provide. The remainder of this chapter will consider other options for reform alongside the proposed legislative amendment set out in this paragraph.

(a) Expert evidence and judicial notice

Holtzhauzen v Roodt[84], which was discussed previously in chapter 2, indicates that expert evidence may play a crucial role in the adjudication of sexual offence matters. This section will briefly explore whether this is a suitable option in sexual offence cases. In *Holtzhauzen*, Satchwell J stated that in circumstances where presiding officers would not be able to fully grasp the experience of the sexual offence victim, it would be unwise and irresponsible for such a presiding officer to draw inferences without the benefit of guidance from an expert witness who is better qualified to draw such inferences.[85] This would not be usurping the functions of the court as the court would merely be guided by the evidence of an expert and not obliged to draw the same inference as the expert witness.[86] The opinion evidence of an expert witness is

[84] [1997] 3 All SA 551 (W).
[85] Ibid at 561.
[86] Ibid at 562.

only one factor to be considered and it would still be the duty of the court to determine the probative value to be attached to such evidence.[87]

Satchwell J emphasized that if there were reasons known to professionals who work with rape survivors which explain why rape victims often do not utilize what is traditionally considered the first reasonable opportunity to disclose the rape, then:

> it would ill behoove me as a judge to turn my ear against the opportunity to gain a better understanding from an available expert.[88]

Craig supports the use of expert witnesses in sexual offence cases to provide the context of why complainants disclose sexual offences after a delayed period of time.[89] In *R v D.D.*[90], the court held that expert evidence on delayed disclosure was inadmissible and unnecessary because it was a matter of common sense that the evidence of complainants should not be discredited based on the view that real victims report sexual offences promptly.[91] The court held that such a view could be addressed through the taking of judicial notice or by warning the jury.[92] It can be argued that both in the Canadian context and in the South African one that this does not appear to be a matter of common sense and that the taking of judicial notice regarding late disclosure is necessary. Judicial notice is a legal tool which enables a court accept particular facts as being proved even though there was no evidence led to prove them.[93] However, judicial notice deprives parties of cross-examining witness and therefore courts take judicial notice of facts with caution.[94] Craig argues that judicial notice alone is unlikely to result in a change in attitudes regarding rape complainants.[95]

The South African law of evidence recognizes that there are issues in cases which cannot be resolved without recourse to the testimony of an expert witness.[96] These are often issues which require an understanding of ballistics, accounting, psychiatry and other complex fields usually beyond the ordinary experience of a judge.[97] It is not an exhaustive list of matters where expert evidence may be received by a court, and there are cases where expert evidence would be useful and helpful to the court even though not strictly necessary for the adjudication

[87] Ibid.
[88] *Holtzhauzen v Roodt* supra note 84 at 561-62.
[89] Craig op cit note 6 at 582-83.
[90] *R v DD* supra note 28.
[91] Ibid and Craig op cit note 6 at 582.
[92] Ibid.
[93] PJ Schwikkard & SE Van der Merwe *Principles of Evidence* 4 ed (2016) at 515.
[94] Ibid at 516.
[95] Craig op cit note 6 at 583.
[96] Schwikkard & SE Van der Merwe op cit note 93 at 99.
[97] Ibid.

of the case.[98] The party to the case who wishes to adduce the evidence of an expert witness must satisfy the court that the opinion evidence to be adduced is not irrelevant or superfluous.[99] The party must also satisfy the court that the witness has the necessary specialist knowledge, training or skills on the subject matter and that this would assist the court in resolving the issues; the witness is an expert for the purpose for which they have been asked to express an opinion; and the witness must not express their expert opinion based on hypothetical facts.[100] It is also required that the expert witness remain objective in testifying.[101]

Following the example of *Holtzhauzen*, expert evidence in sexual offence cases should be adduced where it is necessary to educate the court about matters beyond its traditional experience. In cases where it is known to the prosecution that the complainant disclosed the commission of the sexual offence after a period of time had elapsed, it may be practical to obtain expert evidence which refutes any attacks which may arise on the complainant's credibility solely due to the timing of the complaint. However, if the legislative amendments I propose in this chapter were to be implemented, then expert evidence on this particular point should not be necessary.

(b) The need for judicial training

Earlier, Schwikkard had warned that SORMA would only have a limited normative effect at best if its application was not coupled with context training.[102] Schwikkard has also expressed the view that the exercise of judicial discretion in sexual offence cases, where legislation is unclear, has proven to be an 'unruly factor'[103]. Craig too warns of the dangers of introducing legal reform prior to a change in prevailing social beliefs and explains that legal reform alone may not be enough to challenge assumptions about sexual violence and that something more is needed.[104] Temkin also highlights that procedural reforms to the law on its own cannot create a belief that a complainant who says they have been raped is being truthful because there still exists an plethora of prejudicial rape myths.[105] She makes an unflinching statement that:

> Old attitudes die hard and innovation not to be supported by judicial education is bound to falter.[106]

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[98] Ibid.
[99] Ibid at 105.
[100] Schwikkard & SE Van der Merwe op cit note 93 at 105-106.
[101] Ibid at 106.
[102] Schwikkard *Getting somewhere slowly* op cit note 1 at 97.
[103] Schwikkard *Sexual Offences Commentary* op cit note 79 at 23-4.
[104] Craig op cit note 6 at 553.
[105] Temkin op cit note 41 at 191.
[106] Ibid at 194.

Thus, the need for any proposed amendments to SORMA must go hand in hand with judicial training on the unique features of sexual offences and the complex, distinctive experiences of sexual offence victims. Failure to do so will render any legislative amendments futile.

IV CONCLUSION

This chapter has explored the possible options to reform the sexual offences exception contained in sections 58 and 59 of SORMA. It is concluded that, based on an evaluation of the possible options with guidance from the experience in other common law jurisdictions, the best method of reform would be to retain the statutory exception. However, this statutory exception to the general rule of evidence guarding against the admissibility of previous consistent statements, contained in SORMA, is in need of amendment. Any amendment should expressly remove the requirement which existed under the common law that a prior complaint be made at the first reasonable opportunity in order to be admissible. Removing this requirement is in keeping with the approach in English law and would meet the aims and objectives of SORMA. It would afford the rape complainant with protection against negative inferences and baseless attacks on her credibility, whilst not causing prejudice to the accused. Nor would admitting evidence of a prior complaint confer any advantage on the complainant. Unlike in English law where prior complaints are admitted into evidence to assert the truth of its contents, the amendment I propose be introduced would merely be for the purpose of demonstrating consistency. It would not impact an accused's fair trial rights or infringe the presumption of innocence as argued by Zeffertt, Paizes and Grant.[107] It has also been argued by several authors that any legal reform must be coupled with judicial training. This is essential in ensuring that the protections afforded in specialized sexual offences legislation such as SORMA are realized in practice in the criminal justice system.

[107] Zeffertt, Paizes & Grant op cit note 4 at 647.

CHAPTER SIX: CONCLUDING REMARKS

This dissertation has systematically set out the chronology of and rationale for the common law sexual offences exception to the general rule precluding evidence of previous consistent statements. The question sought to be answered was whether the rules contained in section 58 and section 59 of SORMA can be reconciled with the aims and objectives of SORMA. These provisions allow previous consistent statements made by a complainant in a sexual offence matter to be admitted into evidence. The history of the rule dating back to medieval England and its reception into the South African rules of evidence was explained in chapter 2. The application of the rule in South African case law was examined and it was clear to academics, practitioners and the SALC alike that there needed to be reform to the common law position. The common law exception was based on antiquated, misogynistic and inaccurate understandings of the effect of rape on victims.[1] In an effort to cure this and many other challenges in the adjudication of sexual offences, the SALC explored the need for reform to the common law exception.[2]

The SALC ultimately drafted and enacted sections 58 and 59 of SORMA to alleviate the difficulties that the common law exception caused. This was canvassed in chapter 3. The SALC aimed its focus on the negative inferences that could be drawn from absent or delayed complaints and unfortunately did not pay sufficient attention to prescient drafting.[3] This resulted in debates on the ambit and meaning of sections 58 and 59 and the application of these sections by the courts raised uncertainties. These uncertainties related to whether complaints needed to be made voluntarily, whether complaints could be adduced for the limited purpose of proving consistency or whether such complaints could prove the truth of their contents, and whether complaints must have been made at the first reasonable opportunity as under the common law. It is submitted that the lack of focus on this latter requirement resulted in discrepancies in the courts in the interpretation and application of these sections.[4]

Chapter 4 of this dissertation determined, through an examination of South African case law following the enactment of SORMA, that the failure by the legislature to expressly abolish the common law requirement that a prior complaint be made at the first reasonable opportunity

[1] PJ Schwikkard 'Getting somewhere slowly - the revision of a few evidence rules' in Artz & Smythe (eds) *Should We Consent? Rape Law Reform in South Africa* at 87.
[2] South African Law Commission, Discussion Paper 102, Project 107, Sexual Offences: Process and Procedure December 2001.
[3] DT Zeffertt, AP Paizes & JS Grant 'Complaints in sexual offences' (2008) *SALJ* 642 at 646.
[4] See *S v TN and Others* 2020 (1) SACR 633 (LP); *S v Sithole* 2013 (1) SACR 298 (GNP).

was not in keeping with the spirt and objectives of SORMA. The objectives of SORMA were set out in chapter 1, namely that complainants of sexual offences be afforded 'the maximum and least traumatising protection that the law can provide'[5] and promoting the spirit of *batho pele* in respect of service delivery.[6] This includes taking proper consideration of the needs of victims through effective prosecutions.[7] The analysis of case law adjudicated after the commencement of SORMA indicates that the introduction of sections 58 and 59 of SORMA has not had the desired positive outcome of reforming the law on prior complaints as envisioned by the SALC nor is it meeting the basic aims and objectives of SORMA.

Chapter 5 of this dissertation focused on the potential options for reforms to sections 58 and 59, including the abolition of both the common law and statutory forms of the sexual offences exception as suggested by Schwikkard[8] and Zeffertt, Paizes and Grant.[9] Due regard was paid to comparative law and two contrasting legal positions were considered. Ultimately, it is recommended that sections 58 and 59 of SORMA be amended to make it clear that prior complaints in sexual offence cases are admissible regardless of the timing of the complaint. This would accord with empirical evidence on the psychology of rape victims and finds support in English legislation which removed the 'first reasonable opportunity' requirement. However, unlike SORMA, the Criminal Justice Act no longer recognizes a special rule for sexual offences and limits the scenarios in which evidence of prior complaints can be adduced.[10] It may also be suitable for courts to allow expert evidence in sexual offence cases to be adduced where this would be useful to the court and provide evidence on matters outside of the traditional experience of the judge. Where appropriate, judicial notice could also be taken about the varied impact of rape on victims.

Furthermore, any amendments to SORMA which are made to facilitate the aims of affording victims the least traumatizing protection by the law must be coupled with judicial training if these are to be effective.

[5] Section 2 of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[6] Supra section 2*(e)*.
[7] Supra section 2*(e)*(ii).
[8] PJ Schwikkard 'Previous consistent statements – the sexual offence anomaly' (2022) 35 *SACJ* 58.
[9] Zeffertt, Paizes & Grant op cit note 3.
[10] Section 120 of the Criminal Justice Act 2003 (United Kingdom).

BIBLIOGRAPHY

Primary Sources

Constitution

Constitution of the Republic of South Africa, 1996.

Statutes

South African:

Child Justice Act 75 of 2008.

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

Criminal Procedure Act 51 of 1977.

Foreign:

Criminal Code (R.S.C., 1985, c. C-46) (Canada).

Combating of Rape Act No. 8 of 2000 (Namibia).

Coroners and Justice Act 2009 (United Kingdom).

Criminal Justice Act 2003 (United Kingdom).

Cases

South African:

AK v Minister of Police [2022] ZACC 14.

Cornick & Kinnear v The State [2007] SCA 14 (RSA).

Holtzhauzen v Roodt [1997] 3 All SA 551 (W).

Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others 2018 ZACC 16.

R v C 1955 (4) SA (40) N.

R v Du Plessis 1922 TPD 153.

R v Gannon 1906 TS 114.

R v Kgaladi 1943 AD 255.

R v T 1937 TPD 389.

S v Burgh 1976 (4) SA 857 (A).

S v Ganga 2016 (1) SACR 600 (WCC).

S v Hammond [2007] ZASCA 164.

S v Mathikinca 2016 (1) SACR 240 (WCC).

S v Monageng 2008 JDR 1240 (SCA).
S v Peterson 2019 JDR 0248 (ECG).
S v R 1965 (2) SA 463 W.
S v Sithole 2013 (1) SACR 298 (GNP).
S v T 1963 (1) SA 484 (A).
S v TN and Others 2020 (1) SACR 633 (LP).
S v Van der Ross A1044/01) [2002] ZAWCHC 30 (31 May 2002).
S v ZF 2015 JDR 2411 (KZP).
S v Zulu 2013 JDR 1413 (KZP).

Foreign:
R v CMG, 2016 ABQB 368.
R v DD, [2000] 2 SCR 275, 148 CCC (3d) 41 [DD].
R v Handy, 2002 SCC 56, [2002] 2 SCR 908 [Handy].
R v O [2006] EWCA Crim 556.
R v Osborne [1905] 1 KB 551.
R v Valentine [1996] 2 Cr App R 213.
R v Williams, (2004), 2004 BCCA 207 183, CCC (3d) 510 [Williams].

Secondary Sources

Journal articles

Baker, Katharine K 'Once a Rapist, Motivational Evidence and Relevancy in Rape Law' (1997) 110 *Harvard Law Review* 563.

Campbell, Rebecca & Sheela Raja 'Secondary Victimization of rape victims: Insights from mental health professionals who treat survivors of violence' (1999) 14 *Violence and Victims* 261.

Craig, Elaine 'The relevance of delayed disclosure to complainant credibility in cases of sexual offence' (2011) *36 Queen's L.J.* 551.

Dufraimont, Lisa 'Myth, inference and evidence in sexual assault trials' (2019) 44:2 *Queen's LJ* 316.

Durston, Gregory 'Previous (in)consistent statements after the Criminal Justice Act 2003' (2005) *Crim. L.R.* 206.

Fletcher, Duncan 'The abrogation of recent complaint: Where do we stand now' (1984) 27 *Crim. L.Q.* 57.

Schwikkard, PJ 'Previous consistent statements – the sexual offence anomaly' (2022) 35 *SACJ* 58.

Singh, Karam Jeet 'Evaluating the ''first report'': The persistent problem of evidence and distrust of the complainant in the adjudication of sexual offences' (2006) 1 *SACJ* 37.

Stanchi, Kathryn M 'The paradox of the fresh complaint rule' (1996) *Boston College Law Review* 441.

Zeffertt, DT; AP Paizes & JS Grant 'Complaints in sexual offences' (2008) *SALJ* 642.

Books and chapters in books

Artz, Lillian & Dee Smythe 'Introduction: Should we consent?' in Lillian Artz & Dee Smythe (eds) *Should We Consent? Rape Law Reform in South Africa* (2008) Juta & Co.Ltd, Cape Town.

Combrinck, Helene 'Claims and entitlements or smoke and mirrors? Victims' rights in the Sexual Offences Act' in Lillian Artz & Dee Smythe (eds) *Should We Consent? Rape Law Reform in South Africa* (2008) Juta & Co.Ltd, Cape Town.

Hlophe, Zakhele et al. (eds) *Law of Evidence in South Africa: Procedural Law* 2 ed (2019) Oxford University Press, Cape Town.

Munday, Roderick J.C. *Cross & Tapper on Evidence* 13 ed (2018) Oxford University Press, Oxford.

Schwikkard, PJ 'A critical overview of the rules of evidence relevant to rape trials in South African law' in Saras Jagwanth, Pamela-Jane Schwikkard & Brenda Grant (eds) *Women and the Law* (1994) HSRC, Pretoria.

Schwikkard, PJ '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) Juta & Co.Ltd, Cape Town.

Schwikkard, PJ 'Sections 58–60 and amendment in terms of s 68(2): Matters pertaining to evidence' in Dee Smythe & Bronwyn Pithey *Sexual Offences Commentary* (service 4), 2011 looseleaf publication.

Schwikkard, PJ & SE Van der Merwe *Principles of Evidence* 4 ed (2016) Juta, Cape Town.

Tapper, Colin *Cross & Tapper On Evidence* 12 ed (2010) Oxford University Press, New York.

Temkin, Jennifer *Rape and the Legal Process* 2 ed (2002) Oxford University Press, Oxford.

Zeffertt, DT & AP Paizes *The South African Law of Evidence* 3 ed (2017) LexisNexis, Durban.

Discussion Papers

South African Law Commission, Discussion Paper 102, Project 107, Sexual Offences: Process and Procedure December 2001.

South African Law Commission, Project 107, Sexual Offences Report December 2002.