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Title: *Burying the Ghosts of a Complainant's Sexual Past: The Constitutional Debates Surrounding Section 227 of the Criminal Procedure Act 51 of 1977*

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Burying the Ghosts of a Complainant's Sexual Past: The Constitutional Debates Surrounding Section 227 of the Criminal Procedure Act 51 of 1977

1. Introduction

"It has been said that the victim of a sexual assault is actually assaulted twice-once by the offender and once by the criminal justice system."¹

South Africa's rape shield provision is contained in section 227 of the Criminal Procedure Act.² The purpose of its enactment is to protect a complainant in a sexual offence matter from secondary victimisation during the trial as far as possible, by restricting the type of evidence that is admissible and the circumstances under which such evidence can be found to be admissible.

This rationale has come under attack for its effect on the fair trial rights of the accused. There has been no challenge to the constitutionality of section 227 before a court yet. However, there are numerous rumblings of discontent at the consequences of a provision that restricts evidence that could be necessary to prevent a wrongful conviction.

This paper seeks to consider the constitutional debates surrounding section 227 and to determine whether, to the extent that they may prove to be constitutionally problematic, the potential constitutional challenges are justifiable under a limitations analysis.

It is impossible to engage with the constitutionality of section 227 without first discussing the rationale behind rape shield laws in general. The structure of the paper is therefore as follows: firstly, the history and purpose of rape shield laws will be investigated, and secondly, the history of section 227 under South African law will be discussed.

¹ *State v Sheline*, 955 S.W. 2d 42, 44 (Tenn. 1997).

² Act 51 of 1977.

The paper will then move from these preliminary questions, to an outline of the constitutional challenges that are levelled against section 227. In order to adequately determine the constitutionality, or otherwise, of section 227, it is necessary to determine the scope of the accused's constitutional right to a fair trial. Thereafter, an in-depth interpretation exercise of section 227 will be conducted. Finally, a limitations analysis under section 36 will be followed, to determine whether the constitutional challenges levelled at section 227 are "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".

The paper will often make use of gender-specific language. The reason for this is two-fold. Firstly, it is necessary for ease of writing. Secondly, and more importantly, in the past only women could be raped, and at present the majority of sexual offence complainants remain women. The paper therefore takes cognisance of this fact and will sometimes refer to the effect on 'women' rather than on complainants in general. However, the paper does not exclude the possibility that a complainant may be male.

2. Rape Shield Laws

2.1. The History of Rape Shield Laws

English law adopted the ancient law requirement that a female had to be a virgin otherwise raping her would not be considered illegal conduct.³ English colonies took on the law of England, and therefore many countries in the world have a legal history that differentiated between the rape of a virgin and the rape of a non-virgin.⁴ In South Africa, these evidentiary rules were adopted from the English law of evidence into the South African common law.

³ Michelle J Anderson *From Chastity Requirement to Sexuality Licence: Sexual Consent and a New Rape Shield Law* (2002) *George Washington Law Review* 70 at 60.

⁴ Anderson (note 3) at 61. The punishment for the rape of a virgin was having the man's eyes and testicles removed; and the punishment for the rape of non-virgins was corporal punishment.

The law traditionally endorsed the view that the sexual history of a woman who laid a charge of rape was relevant to the truth of the allegation.⁵ The rationale for these rules was that no decent woman engaged in sexual intercourse outside of marriage.⁶

Although lack of chastity was not in itself a defence to a charge of rape, a woman's chastity, or lack thereof pointed to two issues, namely, credibility and consent.⁷ A woman who had previously engaged in sexual intercourse was considered unchaste. Further, such an unchaste woman was believed to more likely have willingly agreed to sexual intercourse with the accused, and to have lied afterwards about it.⁸ Thus, accusing a woman of lack of consent was an effective functional defence.⁹

“Since want of consent on the part of the complainant is of the essence of the crime of forcible rape . . . , it is permissible, in order to show the probability of consent by the prosecutrix, that her general reputation for immorality and unchastity be shown. The underlying thought here is that it is more probable that an unchaste woman would assent to such an act than a virtuous woman.”¹⁰

It is clear that embedded within the law was the requirement that women had to abstain from sexual conduct in order to gain access to the protection of the law.¹¹ Anderson calls this command the law's "chastity requirement".¹² She argues that the chastity requirement derived from the distorted view that

⁵ JRL Milton *South African Criminal Law and Procedure* 2nd ed. (1982) at 441. Anderson (note 3) at 52.

⁶ PJ Schwikkard "Matters Pertaining to Evidence" (Chapter 23) in Dee Smythe at al *Commentary to the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007* (unpublished) at 23-12. PJ Schwikkard 'Getting Somewhere Slowly – The Revision of a Few Evidence Rules' in Lillian Artz and Dee Smythe *Should We Consent? Rape Law Reform in South Africa* (2008) at 95.

⁷ Victoria Bronstein *The Rape Complainant in Court: An Analysis of Legal Discourse* (1994) Acta Juridica 202 at 214.

⁸ Thea Illsley *Sexual History Evidence in South Africa: A Comparative Enquiry* (2002) 15 South African Journal of Criminal Justice 15 at 228. Anderson (note 3) at 53.

⁹ Anderson (note 3) at 77.

¹⁰ *People v. Collins*, 186 N.E.2d 30 (Ill. 1962) at 33.

¹¹ Susan Edwards *Female Sexuality and the Law* (1981) at 70.

¹² Anderson (note 3) at 53.

consent to sexual intercourse lacked temporal constraints, could be imprecise as to act and was transferable to other people.¹³

Historically, a husband could not be accused of rape, because the act of marriage meant that a woman was legally submitting to her husband's sexual advances for the duration of their marriage.¹⁴ Even where there was no marital relationship, prior sexual intercourse with the defendant was considered sufficient indication of consent to the intercourse presently in dispute.

Consent was also thought to be imprecise as to the nature of the act as non-penetrative sexual conduct with a particular man was understood to imply consent to sexual intercourse with him as well. Consent was also considered transferable. Where a woman had previously consented to intercourse with other men, her consent lost its unique nature and she was considered indiscriminate in her sex life. Therefore she had functionally consented to intercourse with the defendant.¹⁵

In the United States of America, the Woman's Movement flourished in the 1970s. As a result, legislators were forced to re-examine the so-called chastity requirement.¹⁶ Legislatures began imposing rape shield laws to restrict the admission of rape complainants' sexual histories.¹⁷ The first rape shield law was passed by the state of Michigan in 1974. By the early 1980s, many states in the United States had enacted some form of rape shield law. South Africa legislated for its first rape shield law in 1989, where the previous common law rules first met legislative challenge.¹⁸ Rape shield laws now exist in many jurisdictions throughout the world.¹⁹

¹³ Anderson (note 3) at 53.

¹⁴ Joanne Fedler et al 'Beyond the Facelift: The Legal System's Need for a Change of Heart' in Yoon Jung Park et al *South Africa* (2000) at 130.

¹⁵ Anderson (note 3) at 54.

¹⁶ Anderson (note 3) at 80.

¹⁷ Catherine L Kello *Rape Shield Laws – Is it Time for Reinforcement?* (1987-1988) University of Michigan Journal of Law Reform 21 at 317.

¹⁸ The full history of rape shield laws in South Africa will be discussed below.

¹⁹ *Inter alia*, Canada, Australia, New Zealand, England.

2.2. The Purpose of Rape Shield Laws

The myths relating to rape and gender are inextricably bound within the legal system. This is evidenced from the way laws are drafted, and more poignantly, by the way they are implemented by judicial officers. Research has shown that there is a relation between the acceptance of rape myths and other forms of prejudice, such as sexism, racism and religious intolerance, and that all these constructs are connected as part of a unitary belief system.²⁰ Stereotypical beliefs about victims can affect the judgment of those involved in decision-making at different stages of the criminal justice process.²¹ Rape myths are prejudicial, and people who believe rape myths are more likely to attribute blame to the victim, holding that she could have avoided the incident by modifying her own behaviour.²²

Even where rape shield laws do exist, they are often not properly implemented, or are ignored. The nature of sexual offences is such that they often occur in private. When the word of one person is set against the other, there may not always be sufficient evidence or law to point to a clear verdict. Other factors, such as credibility, will then become more important in determining the truth. Character evidence often plays a huge role, and could be the deciding factor of a decision. The danger is that lifestyle choices are attributed to whether there was consent in a particular case or not.²³ The successful prosecution of sexual offences is continually barred by these rape myths, particularly those related to the promiscuity of women.²⁴

Unfortunately, once character and prior sexual history evidence is admitted, there is very little that can be done to prevent negative inferences being drawn from it. Rape shield laws are therefore intended to mitigate the chastity

²⁰ Allyson K Clarke and Karen L Lawson *Women's Judgments of a Sexual Assault Scenario: The Role of Prejudicial Attitudes and Victim Weight* (2009) *Violence and Victims* 24(2) at 250.

²¹ Jennifer Temkin and Barbara Krahe *Sexual Assault and the Justice Gap: A Question of Attitude* (2009) at 31.

²² Clarke and Lawson (note 20) at 249.

²³ Myrna S Raeder *Litigating Sex Crimes in the United States: Has the Last Decade Made Any Difference?* (2009) *International Commentary on Evidence* 6(2) at 12.

²⁴ Raeder (note 23) at 14.

requirement.²⁵ When evidence of prior sexual history is admitted, collateral issues may become the central focus of the trial and there is the danger of misuse of the evidence.²⁶ Rape shield laws thus seek to prevent the prior sexual history being admitted as evidence at all.

The primary purpose of rape shield laws is to protect a woman from allowing her sexual reputation or behaviour from being used to reduce her credibility or infer that in all probability she had consented to the sexual conduct. These inferences are based on historical prejudices of women, and do not actually assist with the fact-finding role of the court. At its essence then, rape shield laws endeavour to protect the very truth-seeking process itself.²⁷

Moreover, it is argued that cross-examination of a sexual offence complainant, besides aiding in the traumatising and humiliation of the victim, does not illicit any relevant evidence.²⁸ At most it establishes a propensity to have sexual intercourse.²⁹ There is no reason why this evidence ought to be admitted as relevant in sexual offences, since propensity evidence in other cases is considered inadmissible.³⁰ Furthermore, it is unfounded that a woman's reputation for a propensity to consent can show that she will consistently consent to sexual intercourse with other persons in other situations.³¹

Although many people take objection to it, rape shield laws are also aimed at limiting the discretion of judicial officers. Discretion allowed to presiding officers can be dangerous in an area of the law where intuitions and social

²⁵ Michelle J Anderson *Understanding Rape Shield Laws*. Violence Against Women Net (2004). <http://www.naevs.org/Resources/Articles/UnderstandingRapeShieldLaws.pdf> (accessed at 20-10-2010, 13:00).

²⁶ Stephen J Odgers *Evidence of Sexual History in Sexual Offence Trials* Sydney 11 Law Review (1986-1988) at 76.

²⁷ *People v. McKenna*, 196 Colo. 367, 585 P. 2d 275 (1978). Anderson (note 3) at 104.

²⁸ South African Law Commission Project 45: *Women and Sexual Offences in South Africa*, April 1985. PJ Schwikkard *The Evidence of Sexual Complainants and the Demise of the 2004 Criminal Procedure Act* (2009) Namibia Law Journal 1(1) at 22.

²⁹ *Sexual Offences Commentary* (note 6) at 23-12.

³⁰ Schwikkard in Artz and Smythe (note 6) at 95. PJ Schwikkard "A Critical Overview of the Rules of Evidence Relevant to Rape Trials in South African Law" in Saras Jagwanath et al *Women and the Law* (1994) at 204.

³¹ Odgers (note 26) at 81.

prejudices are biased against women and critical of their sexual autonomy.³² Further, it is clear from case law that judges often do not properly exercise discretion to reject irrelevant character evidence of the complainant.³³

In sexual offence cases, particularly those in which consent is in dispute, the role that defence attorneys take on is to divert attention from the alleged offence in question and attempt to show that the complainant had provoked the sexual acts by the way she was dressed, where she was or how promiscuous she has been in the past, inferring that she was contributory negligent.³⁴ Rape shield laws wish to restrict these tactics from severely deviating and shifting the focus from reliable evidence in the present trial.

Another purpose is to protect sexual offence victims from the degradation of having to disclose intimate and embarrassing details about their private lives.³⁵ Anderson, however, argues that this secondary trauma, while real and severe, is not the legal purpose of rape shield laws.³⁶ The essential purpose is to prevent decisions being based on unfair, prejudicial and often irrelevant evidence of a complainant's sexual history.³⁷ There is a danger in conflating the two purposes. The implication of the emphasis on privacy is that women who freely engage in sexual conduct, such as prostitutes, are often seen as undeserving of the purpose of rape shields, since their sexual conduct is seen as taking place in a 'public' space.

The legislative objective behind rape shield laws are also aimed at protecting sexual offence victims from victimisation under the legal process, to encourage the reporting of sexual offences,³⁸ to promote the administration of justice, and to serve as an educational tool to change attitudes to sexual

³² Anderson (note 3) at 96.

³³ *S v Balhuber* 1987 (1) PH H22 (A); *S v N* 1988 (3) SA 450 (A); *S v M* 2002 (2) SACR 411 (SCA).

³⁴ Raeder (note 23) at 12.

³⁵ John McDonough *Consent v Credibility: The Complications of Evidentiary Purpose Rape Shield Statutes* (2006) *Law and Society Journal at UCSB* Volume V at 11.

³⁶ Anderson (note 3) at 104.

³⁷ Anderson (note 3) at 110.

³⁸ Raeder (note 23) at 12.

assault.³⁹ It is necessary to investigate each of these features separately, in order to properly understand the necessity of rape shield provisions in our law. Each of these features will be investigated and elaborated upon under the section of the paper involving the limitations analysis.⁴⁰ The limitations stage of the inquiry is the most appropriate point in the argument to test the purposes of rape shield laws against the competing interests of the accused.

3. The History of Section 227 in South Africa

South Africa's rape shield law is contained in Section 227 of the Criminal Procedure Act. Prior to enactment in 1989, there was no rape shield available to protect complainants of sexual offences and evidentiary rules were governed by the common law. The statutory enactment of the rape shield law has faced recent amendment in order to bring it more in line with South Africa's constitutional dispensation.

This part of the paper will lay out the history of the evidentiary rules relating to the character and prior sexual history evidence of a sexual offence complainant, from the common law, through to the current section 227 which was amended in 2007 by the Criminal Law Amendment (Sexual Offences and Related Matters) Act.

3.1. The Common Law Rule

In criminal cases generally, a complainant who testifies is subject to cross-examination, and may be asked questions that will reveal credibility, or lack thereof. The character of the complainant is not relevant to credibility, and therefore evidence solely directed at establishing the bad character of the

³⁹ Hon, Neville Wran, Premier of NSW, HSW Hansard, Legislative Assembly, 18 March 1981 at 4758, as quoted in *Heroines of Fortitude* at 223.

⁴⁰ See footnote 202

complainant is prohibited.⁴¹ However, there is a common law rule that the accused may cross-examine the complainant as to her bad character due to lack of chastity in a case involving rape or indecent assault, as this line of questioning was considered relevant to credibility.⁴² Prior to its amendment in 1989, section 227 of the Criminal Procedure Act provided that the admissibility of character evidence of a complainant in a sexual offence case, would be determined according to the common law rules.⁴³ It was also recognised that the general reputation on the complainant could be relevant to the issue of whether consent was given.⁴⁴

The common law relating to the sexual history of the complainant was not very clear, as three variables were involved, namely, whether the evidence had to be given by a witness of the defence or extracted from the complainant during cross-examination; whether the evidence was adduced for purposes of the credibility of the complainant or for substantive issues such as consent; and, the nature of the evidence, whether it pertained to the general reputation of the complainant, the sexual relations between the accused and the complainant on other occasions, or sexual relations with persons other than the accused.⁴⁵

The common law provisions were, thus, heavily criticised. The inconsistency with which the common law rule was applied blurred the circumstances under which prior history could be adduced, as well as the purpose for which such evidence was allowed to be adduced. Generally speaking, therefore, although the rule allowed evidence of the complainant's sexual conduct with persons other than the accused only where relevance could be established to an issue other than general character,⁴⁶ evidence as to the character of the complainant was often adduced for no reason other than to show bad reputation for lack of chastity.⁴⁷

⁴¹ PJ Schwikkard and SE Van der Merwe et al. *Principles of Evidence* 3rd ed. (2009) at 65.

⁴² Schwikkard and Van der Merwe (note 41) at 65-66.

⁴³ Schwikkard and Van der Merwe (note 41) at 66.

⁴⁴ Etienne du Toit et al *Commentary on the Criminal Procedure Act 1987* at 24-100A.

⁴⁵ Du Toit (note 44) at 24-100A.

⁴⁶ *R v Adamstein* 1937 CPD 331.

⁴⁷ DT Zeffertt & AP Paizes *The South African Law of Evidence* 2nd ed. (2009) at 263.

3.2. The 1989 Enactment

It was admitted by the South African Law Commission,⁴⁸ that the common law position was a relic from an era when it was generally accepted that “no decent woman had sexual intercourse outside marriage”.⁴⁹ Thus, on the recommendations of the South African Law Commission, section 227 of the Criminal Procedure Act was enacted so that evidence relating to the sexual conduct of the complainant outside of the conduct complained of became inadmissible, as well as making cross-examination of such matters impermissible.⁵⁰ The only way to have evidence of this nature admitted in court was to make application to court for leave to adduce evidence, or question the complainant, with regard to her previous sexual history. Such leave would only be granted if its relevance could be established.⁵¹ Relevance became the only criterion upon which admissibility could be based.⁵²

The purpose behind the amendment of the previous position was to ensure that only evidence which was relevant would be admissible. This seems to be in keeping with the general rules of the law of evidence. However, this provision was in practice still ineffective because, it was argued, it conferred too wide a discretion on judicial officers, who in the past had failed to properly exercise their discretion to exclude irrelevant previous sexual history evidence.⁵³ Another problem with the relevancy test is that it is an insufficiently objective criterion, since myths and stereotypes in the area of sexual offences are often employed in determining relevance.⁵⁴ Furthermore, relevance was not defined or restricted, and was therefore open to a court to interpret and apply as it saw fit.⁵⁵

⁴⁸ SA Law Commission: Project 45 (note 28).

⁴⁹ SA Law Commission: Project 45 (note 28) at para 3.9.

⁵⁰ Du Toit (note 44) at 24-100B.

⁵¹ Section 2 of the Criminal Law and Criminal Procedure Amendment Act 39 of 1989.

⁵² Du Toit (note 44) at 24-100B.

⁵³ *Sexual Offences Commentary* (note 6) at 23-13.

⁵⁴ Jennifer Temkin *Sexual History Evidence* (1993) *Criminal Law Review* 3.

⁵⁵ Du Toit (note 44) at 24-100B.

The Commission had considered two different trends in other jurisdictions, one which prohibited evidence and cross-examination on the complainant's sexual history with anyone other than the accused,⁵⁶ and the other, which left it to the discretion of the presiding officer in each case whether to allow evidence or cross-examination of the complainant's sexual history with a person other than the accused.⁵⁷ The Commission's recommendation was a fairly balanced path between the two trends, whereby a limited restriction be placed on sexual history with other persons, which would only be permitted after an application heard *in camera* was granted.⁵⁸

3.3. The 2007 Amendment

The most recent amendment of section 227 came into effect through the process of discussion and recommendations by the South African Law Commission.⁵⁹ Because the 1989 amendment still left open very wide discretion to judicial officers, in 2002 the Law Commission was persuaded by pressure from academics as well as the lobbying efforts of woman's groups,⁶⁰ that further amendments were necessary.⁶¹

The amendment to section 227 was brought to legislative life in the 2007 Criminal Law (Sexual Offences and Related Matters) Amendment Act (hereafter referred to as the "2007 Sexual Offences Act").⁶² Section 227 reads as follows:

- (1) Evidence as to the character of the accused or as to the character of any person against or in connection with whom a sexual offence as contemplated in the Criminal Law (Sexual Offences and Related

⁵⁶ The rape shield provision in the State of Michigan is an example of this strict approach.

⁵⁷ Zeffert and Paizes (note 47) at 264.

⁵⁸ South African Law Commission: Project 45 (note 28) at para 3.28.

⁵⁹ South African Law Commission, Discussion Paper 102, Project 107, *Sexual Offences: Process and Procedure* December 2001, Chapter 32.

⁶⁰ Inter alia, Rape Crisis and The Women's Legal Centre.

⁶¹ Schwikkard in Artz and Smythe (note 6) at 95.

⁶² Act 32 of 2007.

Matters) Amendment Act, 2007, is alleged to have been committed, shall, subject to the provisions of subsection (2), be admissible or inadmissible if such evidence would have been admissible or inadmissible on the 30th day of May, 1961.

- (2) No evidence as to any previous sexual experience or conduct of any person against or in connection with whom a sexual offence is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no evidence or question in cross-examination regarding such sexual experience or conduct, shall be put to such person, the accused or any other witness at the proceedings pending before the court unless –
 - (a) the court has, on application by a party to the proceedings, granted leave to adduce such evidence or to put such question; or
 - (b) such evidence has been introduced by the prosecution.
- (3) Before an application for leave contemplated in subsection (2)(a) is heard, the court may direct that any person, including the complainant, whose presence is not necessary may not be present at the proceedings.
- (4) The court shall subject to subsection (6), grant the application referred to in subsection (2)(a) only if satisfied that such evidence or questioning is relevant to the proceedings pending before the court.
- (5) In determining whether evidence or questioning as contemplated in this section is relevant to the proceedings before the court, the court shall take into account whether such evidence or questioning –
 - (a) is in the interests of justice, with due regard to the accused's right to a fair trial;
 - (b) is in the interests of society in encouraging the reporting of sexual offences;
 - (c) relates to a specific instance of sexual activity relevant to a fact in issue;
 - (d) is likely to rebut evidence previously adduced by the prosecution;
 - (e) is fundamental to the accused's defence;

- (f) is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy; or
 - (g) is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue.
- (6) The court shall not grant an application referred to in subsection (2)(a) if, in its opinion, such evidence or questioning is sought to be adduced to support an inference that by reason of the sexual nature of the complainant's experience or conduct, the complainant –
- (a) is more likely to have consented to the offence being tried; or
 - (b) is less worthy of belief.
- (7) The court shall provide reasons for granting or refusing an application in terms of subsection 2(a), which reasons shall be entered into the record of the proceedings.

Section 227 as it stands in the new Sexual Offences Act will be properly interpreted further in the paper. However, a few aspects of the new section 227 will be outlined here, merely to show the similarities and differences with the old section 227.

There are some similarities with the old position. Firstly, the evidence relating to sexual conduct in respect of the offence being tried is still admissible. Secondly, prior sexual history with anyone other than the accused may not be adduced or raised in cross-examination without leave of the court. Thirdly, leave will only be granted if the court is satisfied that the evidence or line of questioning is relevant.

There are, however, a number of differences. According to section 227(2)(a), it is expressly provided that prior sexual history evidence is exempt from the general prohibition as well as the requirement that leave from the court is necessary, where such evidence has been introduced by the prosecution. This does not mean that such evidence is automatically admissible, the

evidence still has to meet the general rules of admissibility, but it is freed from the general exclusionary rule.⁶³

Secondly, section 227(5) contains a list of factors which the court has to take into account when deciding whether to grant leave for the complainant's prior sexual history to be adduced or cross-examined.⁶⁴ The aim of these factors is to set out the circumstances in which prior sexual history evidence may be admitted.

Further, according to section 227(7), the court has to give reasons for granting or refusing an application for leave to adduce or question issues of sexual history. This will force a court to properly engage with section 227 as well as with the evidence, and promote better general accountability.

Subsection (6) instructs a court to refuse leave if the purpose for which it is being adduced is to support an inference that the complainant is likely to have consented or is not truthful. Thus, the privacy and dignity of the complainant must be protected, unless a court finds that such evidence is relevant and necessary according to the list of factors. The court has no discretion in the matter, since once it has determined that one of the prohibited inferences is in issue it has to dismiss the application. In effect this creates an exclusionary rule.⁶⁵ Evidence becomes inadmissible, not by the fact of how the court itself would make use of the evidence if it had the opportunity to engage with it, but because of the *purpose* for which it is sought to be adduced.

The amendments to section 227 are extremely important and essential to ending the tradition of avoiding proper engagement with the rape shield law and to curtail the too easy admission of the prior sexual history evidence of sexual offence complainants.

⁶³ Du Toit (note 44) at 24-100D.

⁶⁴ These factors will be analysed more fully further on as part of the section on the limitation of the accused's rights to a fair trial.

⁶⁵ Du Toit (note 44) at 24-100E. This issue will be investigated in detail further on, where it will be determined if it withstands constitutional scrutiny.

The paper will now move to outline the constitutional challenge to section 227.

4. The Constitutional Challenge to Section 227

Section 35(3) of the Constitution entrenches the right of every accused person to a fair trial. For the purposes of this paper, the most relevant component is 35(3)(i), which embeds the right to adduce and challenge evidence. Section 35(3)(i) reads as follows:

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

4.1. General constitutional challenge

The constitutional challenge to section 227 in general is that by restricting the kind of evidence that is allowed to be admitted into evidence or restricting the line of questioning that is allowed, the accused's rights to adduce and challenge evidence is infringed.

On first appearance it appears that section 227 does to some extent limit the right to adduce and challenge evidence. Whether there is in fact a limitation of the right or not, can only be determined by first interpreting section 35(3)(i) of the Constitution with regard to its scope. It is also necessary to consider how much infringement is required before it can be said that the right to adduce and challenge evidence is sufficiently adversely affected to require a limitations analysis under section 36 of the Constitution.⁶⁶ Only then is it possible to say whether section 227 infringes an accused's right to adduce and challenge evidence.

⁶⁶ Woolman et al *Constitutional Law of South Africa* Volume 3 (2009) at 51-165.

Under normal circumstances, a limitations analysis will only be conducted if it is found that a right is restricted. However, for the purposes of the paper, it is necessary to undertake a limitations analysis even if the view taken here is that the scope of section 35(3)(i) does not include the right to adduce evidence of, or question a complainant regarding, prior sexual history evidence. This is to ensure that the constitutional challenge is properly dealt with, leaving no gaps in the discussion, as well as to answer any possible critiques that may be levelled at the argument posited herein.

The next question is whether this limitation is justifiable in terms of section 36 of the Constitution. The paper will, therefore, consider the legitimacy of this constitutional challenge to section 227 by delving into a limitations analysis, which will specifically include the scope of the fair trial rights of the accused, as well as taking due regard of the competing interests of the victim to have her dignity and privacy respected.

4.2. Constitutional challenge: specific provisions of section 227

The general challenge is not the only constitutional challenge that can be levelled against section 227. Certain individual aspects of section 227 have been criticised for their potential in not being able to face constitutional muster if ever they are challenged in court. The particular provisions that will be individually discussed are, subsection (1), (2), (5) and (6). It will then have to be determined, whether on a literal reading of the sections they limit the rights of the accused in terms of section 35(3)(i), and whether these limitations are unjustifiable.

The paper will also investigate the argument that it is possible to read these provisions in a way that does not unjustifiably limit the rights of the accused. If this is possible then it may not be necessary to challenge their validity, only to ensure that they are interpreted to justifiably limit section 35(3)(i). In order to ensure that the argument is complete and legally sound, a limitations analysis will be conducted to test its justifiability.

In order to begin the investigation of the validity of the constitutional challenges levelled against section 227, the scope of the constitutional right to adduce and challenge evidence as enshrined in section 35(3)(i) will have to be determined.

5. The Scope of Section 35(3)(i): The Right to Adduce and Challenge Evidence

Section 39(1) of the Constitution contains an interpretation clause, and includes instruction as to what a court ought to consider when interpreting the Bill of Rights. The section makes it mandatory, by means of the word "must", for any court to "promote the values that underline an open and democratic society based on human dignity, equality and freedom".⁶⁷ The section equally makes it mandatory, again by means of the use of the word "must" as a prefix, for a court to consider international law.⁶⁸ Finally the section encourages, but in the use of the word "may" fails to make it mandatory, the use of foreign law.⁶⁹

The underlying point to the interpretation of the Bill of Rights can be understood by means of four principles, namely, looking to the actual "text", using a "purposive interpretation", which is both "generous" towards the right itself and cognisant of the "context".⁷⁰

⁶⁷ Section 39(1)(a).

⁶⁸ Section 39(1)(b).

⁶⁹ Section 39(1)(c).

⁷⁰ Iain Currie and Johan de Waal *The Bill of Rights Handbook* 5th ed (2008) at 145.

5.1. The Literal Meaning of the Text

The starting point for interpreting a provision of the Bill of Rights is the language of the text itself. In the first Constitutional Court judgment in *S v Zuma*,⁷¹ the Court said:

*“While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. The Constitution does not mean whatever we might wish it to mean... the language... must be respected.”*⁷²

In the case of section 35(3)(i) the language used is very concise and unspecific. Included in the broad right of an accused's right to a "fair trial" is the right to "adduce" and "challenge" evidence.⁷³ The golden rule of interpretation is to look to the "plain words" used and to give them their ordinary meaning.⁷⁴ Applying the golden rule to "the right to adduce and challenge evidence", it seems clear that the right includes both the capacity to introduce new evidence before the court, and secondly, to test evidence that has already been presented. It seems then that the literal meaning of the text does not provide a clear indication of its denotation, or to put it more clearly, it does not provide an indication of the extent of the right.

The literal meaning of the text in isolation is seldom sufficient to understand the true scope of a constitutional provision. Even where the literal meaning appears self-evident, other interpretive tools ought also to be employed to give a proper interpretation to a provision.⁷⁵ The Court in *S v Makwanyane* summarised the approach to the proper interpretation of the Bill of Rights:

⁷¹ 1995 (2) SA 642 (CC) at para 17.

⁷² Ibid.

⁷³ Section 35(3)(i).

⁷⁴ Lourens Du Plessis *Re-Interpretation of Statutes* 1st ed (2007) at 103.

⁷⁵ Currie and de Waal (note 70) at 148.

*“Whilst paying due regard to the language that has been used, [an interpretation of the Bill of Rights should be] ‘generous’ and ‘purposive’ and ‘give...expression to the underlying values of the Constitution’.”*⁷⁶

Aligning the two seemingly contradictory approaches by the Constitutional Court in *Zuma* and in *Makwanyane*, Currie and de Waal suggest that a reconciled approach is to accept the literal meaning of the text if it accords with a generous and purposive interpretation that takes due account of the underlying values of the Constitution.⁷⁷

5.2. A Purposive Interpretation

It is clear that the purpose of section 35(3)(i) is to constitutionally entrench the accused’s rights to a fair trial. What is not clear is whether the purpose is to extend the rights beyond their meaning at common law. The “right to adduce and challenge evidence” is ambiguous and does not give any indication of the scope or limitation of the right. Thus, at first sight, it appears that the right extends to all evidence. It is therefore necessary to apply a purposive approach to determine the scope of the right.

Purposive interpretation is aimed at understanding the core values that underpin the listed fundamental rights in an open and democratic society, based on human dignity equality and freedom, and then to prefer an interpretation of the provision in question which best complies with those values.⁷⁸ Once the purpose of the right has been identified, it is possible to then determine the scope of the right.⁷⁹ Purposive interpretation recognises that the interpretation of the Bill of Rights involves a value judgment, but does not prescribe how the value judgment is to be made, as well as emphasising

⁷⁶ *S v Makwanyane* 1995 (3) SA 391 (CC) at para 9.

⁷⁷ Currie and de Waal (note 70) at 148.

⁷⁸ Currie and de Waal (note 70) at 148.

⁷⁹ Currie and de Waal (note 70) at 149.

that this value judgment should not be construed as the importation of public opinion.⁸⁰

There are two ways in which evidence may be adduced. Firstly, by oral evidence, and secondly, by physical evidence,⁸¹ both of which can be provided by the accused or a witness. The right to introduce new evidence and the right to challenge evidence shall be examined separately as the objects of these two elements are clearly distinguishable.⁸²

The law of evidence is governed by the common law and by statute, both of which include evidentiary rules that limit the kind of evidence that an accused may adduce or challenge.⁸³ Generally, only evidence that is relevant is admissible.⁸⁴ There is no reason to believe that by including the right to adduce evidence in the Constitution, the drafters intended to endow the accused with the right to adduce irrelevant evidence. Therefore, arguably, on a purposive interpretation, the general common law rule with regard to relevance remains. The only difference is that the right has constitutional protection. The scope of the right to adduce evidence thus extends only as far as relevant evidence.

Ordinarily, evidence regarding a complainant's prior sexual history does not assist the court in reaching a decision on the actual issues in dispute, and is therefore irrelevant and inadmissible. The right in section 35(3)(i) cannot be read as extending the accused's right to adduce evidence to allowing irrelevant prior sexual history evidence.

Such an interpretation is in accordance with the underlying values of the Constitution, in particular human dignity. The Constitution clearly protects the

⁸⁰ Currie and de Waal (note 70) at 150.

⁸¹ This includes documentary evidence, real evidence and electronic evidence.

⁸² The reason for this division shall become clear when discussing a proper interpretation of section 227 of the CPA, which refers to both adducing evidence and cross-examination, without separating the two.

⁸³ Hearsay evidence is a good example of this, and is governed by section 3 of the Law of Evidence Amendment Act of 1988.

⁸⁴ Section 210 of the Criminal Procedure Act 51 of 1977.

right of the accused to a fair trial, but if this extended to allowing irrelevant evidence, of which the prejudice to the complainant clearly outweighed its probative value, the dignity of the complainant would be trampled on.

The right to challenge evidence can likewise also be done by adducing new contradictory evidence. This is not a problem at this stage, because the accused is allowed, according to section 227(5)(d), to admit sexual history evidence where it is to dispute evidence already admitted by the prosecution, or as in section 227(5)(e), it is fundamental to the accused's defence.

However, the question in dispute is how the right to challenge evidence aligns itself with the right to cross-examine. Cross-examination is an essential part of an adversarial system, and is the stage at which the defence should be introduced.⁸⁵ The court has no right to prevent cross-examination, even where the purpose is to protect the witness.⁸⁶ It is clear that the right to adduce and challenge evidence includes the right to confront one's accuser and to cross-examine them.⁸⁷

The purpose of cross-examination is to elicit favourable facts to the cross-examiner's case and to challenge the accuracy of the witness's version.⁸⁸ The scope of cross-examination is wider than examination-in-chief, and cross-examination is not restricted to matters covered by the witness in her evidence-in-chief.⁸⁹ However, there are limits to what may be cross-examined.⁹⁰ The court retains the discretion to disallow questioning which is "irrelevant, unduly repetitive, oppressive or otherwise improper".⁹¹ Inadmissible evidence may not be put to or elicited from a witness, and where such evidence is elicited, this evidence does not become admissible.⁹²

⁸⁵ Schwikkard and Van der Merwe (note 41) at 366.

⁸⁶ Schwikkard and Van der Merwe (note 41) at 366.

⁸⁷ Davis, Cheadle and Haysom *Constitutional Law: Bill of Rights of South Africa* (2005) at 29-27.

⁸⁸ Schwikkard and Van der Merwe (note 41) at 366.

⁸⁹ Schwikkard and Van der Merwe (note 41) at 366.

⁹⁰ Davis, Cheadle and Haysom (note 87) at 29-27.

⁹¹ *Kink v Regional Court Magistrate NO and Others* 1996 (3) BCLR 402 (SE) at 410A-B.

⁹² Schwikkard and Van der Merwe (note 41) at 367.

As with adducing evidence, there seems to be no reason to believe that the constitutional entrenchment of the right to challenge evidence has become sufficiently wide to allow the eliciting of inadmissible evidence during cross-examination. Thus, the scope of the right to adduce and challenge evidence does not extend to adducing and eliciting inadmissible evidence.

Furthermore, the right to cross-examine falls under the broader right to challenge evidence. The right to challenge evidence involves the refuting of evidence tendered by the other side. In the case of *S v Mosoetsa*,⁹³ it was emphasised that an accused had to be informed of his right to dispute any evidence submitted by the state, and that he could present any evidence to the contrary.

In the case of *S v Ndhlovu*,⁹⁴ Cameron JA held:

"I cannot accept, however, that 'use of hearsay evidence by the State violates the accused's right to challenge evidence by cross-examination', if it is meant that the inability to cross-examine the source of a statement in itself violates the right to 'challenge' evidence. The Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination. What it contains is the right (subject to limitation in terms of s 36) to 'challenge evidence'."⁹⁵ (emphasis added)

It is submitted that when the defence questions a complainant about her prior sexual history, without prior or subsequent evidence being tendered in that regard, there is no evidence that is being challenged. In fact, new evidence is being elicited, without allowing the opportunity for the other side to challenge this evidence. This is a circumventing of the general rules related to the admission of evidence.

⁹³ 2005 (1) SACR 304 (T).

⁹⁴ 2002 (2) SACR 325 (SCA).

⁹⁵ Supra note 94 at para 24.

Thus, cross-examination that seeks to elicit new evidence regarding the complainant's prior sexual history does not fall under the protection of 'challenging evidence' as contained in section 35(3)(i).

5.3. Generous Interpretation

Generous interpretation is interpretation in favour of rights and against their restriction, by drawing the boundaries as widely as the language allows.⁹⁶ However, a court when faced with conflicting interpretations between purposive and generous interpretation, will choose to understand the scope of the right in terms of its purpose.⁹⁷

Thus, we have to understand the right to adduce and challenge evidence generously, especially with regard to the fact that it forms part of the broader right to a fair trial. A clear purpose of the provision is to create a negative obligation on the part of the court which is barred from preventing evidence necessary for a proper defence to be introduced, a purpose which must be interpreted generously.

However, as already shown, it is not the purpose of the constitutional entrenchment, to allow evidence that is inadmissible. A generous approach cannot be used to go further than the literal and purposive approach allows. Therefore, if we favour a purposive approach, the scope of the right is only to constitutionally protect the right of an accused to adduce and challenge evidence that is relevant and necessary, and hence admissible, for his defence.

⁹⁶ Currie and de Waal (note 70) at 150.

⁹⁷ Currie and de Waal (note 70) at 152-153.

5.4. Contextual Interpretation

The meaning of a constitutional provision must be read in context in order to ascertain the purpose. 'Context' in a wider construction involves the historical and political background of the Constitution, and the narrower construction involves the context set out by the constitutional text.⁹⁸

The contextual interpretation does not provide an interpretation that would either extend or limit the understanding of section 35(3)(j). It is therefore not necessary to focus on a contextual interpretation.

5.5. Foreign Law

According to section 39(1)(c) of the Constitution, a court when interpreting a provision in the Bill of Rights, may have regard to foreign law. Although any findings under different jurisdictions would only be persuasive in a South African court, it would be interesting and helpful to consider the constitutionality of rape shield laws in other countries, particularly since similar constitutional arguments have been levelled against rape shield provisions in almost all jurisdictions.

The paper will discuss the jurisprudence of three other jurisdictions, namely, Canada, the United States of America and England. These jurisdictions were chosen for varying and important reasons. Section 227 was modelled along the Canadian approach, making jurisprudence from Canada on this issue an important point of reference. The first rape shield law was enacted in Michigan, which gives the United States a unique milestone position in the history of rape shield laws. The laws of evidence in South Africa originate to a large extent from the evidentiary rules of England. Prior to the enactment of a rape shield provision in 1989, the common law of South Africa was based on the laws of England.

⁹⁸ Currie and de Waal (note 70) at 153.

Canada

Under the common law, the complainant could be questioned about her prior sexual history, without having to prove that it was relevant to a particular issue.⁹⁹ The complainant could be questioned about her sexual conduct with the accused as well as with others, but she could not be compelled to answer questions regarding her conduct with persons other than the accused.¹⁰⁰

Legislative attempts to amend the common law position took effect in the Criminal Code of Canada. Section 277 renders evidence of sexual reputation completely inadmissible, the rationale being that a woman's sexual reputation is not relevant to her credibility as a witness.¹⁰¹ Section 276 prohibits sexual history evidence of the complainant with persons other than the accused. Thus, if the accused adduces evidence of a relationship between himself and the complainant, the evidence is admissible unless it relates to the sexual reputation of the complainant.¹⁰²

In the case of *R v Seaboyer*, *R v Gayme*,¹⁰³ the rape shield law was challenged for its constitutionality. The appellants were charged with sexual assault on two separate incidents, and both wanted to introduce evidence of the complainant's sexual history with other men. They challenged section 276 on the ground that the evidence was vital to a proper defence and that the exclusion of the evidence would deny them a fair trial.¹⁰⁴ They further contended that section 276 and section 277 were unconstitutional because they violated section 7¹⁰⁵ and section 11(d)¹⁰⁶ of the Canadian Charter of Rights and Freedoms.¹⁰⁷

⁹⁹ Illsley (note 8) at 227.

¹⁰⁰ Illsley (note 8) at 227-228.

¹⁰¹ Section 277: "In proceedings in respect of an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant."

¹⁰² Illsley (note 8) at 229.

¹⁰³ (1991) 83 DLR (4th) 193.

¹⁰⁴ Illsley (note 8) at 229.

¹⁰⁵ "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

The Supreme Court discounted the contention levelled against section 277, holding that evidence of sexual reputation is irrelevant and rightly inadmissible. The Court held that there is no link between a woman's sexual reputation and whether she is telling the truth.¹⁰⁸

With regard to section 276, the majority held that it did infringe the rights of the accused under the Canadian Charter of Rights and Freedoms, and that it was not justifiable under the limitations clause.¹⁰⁹ The rationale for this decision was that section 276 contained a 'blanket exclusion' which did not correlate to the purpose of the provisions. Rape shield laws are not aimed at evidence of sexual activity, but to prevent the misuse of such evidence for irrelevant and presumptuous means.¹¹⁰

On the other hand, the minority held that section 276 did not infringe the fair trial rights of the accused, and even if it did, it could be justified in terms of the limitations clause in section 1 of the Charter.

The Court in *Seaboyer* provided a number of guidelines that were aimed at assisting judges in determining when sexual history evidence is admissible. The Court suggested a *voir dire*,¹¹¹ in order to determine whether the probative value of the evidence outweighs the potential prejudice.¹¹²

The government responded to *Seaboyer* by rewording the rape shield legislation.¹¹³ The rape shield legislation as it stands at present creates a

¹⁰⁶ "Any person charged with an offence has the right... (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

¹⁰⁷ Part I of the Constitution Act, 1982.

¹⁰⁸ (1991) 83 DLR (4th) 193 at para 55.

¹⁰⁹ Section 1 of the Canadian Charter of Rights and Freedoms.

¹¹⁰ Illsley (note 8) at 230.

¹¹¹ This is already a mechanism under South African law as the means of determining the admissibility of prior sexual history evidence is conducted *in camera* during the trial-within-a-trial.

¹¹² Illsley (note 8) at 231.

¹¹³ Section 276(2) now reads as follows:

1. Application in writing specifying in a detailed way the particulars of the evidence and why the defence claims it is relevant to an issue at trial.
2. If notice requirements are met *and* the trial judge believes that the potential evidence is capable of being admissible under s. 276(2), then, a *voir dire* is held in to determine the admissibility of a

procedure intended to eliminate surprise and unnecessary exposure of the complainant to inappropriate questioning.

In the case of *R. v. Darrach*,¹¹⁴ the Supreme Court of Canada confirmed that the amended section 276 is constitutional. According to the court, exclusion of a complainant's history is only automatic where it is used to support an inference that the complainant is more likely to have consented to the sexual assault or that she is less credible as a witness by virtue of her previous sexual experiences. The court found that the new legislation did not interfere with the accused's opportunity to present a full defence. As such, it does not violate the *Canadian Charter of Rights and Freedoms*, and was constitutional.

United States of America

The State of Michigan

Michigan's rape shield provision prohibits an accused from introducing evidence of a rape complainant's past sexual conduct.¹¹⁵ The approach in the Michigan statute is a complete exclusion, subject to two exceptions. Firstly, it

particular line of questioning. The complainant cannot be compelled to testify at the *voire dire*. However, the defence, must at minimum establish that such an inquiry should be allowed due to specific concerns. This is problematic because it may alert the Crown to the details of the defence's argument in an attempt to get evidence into the trial.

3. If the application succeeds the trial judge must give mandatory reasons and specific reference must be made to the factors in s. 276(3).

¹¹⁴ [2000] 2 S.C.R. 443, 2000 SCC 46.

¹¹⁵ The Michigan provision reads as follows:

“(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

- (a) Evidence of the victim's past sexual conduct with the actor.
- (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

(2) If the defendant proposes to offer evidence described in subsection 1(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an *in camera* hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an *in camera* hearing to determine whether the proposed evidence is admissible under subsection (1).”

permits the accused to introduce evidence of his own past sexual conduct with the complainant, and secondly, it allows evidence which establishes the origin of semen, pregnancy or disease. The constitutionality of the rape shield provision has been challenged on a number of occasions, three of which are herein discussed.

In the case of *People v Arenda*,¹¹⁶ the accused in the circuit court was charged with, and convicted of, three counts of sexual assault with an eight-year-old boy. The Court of Appeal reversed the decision. The matter was appealed again to the Supreme Court.

The defendant sought to admit prior sexual conduct of the complainant in order to establish that the sexual knowledge of the complainant did not originate from sexual experience with the defendant. The argument posited on behalf of the accused was that evidence of sexual knowledge in this context was similar to establishing the presence of semen or pregnancy, because it was to show the origin of the victim's knowledge. The accused contended that the statutory provisions contained in the rape shield provision infringed upon his sixth amendment right to confrontation.

The Sixth Amendment reads as follows:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour; and to have the Assistance of Counsel for his defence.”
(emphasis added)

¹¹⁶ 416 Mich. 1, 330 N.W.2d 814 (1982).

The Court considered the right to confront in the Sixth Amendment, and concluded that the right to confront is not without limits, and does not include a right to cross-examine on irrelevant issues.

The court held that the rape shield law served the interests of the state by protecting the complainant from undue harassment and respecting her privacy, as well as by encouraging the reporting of sexual assaults. It was further acknowledged that the rape shield provision aids the truth-seeking function of the court by restricting collateral issues from clouding the trial.

The Court mentioned that due to the fact that prior sexual history evidence is of minimal relevance in most instances, the prohibitions do not deny or significantly diminish an accused's right of confrontation. The claim that the accused's Sixth Amendment rights were infringed by Michigan's rape shield provision was rejected.

The Court also considered the strength of the argument posited with regard to the sexual knowledge of the complainant. It was held that the relevancy of evidence of the source of the sexual offence complainant's knowledge of specific sexual acts will generally be minimal but the potential for prejudice is substantial. Unlike pregnancy, semen, or disease, the knowledge need not be acquired solely through sexual contact, and thus does not fall within the exception to the general rule excluding evidence of the complainant's conduct with persons other than the accused.

In the subsequent case of *People v Hackett*,¹¹⁷ the rape shield provision was again constitutionally challenged because it was claimed that it unfairly restricts the right to confront contained in the Sixth Amendment.

The court held that the rape shield provision contains the realization that prior sexual history evidence, while may seem logically relevant, is not legally relevant. The court agreed with the reasoning in *Arenda*, that there is a limit to the right to confront. However, the court in the present case also

¹¹⁷ 421 Mich. 338, 365 N.W.2d 120 (1984).

acknowledged that while the extent of the right to cross-examine lies with the court, the right to confront guarantees to the defendant a reasonable opportunity to test the truthfulness of a witness' testimony.

The court held that there may be instances where prior sexual history would be relevant, such as in the case of proving that the victim laid the charge out of spite. However, a court in exercising its discretion should keep in mind the important legislative aim of rape shield provisions, and should always favour the exclusion of the evidence where its exclusion would not unconstitutionally restrict the accused's rights to confront.

The US Supreme Court had to deal with a slightly different challenge in the case of *Michigan v Lucas*.¹¹⁸ In this case the challenge was to the notice-and-hearing requirement, which obliges an accused who wishes to admit evidence of his own past sexual conduct with the complainant, to make application within ten days of arraignment so that an *in camera* proceeding to determine the admissibility of the evidence may be held.

The accused in this case failed to make application, and the court of first instance refused to allow the evidence to be admitted. The Court of Appeals overturned the conviction, and adopted a *per se* rule that the statutory notice-and-hearing requirement violates the Sixth Amendment in all cases where it precludes the admission of evidence of a past sexual relationship between the accused and the complainant.

The question before the Supreme Court was whether the legitimate interests served by the notice requirement could justify preclusion of a prior sexual relationship between the parties. In reaching an answer to this question, the Court interpreted the scope of the Sixth Amendment in such a way that its extent does not “*confer the right to present testimony free from the legitimate demands of the adversarial system*”.¹¹⁹

¹¹⁸ 500 U.S. 145 (1991).

¹¹⁹ *Supra* note 118 at 152.

The Court held that the notice-and-hearing requirement serves legitimate interests in protecting the complainant from harassment and invasions of privacy, and preventing unfair surprise to the prosecution. The Court found that the notice-and-hearing requirement did not infringe the Sixth Amendment.

The State of North Carolina

In the case of *State v. Fortney*,¹²⁰ the Court found the rape shield law, N.C. Gen. Stat. § 8-58.6¹²¹ (before it was moved into N.C. Gen. Stat. 8C-1 and the rules of evidence) to be constitutional.

The trial court had refused to admit evidence that three different blood groupings of semen were found on the clothing the victim wore the night of the rape. Defendant argued that the statute was unconstitutional because it prevented him from automatically questioning the victim about her prior sexual experience, thus his right to confront the victim was compromised.

¹²⁰ 301 N.C. 31, 269 S.E.2d 110 (1980).

¹²¹ N.C. Gen. Stat. § 8-58.6 provides as follows:

(a) As used in this section, the term "sexual behaviour" means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial.

(b) The sexual behaviour of the complainant is irrelevant to any issue in the prosecution unless such behaviour:

- (1) Was between the complainant and the defendant; or
- (2) Is evidence of specific instances of sexual behaviour offered for the purpose of showing that the act or acts charged were not committed by the defendant; or
- (3) Is evidence of a pattern of sexual behaviour so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or
- (4) Is evidence of sexual behaviour offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

(c) No evidence of sexual behaviour shall be introduced at any time during the trial of a charge of rape or any lesser included offence thereof or a sex offence or any lesser included offence thereof, nor shall any reference to any such behaviour be made in the presence of the jury, unless and until the court has determined that such behaviour is relevant under subsection (b). Before any questions pertaining to such evidence are asked of any witness, the proponent of such evidence shall first apply to the court for a determination of the relevance of the sexual behaviour to which it relates. The proponent of such evidence may make application either prior to trial pursuant to N.C. Gen. Stat. § 15A-952, or during the trial at the time when the proponent desired to introduce such evidence. When application is made, the court shall conduct an in-camera hearing, which shall be transcribed, to consider the proponent's offer of proof and the arguments of counsel, including any counsel for the complainant, to determine the extent to which such behaviour is relevant. In the hearing, the proponent of the evidence shall establish the basis of admissibility of such evidence. If the court finds that the evidence is relevant, it shall enter an order stating that the evidence may be admitted and the nature of the questions which will be permitted.

The court held that there was no constitutional right to ask the victim irrelevant questions. Furthermore policy reasons with regard to the protection of victims of sexual offences supported the statute. It was found that the defendant's right to cross-examine the victim was not infringed by the rape shield provision. Most importantly, the Court found the provision legitimate as it went no further than codifying the rule that only relevant evidence is admissible.

The Court did, however, allow the defence to question the complainant as to her sexual activity with third parties on the night of the incident in question, because it may have indicated the origin of the semen that was found in her vagina. The defence, however, chose not to question the complainant in that regard.

Courts have not always found that evidence of intercourse on the same day as the alleged incident is relevant. In the case of *State v. Rhinehart*,¹²² the court did not allow such evidence even though the victim had consensual sex with her former boyfriend on the night of the incident.

In the case of *State v Harris*,¹²³ the defendant wished to question the complainant about her sexual activity on the day of the incident in question. The majority held that the presence of injury could be attributed to the earlier sexual conduct and therefore the trial court erred in rendering the evidence inadmissible. The minority, on the other hand, differed, holding that the injuries were significant, and there was no evidence that any injury occurred during the prior conduct where no intercourse occurred, and the trial court was correct in excluding the evidence.

¹²² 68 N.C.App. 615, 316 S.E.2d 118 (1984).

¹²³ 166 N.C. App. 386, 602 S.E.2d 697 (2004).

England

The challenge to the rape shield provision was decided by the House of Lords in the case of *R v A*.¹²⁴ Section 41 of the Youth Justice and Criminal Evidence Act 1999 imposed a requirement of judicial approval to adduce evidence or cross-examine on prior sexual history, but set out the circumstances under which judicial leave ought to be given.¹²⁵ The section prohibited any evidence regarding any sexual behaviour of the complainant.

¹²⁴ [2001] 2 W.L.R. 1546 [HOL].

¹²⁵ Section 41 reads as follows:

(1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—

- (a) no evidence may be adduced, and
- (b) no question may be asked in cross-examination,

by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.

(2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied—

- (a) that subsection (3) or (5) applies, and
- (b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.

(3) This subsection applies if the evidence or question relates to a relevant issue in the case and either—

- (a) that issue is not an issue of consent; or
- (b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or
- (c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—
 - (i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or
 - (ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event,

that the similarity cannot reasonably be explained as a coincidence.

(4) For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.

(5) This subsection applies if the evidence or question—

- (a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and
- (b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

(6) For the purposes of subsections (3) and (5) the evidence or question must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant (and

The section was challenged because the prohibition in section 41 extended to evidence related to the complainant's past sexual behaviour with the accused himself. Thus, the accused was prevented from adducing evidence that they had been in a relationship involving regular consensual intercourse, unless the last occasion was "at or about the same time" as the alleged rape.¹²⁶

The accused and the complainant were involved in a consensual sexual relationship over a period of about three weeks prior to the alleged offence. The last instance of consensual intercourse took place approximately a week before the incident in contention. Under section 41, the accused was prevented from questioning the complainant, or adducing evidence, that she had consensual sexual intercourse with him during the three weeks prior to the alleged incident.¹²⁷

In the trial Court, the Judge had ruled that the evidence relating to the alleged relationship between the accused and the complainant could not be lead. The Court of Appeal held that such evidence could be adduced, but only to show that he believed that she had consented, not to show that she actually did consent.¹²⁸

The case went on to the House of Lords, where the accused argued that prohibiting this evidence was an infringement of his right to a fair trial in terms of Article 6 of the European Convention on Human Rights.

accordingly nothing in those subsections is capable of applying in relation to the evidence or question to the extent that it does not so relate).

(7)Where this section applies in relation to a trial by virtue of the fact that one or more of a number of persons charged in the proceedings is or are charged with a sexual offence—

(a)it shall cease to apply in relation to the trial if the prosecutor decides not to proceed with the case against that person or those persons in respect of that charge; but

(b)it shall not cease to do so in the event of that person or those persons pleading guilty to, or being convicted of, that charge.

(8)Nothing in this section authorises any evidence to be adduced or any question to be asked which cannot be adduced or asked apart from this section.

¹²⁶ Section 41(3)(b) of the Youth Justice and Criminal Evidence Act 1999.

¹²⁷ Illsley (note 8) at 235.

¹²⁸ JR Spencer "Rape Shields" and the Right to a Fair Trial' in *Case and Comment* (2001) *The Cambridge Law Journal* 60(3) at 453.

Four of the five judges in the House of Lords agreed that to ban evidence of this nature would be an infringement of the right to a fair trial, because in some cases such evidence would be relevant to the issue of consent and therefore admissible. However, they held that section 3 of the Human Rights Act allowed the courts to interpret the language so that if the evidence was relevant it would be admissible.¹²⁹ On that basis, they held that evidence of the complainant's previous sexual relationship with the defendant could fit under section 41(3)(c): "behaviour so similar that the similarity cannot reasonably be explained as coincidence".

The view of the Court was that judges on a case-by-case basis have to determine whether the previous sexual history between the accused and the complainant is relevant. This determination ought to include awareness of the importance of protecting the complainant from humiliation.¹³⁰ However, if the evidence of the previous sexual history between the parties is relevant to the issue of consent to such an extent that the fairness of the trial would be endangered by its exclusion, the evidence ought to be admitted. The Court did not, therefore, find it necessary to declare section 41 incompatible with an accused's fair trial rights.¹³¹

The cases discussed above are helpful in presenting some of the challenges levelled against rape shield provisions, as well as demonstrating how courts in other jurisdictions have dealt with these challenges. The discussions and findings of the various courts assist with the interpretation and understanding of rape shield laws. These findings are important in a South African setting, in order to assist with the interpretation of section 227.

The findings of the foreign courts are also important in interpreting the fair trial and due process rights of an accused person, and the degree to which the right to adduce evidence and to cross-examine witnesses extends. One of the potential arguments posited against the legitimacy of a rape shield provision is

¹²⁹ Spencer (note 128) at 454.

¹³⁰ Illsley (note 8) at 237.

¹³¹ Spencer (note 128) at 454.

that due to the constitutional enshrinement of the right to adduce and challenge evidence, infringement of the right cannot be justified. However, these foreign cases have all formulated similar answers to this challenge, that there is no constitutional right to raise evidence that is irrelevant.¹³² These cases are, therefore, important to the interpretation of the right to adduce and challenge evidence as contained in South Africa's Constitution.¹³³

In order to determine whether section 227 limits the right as contained in section 35(3)(i), a proper interpretation of the meaning of section 227 has to be conducted.

6. The Interpretation of Section 227

The golden rule for the interpretation of legislation is to look at the "plain words" used in the statute and to accord them their ordinary meaning.¹³⁴ Therefore, when interpreting section 227, the first port of call is the plain meaning of the text.

The exceptions to the general rule that the simple language of the text be given its ordinary meaning are, firstly, that such a simple reading would create an absurdity in the text, and secondly, in the event of ambiguity, any meaning contrary to the intention of the drafters.¹³⁵

Olivier JA in the case of *Ncobo and Others v Salimba CC, Ncobo v Van Rensburg*,¹³⁶ held that in addition to the conventional caveat of the golden rule, where deviation from the "plain words" and their ordinary meaning was permissible in the event of absurdity, there is a new exception that has been imported by the Bill of Rights. An interpreter may thus deviate from the

¹³² *People v. McKenna*, 196 Colo. 367, 585 P. 2d 275 (1978).

¹³³ Section 35(3)(i).

¹³⁴ Lourens Du Plessis *Re-Interpretation of Statutes* 1st ed (2007) at 103.

¹³⁵ Particularly in the case of ambiguity, the intention of the drafters is paramount to a proper interpretation of the text in the provision concerned.

¹³⁶ 1999 (2) SA 1057.

ordinary meaning of the text in the event that the meaning accorded to the "plain words" is, "unconstitutional or contrary to the spirit, purport and objects of the Bill of Rights".¹³⁷

This exception was introduced by section 39(2) of the Constitution which created a new guiding principle for the interpretation of all statutory provisions:

"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

Langa DP in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO*,¹³⁸ held that,

"[t]he purport and objects of the Constitution find expression in section 1 which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as possible, in conformity with the Constitution."

A natural corollary of this principle is that constitutionally aligned interpretations should be preferred over interpretations conflicting with the language of the Constitution or "spirit, purport and objects of the Bill of Rights". Therefore, judicial officers have to prefer an interpretation of the legislation that complies with constitutional boundaries over an interpretation

¹³⁷ 1999 (2) SA 1057 at para 11.

¹³⁸ 2001 SA 545 (CC); 2000 (2) SACR 348 CC; 2000 (10) BCLR 1079.

that does not, provided that the legislation can reasonably be interpreted in such a way.¹³⁹

It has further been held that section 39(2) "means that all statutes must be interpreted through the prism of the Bill of Rights".¹⁴⁰ The Constitutional Court has confirmed and applied this principle in *S v Dzukuda and Others; S v Tshilo*¹⁴¹ and *Chagi and Others v Special Investigating Unit*.¹⁴² The principle has been more firmly stated in the case of *Centre for Child Law v Minister of Justice and Constitutional Development and Others*,¹⁴³ by Yacoob J, when he stated that:

"The advent of our constitutional democracy with the principle of the supremacy of the Constitution that it introduced requires a fundamental change to the way in which the task of statutory interpretation is carried out. The effect of the supremacy of the Constitution is that the Constitution (and every provision of it) permeates the law to every corner. In 'one fell swoop' our supreme law brought about a decisive transformation of our legal system and the way we interpret statutes. To borrow a phrase, 'it was no longer going to be business as usual' - that business being the statute as the starting point. The starting point is no longer the statute but the Constitution itself. This means the starting point is no longer what the statutory provision says but what the Constitution says."¹⁴⁴

For the purposes of interpreting section 227, what these dicta tell us, is that it must be interpreted in line with the Constitution. The above quote should not be interpreted to mean that the ordinary meaning is not still the place to start. To interpret it that way would mean that all legislative interpretation will

¹³⁹ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 SA 545 (CC); 2000 (2) SACR 348 CC at para 23.

¹⁴⁰ *Ibid.*

¹⁴¹ 2000 (4) SA 1078 (CC).

¹⁴² 2009 (2) SA 1 (CC).

¹⁴³ 2009 (6) SA 632 (CC).

¹⁴⁴ *Supra* note 143 at para 107.

become a constitutional matter. Furthermore, in order to determine how the legislation ought to be read to bring it in line with constitutional values, it is necessary to first determine what it means in the ordinary, literal translation. If this meaning does not accord with a constitutional meaning, then it must be determined if it can be read in a way that does comply with constitutional standards.

Thus, section 227 will be interpreted in the following way: firstly, the literal meaning of each subsection will be described. Where an ambiguity arises, or where the ordinary meaning from the words results in a problem, it will be determined whether there is a constitutionally-compliant way to read the subsection without challenging its constitutionality.

6.1. The Provisions of Section 227

6.1.1. Subsection (1)

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

Section 227(1), for all intents and purposes, maintains the approach to character evidence as was the position at common law. This means that the primary test for character evidence is relevance. According to subsection (1), if the character evidence would have been admissible on 30 May 1961, then it would be admissible now.

There are two categories of character evidence, namely, evidence of general reputation and evidence of a general disposition to think or act in a particular

way.¹⁴⁵ The law of evidence does not place an emphasis on the importance of evidence of general reputation, however, under South African law, disposition evidence is often considered relevant because it may be an indicator of future conduct.¹⁴⁶ On the other hand, disposition evidence can be dangerous because of the prejudice that would arise from relying on past behaviour to determine the accuracy of the claim before the court at present.

The general rule is that a complainant can be cross-examined in order to expose her credibility, or lack thereof. However, evidence as to character or the general disposition of the complainant was not considered relevant to credibility.¹⁴⁷ An exception to this rule was that when the matter related to a sexual offence, evidence as to the complainant's bad reputation for lack of chastity was allowed to be adduced.¹⁴⁸

The admissibility of bad reputation for lack of chastity has been removed from our law by the enactment of section 227 in 1989 as well as its amendment in 2007. Evidence related to lack of chastity would be included in "prior sexual experience or conduct" as contemplated in section 227(2). The problem is that section 227 does not define what kind of character evidence is admissible or not admissible. The only indication of limitation is the words "subject to the provisions of subsection (2)". This means that character evidence related to or stemming from a complainant's prior sexual history would be inadmissible unless a court specifically allowed it after application was made under section 227. Thus, for example, character evidence that a complainant consented to every offer of sexual intercourse ever given to her would not be admissible under subsection (1) because it elicits prior sexual history evidence. Application to have this evidence admitted would have to be made under subsection (2).

But there are other matters of character that were admissible in the past, that are still admitted now. The problem is that certain kinds of character evidence

¹⁴⁵ Schwikkard and Van der Merwe (note 41) at 59.

¹⁴⁶ Schwikkard and Van der Merwe (note 41) at 59.

¹⁴⁷ Schwikkard and Van der Merwe (note 41) at 65.

¹⁴⁸ Schwikkard and Van der Merwe (note 41) at 65-66.

gets admitted because it is considered 'normal' to admit it. However, it is very dangerous, because it is not properly admitted as character evidence but inferences as to a complainant's character are made. These inferences as to negative aspects of a complainant's character stem from myths surrounding the area of sexual offences. An example is questioning the complainant about why she was out alone at night, or why she was at a bar in a bad part of town. The amount of makeup a woman was wearing at the time of the incident is an issue that is often raised by the defence. The purpose of distorting the image of the complainant is to create the impression that the complainant was dressed provocatively and therefore partly at fault for the incident.¹⁴⁹ These kinds of questions make inferences about the 'decency' of a woman, and often are highly prejudicial.

Stereotypically, a woman who is single, unmarried or is a single parent is seen as unrespectable.¹⁵⁰ These labels can also imply that a woman is promiscuous. By implying that the complainant is unrespectable, her credibility is cast into suspicion.¹⁵¹ Instead of focusing on the sexual character of the accused, the character of the complainant is focused on, cloaking the true issue at stake in the trial: the guilt of the accused.

The consumption of alcohol is a common means of discrediting a rape complainant. For women, alcohol carries the taint of immorality and promiscuity.¹⁵² A complainant's alcohol consumption is used in two ways to discredit her. The first is to suggest that alcohol unleashes a woman's sexuality and lowers her inhibitions.¹⁵³ The second is to imply that a woman under the influence of alcohol is more likely to act vindictively and lay a false charge.¹⁵⁴ Both of these means suggest that it is likely that the complainant consented to the sexual advances of the accused, and that it was not unwelcome by the complainant at the time.

¹⁴⁹ Sue Lees *Carnal Knowledge: Rape on Trial* (2002) at 141.

¹⁵⁰ Lees (note 149) at 133.

¹⁵¹ Lees (note 149) at 142.

¹⁵² Lees (note 149) at 145.

¹⁵³ Lees (note 149) at 145.

¹⁵⁴ Lees (note 149) at 146.

Another issue which sometimes falls by the wayside is that of the appearance of the complainant. This kind of evidence is often admitted without a problem, as it is not properly understood by presiding officers as character evidence. Attorneys are therefore able to allow inferences to be made, just by how a sexual offence complainant was dressed. This kind of evidence is considered not to be important enough to require application to the court to have it admitted. However, whether consciously or not, it is widely accepted that “appearances have meanings”,¹⁵⁵ and are crucial in how people get judged, even during the criminal justice process.¹⁵⁶

It is undeniable that the appearance of a witness or the accused at the trial can often sway the presiding officer’s mind as to general credibility. It is not inconceivable, therefore that hearing an account of the complainant’s appearance at the time of the incident may hold similar strength in the mind of the presiding officer in reaching a decision. When clothing items of the victim are introduced as evidence in a rape trial, legal rules of evidence are drawn on, as well as cultural meanings of dress in determining its relevance.¹⁵⁷ The intention of the complainant in dressing in a particular way is inferred from the kind of clothing worn.¹⁵⁸

Many people, including presiding officers believe that by a woman dressing provocatively in public, she is inviting an attack through her appearance. A woman is considered at least partially responsible for being raped if she was wearing revealing clothing.¹⁵⁹ This means that the perpetrator is then judged as less morally and criminally blameworthy. During cross-examination, a complainant is often asked to describe her underwear at the time of the alleged incident,¹⁶⁰ the inference being that sexy underwear means that the complainant must have intended to have sexual intercourse.

¹⁵⁵ Chen Shen *Study: From Attribution and Thought-Process Theory to Rape Shield Laws: The Meaning of Victim’s Appearance in Rape Trials* (2003) *Journal of Law and Family Studies* 5 at 435.

¹⁵⁶ Sue Lees (note 149) at 133.

¹⁵⁷ Shen (note 155) at 436.

¹⁵⁸ Shen (note 155) at 444.

¹⁵⁹ Temkin and Krahe (note 21) at 33. Barbara Allen Babcock et al *Sex Discrimination and the Law: History, Practice, and Theory* 2nd ed (1996) at 1410.

¹⁶⁰ Lees (note 149) at 139.

Although evidence as to appearance might not seem as essential to prevent as evidence related to past sexual encounters, in practice its effect is substantial. For example, in the *Zuma* case,¹⁶¹ there was much reference made of the fact that the complainant was attired in a “kanga with no underwear”.¹⁶² The accused’s daughter testified that the complainant was dressed inappropriately.¹⁶³ The way the complainant was dressed, albeit not in isolation, was certainly a factor which the court took into account in determining that the complainant was not a credible witness.

The problem is that even though evidence of general reputation ought not to be admitted as relevant, sexual character and past sexual history are used as indicators of a complainant’s reputation.¹⁶⁴ It seems then that the lack of guidelines as to what types of character evidence is a problem. The common law is not the best place to look for guidance, since the old common law position with regard to character evidence is somewhat restricted by section 227. The common law also has a history of prejudice against women complainants in particular, and making use of it as a standard would perhaps not achieve the purpose of the amendments in section 227 to bring the law in line with our constitutional dispensation.

6.1.2. Subsection (2)

Section 277(2) reads as follows:

"No evidence as to any previous sexual experience or conduct of any person against or in connection with whom a sexual offence is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no evidence or question in cross examination regarding such sexual experience or conduct, shall be put to such

¹⁶¹ 2006 (2) SACR 191 (W).

¹⁶² Supra note 161 at 217.

¹⁶³ Supra note 161 at 217.

¹⁶⁴ Lees (note 149) at 131.

person, the accused or any other witness at the proceedings pending before the court unless—

- (a) the court has, on application by a party to the proceedings, granted leave to adduce such evidence or to put such question;
or
- (b) such evidence has been introduced by the prosecution."

The simple language of the provision indicates that there are four basic elements involved in the provision: the subjects of the provision, the object of the provision, the prohibited acts, and the actual nature of the acts in question.

The subject of the provision is the legal representatives or an un-represented accused themselves in the context of a sexual offences case; the object of the provision is a witness to the alleged sexual offence who gives testimonial evidence in court; the acts that the legal representatives for the defence are prohibited from performing are the "adduc[ing]... [of] evidence" or the posing of "question[s] in cross examination" to a witness in a sexual offences case without the permission of the court or the prior conduct of the prosecution, the nature of the "evidence" or "question" that evidence or question relates to prior "sexual experience or conduct" of the witness.

The "plain words" used in sub-section 227(2) of the CPA when accorded their ordinary meaning do not appear to disclose any absurdity or ambiguity contrary to the purpose of protecting the complainant acting as witness, which is clearly the intention of the drafters.

6.1.3. Subsection (5)

Subsection (5) reads as follows:

- (5) In determining whether evidence or questioning as contemplated in this section is relevant to the proceedings before the court, the court shall take into account whether such evidence or questioning –
- (a) is in the interests of justice, with due regard to the accused’s right to a fair trial;
 - (b) is in the interests of society in encouraging the reporting of sexual offences;
 - (c) relates to a specific instance of sexual activity relevant to a fact in issue;
 - (d) is likely to rebut evidence previously adduced by the prosecution;
 - (e) is fundamental to the accused’s defence;
 - (f) is not substantially outweighed by its potential prejudice to the complainant’s personal dignity and right to privacy; or
 - (g) is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue.

Section 227(5) instructs that when a court is determining whether prior sexual history evidence is relevant or not, the court “shall” take the outlined factors into account. “Shall” constitutes mandatory language, which means that a court *must* consider the factors that are outlined.

Such an approach was criticised in the past for devising categories which would leave open situations which have not been foreseen, and therefore evade the recognised categories.¹⁶⁵ However, the factors are extremely useful as they make mandatory the considerations that have to be considered in determining the relevance of the evidence or questioning.¹⁶⁶

¹⁶⁵ Du Toit (note 44) at 24-100D.

¹⁶⁶ Du Toit (note 44) at 24-100D.

This justification leads to another potential criticism that can be levelled against subsection (5). That is, that it constrains judicial discretion in determining whether evidence is relevant or not, particularly because it makes use of mandatory language.

It is clear that the factors as set out in section 227(5) do need to be considered by a court. However, there is nothing to suggest that it is a closed list. A set of guidelines do not displace judicial discretion, but rather guides it. The considerations listed are the sort of factors a court ought to take into account in any event. The evidence apparent from case law is that presiding officers did not properly exercise their discretion in determining the relevance and admissibility of prior sexual history evidence.¹⁶⁷

The Legislature chose to adopt an approach that did not entirely prohibit prior sexual history evidence, since this could have the effect of eliminating relevant evidence that is necessary to the defence of an accused. Hence, it chose to uphold the right to adduce and challenge evidence, and by extension, the accused's right to a fair trial.

On the other hand, it recognised the danger in leaving the determination of relevance entirely in the hands of judicial officers. A balanced approach is to set out a list of the circumstances in which prior sexual history evidence is admissible, while still leaving it to judicial discretion on a case-by-case basis. There is no substantial infringement of judicial discretion. The ultimate decision of the admissibility of evidence lies with the presiding officer. This is not an undue constrain or limitation on judicial discretion, and therefore does not raise any problems, constitutional or otherwise.

It is necessary to consider how these factors are meant to be read. Even if it is assumed that all the factors have to be considered, it is clear that the rights of the accused will have to take precedence. Thus, the policy reasons behind encouraging reporting and minimising secondary victimisation of the

¹⁶⁷ *S v Balhuber* 1987 (1) PH H22 (A); *S v N* 1988 (3) SA 450 (A); *S v M* 2002 (2) SACR 411.

complainant cannot be used to override the constitutionally enshrined right of an accused to a fair trial.¹⁶⁸

It is submitted that on a correct reading of subsection (5), not all the factors need to be read together. Only one of the following factors need be fulfilled: paragraph (a), it is in the interests of justice, with due regard to the accused's right to a fair trial; paragraph (c), relates to a specific instance of sexual activity relevant to a fact in issue; paragraph (d), is likely to rebut evidence previously adduced by the prosecution; paragraph (e), is fundamental to the accused's defence; and paragraph (g), is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue.

Paragraph (b), is in the interests of society in encouraging the reporting of sexual offences, and (f), is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy, can then be used to test the probative value of the evidence that is sought to be adduced. In some cases it will be clear that the evidence is relevant. Thus, for example, where a complainant alleges that the accused raped her and she contracted HIV, it is logical that evidence that her sexual partner is HIV positive would be admissible to rebut such evidence, and it would be unnecessary to consider either paragraph (b) or (f) in reaching that decision. It depends on the scenario in each case individually.

There is a danger that the circumstances which go beyond the ordinary 'probative value versus prejudice' test may disallow evidence that could be necessary to render the trial fair.¹⁶⁹ Examples of these factors are paragraphs (b) and (f), which bring into consideration socio-political considerations and the competing rights of the complainant. However, since there can be no competing interest that can trump the imperative of avoiding a wrong

¹⁶⁸ Du Toit (note 44) at 24-100E.

¹⁶⁹ Du Toit (note 44) at 24-100E.

conviction, there is no material harm in including factors outside of the common law test for relevance.¹⁷⁰

Thus, subsection (5) presents no potential constitutional challenges. By reading the list of factors as an open list which does not unduly restrict judicial discretion, and by allowing an understanding that each circumstance can be considered on its own, without having to consider all of them and pit the interests of the accused against the complainant in each and every case, it is apparent that subsection (5) would pass constitutional muster.

6.1.4. Subsection (6)

Subsection (6) contains the following provision:

“The court shall not grant an application referred to in subsection 2(a) if, in its opinion, such evidence or questioning is sought to be adduced to support an inference that by reason of the sexual nature of the complainant’s experience or conduct, the complainant-

- (a) is more likely to have consented to the offence being tried; or
- (b) is less worthy of belief.”

On the plain meaning of this section, it is noticeable that the discretion available to the judicial officer only extends so far as to determine the purpose for which the evidence is sought to be tendered or questioned. Once such a purpose has been found to fall under section 227(6)(a) or (b), there is no discretion available to the judicial officer. He is forced to exclude the evidence. This has the effect of creating an exclusionary rule.¹⁷¹

It seems that the evidence is inadmissible because of the *purpose* for which the evidence or questioning is sought to be adduced, and does not consider

¹⁷⁰ Du Toit (note 44) at 24-100E.

¹⁷¹ Du Toit (note 44) at 24-100E.

how the court itself would use the evidence.¹⁷² Thus, a court cannot consider the probative value for any other permissible inference.¹⁷³ However, it is difficult to think of a scenario in which some other inference, which did not fit under the listed factors in subsection (5), would otherwise be admissible were it not for subsection (6). Propensity reasoning is generally inadmissible, and there seems no reason why it ought to be allowed in sexual offence cases.

It is contended that the use of the word “support” has the effect of widening the ambit of the apparent exclusionary rule.¹⁷⁴ This means that even where the evidence or questioning would form part of a larger set of evidence which the court would consider together, and not just where the evidence or questioning is sought to establish the inference, the evidence or questioning is excluded.¹⁷⁵ Thus, even where there may be a range of evidence to support the inference, the evidence or questioning regarding prior sexual history will be inadmissible.

Exclusion of inferential evidence in the scenario explained above is logical and legally sound. If there are other pieces of relevant evidence available to point to an inference, then the court ought to make use of those without relying on otherwise inadmissible evidence to assist in making a judgment about the possibility of a complainant having consented or a complainant’s believability. On the other hand, if it is the only piece of evidence available upon which an inference as to consent or believability can be drawn, then it should definitely be inadmissible, as its prejudice to the complainant clearly outweighs its probative value. Section 227 was enacted in order to prevent these very inference-based conclusions being drawn.

It has been argued that the use of the words “by reason of the sexual nature of the complainant’s sexual experience or conduct” and not the words “by reasons only” opens up an ambiguity. It is unclear whether the court ought to refuse to admit the evidence if it is to support an inference that the

¹⁷² Du Toit (note 44) at 24-100E.

¹⁷³ Du Toit (note 44) at 24-100E.

¹⁷⁴ Du Toit (note 44) at 24-100E.

¹⁷⁵ Du Toit (note 44) at 24-100E.

complainant is more likely to have consented or less worthy of belief, by reason of the *sexual nature of the offence*, or *some other aspect of the evidence* that has nothing to do with the sexual nature.¹⁷⁶ It is not clear whether “by reason of” is sufficiently specific to allow the implied reading of “only” into the section.¹⁷⁷

Subsection (6) is substantially similar to section 276(1) of the Canadian Criminal Code. This section has been constitutionally challenged, and has withstood that challenge in the case of *R v Darrach*.¹⁷⁸ The Court in that case stated that:

*“The phrase ‘by reason of the sexual nature of the activity’ in section 276 is a clarification by Parliament that it is inferences from the sexual nature of the activity, as opposed to inferences from other potentially relevant features of the activity, that are prohibited. If evidence of sexual activity is proffered for its non-sexual features, such as to show a pattern of conduct or a prior consistent statement, it may be permitted.”*¹⁷⁹

Arguably, subsection (6) is capable of reading in the word “only”. However, the ambiguity outlined above is not necessarily the most problematic. Rather, the ambiguity that needs to be cleared up is whether this evidence can be adduced or questioned where it is to support the kind of inference prohibited, but is also for some other purpose. Therefore “only” ought to be read-in in the following way: “The court shall not grant an application referred to in subsection 2(a) if, in its opinion, such evidence or questioning is sought to be adduced *only* to support an inference that by reason of the sexual nature of the complainant’s experience or conduct, the complainant...”

This reading ensures that evidence that is sought to be adduced or cross-examined must be intended for some purpose other than mere propensity

¹⁷⁶ Du Toit (note 44) at 24-100E.

¹⁷⁷ Du Toit (note 44) at 24-100E.

¹⁷⁸ [2000] 2 S.C.R. 443, 2000 SCC 46.

¹⁷⁹ Supra note 178) at para 35.

reasoning. Subsection (6), therefore, does not restrict subsection (5). Only where there is no purpose other than to show that the complainant is more likely to have consented or is less worthy of belief will the application be refused.

There is evidence to suggest that the courts will read subsection (6) in this way. In the *Zuma* case,¹⁸⁰ the court allowed evidence of the complainant's history of having (allegedly) falsely accused men of rape in the past. Although the 2007 amendment was not yet in force, the learned Judge in the case did consider it, albeit not in-depth. The effect of the evidence would clearly support an inference that the complainant was less worthy of belief. However, it was also perceived as necessary to the accused's defence. Therefore, it can be seen that where there is another reason besides the support of an inference as contemplated in subsection (6), the evidence sought to be adduced or questioned does not fall under the 'exclusionary rule'.

Similarly, in *R v M*,¹⁸¹ evidence from a male witness regarding the complainant's approach to sexual intercourse was admitted. The evidence was tendered to rebut the prosecution's claim that she was rendered asexual as a result of an operation. It is true that this evidence would support an inference that, by reason of the sexual nature of the complainant's conduct, she was less likely to have withheld her consent and was less worthy of belief. However, it was clearly also tendered to rebut evidence raised by the prosecution. This is allowed under section 227(5)(d), and therefore even under the current section 227 this evidence would not be excluded. There would be no grave injustice to the accused and would not have led to an unfair trial.

It is suggested that subsection (6) was drafted because it was envisaged that it would render inadmissible evidence that is in fact relevant.¹⁸² If the correct understanding of the purpose of section 227 is remembered, it is possible to

¹⁸⁰ 2006 (2) SACR 191 (W).

¹⁸¹ 1970 (1) SA 323 (RA).

¹⁸² Du Toit (note 44) at 24-100F.

read the purpose of subsection (6) entirely differently. Section 227 was enacted largely because it was clear that sexual offence complainants were not being properly treated by the court, in that evidence that was irrelevant was allowed to be adduced or at least open to cross-examination. This trend comes from a long history of prejudice against the sexual autonomy of women. The 1989 enactment of the rape shield provision was found to be insufficient to curb judicial misuse of its discretion. Section 227 was therefore enacted to ensure that a similar pattern was not maintained.

Against this backdrop, it becomes clear that subsection (6) serves to prevent propensity and inferential reasoning being used to sway the court against the complainant, where such propensity and inference is the only purpose behind its adducement. The accused's innocence and fair trial rights generally are not put in danger, since this kind of reasoning is ordinarily inadmissible in any event. If there is some other reason besides an inference being drawn, the court will consider such a purpose under subsection (5) and it no longer falls under the 'exclusionary rule' arguably created under subsection (6).

Another criticism which can be levelled against this section, as well as subsection (2), is that in the situation where the accused and the complainant were involved in a relationship, either in the past or immediately preceding the alleged incident, evidence as to their sexual history is inadmissible without leave from the court. Many people would argue that evidence of a past sexual relationship is always relevant and admissible.

There may be circumstances in which the evidence is relevant. Such circumstances may include the presence of semen on clothing, or pregnancy. However, this is already an accepted exclusion to the general admissibility under subsection 5(g). Another reason for its relevance may be that the accused genuinely and reasonably believed that the complainant had consented. For instance, the parties may have had an understanding that a message asking the other to come over was always an offer of sexual intercourse. Such evidence may be necessary to show that the accused did

believe that there was consent. However, this is also provided for in subsection 5(e), in that it is fundamental to the accused's defence.

It cannot be upheld that evidence of a past sexual relationship between the accused and the complainant is *always* relevant. At most, this points only to a propensity to engage in sexual intercourse with the accused, which is an inference prohibited by subsection 6(a). Furthermore, if evidence of a sexual relationship was always admissible, this would have the effect of negatively affecting those complainants who are raped by their boyfriends or husbands,¹⁸³ because it would always create the assumption that the complainant did consent, or that the accused believed that she did consent. The former is prohibited, and the latter has to be proven after application to admit it is made in terms of subsection (2). Evidence related to a past relationship between the parties has no bearing on the truth of the allegation before the court at present, unless it can be shown that it is relevant according to one of the factors contained in subsection (5). Therefore, expecting the accused in such a situation to make application to the court before being able to adduce such evidence or question the complainant accordingly is not unreasonable.

Section 227 does not limit an accused's right to adduce and challenge evidence. Prior sexual history evidence is generally irrelevant and detracts from the truth-finding mandate of the court. The restriction on the kind of evidence that may be adduced or cross-examined does not infringe the scope of section 35(3)(i). Where such evidence is necessary to ensure that the trial is fair, the evidence is admissible if it falls under one of the factors under subsection (5). This is sufficient to maintain the fair trial rights of the accused, while ensuring that the complainant is protected from unnecessary humiliation and only relevant evidence is placed before the court.

Although the conclusion herein is that section 227 does not restrict the right to adduce and challenge evidence, it is necessary to undertake a limitations

¹⁸³ It would be a partial reversion to the old approach where a woman could not be raped by her husband.

analysis in order to ensure that the arguments posited are thorough and will rise to potential challenges levelled by critics. The paper will turn to the limitations stage of the analysis, in order to determine whether the limitation created by section 227 can be justified under section 36 of the Constitution.

7. The Limitations Analysis

7.1. Law of General Application

Any law that limits a right in the Constitution infringes the right. However, the infringement is not unconstitutional if the reason for its limitation is an acceptable justification.¹⁸⁴ It is not sufficient that the limitation is to serve general welfare, rather the limitation must serve a purpose that is compelling.¹⁸⁵ Moreover, there must be a good likelihood that the limitation will achieve the purpose it is meant to achieve, and that there is no other way of achieving the purpose without the right being restricted.¹⁸⁶

In order to determine whether section 227 is an unjustifiable limitation on an accused's right to challenge and adduce evidence as entrenched in section 35(3)(i) of the Constitution, an inquiry in terms of section 36 will be conducted.

Section 36 of the Constitution reads as follows:

- (1) The rights in the Bill of Rights may be limited only in terms of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;

¹⁸⁴ Currie and de Waal (note 70) at 164.

¹⁸⁵ Denise Meyerson *Rights Limited* (1997) at 36-43.

¹⁸⁶ *S v Manamela* 2000 (3) SA 1 (CC) at para 32.

- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

The first question that must be answered under section 36 is whether the law that potentially limits a constitutional right is a 'law of general application'. This means that the limitation must be authorised by law, and must apply generally.¹⁸⁷

The requirement of authority derives from the rule of law, which encapsulates the notion that the authority of the government derives from the law.¹⁸⁸ All forms of legislation, the common law and customary law,¹⁸⁹ and exercises of judicial rule-making authorised by the Constitution,¹⁹⁰ qualify as 'law'. Since we are dealing with a provision contained in original legislation, it is clear that the limitation is 'authorised by law'.

The second part of the initial inquiry is whether the law is of general application. This means that the law must be sufficiently clear, accessible and precise, and on a substantive level it must apply equally and must not be arbitrary in its application.¹⁹¹ Equal application means that it cannot apply only to a group of individuals.

Although section 227 does not apply to "everyone" in the generous sense of the word, it does apply to any accused wanting to adduce or challenge evidence in a sexual offence case. Further, section 227 does include guidelines to constrain judicial discretion. In this sense, it applies equally to all such accused persons, allowing that like cases are treated alike.

The second question under a section 36 analysis, involves whether the limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

¹⁸⁷ Currie and de Waal (note 70) at 168.

¹⁸⁸ Currie and de Waal (note 70) at 168.

¹⁸⁹ Currie and de Waal (note 70) at 169.

¹⁹⁰ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) at para 104.

¹⁹¹ Currie and de Waal (note 70) at 169.

7.2. Is the Limitation ‘Reasonable and Justifiable’?

The Constitutional Court in *S v Makwanyane*,¹⁹² described the analysis that must be undertaken under the limitations analysis of the Interim Constitution, section 33, which is equally relevant to the inquiry under section 36 of the Final Constitution:

*“The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on proportionality... In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open an democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.”*¹⁹³

The Court outlined the inquiry as one of proportionality, which corresponds to the factors outlined in section 36(1)(a)-(e). These factors are not a closed list of what must be considered under a limitations analysis, but are merely indications of whether a limitation is reasonable and justifiable.¹⁹⁴ Each of these factors will be individually considered with specific reference to section 227 and the accused’s rights to a fair trial. A separate limitations inquiry will be conducted for the general challenge to section 227, and the challenge to subsection (6) specifically, beginning with the general challenge to section 227.

¹⁹² 1995 (3) SA 391 (CC).

¹⁹³ Supra note 192 at para 104.

¹⁹⁴ Currie and de Waal (note 70) at 178.

7.3. The Justifiability of Section 227 in General

Section 36(1)(a): the nature of the right

The nature of the right to adduce and challenge evidence forms part of the larger right to a fair trial.

It has been argued that the accused should have more liberal rights than the prosecution to adduce evidence which may not be of high probative value.¹⁹⁵ There is some truth in this, especially in light of the fact that the Constitution enshrines the rights of the accused to a fair trial.

However, the right to adduce and challenge evidence does not extend to irrelevant evidence.¹⁹⁶ There is no unqualified right to adduce irrelevant evidence or challenge admissible evidence with irrelevant evidence, and this limitation is justifiable in terms of section 36 of the Constitution.¹⁹⁷

But there remains some reasonableness in the argument that where there is limited probative value, evidence that would normally be inadmissible on account of irrelevance, ought to be admissible in order to protect the accused's right to a fair trial.¹⁹⁸

This kind of argument does not extend to allowing prior sexual history evidence in order to show that the complainant has a propensity to act in a certain way or to engage in sexual intercourse with a number of persons. Such evidence is irrelevant, and therefore inadmissible. The accused's right to a fair trial cannot be used to make admissible evidence that is irrelevant if there is no, or little, probative value. Thus, for example, evidence that a complainant had intercourse with five men in five days to show that on the sixth day she probably consented to the sixth man (the accused) has no probative value at all. On the other hand, evidence that the accused had reason to believe that the complainant was consenting because that was how

¹⁹⁵ Schwikkard and Van der Merwe (note 41) at 56.

¹⁹⁶ Schwikkard and Van der Merwe (note 41) at 56.

¹⁹⁷ Schwikkard and Van der Merwe (note 41) at 56.

¹⁹⁸ Schwikkard and Van der Merwe (note 41) at 56.

she often agreed to intercourse with other men, which was well-known to various people including the accused, might not have substantial probative value, but might nonetheless be admitted in order to protect an accused's fair trial rights.

Even if one were to argue that all relevant information must be put before a court in order to ensure that justice is served,¹⁹⁹ admitting prior sexual history evidence in any form would not achieve justice. Collateral issues add confusion to the court, cloud the actual issues and extend the length and cost of trial. Furthermore, it is necessary for the administration of justice that all *relevant* evidence is admitted. Unless the evidence is found to be relevant because of its purpose, it cannot assist the court's fact-finding function.

Thus, there is no right to adduce irrelevant evidence or challenge evidence with irrelevant questioning.

Section 36(1)(b): the importance of the purpose of the limitation

The purpose must be one that is worthwhile and important in an open and democratic society based on human dignity, equality and freedom.²⁰⁰

At the core of the purpose of rape shield laws, lies the protection of the dignity and privacy of a sexual offence complainant. Section 10 of the Constitution guarantees every person the right to have their dignity respected.²⁰¹ It is unavoidable that a person who charges another with a crime will have to face gruelling questioning and cross-examination in order to assist the court with its fact-finding mandate, as well as to test the complainant's version of events and ensure that the accused is given a fair trial. However, this does not mean that the complainant should be subjected to unfair and harsh questioning which is aimed solely at reducing her credibility, and hence, her dignity.

¹⁹⁹ Schwikkard in Jagwanath (note 30) at 204.

²⁰⁰ Currie and de Waal (note 70) at 179.

²⁰¹ "Everyone has inherent dignity and the right to have their dignity respected and protected."

When a complainant testifies to a sexual offence, a certain amount of her privacy has to be made public, at least to those in the courtroom. She will be asked to describe her relationship with the accused, the exact details of the incident, what genital organs were involved and the effect of the incident on her general psyche and state of mind. These infringements on her privacy are necessary for the same reasons as outlined above. However, the infringement on a sexual offence complainant's privacy ought not to extend to other personal information related to her sex life that is not relevant or necessary to the incident in question. Thus, section 227 protects the constitutionally entrenched right to dignity and privacy of a sexual offence complainant.

As mentioned earlier,²⁰² there are a number of legislative objectives behind the enactment of a rape shield law. These objectives will be discussed in detail in order to assist with the determination of the importance of the purpose of the limitation.

❖ Preventing secondary victimisation of the complainant

Testifying in a room full of strangers, including one's (alleged) attacker is an ordeal in and of itself.²⁰³ The complainant is expected to recount the details of the alleged sexual offence, to describe hers and the accused's body parts, the context and surroundings. Under cross-examination, the victim is severely questioned about her own conduct leading up to the alleged sexual assault, her own enjoyment of the sexual experience, and is accused of lying about the identity of the perpetrator or of her own acquiescence to the sexual experience. Overall, the court experience for a victim of a sexual offence is intimidating, humiliating and degrading.²⁰⁴

If a complainant is subjected to questioning about her past sexual history, which has no ties to the sexual offence in question, the humiliation the

²⁰² See footnote 40.

²⁰³ Dee Smythe *Moving Beyond 30 Years of Anglo-American Rape Law Reforms: Legal Representation for Victims of Sexual Offences* (2005) South African Journal of Criminal Justice 18(2) at 171-172.

²⁰⁴ Kello (note 17) at 179-180.

complainant will experience is ten-fold.²⁰⁵ Further victimisation is experienced if such questioning is allowed and it influences the presiding officer's mind,²⁰⁶ whether consciously or not, about her believability in the present context. This victimisation is blatantly unfair and infringes the complainant's right to dignity and privacy.

❖ To encourage reporting

Only a very small percentage of women report rapes to the police.²⁰⁷ Although reporting rape can bring social, medical and financial services, it can also complicate the healing process.²⁰⁸ In sexual cases in particular, the events are obviously already traumatic and sexually sensitive, and testifying in open court will cause further emotional and psychological harm to the complainant.²⁰⁹

There are many reasons why women choose not to report sexual crimes, for example, lack of confidence in the police, confusion as to whether the experience actually constitutes an offence, fear of the perpetrator, to name but a few. But at least some women fail to report because of fear of having their past sexual experiences being brought to light in court.²¹⁰

In the case of *S v Staggie*,²¹¹ it was held that greater assistance ought to be provided for women who report sexual offences, as this would encourage more women to report sexual offences and become witnesses in these

²⁰⁵ Susan Estrich *Sex at Work* 43 *Stanford Law Review* 813 (1991).

²⁰⁶ Lees (note 149) at 130. There exists inbuilt sexism in the law as well as in the thinking of many judicial officers.

²⁰⁷ Michelle J Anderson *Rape in South Africa* (1999-2000) *The Georgetown Journal of Gender and the Law* 1(818) at 811.

²⁰⁸ Jody Clay-Warner and Jennifer macMahon-Howard *Rape Reporting: "Classic Rape" and the Behaviour of Law* 24 *Violence and Victims* 6 (2009) at 723.

²⁰⁹ Du Toit (note 44) at 22-6D.

²¹⁰ Kello (note 17) at 327.

²¹¹ *S v Staggie & Another* 2003 (1) BCLR 43 (C).

proceedings if they saw that they would be protected from wide-scale humiliation and embarrassment.²¹²

If women know that they are less likely to come under attack and have their sexual histories revealed to the public at large, then they will be more willing to report sexual offences. If even this one factor could be curtailed, many more women would feel more at ease with reporting an offence.

❖ To promote the administration of justice

It cannot be reasonably argued that justice is served if a victim of a sexual offence becomes so distraught that she is unable to give effective testimony.²¹³ More dangerous to the rule of law, is if her constitutional rights are not properly respected. In the case of *S v Mothopeng*,²¹⁴ it was held that it is for the proper administration of justice that witnesses should not feel the fear of retribution if choosing to testify.

If irrelevant evidence is allowed, merely to ensure that the accused is able to make any and every defence he can, at the expense of the complainant's constitutional rights, justice is not being served.

❖ To change attitudes to sexual offences

Much of the history of prejudice against women is carried over from the common law cautionary rule and the perception of women as less believable. Women who are raped are often believed to have deserved it or asked for it,²¹⁵ or needed it.²¹⁶ Changing how a complainant's prior sexual history is dealt with in court can go a long way in reforming society's views of women

²¹² Ibid.

²¹³ Smythe (note 203) at 183.

²¹⁴ (1) 1979 (2) SA 180 (T).

²¹⁵ By dressing provocatively, or being out alone at night.

²¹⁶ This is a misconception used to justify the rape of lesbians, in order to make them 'straight'.

who have been the victim of sexual offences and how society views women in general terms.

Since a large number of sexual offences cases that make it through to the trial stage turn on whether or not there was consent, it is this factor that is most important, and which needs to be protected from unfair inference.

“So what if a woman might have had sex with 60 men, 4 times a night for the past five years, what’s that got to do with whether she consented to these three accused on this night...?”²¹⁷

This is precisely the purpose of Section 227, to reduce the kind of inferential reasoning that a woman is likely to have consented because of sexual promiscuity in her past. This kind of prejudice perpetuates the fallacy that rape can be justifiable.²¹⁸

It is clear that rape shield laws such as section 227 of the Criminal Procedure Act can play a vital role in the protection of the complainant and for the proper administration of justice.

Section 36(1)(c): the nature and extent of the limitation

This factor is an important part of the proportionality requirement, because proportionality requires that the infringement must not be more extensive than is warranted by the purpose that the limitation seeks to achieve.²¹⁹ Therefore, it is necessary to determine what the extent or seriousness of the infringement is.

The common law states that irrelevant evidence is inadmissible. This rule is statutorily confirmed in section 210 of the Criminal Procedure Act, which

²¹⁷ Department of Women (NSW) *Heroines of Fortitude* (1996) at 266.

²¹⁸ Anderson (note 207) at 818.

²¹⁹ Currie and de Waal (note 70) at 181-182.

provides that only evidence that is relevant and material to conduce or prove or disprove any point or fact in issue is admissible.²²⁰

The rationale for the exclusion of irrelevant evidence is succinctly described:

*“Because the purpose of evidence is to establish the probability of the facts upon which the success of a party’s case depends in law, evidence must be confined to the proof of facts which are required for that purpose. The proof of supernumerary or unrelated facts will not assist the court, and may in certain cases prejudice the court against a party, while having no probative value on the issues actually before it.”*²²¹

Evidence is relevant if when considered alone or alongside other facts render the issues which have to be proved, more or less probable.²²² However, relevance is not the only test for admissibility. The general rule is that relevant evidence is admissible unless there is another rule of evidence which excludes it.²²³ In the case of *S v Shabalala*,²²⁴ it was said that if the weight of evidence “is so inconsequential and the relevance accordingly so problematical, there can be little point in receiving the evidence...”²²⁵

For the purposes of this paper, an important factor to consider is the admissibility of evidence which has the potential to prejudice a party. The general rule is that evidence is irrelevant if its prejudicial effect outweighs its probative value.²²⁶

As already argued elsewhere in this paper, evidence as to the prior sexual history of the complainant is generally irrelevant since it does not assist the

²²⁰ Section 210 of the Criminal Procedure Act 51 of 1977.

²²¹ Murphy *A Practical Approach to Evidence* 10th ed (2008) at 25.

²²² Schwikkard and Van der Merwe (note 41) at 46-47.

²²³ *R v Schaube-Kuffler* 1969 2 SA 40 (RA) 50B.

²²⁴ 1986 4 SA 734 (A).

²²⁵ Supra note 224 at 743F.

²²⁶ Schwikkard and Van der Merwe (note 41) at 52.

court in proving any issue at stake. Therefore, the evidence ought to be inadmissible for its irrelevance.

At most, prior sexual history evidence establishes a propensity to have sexual intercourse or otherwise engage in sexual conduct. If this evidence is allowed, its probative value is clearly outweighed by the prejudice to the complainant.

Thus, section 227 does not change the general rules of the law of evidence in any substantial or material way. Rather, it simply cements the general rules of evidence with regards to admissibility, and even constructs the circumstances in which the prior sexual history evidence is relevant and hence admissible.

One might then ask why section 227 is necessary at all. The answer to this question is two-fold. Firstly, there is sufficient evidence in case law to show that judicial officers did not exclude prior sexual evidence even where it was clearly irrelevant.²²⁷ Secondly, because of the very personal nature of sexual offences²²⁸ and the history of prejudice against women, the general rules of relevancy often appear unclear in the area of sexual conduct. It is therefore necessary to have a specific rule that applies to sexual offences and ensures that there are clear guidelines and restrictions on judicial discretion.

Furthermore, the restriction on sexual history evidence is not a complete prohibition. There remains a large element of judicial discretion, and there is room for flexibility in determining whether admission of prior sexual evidence of the complainant is necessary to protect the fair trial rights of the accused. Therefore, the nature and extent of the limitation does not restrict the rights of the accused any further than is necessary, or further than it does with regard to any other kind of evidence, such as character evidence or similar fact evidence. Section 227 does not go further than it ought to, or beyond what is proportional.

²²⁷ *S v Balhuber* 1987 (1) PH H22 (A); *S v N* 1988 (3) SA 450 (A); *S v M* 2002 (2) SACR 411.

²²⁸ Temkin and Krahe (note 21) at 33. There is no other criminal offence as closely connected to broad social attitudes and prejudices relating to the conduct of the victim.

Section 36(1)(d): the relation between the limitation and its purpose

In order for the limitation to be reasonable, there has to be a causal connection between the law and its purpose.²²⁹ It has to be determined whether the limitation serves the purpose it purports to achieve.

Section 227 has two primary purposes. Firstly, it prevents prior sexual history evidence being introduced where it is irrelevant. Secondly, it serves to protect the complainant's dignity and privacy.

Section 227 cements the general rules of evidence that irrelevant evidence is inadmissible. It restricts judicial discretion by providing guidelines within which a court can determine whether evidence is relevant or not, including the accused's right to a fair trial.²³⁰ It ensures that a proper analysis of section 227 and of the facts of the case are considered, since it requires a court to give reasons for its decision to allow or disallow the adducement or cross-examination of prior sexual history evidence. Section 227 prevents collateral issues being placed before the court and drawing its attention away from the actual issues which have to be proven.

By preventing irrelevant evidence that will more often than not be extremely prejudicial to the complainant, the dignity and privacy of the complainant is better protected. Further, there is protection to the complainant's dignity because the ordeal of testifying and facing the accused is somewhat lessened, if at least her past sex life is respected as private. The dignity of the complainant is also respected by eliminating the possibility that the court may, consciously or not, draw inferences from the evidence related to prior sexual conduct that is raised.

²²⁹ Currie and de Waal (note 70) at 183.

²³⁰ Section 227(5)(a).

Section 36(1)(e): less restrictive means to achieve the purpose

In order to be legitimate, a limitation of a constitutional right must achieve the benefits that are in proportion to the costs of the limitation.²³¹ Thus, the limitation will not be legitimate if less restrictive means could be used to achieve the same ends, such that rights will not be restricted at all or at least will be less restricted. However, courts ought not to second-guess the Legislature.²³²

The only less restrictive means that could be used would be to revert back to the 1989 amendment, which made the only test *relevancy*. In this way, there was almost no restriction on the judiciary, and the accused's rights were given a higher status, since any time evidence was at all relevant, even where it was prejudicial to the complainant, it would be admitted.

However, under this approach, the purposes of section 227 would not be achieved. Limits on judicial discretion are important, and as long as it is not over-burdensome, can serve a necessary function in ensuring that the law is consistently applied across the judiciary.²³³ Because of the history of judicial discretion not being properly exercised to exclude irrelevant sexual history evidence, it is clear that section 227 is necessary to ensure that presiding officers properly engage with the purpose of section 227, and avoid following a tradition that prejudices sexual offence complainants, in particular women, based on their past sexual conduct.

The other way would be to avoid rules that specifically deal with sexual offences, and rely only on the general rules of evidence. However, since here the primary test is again relevance, the purposes of section 227 would not be realised, neither to prevent irrelevant evidence from being adduced and cross-examined, nor to protect the complainant's fundamental rights to dignity and privacy.

²³¹ Currie de Waal (note 70) at 183.

²³² Currie and de Waal (note 70) at 184.

²³³ This is similar to the Mandatory Minimum Sentencing Legislation, which was enacted to promote consistency and guidelines to the judiciary in the sentencing of certain offences.

The Legislature did in fact prefer a less restrictive means when it drafted section 227. It chose not to enact a provision similar to that adopted in Michigan, where all cross-examination and evidence as to sexual conduct, except evidence related to the accused and evidence that can explain the presence of semen, pregnancy or disease, is prohibited.²³⁴ The Legislature chose a route of regulation that is less restrictive than the Michigan approach, allowing prior sexual history evidence in more than one instance, including where it is necessary for the accused's fair trial rights,²³⁵ where it could rebut evidence raised by the prosecution,²³⁶ and where it is fundamental to the accused's defence.²³⁷ It is clear that section 227 is not as strict as the Michigan formulation and does allow prior sexual history in various different ways. Thus, section 227 as it stands today is already a 'less restrictive means to achieve the purpose'. There is no other lesser restriction that would still achieve the purpose of the limitation.

Due to the separate challenges levelled against section 227, one as a general constitutional challenge, and the other as a critique of specific parts of section 227, particularly subsection (6), a separate inquiry will be conducted concerning the justifiability of the limitation created by section 227(6).

7.4. The Justifiability of Subsection (6)

Section 36(1)(a): the nature of the right

The nature of the right has already been discussed under the limitations analysis for the general challenge to the constitutionality of section 227 as a rape shield law. For the most part it will not be repeated in this section.

²³⁴ Anderson (note 3) at 80.

²³⁵ Section 227(5)(a).

²³⁶ Section 227(5)(d).

²³⁷ Section 227(5)(e).

There is only one part of the scope of section 35(3)(i) that will be considered in more depth at this stage, and that concerns the scope of the right to challenge evidence, and how this accords with the right to cross-examination.

Until 1989, the accused was prohibited from leading evidence of the complainant's sexual relations with other men, but she was able to be questioned regarding this aspect during cross-examination as it was considered relevant to credibility.²³⁸ This is clearly not the position any longer, since permission of any evidence sought to be adduced or questioned during cross-examination has to be requested from the court.

Cross-examination is not restricted to the questions covered during the examination-in-chief.²³⁹ However, it is less clear whether new evidence that will not be adduced can be raised in cross-examination. If this were allowed, it would mean that the attorney, who is not under oath and not a party to the proceedings, can raise new evidence. Further, it also means that any evidence could be brought into the courtroom without having to have it properly admitted as evidence. This would circumvent the process of having evidence admitted as relevant.

Thus, the question is whether the right to challenge evidence in section 35(3)(i) can reasonably be extended to include cross-examination of a complainant on matters of fact that will not otherwise be raised as evidence.

It is submitted that the right to adduce and challenge evidence does not include the right of an accused to raise new evidence during cross-examination. Thus, cross-examination relating to prior sexual history, where such evidence will not later be adduced, for example, by calling other witnesses, is not a constitutionally protected right.

This is so because if cross-examination is used to support the inference that, for instance, the complainant is less worthy of belief, there is no way to test

²³⁸ Schwikkard and Van der Merwe (note 41) at 66.

²³⁹ Schwikkard and Van der Merwe (note 41) at 366.

this assertion if evidence is not adduced. If we consider the *Zuma* case, let us suppose that the defence made application to cross-examine the complainant about her history of alleged false rape accusations without calling other witnesses to present this evidence. That would mean that a clear inference would be drawn that she was less worthy of belief, without actual evidence being tendered in that regard.

Section 35(3)(i) could not have been intended to constitutionally protect the circumventing of the ordinary rules of evidence.

Section 36(1)(b): the importance of the purpose of the limitation

The limitation in section 227(6) involves the refusal to grant an application in terms of subsection (2) if the evidence or line of questioning is to support an inference that the complainant, by reason of the sexual nature of the complainant's experience or conduct, is more likely to have consented, or less worthy of belief.

The purpose of the limitation is to prevent evidence being tendered merely to create an inference. This is important because at common law this kind of inferential and propensity reasoning was allowed without restriction. Even after the 1989 amendment, where the test became one of relevancy, there were a number of cases that failed to properly refuse to admit evidence that generally pointed to an assumption of consent. The prejudice against women, who remain the majority of sexual offence complainants, has become so entrenched in our minds that it is often implemented as part of the law.

This kind of inferential reasoning is not merely a cruel ordeal to which the complainant ought not to be subjected to, but more importantly for the purposes of the law, this sort of evidence presents nothing more than inference has very little probative value and is irrelevant.

Therefore, the purpose of the limitation is necessary to protect the rights of the complainant, and to promote the administration of justice, which does not extend to admitting irrelevant, prejudicial evidence.

Section 36(1)(c): the nature and extent of the limitation

It is submitted that the right to challenge evidence does not include raising new evidence which will not be adduced later at the stage of cross-examination. If this is accepted as true, then it follows that the right to ask questions pertaining to a complainant's prior sexual history during cross-examination does not form part of the right to adduce and challenge evidence as contained in section 35(3)(i).

The limitation caused by subsection (6), therefore, only extends as far as the adducing of evidence, and not cross-examination in so far as it aimed at eliciting new evidence.

According to this reading of the subsection, the limitation extends only so far as rendering inadmissible evidence that *only* supports the inference contemplated in subsection (6) and serves no other purpose.

This seems to be in keeping with the general rule that propensity and inferential reasoning is inadmissible. If there is any other valid reason for which the evidence is sought to be adduced or questioned, the judicial officer has the discretion to allow it. Thus, the exclusionary rule extends only so far as preventing evidence or questioning that has no purpose other than to create an inference as contemplated in subsection (6).

Section 36(1)(d): the relation between the limitation and its purpose

The limitation seeks to ensure that prior sexual history evidence that is aimed only at creating an inference as contemplated in subsection (6) is excluded.

This is because the evidence it elicits is irrelevant and prejudicial to the complainant.

Subsection (6) clearly seeks to prevent this kind of evidence from coming before the court. If properly implemented, section 227(6) will have the effect of protecting sexual offence complainants from dangerous inferential reasoning.

The exclusionary rule is a necessary and legitimate formulation. It serves to emphasise that inferential reasoning is not ordinarily relevant, and seeks to ensure that it does not get admitted in sexual offence cases where its admission has been too easily allowed in the past. Unless the evidence is necessary for another reason, such as the circumstances outlined in subsection (5), it is submitted that when evidence is aimed only at supporting an inference that the complainant is more likely to have consented or is less worthy of belief, it should be excluded.²⁴⁰

Section 36(1)(e): less restrictive means to achieve the purpose

It could be argued that if subsection (6) were to be drafted differently, so as to avoid creating an exclusionary rule, it would achieve its purpose in a less restrictive means.

However, the formulation of subsection (6) as it stands at present is necessary to ensure that evidence aimed only at creating an inference is excluded. This is because there is sufficient case law to suggest that determining the admissibility of this kind of evidence is tricky, and in the past, presiding officers have too easily allowed this sort of evidence, especially during cross-examination.²⁴¹ Thus, it is necessary to ensure that the potential for discretion to be improperly exercised is curtailed.

²⁴⁰ Subject, of course, to the desire to avoid an innocent accused from a wrongful conviction.

²⁴¹ Temkin (note 54).

If subsection (6) were not drafted as an exclusionary rule, there is the danger that evidence that is aimed only at supporting an inference as contemplated in subsection (6) would be admitted, even where it served no other purpose.

The purpose of section 227, which is to avoid just such a result, would be undone.

8. Conclusion

Rape shield laws serve a very important purpose in our law. Firstly, to offer some protection to a complainant in a sexual offence by reducing, to some extent, secondary victimisation and humiliation that encompasses the trial experience. This is a legitimate purpose and is necessary to protect the complainant's constitutional rights to dignity²⁴² and privacy.²⁴³

In the recent case of *S v Matyityi*,²⁴⁴ the Supreme Court of Appeal emphasised the importance of adopting a more victim-centred approach across the criminal justice system.²⁴⁵ The protection of the complainant is a legitimate and important purpose which is foundational to the rationale underlying rape shield provisions.

In a South African context, sexual offences are extremely prevalent. Yet, reporting rates are extremely low, a fact which can be partly attributed to various problems within the criminal justice system, including low rates of prosecutions of sexual offences, low conviction rates and a general lack of faith in the system. Another reason for the low rates of reporting is the stigma and humiliation that complainants experience throughout the process.

Prior to the enactment of South Africa's rape shield provision, the trauma that the complainant suffered during the trial was almost entirely disregarded. It

²⁴² Section 10 of the Constitution of South Africa, 1996.

²⁴³ Section 14 of the Constitution of South Africa, 1996.

²⁴⁴ (695/09) [2010] ZASCA 127 (30 September 2010).

²⁴⁵ Supra note 244 at para 16.

has now become generally accepted that it is important to offer some protection to a complainant, even though in protecting the rights of the accused, complete protection cannot be offered to a complainant.²⁴⁶ The Court in the case of *De Beer v The State*,²⁴⁷ succinctly commented on the growing realization that the myths that are historically bound within the law, have to be thwarted:

*“Rape is a topic that abounds with myths and misconceptions. It is a serious social problem about which, fortunately, we are at last becoming concerned. The increasing attention given to it has raised our national consciousness about what is always and foremost an aggressive act. It is a violation that is invasive and dehumanising. The consequences for the rape victim are severe and permanent. For many rape victims the process of investigation and prosecution is almost as traumatic as the rape itself.”*²⁴⁸

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

There is another purpose that underlies the rationale for rape shield laws, that of ensuring that only relevant facts are placed before the court. Generally, evidence of prior sexual history is not directly relevant to proving the allegation. Such merely creates assumptions and ancillary issues, which detracts from the truth-finding mission of the court.

The common law of evidence contains the general rules of relevance and admissibility. However, due to the history of prejudice aimed at rape complainants, these general rules are not successful in the area of sexual

²⁴⁶ *S v Mothopeng & Others* (1) 1979 (2) SA 180 (T).

²⁴⁷ *Stephen Bryan de Beer v The State* (121/04) (Delivered on 12 November 2004) (Unreported judgment of the Supreme Court of Appeal).

²⁴⁸ *Supra* note 247 at para 18.

offences. Section 227 serves the function of creating specific guidelines for the issue of prior sexual history evidence, to ensure that only sexual history evidence that is genuinely relevant will be admitted.

This rationale is the most important in showing that section 227 does not unjustifiably limit the fair trial rights of the accused. The rights of the accused do not extend to being allowed to raise evidence that is irrelevant and inadmissible. To allow this in the context of sexual offences, but not for other offences, would be to favour certain groups of accused persons over others depending on the type of crime committed, which is illogical and legally incorrect.²⁴⁹

The purposes of section 227 are necessary and legitimate. More importantly, the scope of section 35(3)(i), the right to adduce and challenge evidence, is not materially affected by section 227 because the right does not extend to irrelevant evidence. Section 227 is reasonable and justifiable and is, therefore, constitutional.

²⁴⁹ Section 9(1) of the Constitution of South Africa, 1996. “Everyone is equal before the law and has the right to equal protection and benefit of the law.”

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