



# Policing Sexual Violence in South Africa: Problems and Challenges<sup>1</sup>

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## Abstract

*South Africa has one of the highest levels of reported sexual offences (more specifically rape) in the world. Sexual offences pose a daunting challenge for the police and for the criminal justice system holistically. Although victims play a crucial role in the criminal justice process, there are many reasons why rape and sexual assault is chronically under-reported. In this context, an attempt has been made to explore how the South African Police polices sexual offences, and the problems and challenges that are encountered herein.*

Keywords: South Africa, Police, Sexual Offences, Problems, Challenges.

## Introduction

The subject of sexual violence and more specifically the role of the criminal justice system in managing, investigating and prosecuting sexual offenders have attracted lively and sometimes controversial debate, in both public and legal spheres. Over the past decade human right scholars, civil society organizations and South Africans at large have advocated for the creation of new laws, policies and practices for the policing and punishment of sexual offenders. South Africa has one of the highest levels of reported sexual offences (more specifically rape) in the world.

Sexual violence poses a daunting challenge for the police and for the criminal justice system holistically. Although victims play a crucial role in the criminal justice process (Hindelang & Gottfredson 1976), there are many reasons why rape and sexual assault is chronically underreported. Many rape victims fail to report their ordeal to the police for reasons of embarrassment, stigma or fear of not being believed, or they avoid reporting because they deem the assault against them ‘not serious enough’ for police involvement. Rape victims may also be pressured not to report rape, and when they do they may experience hostility and indifference from the police. While the resultant trauma and psycho-social effects of sexual assault are well documented in South African literature, the impact of victim trauma is only beginning to dawn upon South Africa.

<sup>1</sup> Revised version of the Paper presented at the Third International Conference of the South Asian Society of Criminology and Victimology (SASCV) held at Goa, India during 28–29, January 2016.

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In addition to this disconcerting and discouraging social and institutional response to rape, contemporary and traditional policing methods are not often effective in extracting adequate information from rape complainants, nor are they able to provide adequate support and protection for traumatized victim.

The South African Police Service plays an important role in combating sexual offences. The police are responsible for investigating the case, collecting the evidence, recording the statements of victims and witnesses and arresting the suspects. The successful prosecution of sexual offenders therefore largely depends on the thoroughness of the police investigation.

Generally police officers have a poor understanding of the impact of trauma on the rape victim and the consequential needs of the victim. Most police officers are perceived by complainants as unable to render care, support, respect and the ongoing information that the victims require (Jordaan 2005, p. 5). As a result there is little or no trust and the quality of the police investigation is undermined, as the victim tends to withdraw or withhold information that is considered too confidential or embarrassing to disclose. Research reveals that the decision to report rape may be associated with issues of denial, feelings of fear and embarrassment, self blame and concerns about safety (Jordan 2005, p. 5).

Perceptions based on stereotypes about the “nature of woman and the nature of rape”, in conjunction with the continued legacy of patriarchy, influences the policing of sexual offences and undermines efforts to reform the criminal justice response to rape (Jordan 2005, p. 5). Approaches to rape cases by the police are often dominated by prevalent rape myths and stereotypes, and more specifically the notion that women easily lie about rape and that where there are no signs of violence it is unlikely that a rape has occurred.

The medical research Council found that only one in nine rape cases is reported to the police (Jewkes, Penn & Kekana 1999, p. 27). Another serious concern is the fact that a significant proportion of sexual offence cases reported to the police are cases in which the victim is a child. The South African Police Service Annual Report indicates that 42.7% of all rape cases and 48.2% of all indecent assault cases are victims under the age of 18. The majority of sexual offence cases are withdrawn by the police or the prosecution (Lartz & Smythe 2008, p. 200). The Crime Information Analysis Centre reported, for example, that during 2000 40% – 60% of rape cases reported in South Africa were withdrawn by the police or the prosecution. Common reason advanced by the police, for their decision to withdraw rape cases is the perception that the complaints are false or that victims withdraw for their own personal reasons.

This paper explores how the South African Police polices sexual offences, and the problems and challenges that are encountered in this regard. At the outset it should be noted that while reforms by the Sexual Offences Act 32 of 2007 have a significant impact on *what* the police must investigate, these amendments do not holistically address the more challenging issue of *how* the police should manage sexual offences (particularly rape cases) reported to them. This paper further explores the shifts in police policies and practise pertaining to sexual violence.

### **The Sexual Offences Act**

The Sexual Offences Amendment Act 32 of 2007 (referred to as the Act hereafter), contains detailed provisions pertaining to the policing of sexual offences in South Africa. The Act provides for the establishment of an Inter-sectoral Committee responsible for

developing and monitoring a National Policy Framework, which will set performance standards for various departments including the police with regard to sexual offences. The latter is intended to ensure greater accountability and synchronicity between the various criminal justice departments. The Act further requires the development of National Instructions by the South African Police Service on all matters which are reasonably necessary or expedient to be provided for and which must be adhered to by all police officials who are tasked with receiving reports of and the investigation of sexual offences (section 66(1)(a)). The Act also specifies the issues which must be included in the instructions, namely: the manner in which the reporting of an alleged sexual offence is to be handled by police officials; the manner in which sexual offence cases are to be investigated by police officials; the circumstances in which and the relevant sexual offence or offence in respect of which a police official may apply for HIV testing of an alleged offender as contemplated in section 33. In terms of section 66(1)(b) the Act requires the development of training courses on the National Instructions and social context training regarding sexual offences to promote uniform norms, standards and procedures. The Act states that the purpose of this is to ensure that as many police officials as possible are in a position to deal with sexual offence cases in an appropriate, efficient and sensitive manner.

### **Understanding Sexual Violence in South Africa**

While the state has largely failed to address violence against women in both public and private spaces, and while intimate partner violence and violence in the home is what creates the social context within which violence in public spaces takes place, the focus of this paper will be to look at the role of the state in addressing sexual violence. While the focus is on sexual violence, violence against women is seen as existing in a continuum. It is the everyday acts of violence, the gendered power dynamics within intimate relationships, and acts of harassment directed at women on the streets that create the gendered social order within which more brutal manifestations of violence can take place. Much of the state's approach to addressing such violence has been one of protectionism, namely, to keep women safe. This approach is underscored by the fact that women should be cautious in engaging with public spaces, that they should not be in certain places at certain times. Narratives of danger are used to invoke a sense of fear of being in public spaces and to get women to re-negotiate their navigation of such spaces. Narratives of danger are internalized by most women who consequently limit their movement in public spaces in an attempt to be safe. An inherent part of the narratives of danger is that sexual violence happens to 'bad' women who risk being in public spaces at certain times, while 'good' women who adhere to the unspoken rules of protectionism will be safe. In reality, rape and sexual violence have confounded this myth. Most acts of sexual violence are known to take place within the home and by perpetrators known to the victim. Even women who adhere to all the rules have been victims of sexual violence. This form of protectionism is a form of violence in its own right.

Phadke (2010, p. 18) argues that it reflects a concern with women's sexual virtue and sexual safety rather than actual safety. As such, it serves to hide the real agenda, which is controlling women's sexuality. Approaches that seek to limit women's occupation of public spaces result in the worst possible outcome for women in that they further control women's sexuality and their right to freedom of movement. Instead, the focus should be on claiming these public spaces; in a sense, women should viscerally write their cities with

their bodies. Rather than focusing on safety and limited movement in public spaces, women should instead place their claim in the discourse of rights rather than protectionism as an integral part of urban living. The more strategic, long-term strategy is for women to enhance claims to public space and to engage with risk and pleasure while accepting that violence is something that must be negotiated in the process of doing so. The disproportionate focus on the dangers to women in public spaces ignores the reality that more women face violence in private spaces (Phadke, 2010, p. 25).

‘Rape myths’, a series of misplaced beliefs that hold that the victim is somehow at fault for being raped, lie at the root of poor prosecution and conviction of rape. This can take various forms. They include the view that it is impossible to rape a resisting woman, that some forms of forced sex are not really rape and that a woman who says ‘no’ can actually mean ‘yes’. Rape myths stem from deeply embedded views about the role of women and women’s sexuality in relation to that of men in a society. One of the more common rape myths is rooted within the notion that women somehow ‘ask’ for rape. This is tied to gendered notions of men’s sexual needs and women’s seductiveness. Women who are overtly sexualised in any way and who dress in a particular way are therefore seen to be ‘deserving’ of being raped. Similarly, women who consume drugs or alcohol are viewed as being responsible when they are raped, yet men who are under the influence of drugs or alcohol are rendered less responsible. In the same way, the problematic notion of the ‘corrective rape’ of lesbian women is viewed through the lens of not being an act of violence, but rather an attempt to make amends of sorts, to rectify something that is wrong. Stemming from this is the myth that not all forms of coerced sex constitute rape. Women who are seen to lead men on and then ‘change their minds’ are seen as being delinquent, as being irresponsible ‘teasers’. Opting out of sex is therefore not an option for women. Bourke (2007, p. 74) argues that for a long time, the view was held that to be proved guilty of rape, a man had to believe that a woman was not consenting. A case in the United Kingdom in 1968 argued that to be guilty of rape, a man must have believed that his victim was not consenting (Thornton 1982, p. 15). If he genuinely believed that his victim was consenting to sexual intercourse, then he lacked the requisite *mens rea* to rape.

One other popular rape myth is that women lie about being raped to settle scores as part of ulterior agendas. Researchers have at times sought to establish the extent to which this is a phenomenon. However, these studies have been fraught with contestation. In reality, it is not possible statistically to calculate the number of such cases. In contrast with inflated guesses, examinations of rape cases actually reveal low levels of deception. Some investigations have shown that the percentage of false accusations in rape cases probably does not exceed 2–3 per cent (Bourke, 2007, p. 23). Most victims would not put themselves through the associated trauma of lodging a false case and contending with secondary victimization within a largely insensitive criminal justice system. It is important to note that just because the police describe a rape charge as unfounded does not necessarily mean that it is false. Contrary to the notion that men are at risk of being falsely accused of rape, it is more common for rapists to get away with their actions. One survey of 1 007 women in 11 UK cities found that a startling 91 per cent failed to report their rape.

### **The Policing of Sexual Offences in South Africa**

As part of its response to addressing sexual violence, South Africa has sought to put in place a comprehensive legislative and policy framework to combat sexual violence. This includes:

- The Domestic Violence Act (Act No. 116, 1998);
- The Criminal Law Sexual Offences and Related Matters Amendment Act (Act No. 32, 2007);
- Firearms Control Act (Act No. 60, 2000);
- National Policy Guidelines on Victim Empowerment;
- National Instructions on Domestic Violence;
- National Policy Framework on the Management of Sexual Offences;
- National Instructions on Sexual Offences; and
- National Directives and Instruction on Conducting a Forensic Examination on Survivors of Sexual Offences in terms of the Criminal Law Sexual Offences and Related Matters Amendment Act (Act No. 32, 2007).

In addition, the National Council on Gender Based Violence (NCGBV) was launched in December 2012 and was tasked with developing a national plan on gender-based violence. Since inception, the NCGBV has been unable to come up with a national plan and its future is in abeyance as violence against women seems to have shifted off the state's agenda of priorities after the 2014 elections. Notwithstanding a relatively comprehensive policy and legislative framework, levels of sexual violence remain alarming high. This can be attributed to a number of attendant reasons such as the inability adequately to resource and budget for sexual violence and to translate policy frameworks into realistic and achievable plans, and the lack of political will to implement such plans. In 2014, KPMG reported that conservatively speaking, gender-based violence costs South Africa between R28.4 billion and R42.4 billion per year, an estimated 0.9–1.3 per cent of the GDP annually.

The Department of Safety and Security's Strategic Plan for 2005 to 2010 specifically highlights crimes against woman and children as one of the four key strategic priorities. The plan states that the purpose of the strategy is to reduce the incidence of crimes against women and children, as well as to ensure the proper investigation of sexual offences such as rape. The Strategic Plan indicates that the SAPS will address these crimes by focusing on rape, domestic violence, assault, and child abuse and that the strategy will be further developed within other state programmes and initiatives, such as the Anti-Rape Strategy. Although the crimes are prioritized the interventions identified are not used to determine programme outcomes and indicators. This reflects a serious lack of understanding by the SAPS in regard to what should be done to police these crimes.

The SAPS is charged with receiving, recording and investigating reports of rape. The manner in which this is done is regulated by policy and legislation. The National Crime Prevention Strategy (NCPS) was developed by cabinet in 1996. Despite the prioritization of crime and the accent on appropriate responsiveness, the NCPS is not clear on what the exact role of the SAPS is in relation to sexual violence.

In terms of section 25(1)(b) of the SAPS Act 68 of 1995, SAPS legislative and national priorities are given effect at station level through national instructions and guidelines issued by the National Commissioner. The aim is to provide for the establishment and

maintenance of uniform standards of policing. The SAPS National Instruction 22/1998, includes extensive guidelines for investigating rape cases and the treatment of rape victims. They provide for example that victims should be afforded immediate attention, be treated with respect and dignity, provided with information and referred to victim services. Police officials are provided with step by step instructions on how to deal with a rape complaint from moment of initiation of the complaint. These instructions include ascertaining whether the victim is in immediate danger or in need of medical assistance, obtaining a description of the suspect, interviewing the victim, opening a case docket and safeguarding of the crime scene. Annexure C of the SAPS National Instruction is a checklist containing seventy seven detailed questions that should put to a victim at the time her statement is taken. The purpose of these questions is to obtain a composite picture of what lead up to the attack including, the extent to which force was used or threats made, the nature of the interaction between the victim and the suspect, the exact nature of the attack, how the attack ended as well as any relevant characteristics of the suspect. According to research undertaken this template is never used (Lartz & Smythe 2008: 204). More than 1500 dockets were perused during the latter research and the template was never seen. The SAPS National Instructions allows for deviation only where there are compelling reasons and provisions are made for police officials who act contrary to the instructions. However it is evident that police officials are generally not conversant or familiar with the contents of the instructions and are never disciplined for transgressing them. SAPS National Instructions are of critical importance in standardizing the processing and management of cases. If properly implemented, it can have the effect of shifting systemic cultural practices. However, this requires enforcement.

### **Challenges in Policing Sexual Offences**

Policing sexual offences in South Africa is not without challenges. Poor approaches and attitudes towards rape victims are reinforced by poor police leadership. The SAPS has committed themselves on paper to addressing sexual offences. This is reinforced by the enactment of progressive legislation and policies in pursuit of this goal. In order for these to manifest there must be commitment from police managers at all levels to enforce certain norms and standards. In general this commitment is absent. According to Barday and Combrinck (2003, p. 33) based on an analysis of finalized dockets at 13 police stations:

“.....in some cases arrests had not been made even where the investigating officer knew the identity of the perpetrator and his address. No reasons were noted on these dockets for the failure to arrest the perpetrator, and it was not evident why these cases were closed without further investigation.”

There is no guarantee that once a rape victim has gained access to the criminal justice system, that her case will be properly investigated or that justice will prevail. In terms of the SAPS Standing Orders (SO (G) 325) it is clear that a case may only be closed as undetected when investigations reveal that the complaint is well founded, but fails to reveal the identity of the perpetrator.

One of the key factors affecting police management of rape cases is attrition, through which the majority of cases do not in fact make it through the criminal justice system to prosecution. At each stage of the criminal justice process there are varied opportunities for cases to be lost to the system and a quagmire of factors enable this (Jewkes *et al* 1999: 57).

According to research conducted by CIETAfrica (1998: 7) 394 rapes were committed in the Southern Johannesburg Metropole. Of these 272 (69%) were reported to the police. Of these 17 (6%) became rape cases, 1 of the 17 was lost in a fraudulent manner, 5 were referred to the court for prosecution and 1 resulted in conviction. At each of these attrition junctures criminal justice personnel exercise substantial discretion. It is this discretion which must be addressed if attrition rates are to decrease and conviction rates are to increase.

The majority of rapes in South Africa are never reported to the police. Victims who do not report their cases indicate that they fear that the police will not believe them, that the perpetrators will retaliate against them, that they fear that they will be blamed for the rape and that they will not be able to deal with the cumbersome court process (Lartz & Smythe 2008: 205).

In South Africa very few rape cases are reported and very few of those reported go on trial and result in conviction. At the various stages of the criminal justice process these cases leak out of the criminal justice system as criminal justice officials exercise discretion and respond to institutional pressure and as complainants become frustrated and resolve the matter outside the criminal justice system. A study of the criminal justice process reveals that police discretion is very wide; that the police exercise substantial power in their decisions and that the majority of cases reported are closed by the police. While police officials recognize that rape and related sexual offences are a reality, they just do not acknowledge that many cases that fit the conception of these cases. The disjuncture between progressive legislation aimed at addressing sexual offences and unprogressive attitudes can create hostility and resentment.

A culture shock awaits many victims of sexual offences who approach the police. According to a study undertaken by Combrink and Skefu (2003, p. 18) one police officer actually went around the victim's neighborhood approaching community members with questions such as "what she's like?" It is attitudes such as these that stigmatize and further traumatize an already traumatized victim. The greatest fears that women express with regard to sexual violence are retaliation, community humiliation and being ostracized by family (Combrink & Skefu, 2003, p. 18).

There is a widely accepted perception that the SAPS is lacking both human and logistical resources to deal with South Africa's high levels of crime. The validity of this perception is questionable. According to the SAPS Strategic Plan 2005-2010, South Africa has approximately 130,000 police personnel, amounting to some 320 per 100,000 of the population. In the United States this ratio is 300 per 100,000, which suggests that the SAPS is in fact reasonably well staffed. The problem is that less than 20% of these police officials are detectives, and less than 10% of these detectives are actually trained as detectives (Leggett, 2003, p. 18). The result of this staffing structure is that some detectives are carrying upwards of 100 case dockets at any given time. These caseloads leave very little time for investigative work and can result in a situation where police officials focus their attention on less intricate cases. Resource constraints also compromise the quality of police work. The SAPS National Instruction 22/1998 on Sexual Offences requires police officers with specialized training to take the victims statement. However in practice the first officer on the scene or the officer on duty at the police station actually does this. The problem with this is that these officers are not in any way skilled or

specialized in sexual offences, or even broadly trained in the taking of statements (SA Law Commission Report 2001, para 3.2.9.2.).

Police officials, who are not properly trained, overburdened and working under pressure, are more prone to fall back on their personal store of knowledge and stereotypes to interpret a case. Further there are however systemic barriers impediments to effective policing. When the police are forced into a position where they need to make choices about which cases they need to respond to due to restricted resources and unmanageable case loads, it is the system which contributes to attrition. It is the victim unfortunately who bears the brunt of systemic impediments. Should these structural limitations on policing in South Africa not be addressed, the practice of the police refusing cases, encouraging victims to withdraw their complaints and conducting perfunctory investigations before closing cases as undetected or unfounded, will continue. The most skilled and experienced detective will most likely exercise their discretion injudiciously under poorly resourced conditions.

Lack of respect for victims of sexual offences is reinforced by poor leadership. Policy initiatives show that the South African parliament and the SAPS have committed themselves on paper to addressing the high levels of sexual violence, which is reinforced by the enactment of constitutionally progressive legislation. In order for these to bear fruit and filter through there must be a commitment from leadership and line managers to enforce certain norms, standards and practices.

## **Conclusion and Recommendations**

There is an urgent need to ensure that the sexual violence policing units are adequately resourced and capacitated and that there are sufficient sexual violence units in each province. This includes basic infrastructure to enable them to provide services effectively, and it should also include a monitoring mechanism for ensuring that training provided to investigators is targeted and effective. A plan should also be developed to ensure that more women are employed as investigators in sexual violence units. Clear goals should be developed in this regard.

As a matter of urgency the police need to start recording the different types of sexual offences reported on the police computer system. The prevailing uncertainty as to how to categorize different types of crimes involving violence against women must be resolved. A mechanism must be put in place for monitoring the capturing this information and for addressing problems in this regard. Ideally, statistics could be released within shorter timeframes, as opposed to on an annual basis. In order to understand the trends and patterns properly, the police should map sexual offences geographically and this data should be updated on a continuous basis. Since 2015, SAPS has not reported on crime statistics for murder, assault with the intention to cause grievous bodily harm or common assault by gender. This is a problem as violence against women must be looked at in the context of these statistics.

There is a need for more structured and regular monitoring of the implementation of the National Instructions on Sexual Offences in terms of service provision to sexual offences victims. Attention needs to be paid to addressing the poor quality of statements taken, treating victims with empathy and professionalism and adequate court preparation on the part of the police. Monitoring is required of police collection of evidence specifically as it relates to investigating the scene of the crime, committed follow-up with victims, location and interviewing of witnesses, and preservation of the chain of biological



evidence. In addition, there is a need to monitor and ensure that there are no backlogs in processing forensic evidence and that this happens within the requisite 30 days.

There is a need to track sexual offences cases in the criminal justice system. There is no system in place that is able to track a single case in the police, health and court systems. There is a need for a centralized system in this regard with each case having a single tracking number that applies to all the different service providers. This should be available on a computerized system that links health, police and court services and provides updated information on where a case is at a given point in time. So, for example, if DNA evidence has been sent to a forensic laboratory, then this is duly recorded on the system with the date of the expected return of results.

There is a need to ensure the proper functioning of the structures mandated with both internal and external accountability in the police, namely the Civilian Secretariat, the Independent Police Investigative Directorate and the National Inspectorate. Citizen complaint mechanisms must be strengthened and there must be a clear, targeted strategy for communicating complaint mechanisms to sexual offences victims. In addition, there needs to be greater public awareness of the rights of victims and the minimum standards that can be expected in terms of service delivery must be enforced. There must be a zero-tolerance approach to police officers who are perpetrators of sexual offences. Police officials guilty of such violence should not continue to serve in SAPS.

Training of both SAPS and criminal justice officials must be effective and targeted. Appropriate resources must be made available for training. There must be strict minimum standards for training and the efficacy of training programmes must be externally monitored and evaluated.

Research in 2016 revealed that the Department of Justice and Constitutional Development had not adequately budgeted for the roll-out of the sexual offences courts. This situation has not changed and must be addressed as a matter of priority.

## References

- Barday, R., & Combrinch, H. (2002). *Implementation of Bail Legislation in Sexual Assault cases. First Research Report 2000-2002.*
- Bourke, J. (2007). *Rape: A History from 1860 to the Present.*
- CIETAfrica. (1998). *Prevention of Sexual Violence: A social audit of the role of the police in the jurisdiction of Johannesburg's Southern Metropolitan Local Council.*
- Combrink, H., & Skepu, Z. (2003). *Bail in sexual assault cases: victims experiences. Second Research Report 2002-2003.*
- Jewkes, R., Penn, L. and Kekana, L. (1999). Violence against women in the three South African Provinces. *Medical Research Council.*
- Jordaan, J. (2005). *Rape, Reform and Resistance.* Institute of Criminology: Victoria University of Wellington, New Zealand.
- KPMG, (2014). *'Too costly to ignore: the economic impact of gender-based violence in South Africa'.*
- Lartz, L., & Smythe, D. (2008). *Rape Law Reform in South Africa.* Cape town: Juta.
- Leggett, T. (2003). What do the police do? Performance measurement and the SAPS. *Institute for Security Studies.* Paper Number 66.
- Phadke, S. (2010). 'If Women Could Risk Pleasure'. In B. Datta (ed). *9 Degrees of Justice* Zubaan, New Delhi.

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- Republic of South Africa. (1995). The South African Police Service Act 68 of 1995. Pretoria: Government Printer.
- Republic of South Africa. (2007). Sexual Offences Amendment Act 32 of 2007. Pretoria: Government Printer.
- Republic of South Africa. (1998). SAPS National Instruction 22/1998. *Pretoria*.
- SA Law Commission Report (SALRC). (2001). Discussion Paper 102. *Pretoria*.
- South African Police Service Annual Report 2005/6. *Pretoria*.
- South African Police Service. Undated. Strategic Plan for the South African Police Service 2005 – 2010. *Pretoria*.
- Thornton, M. (1982). 'Rape and Mens Rea' *Canadian Journal of Philosophy* supplement 1.