# Zuma trial

## Lessons for future rape trials

The Zuma trial raised questions around legal reasoning in rape trials. **Lisa Vetten** and **Liesl Gerntholtz** dissect why the law needs reviewing to make it more just for the complainant.

While the Zuma rape trial is in some ways not comparable to the majority of rape cases, in other ways it is entirely typical. And in this respect, the debate prompted by the conservative legal practices and traditions on show in this trial may well be one of the few positive features of this highly divisive process.

What set the Zuma trial apart from most others was its speedy resolution. The complaint was made in November 2005 and judgement handed down in April 2006. Many complainants wait for years before their cases come to court, enduring numerous postponements and delays.

The complainant Kwezi (as she chose to be known) was placed in a witness protection programme before, and for the duration of, the trial. This protection is not usually extended to rape survivors in less high profile cases, and many women face threats and intimidation from perpetrators and their family and friends.

In this instance, DNA evidence was also obtained and presented to the court. Again, in many cases, this evidence is not collected at the scene of the rape, or is lost, or is never presented to the court due to an enormous backlog at the forensic laboratory that delays much forensic analysis.

In certain key aspects however, Kwezi's experience at the hands of Judge van der Merwe is almost identical to that of other rape survivors.

The judgement drew heavily on negative stereotypes about women generally, and rape survivors and their response to rape. It allowed for the introduction of Kwezi's previous sexual history as a means of discrediting her and it relied on the cautionary rule (see below) to further undermine her credibility.

The judgement summarily rejected Kwezi's version of events, measuring her behaviour against what the judge believed 'real' rape survivors feel. So the fact that she did not bath immediately, did not suffer from depression after the rape, was not physically threatened, did not have her clothing torn, failed to scream for either Zuma's daughter or the policeman stationed outside, did not "immediately phone the world and to tell them about it" and did not leave Zuma's home immediately after the incident, all made her story implausible. She was either "a sick person who needs help" because she was so traumatised in the past that she perceives "any sexual behaviour as threatening". Or she was a woman who changed her mind, feeling "guilt, resentment, anger and emotional turmoil" after the event.

A long-standing legal tradition that this trial explicitly drew on, was the cautionary rule around sexual offences. Essentially, this rule stated that women who laid rape charges were particularly unreliable witnesses. They are frequently motivated to lay false claims out of malice, vindictiveness, vengefulness and neurotic fantasy and thus their evidence needs to be approached with caution. The 1998 Supreme Court case of S versus Jackson effectively abolished the application of this particular cautionary rule to rape complainants generally, finding it to 'unjustly stereotype' this group of women, as well as being 'irrational' and 'outdated.' Nonetheless, the Jackson decision still left judges to apply a 'cautionary approach' to particular cases at their discretion. In the judge's opinion, the Zuma matter illustrated the need for just such a selective application of a cautionary approach.

Another means of disqualifying

the complainant's version of events turned on a very particular interpretation of her previous sexual history. This hinged around the claim that she had a history of making false rape accusations, beginning from the time she was 13 years old and exiled in an ANC camp. This particular episode appears to have triggered a period in Kwezi's life of troubled relationships with men, as well as blackouts. However, a reading of the evidence suggests these difficulties ceased in 1995 and no further claims of rape were made by the complainant in the ten years thereafter until the charge against Zuma.

Clearly, her behaviour needed further explanation and contextualisation and, at the conclusion of the state's case, three organisations attempted to enter the trial as amicus curiae (friends of the court, an advisor to the court) to present an alternative reading of Kwezi's history. They proposed to lead evidence around the sexual exploitation and abuse that occurred in the camps during the liberation struggle, as well as evidence around the impact of childhood sexual abuse. While such evidence in of itself was unlikely to have convicted Zuma, it may have helped the court to arrive at a different understanding of the destructive consequences of childhood sexual abuse. The application was, however, dismissed as 'side-tracking' the courts and a bid for self-promotion and international publicity by the organisations concerned. It also provided a basis for the judge to criticise women's organisations for pre-judging elements of the case.

It is telling that the judge chose to upbraid women's organisations for questioning and challenging the conservative legal traditions of criminal law but was silent on the conduct of Zuma supporters outside court whose behaviour at times bordered on the criminal. Indeed, for this particular judge, challenging the law was, apparently, a more noteworthy threat than threatening or intimidating a witness. But this may be due to the fact that the judge, like Zuma's supporters, was also engaged in putting women back in their place albeit using different and more sophisticated legal methods.

In terms of the judge's reasoning, complainants such as Kwezi, who are not the 'unfortunate victims of rape', have no place in the court, anymore than do women's groups who 'bombard' a court 'with political, personal or group agendas and comments.' Expanding on this point, he quoted, with approval, the unnamed newspaper contributor who wrote: "This trial is more about sexual politics and gender relations than it is about rape." Given that rape is a manifestation of a particular type of gender relations and thus cannot be separated from sexual politics, this quote reveals the extent to which both the commentator and the judge fundamentally misunderstand the nature of sexual violence, and also sought to impose a mask of neutrality on the law. In this way they denied how law is implicated in the politics of rape.

Power gives rape its political dimension. This may be the power to impose your will upon another, whether by violence, force, threat, coercion, manipulation or obligation, as well as to rewrite such injury as harmless or imaginary. While such power is most obviously enacted upon individual women's bodies, it is also validated by communities and further legitimated by state institutions.

Law is implicated in this politics for how it excuses or justifies such impositions, invalidates or diminishes the harm that subsequently arises, and upholds particular social arrangements concerning men and women. In this case the decision endorsed a conservative approach to gendered social relations and also sought to exclude particular women from the protection of the law. As such, it is also an illustration of the double-edged nature of the law. On the one hand, women and their advocates have successfully used the law to claim their constitutional rights, but at the same time law has been used to deny women rights to dignity, privacy and a fair trial in relation to rape. The extent to which this decision will reassert legally conservative approaches to future rape cases over the medium to long-term can only be guessed at.

With the Sexual Offences Bill in the offing, it is essential that we rewrite the law to strike a better balance between the rights of the accused and those of the complainant. Justice cannot be served while legal decision-making continues to be informed by the worst possible stereotypes and caricatures of women.

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