SUBMISSION TO THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT
IN RESPONSE TO THE EVALUATION OF THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997

Prepared by:

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Memorandum On The Mandatory Minimum Sentences Legislation

A. Introduction

"Crimes of violence against women differ from other serious offenses, especially regarding their impact on victims, and therefore require the enactment of specific provisions to ensure appropriate punishment and compensation."[1]

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Violent crime is rampant and has been escalating in recent years in South Africa2. According to the most recently released police statistics of reported rape3 in South Africa, 52 733 rapes were reported in the 2003 - 2004 year4. This constitutes an 18% increase from the statistics reported 10 years ago.

In 1997 the Van Den Heever Committee (South African Law Commission) found wide community support for mandatory minimum sentences as the public expressed concerns about the leniency of sentences imposed by courts for serious crimes.[5] During this year, the South African Parliament accordingly passed legislation prescribing mandatory minimum sentences for certain serious offences. The Criminal Law Amendment Act 105 of 1997 provides that the court must impose a specified minimum sentence where an accused is convicted of a listed offence, subject to a qualifying proviso.[6]

While we recognise that each listed offence may have its own specific concerns and rationales justifying a prescribed minimum sentence, in this submission we do not intend to voice an opinion herein in relation to any minimum sentences other than those relating to **sexual offences**.

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[1] Helene Combrinck, Nikki Naylor & Hayley Galgut, "Comments: Discussion Paper 91 - A new sentencing framework." Gender Project, Community Law Centre (UWC), Gender Law Unit, Sonnenberg Hoffmann & Galombik.

[2] Andries Cillers, "Minimum Sentences in South African Law" Jurist Legal Intelligence (8 May, 2002) <http://jurist.law.pitt.edu/world/foreignmay02.php>.

[3] The term "rape" is used in this subsection, since official statistics are compiled on the basis of legal definitions of criminal offences. In order to gain some picture of the total number of reported cases of *sexual assault*, one would have to add the number of indecent assault cases (9,304 for the year in question) to the total number of rape cases.

[4] South African Police Service: Crime Information Analysis Service *Rape in the RSA for the Financial Years 1994/ 1995 to 2003/ 2004* accessible at <www.saps.gov.za/statistics/reports/crimestats/2004

[5] South African Law Commission, June 1997. *Sentencing - Mandatory minimum sentences*. L. van den Heever (project leader). Issue Paper 11, August 1997. Pretoria: SA Law Commission.

[6] Ss 51 and 52 of Act 105 of 1997. the proviso is found in the clause specifying that the court must impose the prescribed minimum sentence unless there are "substantial and compelling circumstances" justifying a departure.

In recognition of the prevalence of sexual offences in South African society, the particularly severe impact these crimes have on the dignity and personal security of women, and in light of the State's Constitutional and International Law obligations,[7] Parliament enacted minimum sentences for sexual offences and further mandated life imprisonment in respect of three instances of sexual assault:

The first is when such sexual asault is committed:

- in circumstances where the victim was raped more than once, whether by the accused of by any co-perpetrator or accomplice;
- by more than one person, where such person acted in the execution or furtherance of a common purpose or conspiracy
- by a person who has been convicted of two or more offences of rape but has not yet been sentenced in respect of such convictions; or
- by a person, knowing that he has HIV/AIDS

The second instance is where the sexual assault is perpetrated upon:

- a girl under the age of 16
- a physically disabled woman who, due to her disability, is rendered particularly vulnerable; or
- is a mentally ill woman

The third instance is when a person is convicted of a sexual assault inflicting grievous bodily harm on the victim.

There is, however, an exception to the requirement of a minimum sentence if there are "substantial and compelling circumstances" that warrant a departure therefrom.[8] The legislature provided no statutory guidelines for interpreting this exception, thus leaving the judiciary to determine its meaning.

B. Concerns Surrounding the Mandatory Minimum Legislation

a) Summary of Criticisms by the Judiciary

i. Need for Individualized Sentencing

[7] In S v. Abrahams the court, albeit obiter, adopted the submissions of the amicus regarding the particular responsibilities to women that courts have in the context of violent crime:

> The amicus rightly pointed out that our Constitution, as well as international treaty obligations, require the government and the courts to take special steps to protect the public in general and women in particular against violent crime. The Constitutional Court has given these obligations emphasis in recent decisions (S v Baloyi (Minister of Justice and another intervening) 24(34) and Carmichele v Minister of Safety and Security), 25(35) and in the sentencing process they must be accorded appropriate weight.

For a comprehensive outline of the international legal obligations that must form part of the context in legislation regarding sentencing for rape offenders see: Combrinck et al, supra note 1.

[8] S 52(3)(a).

There is a history of judicial opposition to mandatory minimum sentencing legislation in South Africa.[9] For example the Viljoen Commission, which was established to make recommendations about the penal system in South Africa,[10] expressed strong reservations about mandatory minimum sentencing as, it felt, restricting judicial discretion could lead to injustices. Furthermore, Chief Justice Corbett commented in S v Toms; S v Bruce "…*the imposition of a mandatory minimum prison sentence has always been regarded as an undesirable intrusion by the Legislature upon the jurisdiction of the courts to determine the punishment to be meted out to persons convicted of statutory offenses and as a kind of enactment that is calculated in certain instances to produce grave injustice*."[11]

Unsurprisingly, the enactment of the 1997 Criminal Law Amendment Act therefore gave rise to considerable controversy. Judges perceived the mandatory minimum sentencing legislation as a "rigid and vague" set of rules. The resistance of the judiciary to limitations of its sentencing discretion, combined with the lack of legislative guidance as to the meaning and scope of "substantial and compelling circumstances," has led to varying interpretations of this exception.

Based on examples below, we question whether it is indeed a tenable position to argue that the legislation has in practice infringed judicial discretion. Far from being the "exception" to the general rule of minimum sentences, there is a notable judicial propensity to invoke this clause in sentencing. Unfortunately, as will be illustrated below, the invocation of this exception clause is often used on the basis of myths and misconceptions about sexual assault and the impact thereof on the dignity, personal security, and psychological integrity of survivors.

Accordingly, it is submitted that this particular concern regarding the alleged infringement of judicial discretion has not been borne out by practical experience as reflected in the case law.

ii. Constitutionality of Mandatory Minimum Sentences

The constitutionality of the 1997 Act has been challenged on a number of grounds.[12] Firstly, the provisions have been said to infringe an accused's constitutional right to a fair trial since the scheme contemplates fragmentation of the criminal process. Specifically, the challenge related to the provision stating that when a Regional Court Magistrate finds an accused guilty, the case must then be referred to the High Court for sentencing. In *S v. Dzukuda* and Others, the High Court accepted this argument and found the legislation to be unconstitutional.[13]This decision was however overturned by the Constitutional Court[14] in September 2000.

[9] J.J. Neser, "Mandatory Minimum Sentences in the South African Context" 3 Crime Research in South Africa <www.crisa.org.za/volume3/vvs.html>.
[10] *Verslag van die Kommissie van Ondersoek na die Strafstelsel van die Republiek van Suid-Afrika* [Report of the Commission of Enquiry into the Penal System of the Republic of South Africa] ("Viljoen Report"), Government Printer, Pretoria, 1976.
[11] 1990 2 SA 802 [A] 817 C-D, quoted in Neser, supra note 7.
[12] Neser, supra note 7.
[13] Per Judge Lewis (unreported decision in the Rand supreme court of 17 May 2000).
[14] 2000 (11) BCLR 1252 (CC)

Secondly, in *S v Dodo*[15], the Minimum Sentences Legislation was challenged on the basis, inter alia, that it does not meet the requirements for the separation of powers between the judiciary and the legislature. The Constitutional Court upheld section 51, holding that the Constitution did not require an absolute separation between legislative, executive and judicial powers and that "…it is pre-eminently the function of the legislature to determine what conduct should be criminalised and punished."[16]

b) Criticisms by Civil Society Regarding the Misapplication of the Legislation in the Context of Sexual Assault

i. Interpretation of "Substantial and Compelling Circumstances"

There has been widely divergent judicial interpretation of the words "substantial and compelling circumstances."

In *S v Mofokeng and Another*[17] the Judge held that:

> *for substantial and compelling circumstances to be found, the facts of the particular case must present some circumstance that is so exceptional in nature, and that so obviously exposes the injustice of the statutorily prescribed sentence in the particular case, that it can rightly be described as "compelling" the conclusion that the imposition of a lesser sentence than that prescribed by Parliament is justified.*[18]

In *S v. Malgas*,[19] the Supreme Court of Appeal held that the imposition of the prescribed sentence need not amount to a shocking injustice before a departure is justified. That such a sentence would be an injustice is enough.[20] Justice Marais JA stated:

> *In short, the Legislature aimed at ensuring a severe, standardized, and consistent response from the courts to the commission of such crimes unless there were and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it.*[21]

The Malgas decision has since been considered by the Constitutional Court in *S v Dodo*[22] to be correct.

However, the Supreme Court of Appeal cases of *S v. Mahomotsa*,[23] and *S v Abrahams*[24] added a gloss on the "substantial and compelling" test that has resulted in confusion in the jurisprudence, and perhaps a change in the *Malgas* test.

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[15] Sv Dodo 2001 (3) SA 382 (CC).
[16] Ibid. at 387.
[17] 1999 (1) SACR 502 (W).
[18] Ibid. at 523c-d.
[19] 2001 (1) SACR 469 (2001 (1) SA 1222).
[20] Ibid. at para 23.
[21] Ibid. at para 8.
[22] supra note 14
[23] 2002 (2) SACR 435 (SCA).

In *S v Mahomotsa*, in discussing the interpretation of "substantial and compelling circumstances," Mpati JA stated:

> *Even in cases falling within the categories delineated in the Act there are bound to be differences in the degree of their seriousness. There should be no misunderstanding about this: they will all be serious but some will be more serious than others and, subject to the caveat that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment. As this Court observed in S v Abrahams, 'some rapes are worse than others and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust'*[25]

The wording in the latter half of this paragraph seems to change the presumption such that rather than justifying departures from mandatory minimum sentences, judges should justify failures to depart therefrom.

Indeed, this was the interpretation that was seized upon by the court in *S v G*[26] where the court found that although the mitigating factors could not be said to amount to substantial and compelling circumstances, the cases of *Abrahams* and *Mahomotsa* required the court to find that the rape in question is one of the most serious manifestations of rape before imposing a life sentence can on the accused.

Thus there has been a clear retreat from the initial purposes of the minimum sentencing legislation. Whereas the minimum thresholds were enacted to increase the sentences for sexual assault, in recognition of the need for deterrence and denunciation as we come to grips with the particular gravity and distinct nature of violent offences against women, the interpretation and over-use of the "substantial and compelling" exception has resulted in an undermining of the legislation, and consequently of women's rights.

ii. Stereotypical Assumptions and Reliance on "Rape Myths"

Mandatory minimum sentences for sexual assault were meant to increase sentences for perpetrators in recognition of the particular seriousness of these crimes and their impact on women. The particular importance of harsh penalties and deterrence in the context of rape was recognized in cases such as *S v Chapman*:

> *The Courts are under a duty to send a clear message to the accused in rape cases, to other potential rapists and to the community that the Courts are determined to protect the equality, dignity and freedom of all women, and they will show no mercy to those who seek to invade those rights.*[27]

Thus, the prescribed sentences of the Criminal Law Amendment Act were meant to be the default, with judges only departing from them where they could justify substantially compelling circumstances that would make the imposition of the minimum sentence unjust.

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[24] 2002 (1) SACR 116 (SCA).
[25] Ibid. at para 18. [emphasis added]
[26] 2004 (2) SACR 296 (W).
[27] 1997 3 SA 341 (SCA) at 345.

Perhaps the best rationale for the continuation of the mandatory minimum sentencing legislation specifically in relation to sexual offences is provided by a thorough examination of the cases in which judges have departed from the legislative benchmarks and their reasons for having done so. A survey of these judgments (summarised in appendix 1 hereto) makes it clear that, notwithstanding the South African constitutional dispensation and the Constitutional Court's pronouncements regarding the seriousness with which gender based violence must be treated, many members of the judiciary still do not understand the seriousness of sexual assault, particularly rape, or the impact on and consequences thereof experienced by rape survivors. The continued reliance on and perpetuation of rape misconceptions and myths in justifying lower sentences is immensely concerning and indicative of precisely why minimum sentencing for sexual assault was considered important by the Legislature in the first place.

> *While the back door of 'substantial and compelling circumstances' created by the legislature (arguably) saves the provision from unconstitutionality, it also allows for judicial interpretation which is inconsistent with an understanding that all women (irrespective of their age or previous sexual history) are entitled to dignity, physical and psychological integrity and freedom from all forms of violence.*[28]

The manner in which the concept of "substantial and compelling circumstances" has been interpreted (especially, with respect, at the High Court level) is troubling. In preparing this submission a study was conducted of recent case law where the courts considered and then departed from the minimum sentence for rape. A summary of recent cases along with a brief outline of the concerns each case raises can be found in **Appendix I** below.

The case law reveals the following factors are consistently and erroneously used to justify lesser sentences:

- the previous sexual history of the complainant[29];
- an accused's cultural beliefs about sexual assault[30];
- an accused's use of intoxicating substances prior to the assault[31];
- an accused's lack of intention to cause harm to the complainant in committing the rape[32];
- a lack of education, sophistication or a disadvantaged background of the accused[33];
- a lack of "excessive force" used to perpetrate the rape[34];
- a lack or apparent lack of physical harm to the complainant[35];
- a lack or apparent lack of psychological harm to the complainant[36]; or
- any relationship between the accused and the complainant prior to the offence being committed (including a consensual sexual relationship)[37].

It should be noted that the factors listed above are precisely those that were submitted[38] should be included in the legislation as factors which the Courts may not consider in determining substantial

[28] Nikki Naylor "The mandatory minimum sentences waltz: one step forward, five steps back" *GenderNews* [Quarterly Newsletter of the Gender Project] Vol 3 No 2 (October-November 1999) at 4-5.
[29] See Mahamotsa below.
[30] See Mvamvu below.
[31] See Njikelana below.
[32] See Mvamvu below.
[33] See Njikelana below.
[34] See S v G and Shongwe below.
[35] See S v G, Njikelana and Shongwe below.
[36] See Mvamvu and Shongwe below.
[37] See Mvamvu and Abrahams below.
[38] Supra note 1

and compelling circumstances with a view to imposing a sentence lower than the mandatory minimum.

The negative effect that ill-conceived sentencing practices have on survivors has been noted by rape crisis counsellors in South Africa. A summary of testimonials of counsellors of the Rape Crisis Cape Town Trust can be found in **Appendix II** below. Counsellors note that lenient sentences make survivors feel like their lives are "cheap," that they have been exposed to tremendous injustice, and that they are left exposed to intimidation and threats.

iii. The Sentencing Regime and Prison Overcrowding

Further criticism of the mandatory minimum sentencing legislation has emerged from Judge Fagan, the Inspecting Judge of Prisons, who has recently suggested that the sentencing regime contributes to the intolerable position of overcrowding in South African prisons. However, since we do not have access to statistics indicating the percentage that those sentenced for sexual assault crimes comprise of the sentenced population, we are not in position to comment thereon.

C. In Summary – Options Currently Available to the Legislature

i. Option 1: Maintain Mandatory Minimum Sentencing

Sentencing theory holds that there are a number of justifications for sentencing including deterrence, denunciation, and reformation.[39] Sentencing requires a judge to inquire into the facts of each case while also drawing on the norms and expectations of society in order to craft a punishment that will be seen to fit the crime and will serve the societal interests of protection and deterrence. The aims of sentencing, however, cannot be achieved where judges draw on outdated or stereotypical misconceptions – regardless of widely held they may be.

This is precisely the problem that continues to surface in sexual assault sentencing. The case law illustrates the existence of a significant body of judicial officers (especially, with respect, at the High Court), who draw on misconceptions and rape myths in justifying lesser sentences than the prescribed minimum. We offer the submission here that in respect of most other offences listed in terms of Act 105 of 1997, this phenomenon has not arisen. Underlying the judicial willingness (or in some cases eagerness) to depart from minimum sentences in certain sexual assault matters is a failure to recognise that sexual assault is a unique and serious crime that has particular constitutional equality and dignity dimensions that distinguish it from other violent offences.

While courts must be able to depart from minimum sentences in the limited cases where the punishment would grossly outweigh the gravity of the crime, it is submitted that these statutory minimums must be maintained in respect of sexual assault, at least until such time as the judiciary shows it is able to apply sentencing principles so as to safeguard the rights of women. While we argue that there has been a drastic over use of the "substantial and compelling" exception, at the

[39] Martin Schonteich, "Sentencing in South Africa: Public Perceptions and Judicial Process," Occasional Paper No 43 - November 1999 <www.iss.co.za/Pubs/PAPERS/43/paper.html>.

very least it requires the justification of judicial reasoning in the determination of sentences for violent crimes in a somewhat standardised framework. This allows for scrutiny of reasons and facilitates appeals of unjust sentences.

We further recommend that the Sentencing Framework Bill, as developed by the South African Law Reform Commission, be prioritised together with the Sexual Offences Bill, specifically before any move is made to repeal the minimum sentences legislation.

ii. Option 2: Issue Mandatory Interpretative Guidelines for "Substantial and Compelling" Circumstances

In light of the problematic jurisprudence on the meaning of "substantial and compelling circumstances," it is submitted that Parliament must enact mandatory interpretative guidelines for the judiciary, setting out how it is to be interpreted in light of the Constitution and international obligations to protect the rights and dignity of women.[40] Specifically, the legislature should set out circumstances or factors that may not in themselves be regarded as "substantial and compelling circumstances", including, but not limited to, the fact that the victim was not sexually inexperienced at the time of the sexual assault, an accused's lack of intention to cause harm to the complainant in committing the rape, lack of "excessive force" used to perpetrate the rape, a lack or apparent lack of physical harm to the complainant, a lack or apparent lack of psychological harm to the complainant or any relationship between the accused and the complainant prior to the offence being committed (including a consensual sexual relationship).

iii. Option 3: Legislate Mandatory Consideration of Victim Impact Statements

Research must also be conducted on the way in which complainants' experiences are presented to the courts. That there is a duty on the prosecuting authority to introduce evidence on the impact of the offence on the survivor has been recognised and detailed elsewhere,[41] however what the case law clearly shows is that the serious indignity and trauma of sexual offences experienced by survivors is not being understood by the courts.

In light of this fact, the duty to present and consider victim impact statements must be made mandatory through legislation. It should be recognised that such statements may be made by the complainant or close family, friends or a counselor. Furthermore, it is imperative that such statements be considered at the sentencing stage. It is, with respect, inappropriate for presiding officers to project the impact of a sexual offence onto a survivor based on the subjective perceptions, assumptions and biases such officers may hold.

iv. Empirical Research is Needed

It is significant to note that in-depth research on the effects of the minimum sentencing legislation was last conducted in the year 2000. We submit that government must undertake to update this research in order to get statistical evidence as to the effects that this legislation has had on sentencing practices in sexual offences cases. An audit of reported cases since 2002 reveals continuing non-compliance with the purposes and intention of the legislation and these trends must be verified for all levels of court through an examination of both reported and unreported decisions. We submit that any final decision about whether or not to maintain mandatory minimum sentencing

[40] supra note 1

[41] Naylor et al, supra note 1 and National Policy Directives Part 31, Par 9(a) - (b) *et seq.*

cannot be made in the absence of strong empirical research, and should not be based on the pronouncements of judicial officers who were never in the first place in favour of or convinced of the need for the legislation.

A further aspect that deserves urgent investigation is the extent to which original convictions are overturned by the High Court following referral for sentencing in terms of Act 105 of 1997 after trial in the regional court. In many cases, such action by the High Court results in the complainant's having to testify again, thus doubling the secondary traumatisation that she may have experienced the first time round. At present, there is insufficient data to ascertain whether there may be trends of negligence (whether on the part of the prosecution or presiding officers) during the original trial, resulting in an unsupportable conviction, or whether High Courts are perhaps (with respect) being over-sensitive in assessing such convictions.

Furthermore, in order to get a true picture of the effects of this legislation, there is a need to meet with judicial officers and to hold public hearings into the issue of minimum sentences for sexual offences.

APPENDIX I: Case Examples of Misapplication of the Legislation

A. Examples from Reported Cases

S v G[42]

The Facts and Judgment:

The accused was convicted in regional court on a charge of raping a ten-year-old girl and was referred to the High Court for sentencing. The accused abused his position of trust as a father-figure (he was the mother's boyfriend) in committing the rape. Though Borchers J found that the accused showed no remorse for his actions and that trauma persists for the complainant, he found that this "is not among the worst cases of rape that appear before the courts in South Africa."[43], he found the following to be "substantial and compelling" circumstances justifying a departure:

- The accused was a first-time offender;
- the violence he employed "was not excessive, and he therefore did not inflict serious physical injuries on the complainant"; and
- The accused had already been in custody for two years

The judge doubted that these factors "can be said to amount to substantial and compelling circumstances as envisaged by Act 105 of 1997," however, the judge felt bound by the decisions of the Supreme Court of Appeal (including ***Mahomotsa***, ***Abrahams***, and ***Rammoko***) in which life sentences for rape were not imposed for the reason, inter alia, that "the complainants were not seriously physically injured as no excessive violence was employed."[44]

Concerns:

There are many problems with this judgment. First, it creates a sort of double exception to the minimum sentencing legislation. Where the court cannot fit the case into the "substantial and compelling" exception, it will look at precedents and if it concludes that this is "not one of the worst rapes" it will avoid application of the minimum sentence. This befuddled two-pronged test fails to acknowledge that minimum sentences were meant to recognize that all rapes are inherently abhorrent and serious, and those falling into listed offences should as a default be treated as such and subjected to the imposition of a minimum penalty.

The judges reference to the violence the rapist used as "not excessive" misses the point that rape, by definition, is excessive force. Further, the reliance on the fact that the rape did not inflict "serious physical injuries" also fails to recognise the distinct nature of rape whereas the most serious (yet invisible) injuries are often those to the dignity and psychological well-being of women.

[42] 2004 (2) SACR 296 (W).
[43] Page 299.
[44] Ibid. at 299.

S v Mvamvu[45]

The Facts and Judgment:

This was a decision of the Supreme Court of Appeal. Here the State appealed an effective 5-year prison sentence imposed on the accused for the multiple rape, abduction and assault of his estranged customary law wife. Here Mvamvu, who had a domestic violence protection order against him, held the complainant against her will for three days during which he raped her on six occasions before she managed to escape. Two weeks later he forcibly removed the complainant from her home and again assaulted and raped her twice.

The SCA found that the court *a quo* had misdirected itself in certain respects of sentencing and so it reconsidered the appropriate sentence. In finding that substantial and compelling circumstances existed justifying the imposition of a lesser sentence than life imprisonment, the SCA considered as mitigating:

- that the Complainant and Mvamvu were not strangers and that they had lived together in a customary marriage for a number of years before the rape;
- there was no evidence that the Complainant suffered any lasting psychological trauma;
- she only suffered minor injuries;
- Mvamvu honestly believed he had a "right" to conjugal benefits;
- Mvamvu grew up and lived in a world of his own, shaped by the norms, beliefs and customary practices by which he lived his life; and
- it did not appear that the prime objective of the rapes was to do harm to the Complainant.

Though the SCA noted that rape is a serious offence, it was not convinced that this case warranted the imposition of mandatory life imprisonment.

Concerns:

In addition to some of the concerns about the stereotypes discussed above, there are a number of other important concerns arising from this judgment, which one author has termed a "retrograde step" for the recognition of marital rape.[46]

As was noted by Women's Legal Centre attorney Hayley Galgut,

> *[t]his apparent failure by the Courts to understand the ramifications of rape for the survivors thereof is immensely concerning and even more so when the rape occurs in the "sanctity" of one's own family or marital home. To approach a consideration of the harm to the complainant from the assumption that prior romantic or other knowledge of the rapist somehow lessens the emotional, psychological or physical consequences for the survivor is misguided, prior knowledge of the rapist often compounds a survivor's trauma and annihilates her sense of trust. This may be precisely because it is someone she trusted that has violated her in the most violently intimate and intensely destructive of ways.*[47]

[45] 2004 SCA (Case No: 350/2003).
[46] Hayley Galgut, "'Breakthrough Judgment' a retrograde step for the recognition of marital rape," Women's Legal Centre, unpublished article, copy on file with author.
[47] Ibid.

Also troubling is the suggestion that sexual assault is a "crime of passion" and that "traditional customary practices" may have informed the accused's mindset, and this may somehow weigh in favour of the accused. Such a view is "thoroughly offensive to those who take pride in 'traditional customary practices' whose basic tenets arguably conform to the values and principles enshrined in the Bill of Rights."[48]

S v Njikelana[49]

The Facts and Judgment

Here the accused was charged and convicted of raping a 16-year-old complainant twice. In committing the attack on the complainant, he pushed her off a bridge and she was injured, albeit "not seriously." The accused used considerable force in raping the complainant.

In finding that a departure from the life sentence was warranted, the court took into account the fact that the accused was "uneduated and unsophisticated," and had been drinking, that the complainant was not "seriously injured," her lacerations were "superficial" and in terms of physical injuries, she had "only one small scar on her forehead, which is hardly visible."

Concerns:

Aside from the problematic reliance on a lack of physical injuries to justify a departure from minimum sentencing, this case adds a further misguided factor to the mix. The lack of education or sophistication of the accused, we submit, is a completely irrelevant factor in respect of sentencing for rape. Recognising that violent and non-consensual sex is a serious invasion of a woman's dignity and right to bodily integrity does not require anything beyond recognition of every person's worth - this is certainly not something that needs to be taught in school. In fact, excusing rape due to a lack of education also perpetuates stereotypes about perpetrators: i.e. that they rape because they don't know any better. Far from the truth, many rapists know that rape is illegal but do so as an expression of power and domination over the women they violate.

That rape is essentially a discriminatory expression of male dominance has been recognized in the UN Declaration on the Elimination of Violence against Women which states that violence against women is a "*manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men*" and that "*violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men*."[50] This was also confirmed by the South African Constitutional Court in its judgment in *Carmichele v Minister of Safety and Security and Another*.[51]However, thus understanding is disregarded in *Njikelana*.

[48] Ibid.
[49] 2003 (2) SACR 166 (C).
[50] General Assembly resolution 48/104 of 20 December 1993.
[51] 2001 (4) SA 938 (CC) Par 62.

S v Mahomotsa[52]

Facts and the Judgments

Here, two women under the age of 16 were raped by a 23-year-old man. Both were raped more than once by the accused. The second rape had occurred while the accused was awaiting trial on the first count. During the first rape he had threatened the complainant with a firearm and during the second he had threatened her with a knife. At the High Court, Kotze J firstly listed a number of mitigating factors, which included the fact that the complainants did not lose their virginity as a result of the incidents. They had already been sexually active, and one of them, although only at school, had sexual intercourse with another person two days before the incident. In addition, the complainants had not sustained any physical injuries or psychological harm. The court then held that the following constituted a "substantial and compelling circumstance":

> *Although there was intercourse with each complainant more than once, this was the result of the virility of a young man still at school who had intercourse with other school pupils against their wishes, and, note, school pupils who had previously been sexually active. Where one is dealing with school pupils, and where, in addition, it appears that the two girls concerned had already had intercourse before, one really shouldn't lose perspective, especially not in relation to the first count, which dealt with a complainant who had in any event been naughty a few days earlier and had intercourse with someone else. The injustice which she suffered in this case does not demand an unusually severe sentence.*[53]

Concerns:

Inherent in the reasoning of the High Court is the myth that rape is not traumatic unless there are physical scars and injury, that there are no psychological consequences where a woman was sexually active prior to the rape, and that so-called "rape" is often merely a matter of misunderstood male virility.

The SCA held that Kotze J had materially erred in finding that the accused's "virility" as "substantial and compelling circumstances" for departure from the minimum sentence.[54] The court disagreed with the factoring in of the complainants' sexual history in favour of the accused.

What the SCA still failed to address were the norms of teenage sexuality inherent in the High Court judgment. Underlying Kotze J's judgment is the idea that it is somehow abnormal for teenagers to engage in sexual relations and that they were "naughty" for having done so.

[52] Unreported Judgment dated 28 July 1999, Case No 29/99, Free State Provincial Division.
[53] Our translation from the Afrikaans original.
[54] Mahomotsa, supra note 20 at 442d-f.

S v. Abrahams[55]

Facts and the Judgments

Here, the SCA overturned the sentence of the High Court (judgment by Foxcroft J) where it was found that the accused who had raped his own 14-year-old daughter was not a threat to society as a whole and that this was a mitigating factor that could be considered in deciding whether or not to impose life imprisonment. The judgment seemed to say that the fact that the rape had been committed in the family context was a factor constituting "substantial and compelling circumstances" justifying the court's departure from the prescribed sentence of life imprisonment.

The SCA held that the High Court had materially misdirected itself in imposing a sentence of seven years. He had erred in failing to take into account the sexual jealousy and possessiveness that, in part, motivated the attack. The SCA asserted that any suggestion that rape within a family was less reprehensible was untenable.[56] Foxcroft J had also failed to take into account the extent of damage suffered by the complainant. The SCA accordingly substituted the original 7-year sentence for one of 12 years.

Concerns:

While overturned by the SCA, the trend seems to be that judges will find assaults in the familial context to be less blameworthy (see Mvamvu above). In stark contrast to perceptions of certain sentencing adjudicators, sexual offences committed by close friends, family, or prior spouses can feel more violative to a survivor. As was noted by Women's Legal Centre attorney Hayley Galgut:

> *While it must be acknowledge that individual rape survivors experience rape and its effects differently, and that no two experiences are alike, far from being a mitigating factor, prior knowledge of the rapist often compounds a survivor's trauma and annihilates her sense of trust. This may be precisely because it is someone she trusted that has violated her in the most violently intimate and intensely destructive of ways.*[57]

S v Shongwe[58]

The Facts and Judgment

In this case a nine-year-old girl was raped in her home by the father of her mother's boyfriend. Cillie J felt that any person with practical experience in criminal cases and sentencing would regard a sentence of life imprisonment on the accused in this case as "shocking."

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[55] 2002 (1) SACR 116 (SCA).
[56] Ibid. at 124g-125g.
[57] Supra note 43.
[58] 1999 JDR 0473 (0).

He interpreted the "substantial and compelling" exception to mean that: "Wherever a judicial officer is of the view that the sentence which would have been imposed prior to the Act and the one required in terms of the new Act are so different that it leads to an injustice, then a departure from the Act would be justified."

The court held that the non-serious nature of the offence and the lack of "real harm" to the child were sufficient grounds for departing from the mandatory sentence requirement.

Concerns:

Once again, the court in this case showed a lack of understanding of the issues surrounding sexual assault and the effect, or real harm, such violations have on survivors.

B. Recent Examples and Public Outcry in the News Media

- Acting Justice Beverly Franks declined sentencing two accused to life, holding that despite the fact that they had stabbed the woman in the face, robbed her, raped her, and threatened her life, they did not kill her. This "mercy," she said, was a mitigating factor that justified departure from the minimum sentence of life. Rape Crisis advocate Nolitha Mazwayi described the sentence as "appalling" and said "What kind of a message was the judge sending out? It is okay for girls and women to be raped as long as they are not killed?"[59]

- A man who indecently assaulted his stepdaughter for 12 years before he raped her was sentenced to house arrest where he will be stay with the survivor's three younger sisters. Magistrate Len Kotze sentenced the 41-year-old man in Pretoria regional court to three years' correctional supervision - comprising house arrest, community service and weekly therapy. A further sentence of two years in prison was suspended for five years. The stepfather began molesting the girl in 1991 and "groomed" her through fondling of increasing severity until he finally raped her at age 16. The survivor had to tape the incidents of molestation in order to get someone to believe her.[60]

- After raping a woman at knife-point, Zwelidumile Buso tied her to a tree, raped her a second time and told her he was going to get something to eat and would return and kill her. In sentencing, Miss Justice Shanaaz Meer stated "It was apparent from the evidence before the court that the victim was not severely injured during the rape; and Buso was a first offender from a severely disadvantaged background." Shocked at this appalling sentence, the public wrote to the editor:

> *What type of injuries must a rape survivor sustain before she will consider imposing the maximum sentence, and does being a first offender from a severely disadvantaged background now become a mitigating factor in cases of rape? After having examined thousands of rape victims, I have come to the conclusion that the majority of magistrates and high court judges have no idea of the mental, psychological and physical trauma suffered by a rape victim.*[61]

[59] Terri-Liza Fortein, "Outcry after judge's clemency for 'merciful rapists'" Cape Argus, December 10, 2004.
[60] Sonja Carstens, "'Shock' sentence stuns State" November 25, 2004, News 24.com
[61] Per Dr A A Adams, in "Rapists Deserve Maximum Sentence" Cape Argus, December 10, 2004.

Or further:

> *The fact that she was not able to relate how this attack had impacted on her life gave nobody the right to speculate that the rapes (more than one) had not been severe enough to warrant a prescribed life sentence for the rapist. Any rape or attempted rape has an everlasting effect on any person, whether woman, man or child - perhaps not physically but certainly mentally. It makes me sick to think that there should be degrees of sentencing for rapists or any person who violates another person sexually.*[62]

[62] Ibid. per Meg Steward.

APPENDIX II:

Rape Crisis Cape Town Trust Counsellors Responses to Mandatory Minimum Sentences

These interviews were conducted at short notice with experienced rape crisis counsellors.

The purpose of doing these interviews is to highlight comments and issues that have been raised by the rape survivors who are our clients with regard to the matter of sentencing and punishment of offenders.

I explained what the minimum sentences were. Counsellors were asked to reflect on statements and issues that had come up during their counselling sessions with rape survivors with regard to punishment of the perpetrator. I asked if they think that sentences were sufficient based on these discussions and if they thought that the minimum sentencing legislation could be dropped at this time.

Tessa Pretorius
Position and experience: Rape Crisis Counselling Intake Worker – Cape Peninsula
Tessa has approximately 5 years experience in face to face counselling rape survivors and their families, she is in daily contact with a broad spectrum of rape survivors through our telephone counselling and advise service. Tessa also supervises groups of lay counsellors.

Response:
Sentences are too low and should be higher. In many cases the rapist is out too soon, before the survivor has healed and she is still completely raw to the perpetrator.

The seriousness of rape must be reflected in the seriousness of the punishment, the court only recognises the seriousness of a narrow spectrum of rapes, generally it does not reflect the experience of the survivors.

It would be useful if along with the sentences that are given, counselling and other programmes could be provided in prison.

Very few of the cases that Tessa deals with result in conviction or sentencing. The issue of Bail is still critical, the impact on survivors of perpetrators being released on bail is serious, bail should not be given, it has a negative impact on the survivor and the criminal case.

Nomzi Mtsewu
Position and experience: Rape Crisis Lay Counsellor – Khayelitsha
Nomzi has been counselling rape survivors for approximately one year. She has spent approximately 3 months as an intake worker in the office managing the telephone counselling service.

Response:
Firstly raised the issue of bail – bail is granted too easily and due to harassment by perpetrators, because of insufficient bail conditions and intimidation many do not go back to court. Raised the fact that many perpetrators get "free bail" as problematic.

Nomzi also noted that our clients don't know about minimum sentences but that they accept the years that are given.

She explained that many survivors feel that they must be looked after by the system and that the perpetrators should be kept in prison for more than the 10 years if possible. Our clients raise that their whole lives have been ruined by the perpetrator and when he is still loose, they feel that their lives are cheap.

Many express that he should be arrested and punished for life, because they have been punished for life.

Kathleen Dey
Position and Experience: Rape Crisis Counselling Coordinator – Cape Peninsula
Approximately 11 years experience in counselling rape survivors, also supervises groups of lay counsellors. Has presented victim impact statements in court and a number of trials.

Response:
Kath Agrees with the need for Substantial and Compelling circumstances, to address specific cases. However she feels that in order to make a decision regarding an appropriate sentence, the presiding officer who is making that decision must be exposed to information regarding the impact of the crime directly from the complainant.

She feels that the maximum sentence of 15 years for a first rape conviction that can be given in the regional court is too short in some cases.

Raised the issue of parole, many perpetrators are released on parole a short time after the trial (often due to long periods of time spent in prison awaiting trial), survivors are then exposed to further threats and intimidation from perpetrators for whom the history of the trial is still very recent. This heightens the fear and possibility of revenge.

Nazma Hendricks
Position and Experience: Rape Crisis Counselling Coordinator – Mannenberg
Nazma is a clinical psychologist, at least one-year experience directly with rape survivors, deals daily with survivors and their families. Nazma also supervises groups of lay counsellors.

Response:
The courts are not taking cases seriously, for many survivors that we work with the case does not go that far (to sentencing stage). There are serious issues relating to the management of cases from the time of arrest to trial.

Clients have expressed in different ways that the punishment of the perpetrator must reflect her suffering and it often does not. Our clients don't know about minimum sentences and so they accept the 6 or 7 years given by the courts, there is a strong feeling from them that this is not enough but there is a sense that they are grateful that there is punishment at all. There should be better communication and publicity in communities regarding sentences that are given.

Issues have come up relating to perpetrators being convicted, but on appeal of sentence being granted bail. In a specific instance In the intervening time, the perpetrator has been able to develop life circumstances that will reflect favourably on him during the sentencing decision. (engaged to be married, fiancé pregnant). The survivor's sense is that his life is not as ruined as hers has been. "Their lives go on, they are still walking around".

Another aspect is perpetrators being paroled early, with the effect that the survivors life is thrown into turmoil while the perpetrator is embraced by the family and community. (In the context of stepfathers who return from short prison sentences to the family home)

Yandisa Mahonga
Position and Experience: Rape Crisis Counsellor – Cape Peninsula and Mannenberg
Yandisa has approximately 6 years experience counselling rape survivors and their families, including front line telephonic crisis counselling.

Response:
Dropping the Minimum sentences is going to stop more women from reporting. It adds to the sense that nothing will be done for them except that they are exposed to the stigma. It will anger the survivors.

Irrespective of the different acts that rapists use, they must be punished, our clients want the perpetrator to be punished, whichever way if it is them taking revenge or him going to jail. They feel he must go to jail.

3, 5, 7 years is not enough 10 is a start, the survivor feels that her whole life is ruined, not just for a few years. For people who get no counselling the rape comes back later on in life too.

Judges must go ahead with the minimum sentences, even if they must be forced to. It is the only way out for our clients, to feel that some justice has been done. Although 10 years is not enough still.

Teenagers have it worse still, their whole lives ahead and the court gives a low sentence.

Bail issue again comes up, cases don't go to court because the perpetrator gets bail, they meet him, start panicking and feel scared.

Benita Moolman
Position and Experience: Rape Crisis Training and Public Awareness Coordinator – Mannenberg
Benita has experience in the field working with cases of child abuse, domestic violence and rape for at least 10 years. She currently works with groups in communities regarding issues of rape with extensive interaction and collaboration with different sectors of the Mannenberg community.

Response:
Many people don't know of the minimum sentences, members of the community don't see long punishments being granted to rapists. They see perpetrators getting away with it. There is a strong feeling that punishment is inadequate. The minimum sentencing legislation must definitely be kept.

The Sexual Offences Bill is still not finalised, this should precede scrapping of the minimum sentences. The issue of Indecent assault cases (recent cases of rape of men) being treated as less serious, does not address the impact of the act on the survivor, there is still work to be done on this.