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WISER

Lisa (7 August, 2014)

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My name is Jonathan Klaaren and I am welcoming you to this panel, to the Arts of Human Rights workshop. We've got as I think most of you may have met here before, unfortunately I do not have Kerry Bystrom in the presentation in this panel, which is otherwise a type of law and literature and human rights narratives. So I think it is probably fair to say she was doing quite a bit of the literature part of this, but we have two distinguished panellists who will be able to look at those topics as well. I think what I will do is briefly introduce both at once and then I think we will open the forum and then I will also do just a little bit of framing before turning over to you Lisa. Our first panellist is Lisa Vetten and Lisa is now here at WISER as an honorary research assistant, she holds a Master's degree for political studies with distinctions and has undertaken a range of research projects around violence against women. Her current work is examining rape in the criminal justice system as well as the politics of funding services to women who have experienced violence. She often provides expert testimony on different aspects of violence against women and has been specialist on violence against women appointed to the commission for gender equalities on one of their specialist committees. Lisa also writes in the public sphere and occasionally gets into fights with people on these topics as I understand. Thank you very much for.

Justice Zak Yacoob is our second panellist and we were actually also giving a bit of a welcome yesterday when Justice Yacoob was here, former Justice Yacoob was here participating in a panel that I will speak about a little bit more in a minute. I am going to give some of the biography; Justice Yacoob was born on 3 March 1948 and became blind at sixteen months as a result of meningitis. He married in 1970 has two adult children and has lived in Durban almost all his life. I won't do the whole thing I promise, but I do think it is important because we are talking about arts of human rights, because we are talking about visual cultures, we are talking about musical cultures, we are talking about others, I think that side of things may come in and I think it is appropriate to do so, but effectively what Justice Yacoob has done and I will condense the rest of it is work extremely hard and extremely effectively in the Bar as an advocate in the time of politics in South Africa with the struggle against apartheid, rising to high positions in effectively the structures of the united democratic movement and so on. Then having a quite diverse practice, a commercial practice, also a human rights practice and I'm not going to talk about all the various high profile activities, but the next significant activity was joining the Constitutional Court of South Africa in February 1998, which was a fifteen year term and just stepped down recently. I think Justice Yacoob was amazing in his ability to be outspoken while he was on the court, but now that he's off the court that speaking out has I think only perhaps amplified. So I think you will see him as a thought leader and social justice leader in many different forms and we are very pleased and honoured to have him here. I should also mention that Justice Yacoob is here at Wits for about three weeks this time as an adjunct professor in the School of Law and everyone is available throughout the university to participate in that.

So the last thing from me before I hand over to Lisa is that there are two events that we have had so far in the workshop, which we will probably like to draw into these discussions. One was a panel that we had yesterday where Carol Steinburg in particular was talking about the Spear case which was involving Mr Zuma and questions of the objective view of dignity of in particular black males and a number of various issues that were brought up and I would invite participants and persons who heard that to actually factor this into our discussion here. The other was our discussion last night around forensics, forensic evidence, forensic witnessing, confession towards other modes and methodologies of truth or fiction or fakery and I think that can be placed into some of the questions of narrative that Lisa Vetten will now talk to us about. So thank you very much.

Lisa:

What my paper looks at is really trying to understand judicial reasoning and the way rape trials are conducted as a storytelling contest. That is obviously not the only way to understand law, but in this particular paper I wanted to look at how we could deploy or utilise the tools of narrative and a literature of how we understand stories are told and structured as a way into understanding legal reasoning. There is a secondary aim in doing that because I think there has been a great deal of emphasis on law reform, how do we shift the law, how do we introduce new rules of evidence, what can we do differently in order to make court rooms a less stigmatising and less fearful place. The thinking process in only focussing on law reform, which is quite a blunt instrument, we may think of some of the more subtle and nuanced aspects of how decisions are made and how trials are conducted. So in analysing State versus Zuma I want to tell how we could use some of those narrative tools as a way of understanding how court cases are structured and how that might open up for us different ways of thinking about how we do make court trials a little less fearful. I specifically chose State versus Zuma because I think it is very significant in a range of ways. On the one hand it is very politically significant, I think we are growing in terms of the country's general heart of politics, but think also about the politics and gender and how they have unravelled in many ways in a very conservative way since that trial and how in many ways you have seen a kind of silencing of politics and gender as a consequence of that trial. The other reason why I thought it was a good case to focus on is that you have a very good practitioner in the case of Ken versus Ken. So it is an opportunity to look at someone who is particularly good at defence in terms of analysing how they construct their case. I wouldn't necessarily say the kind of argument and methodology of what is being played out is what you will see in every trial, I think if you go to the regional court you will see something that is a lot more valuable lesson, but I think you have to have perhaps a particularly good example of how when you have somebody who is very highly paid and can dedicate and devote lots of time and does have a lot of experience in dealing with rape trials, how they would go together in putting a rape case together. So it is kind of

ideal in some ways, not necessarily representing everything that happens especially at regional court level, but hopefully it does illuminate how one can think about trials. I think why a narrative was suggested was something that Judge Van der Merwe said, when he talks about how he came to his decisions he talks emphatically about arranging the facts. So I think I think there is some kind of intention of thinking about how well you can arrange it and gets a whole lot of different little bits of information called facts, but you need to arrange them, you need to do something to interpret it with them properly, value it with regards to the burden of proof in a mosaic. So he's talking about something that is quite creative, it's a visual image a mosaic. But he's talking about arranging something into a set of patterns to have some sort of coherent picture to them. That's quite a creative task, it is not something dry and creative only and he suggested some kind of underlying template that forms a kind of mosaic that he was trying to put together from these facts and what I thought was that perhaps in law, which doesn't use the little bits of coloured glass that you use in a mosaic, but you use it as words that the template that you've got to consider in terms of how this arrangement of facts happens is the story or the narrative, which is about words and understanding. So if I was to argue it on that basis that rape trial is a storytelling contest, you have the defence and the prosecution and then final judgement is the thing which pulls them altogether and says this is the truth, this is what happened. The story is about reality rather than reality itself and in social practices and explaining how the world works and then both simultaneously reflecting and constitute their own meaning as well as their own meaning as well as their own protagonist various identities. I think why they are of interest is that [indiscernible 0:10:42] sustain and [indiscernible 0:10:44] and power relations there are also functions and means of social control in that they instruct in those stories what is appropriate behaviour, what is the kind of identity one should have, what should one be, how should one behave and also I think when somebody is cast into a bad character they are more about the consequences of non-conformity. I think you see this illustrated quite clearly in aspects of State versus Zuma. So why am I arguing about rape trials on narratives? I think there are three ends that we have to look at in order to qualify something as a narrative. The first selective appropriation of past events and characters, we don't have everything put into a play, we selectively take what is in there, we selectively choose who is going to testify and select the appropriation of events and characters, but it is not just this random collection of events. There is also some kind of temporal ordering to these events; they have a beginning, middle and an end. Then finally these events and these characters must be related to one another or to some sort of structure often in the context of opposition or struggle I think in order to hold our attention. So this various relationship between the parts where some cause that others follow on from the events of characters [indiscernible 0:12:08] that drives the story line and the integral structural ordering should both provide some kind of narrative closure. The end should tell us why did this happen, why did it happen in the way it did, it

shouldn't necessarily sit in a cloud, it shouldn't leave that as open ended hanging in the air, it should bring them together with some sort of explanation as to why this happened. The important point about these structural elements of this storytelling is a way to understand and organise the wealth of information that you hear in a trial. You have numerous witnesses, you have lots of information, and how does one make sense of it? I think these structural properties of storytelling enable you to do that, they enable you to figure out who was relevant, who is not relevant, why this is relevant, but that is not relevant and how these things fit together in order to give us the coherent story. This kind of construction of stories allows for three operations, first it helps your listeners to identify what is the central action around how this story develops, what are the relations between this action and its surrounding situation of elements. So that you can sort through these various bits and pieces and establish the critical, logical language category normal to aesthetic mentions amongst these various parts and then you can evaluate completeness of the story and its fit with stories of a similar kind. So as it suggests now rape, there is a kind of template or relative limited set of stories that you can tell about rape. So when you hear a story, a rape story you will fit it to what you know about other kinds of stories that does it recall or does it not recall if it doesn't recall then you have a kind of dissidence, what do I now do about this story. So you can hear for example on Friday, which caused a little bit of an outcry, of an eleven year old who was raped by an older family member over a period of time, who was initially sentence to life because she's a child and she is a child under twelve when children are not considered ever capable of having the mental capacity to consent, but nonetheless the high court overturned his life sentence and said she was a willing victim because she had gone to his house on a couple of occasions even though this wasn't likely to happen to her. So clearly that construction of her as a willing victim tells you a whole set of stories about how they expect rape survivors to behave or not to behave. So that is one of the stories and I think it enables people to decide which sort of story do these belong to. I think the problem about these is that these stories and their interpretations of both the listener and the speaker to kind of share a set of normal values that they will both understand what I am telling you. The problem I think comes in when they share very different norms and backgrounds. What for me might make sense to somebody else who comes from a different background, different history, different education, different class, different race may experience it very, very differently. That is why people often find it so difficult to understand is what seemed logical and reasonable to them in the context suddenly becomes something very other and very stigmatising and I think that is one of the more difficult aspects of rape trials and why they are often experienced as a form of victimisation. So in court you get one set of stories against another because there are often no witnesses in there it is typically one person's word against the other so it becomes a credibility contest. Who is the more plausible, who is the more credible and I think one way to distinguish between the kinds of stories we hear is

to think about stock stories and counter stories. Stock stories tend to be created by those in a position of dominance, they are constructed by insiders who have a shared reality and identity, which normalises established power relations and hierarchies. Alternative accounts or counter stories both [indiscernible 0:16:10] stock stories, but they are stories that often struggle to get in because they are not part of the dominant narrative and the stock stories and the kind of stock characters that they rely on are all the more powerful and they are endorsed by law. I think here a typical example if you want to think about in relations to that is what we call the 'human cry rule' and here this constructs with a victim if you believe that if you have really been raped the first thing that you will do is to go and tell the very first person you see what has happened to you [indiscernible 0:16:44]. If you didn't do that then can you be believed, another example which although it was abolished about the cautionary rule, how we see some magistrates and judges continue to think about the cautionary rule around sexual offences. With the cautionary rule stated it was that complainants in sexual offences have a particular tendency to lie more so perhaps than complainants in other matters. So when you hear their evidence you must apply a caution to it and because there are a whole range of reasons why they might lie here one starts to see stock characters that are constructed for rape complainants and these would be under the old cautionary rule, these would be women who fell pregnant and were looking for a father for the child. So she might go and cry rape, women who were somewhat mentally unstable and therefore might be inclined to interpret any kind of sexual event as rape, women who were looking for money so might make up rape in order to obtain money, women who changed their minds. So we have a whole set of these stock characters on which to draw, on which to discount and disqualify what the complainants have to say. So then we have these stock character and stories and then we also have to look at how the courts allow you to tell your story, you don't simply stand up and say this is what has happened to me, you don't tell it in the order you would like to tell it, you don't tell it in the manner you would like to tell it. Legal speech is quite specific and the question and answer format that we use in adversarial trials. So I think in trials you don't stand up and tell your stories, you wait to be guided first by the prosecution and then you go into cross examination by the defence. So the power to control the forms that questions take is a very powerful one. So I think through cross examination one of these is the proposition, "I put it to you that you did the following, my client says that this is the case." So that already forces how you are going to answer, "No that is not correct." So just that one mode of speech forces the way in which the monologue goes. Also presupposition, "But didn't you do this, but wouldn't you have done that," and then the characters, "You did do this, you did do that." So the structures forms the manner in very particular kinds of ways in which the complainant has very little control in how she tells her story, which doesn't mean she has none. I think selective reformulation of what is said as somebody puts it, it transforms a cross examination from a dialogue into a self-serving monologue. I

put it to you, this was said that was said and so forth. So I think if we look at that that gives us the kind of format and structure in which rape trials take place and how stories get told. So if we look at Jacob Zuma's trial there were two different sorts of mutually contradictory stories being told, if we look at the complainant Khwezi her story was about father/daughter rape and the accompanying sense of betrayal. Zuma's story was to quote 'a story about delicious consensual sex and the innocent man falsely accused'. So those are the two kinds of narrative trajectories those trials followed. The characters in Khwezi's cast included her mother, Dr Merle Friedman who was the psychologist, Dr Lakidi who was the examining doctor, two friends of hers Pinkie and Kimmie, Commissioner Thau of the South African Police, JCG Le Roux who was an expert in SMS communication, Yusef Boughardt who testified to conversations that occurred between the complainant and Zuma when he acted as a go between to go and fix the fence and talk about cattle and various other things. There is [indiscernible 0:21:14] who is an expert in HIV and then Superintendent who was the investigating officer. So those were her characters, I want to go into a little bit of detail to be able to contrast them with Zuma's characters so that you get a sense of structure and integral ordering and how they work or don't work in rape trials and how I think in a way that Khwezi was structured is undermining the sense of there being a coherent narrative to what she said. So firstly she gave her testimony, which is traditional rape trails, the complainant says what she has to say, then her mother testified and her mother doesn't add anything really to the story, in fact her mother does her case a good deal of harm because she starts to mention about the previous difficulties that her daughter has had in particular in relation to her mental health and her mother in some ways herself becomes confused and says that perhaps she also needs a psychologist. So we now have somebody who already under cross examination starts to being depicted as unstable being followed by somebody that doesn't add anything from a prevention point of view, but only adds characterisation in Khwezi starting to emerge as somebody who may be somewhat unstable. Then we have the psychologist who doesn't explain that history of instability, which I think was a very important flaw in their whole story because they don't account for some of the weaknesses, from the perspective of a rape trial where the weak points in her story are that can be exploited by the defence. So Dr Friedman merely explained what happens when you are traumatised, how you freeze as oppose to flee and how Khwezi's sense of betrayal, her inability to fight off Zuma at the time is entirely consistent with what we know about the responses of trauma. So she testifies to that, then we have a doctor testifying and he produces some very important evidence, which [indiscernible 0:23:14], which is that basically what he said that Khwezi had is something called a tear to her [indiscernible 0:23:20], which is the classic injury in rape trials. This of course was undermined by suggesting it could have happened while douching or whatever, but he is important because he adds that evidence. Then Pinkie and Kimmie are important because they say, in any way that person was called as the

first witness, the first person she told of what happened to her, but you can see from timing already we have a little bit of a problem here. We have what happened, then you have a mother who doesn't really add anything to what happened, then we have the psychologist explaining the freezing, then we have the medical examination and then we have people saying they were the first people she told. Logically it might have worked better if that had come immediately after her testimony to say that she did tell people straight away and this is what she told us and then to follow with the doctor. We then have the commissioner of police who doesn't really add much again in the way of evidence except again to open up to the defence a whole range of questions about possible irregularities in the way that the trial was conducted and that was something else that we didn't really want and he doesn't add anything to the story. Then there is somebody who testifies about SMS's, doesn't add to the story, doesn't take it up because those SMS's are not in dispute. There is also somebody who is testifying what is said about fences and the possible labola, which again doesn't necessarily add to the story although kind of remorse feelings being expressed. Then you have somebody testifying about HIV, which again doesn't necessarily add to the story because it doesn't tell us anything about why, it doesn't tell us at all really about Khwezi, it just gives us the statistics about HIV and then finally at the very end you have the investigating officer. So you can see here that what you have is a story that is somewhat incoherent, it is introducing people who don't add to the story, who maybe add content, but it shifts back and forth and you don't have a nice coherent flow, you don't have an explanation really for what has happened. I think if anything through some of the witnesses you have allowed these very problematic characterisations of Khwezi to emerge. So we have that and the story closes and a request is brought in to end right there saying the state has brought a case at which point Van der Merwe says the case must proceed. It is now very useful to I think look at how Kim structures his case because it is a very structured point of view and especially if you have a cluster of people together in chunks of time to drive the story forward and also introduce a kind of pasting and sense of climax in a way to add closure to the story. Firstly the first witness he calls is Duduzile Zuma, who is Zuma's daughter and this works very well because you can almost see this acting as a contrast because you have the first appearing in Khwezi's testimony, which is her mother who come across as this very unstable mother/daughter pair and is answered by Kim with a father/daughter pair, which comes across very well. In fact you could argue that Duduzile almost stands there and plays the role of the wife tradition of 'standing by her man', but Duduzile in some ways can't really introduce the wife into a Zuma trial because of the complexities of all the wives, their various roles in his life and what questions that would then raise about the wives and their relationships and what that might say about Zuma and his sexual profanities and behaviour. So Duduzile is introduced and is saying what a fine and upstanding person her father is, how protective she is of him and she introduces it and it comes through in her testimony on numerous

occasions, in seven or eight quotes where she talks about her 'woman's intuition'. I think her woman's intuition becomes very important in terms of undermining Khwezi. That Khwezi is somebody who is on the take, she has insinuated herself into the household, she comes to ask Zuma for money, she has a sense that she wants something, she is trying to invite herself to stay for the night. So she starts to introduce this characterisation of creating somebody who is looking for something, as a bit of a scrounger who is insinuating herself. So she both plays this role I think of lending Zuma her respectability, but she also has this woman's intuition that sends out how dubious Khwezi is. We then have a whole bunch of witnesses who then talk about how unstable Khwezi is in the past. So I think here is good storytelling because it clusters all people that have the same things to say together and it moves the story from the present into the past and here we have a whole lot of witnesses who talk about here they introduce where Duduzile spoke about Khwezi as being somebody who wants things, who is an interloper. They all talk about how sick she is, how they feel sorry for her that she's sick, she goes around accusing men falsely of rape, she is unstable and they represent themselves as performing good in coming forward and stopping Khwezi from going about talking about falsely accusing men of rape. So they take the story backwards and open up this whole history, which the prosecution hasn't addressed that painted this very unstable, dishonest person. Then the story moves forward and we have three people who testify about calls to Zuma on the night, they add nothing of evidentiary value because what Zuma was or wasn't doing in his study before the rape happened really is not relevant, but why those three witnesses are important is that you have this whole cluster of witnesses talk about her dishonesty in the past and now you have another set of witnesses who are testifying to dishonesty immediately prior to the rape because they are all disputing her version she gives of why Zuma was not available. So again we have lying in the past, lying in the present. Then we have another set of witnesses who again move the story backwards, but now they shift the characterisation of creating a completely different direction and this happens to undermine her claim as a victim. Now generally there is a whole cluster or words and claims that go with being a victim, they go with someone who is passive, vulnerable, unable to protect themselves, deeply traumatised and shocked. These three witnesses are there to show that actually Khwezi is a highly assertive sexually demanding individual. They add nothing, all they do is to testify to how - it is previous history and strictly speaking should not have been allowed, but they are there to talk about how fix, six, seven, eight or nine years ago they had sex with Khwezi, how she walked up to them and demanded sex from them, in fact insisted as one detailed, 'If she doesn't have sex now something terrible is going to happen to her'. So here we have a representation of somebody who is clearly not to be seen as a victim, but somebody who is sexually demanding. So they bring that in. So we have a rather schizophrenic representation of Khwezi now starting to emerge, a liar who is very sick, trouble, disturbed and unstable, but somebody who is also sexually

demanding and assertive. They are very contradictory representations and then if you tie them altogether you have Louise Olivier, the psychologist, who says yes she could lie because she suffers from wonderful words like ‘encapsulated delusions’. She has encapsulated delusions; she suffers from possible various kinds of borderline personality disorders etcetera. So here is how they provide narrative closure by saying here are the pictures of this person and you are saying she’s a nutcase who can’t move forward. It was a very, very successful strategy and as you can see from the way the story was structured, the way it moved between past and present it created interest each part built on the other, it presented a far more coherent story than the prosecution’s story, which often introduced witnesses who added nothing, didn’t follow a coherent narrative and in some ways reached its climax with probably guilt because all of the witnesses who come afterwards don’t take the story forward anywhere and we have all this information about Khwezi that is not explained, but it is explained by the defence, which then allows their representation to prevail at the end. So to conclude plots need characters as well as events and the characters that we saw, the characterisation of Khwezi that emerged sometimes the defence was far more successful as that of the prosecution who tried to present who tries to present her as a ... but I think the understand of family that was happening in this trial was very much not the notion of family, it didn’t understand the much more symbolic and fluid approach to family especially a kind of family that is constituted in struggle because I think the notion of family that emerged during this trial was very different to families that are in South Africa and in nuclear setups. So I think if we look at that as example of storytelling and how the two were pitted against each other and I think why at the end of the day the defence won out even though there were the makings of what could have been a strong case in Khwezi’s narrative is what does this mean for how we go forward with rape trials in future. Just to give a quote, ‘it is laws, focus and disqualify, which should become part of the strategy rather than law reform as such’, and I think in this case you see an example besides the defining and disqualification going on and it is that which we really should perhaps be focussing on in a way of going forward if you a more right approach to what happens in trials. The other thing I think to look at is how do we introduce counter stories into this trial and there was an attempt at one point, which Van der Merwe did not take kindly to, was an amicus intervention, which sought to introduce a whole different set of stories in a way of interpreting Khwezi’s conduct and these were stories that grew on with struggle, what had happened in the camps, what had happened in exile, what was the kind of sexual abuse that had happened there, how do we understand the effects of child abuse. So there was an attempt to bring in a set of counter stories and that would have located Khwezi in a very different context, but this attempt to introduce such a counter story was rejected immediately by Van der Merwe and was not taken up by the prosecution either who in theory should have been the ones to have presented such evidence. So I think in going forward we need to think about what role prosecutors play to

introduce stronger counter stories so we don't fall back into stock narrative. Do we open up the case for amicus interventions in order to introduce these different stories. It is difficult in criminal trials, there is already an assumption that you must have the expression of equality, you've got the defence, you've got the prosecution, why do you want to know that a third party is probably there to support the prosecution and therefore you load it against the accused. So I think that is going to be difficult although the Zuma matter didn't tie and close the door to amicus interventions, but there is a thought around how do we introduce those because in many ways the prosecution's interests are not coherent or congruent of those of the complainant. They have a case role to keep within limits and weaker cases that don't look like they are winners are going to be removed off. So I think that poses a whole range of questions, why do we ... and just in conclusion one can see in these two daughters, you can see in this trial something about the way women are being treated post 1994, you can see that are good daughters who support their fathers are the ones who are going inherit post 1994 ... , but those who are more troubled, who ask for things, who perhaps have different stories to tell are the ones that are going to continue to be excluded and treated as the lying pretenders. Thank you.

Justice Yacoob:

Thank you very much indeed; the topic that Jonathan has chosen for me was a very interesting one and it could mean just about anything and that's why I agreed to doing it and the topic was 'judicial persuasion'. You know arguing cases in a court means that we have a habit of standing up when we speak. So it's a kind of habit, I'm sorry about that, I don't mean to power over all of you like you probably think. So I'm in a place that leads Lisa's narrative into some kind of broader context because we have a process in this country in terms of which conflicts are determined. In the old days the king would decide who was right and who was wrong, the king was the prosecutor, the judge and everybody else, but now when A says that something happened and B says no, it didn't happen and something else happened the broader narrative is that we have to have a way of resolving these disputes. We have to have a way of determining what is, what actually happened and what actually can happen, but there is some realisation that it is impossible to determine that. So trials and judges and maybe you don't understand this, don't decide the truth, we don't know what the truth is and judges never know what the truth is and you can never know at the end of a case whether the judge's conclusion has resulted in a true finding or not. What judges do in certain cases is that in criminal cases they look at all the evidence and determine whether the state claim has been established beyond a reasonable doubt. In several cases what judges do is determine whether a case has been established on a balance of probabilities. So judges are not the determination of truth; they weigh evidence in a particular case in order to determine whether the state has established its case or whether the plaintiff has established its case. In

order words the determination in a case is, is there reasonable doubt that this happened, the determination in a civil case is, is there a reasonable probability that this happened. So judging is a human process, judging is a process where it takes place and is determined by a whole range of different factors and in our country as what Lisa says demonstrates, judging takes place in a context. That context depends on how good the lawyers are, some lawyers are better than others, some lawyers handle their cases better than others, some lawyers make their cases better than others. So that it is not necessarily so that truth is achieved and there is a difference between truth on the one hand and justice on the other and what our society has done is established the proposition that in criminal cases unless we are absolutely sure that someone is guilty of a crime that person should not be convicted of a crime. We as a society in that broader narrative, we as a society have adopted that social construct because we would rather as a society that innocent people are not convicted and we pay the price for that because sometimes guilty people go free. That is a broader narrative and that is a construct manner in which one needs to weigh this, it is a criminal trial, it is a criminal case and society has decided that we will convict someone of a crime only if there is evidence beyond reasonable doubt. That is the first thing and of course the availability of it must be borne in mind, the second point that must be made is that judging is always a difficult and complex business. It is a difficult and complex business because although our constitution makes it quite clear that all judges are required to be impartial and independent, judging can never be an objective process. Judging can never be an objective process and should never be an objective process because judging in South Africa is not all about applying points of law it is really about issues on which opinions [indiscernible 0:41:00]. Judging is about humanity, judging is about human beings and therefore is it absolutely essential for a judge to bring his or her subjectivity and his or her own humanity into the judging process because essentially we are judging human beings and that humanity is essential. The issue now is not whether judges should be objective; the issue is what is the correct balance between the subjective and the objective, now I need to put the microphone down to read a quotation to you quickly, which demonstrates what I'm trying to say, can everyone hear me, this would demonstrate what I'm trying to say much better than I could ever say it. To demonstrate a proposition that there are differences of opinion in the judging process and that difference of opinion cannot be involved at all because every judge is different and paragraph 42 of a particular judgement says,

‘Absolute neutrality on the part of a judicial officer can hardly ever be achieved’.

This consideration was elegantly described as follows by Cardozo in an American case. What he said was that, ‘There is in each and every one of us a stream of tendencies, whether you choose to call it philosophy or not, which gives coherence and direction, thought and action. Judges cannot escape that current any more than other mortals, all of their lives forces which we do not recognise and cannot

name have been [indiscernible 0:42:52]. Inherent changed, traditional beliefs, acquired conviction and the resultant is an outlook on life, a conception of social needs in this mental background every problem finds its setting. We may try to see things as objectively as we please nonetheless we can never see them in any eyes except our own. Deep in our consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the person whether she or he be a litigant or a judge’.

That is fundamental, so we’ve got to realise that there are differences of opinion and differences of opinion mean that people have different views about things, people see things differently and it is that subjective current which is always the problem. And what is the relevance of this to art, the relevance of all of this to the narrative of art is that in our country and in many other countries it is judges who decide whether a work of art is offensive or not offensive as was the case in the Spear case. It is judges who determine that and the determination of that depends on where you come from and who we are and in South Africa the narrative is about the extent to which judges in our country have imbibed constitutional values. If you think of our constitutional value for example and work out to what extent, because judges are a representative of our society, to what extent has our society imbibed our constitutional values. Now the interesting thing is that our constitution says for example that gay and lesbian people are equal to all others, I promise you that 90/95/96/97% of our society believe that gay and lesbian people are committing sin. In that sense I belong to an elite club of maybe 100000 people in this whole country who adhere to these constitutional values, who embrace them and who think they are true. Our constitution says men and women are equal, 90% of men believe that women are absolutely and totally unequal. Our constitution says that we should be non-racist, 90% of people of all races believe that their races are superior. 90% of all people believe that their religious beliefs are superior. In rape cases it’s the attitude to women that becomes important, in other cases there are other attitudes that become important and I would end having made these broad points by saying that the judicial personation, the judicial approach, the judicial orientation is so different from person to person that cases that come before judges have been crafted in a particular way, which ensure that they take into account that judicial personation depending on who the judge is and it is precisely because there are these differences of opinion that we have for example eleven judges in the Constitutional Court of South Africa and in our North American trends that have arrived we have nine judges in the Supreme Court of the United States of America precisely because the truth is a very difficult thing to arrive at. There is nothing that can be said to be absolutely right and absolutely wrong and the hope is that if we put eleven people together or nine people together and we have different approaches and different ways of putting things and looking at things and the resultant would be a collective approach which would come as close to the truth as one possibly can, with a single judge of

course that is extremely difficult to achieve. I would like to tell you about another case just to make the point of difference of opinion and it is in a sense this case about art. It is the case of Dey versus Le Roux, which came from the constitutional court.

A child, standard eight, grade ten they call it these days, was sitting at his computer, didn't particularly like his principal or the deputy principal of a famous high school in Pretoria. What the kid did was went into a gay listeners website, found a picture of two men naked sitting together in a very compromising and interesting circumstances, holding each other's hands in sexually suggestive positions and so on and so on. Then went to the school website and found the pictures of the principal and the deputy principal and took the head of the principal and put it onto one of the naked men and took the head of the deputy principal and put it onto the other naked man and of course this was a wonderful work of art, which the kid was very proud of. So he had to take that to school and so on, they were discovered the next day and of course two or three hundred people had seen it, the thing had been on the school noticeboard for half an hour or something and the kid came before the high court. This principal, idiotically in my view, after the child had been through school punishment and so on and so on joined a couple of them and sued them for defamation on the basis that his sense of dignity had been seriously injured and his reputation has been seriously degraded in consequence of this publication. The high court held that this was defamation that the principal's dignity and reputation had been seriously injured and was awarded R100000 as damages. The Supreme Court of Appeal said, four of the judges came to the conclusion that the person's reputation had been affected, one of them came to the conclusion that the person's dignity had been seriously impaired, apparent difference of opinion and they decided that the damages of R100000 would actually stand. Our court against it were three judges, I wrote that judgement coming to the conclusion that this was obviously a childish prank. It was really nothing, principals and deputy principals should be strong enough to put up with this and understand [indiscernible 0:50:01]. Anybody looking at it would know immediately that this was a stupid childish prank and therefore this thing was overdone. Five judges came to the conclusion that it was a dignity and it was a good name issue, three judges came to the conclusion that this was a dignity issue and in the end they reduced the damages from R100000 to R30000.

So the difference of opinion in judging depends on a whole range of different circumstances, it's a good thing, it's a bad thing, but it changes as time goes on and that's why the role of art in changing society and changing views and changing attitudes and trying to create the kind of society the constitution creates. The very important part because as you change society, as you get society to recognise more and more how we should develop to the values that our constitution requires so judges who are no more than a reflection of our own society begin to change the views. So in a sense that narrative is there, the narrative is changeable,

judicial persuasion is there, judicial persuasion is also changeable and art is one of the ways in which we can change that narrative and ensure that society can be extremely different from what it is now.

Thank you very much.

Are there persons who wish to make comments or questions?

Audience member 1:

Regarding a couple of things that Lisa said in particular, one was I thought this way of thinking about a single trial in terms of narrative was really useful, but you decided to locate the narrative at one very particular level, which was each sides arguments. So you ended up with a picture in which there are two narratives within a single trial, but what it sound like and what was fascinating about the way you told it that there were narratives all the way up and down. So the way you put it was that there are facts in the narrative. Well I mean we heard about forensics last night and each of those facts is itself a piece of storytelling, but also the larger scale, the way that you presented the relationship between the first and the second narrative and the way that you end up with open questions that produce suspense that then gets addresses in the second suggests that there's in fact an umbrella narrative that unites the two. In other words a good response narrative is in fact a completion of the story not just a new one. So I thought that was really interesting and what I really briefly wanted to ask about rather than just comment on what was the role of performance here. So your title was not just about narrative, it was about spectacle and I was wondering beyond simply telling a story through words what is going with bodies, what is going on through all of this as a series of again different scales, individual performances, but also in a sense as a big collective performance and how that depends on the kind of audience you have so how that means something different for a judge, for other people in the court people outside of the court and in terms of the way that the whole thing is represented by journalists.

Audience Member 2:

I just want to draw a connection between authorship and authority in the sense that the kind of middle century idea of an author telling a story has to some significant extent been muddied by this modern society idea of democratising voice through consciousness and so on. I think in some sense to conceptualise a rape trial as a judge taking on the role of author essentially and telling the story may not properly reflect the way the trial functions in some sense. I suppose in the South African context of one rape trial or two rape trials is seen as disgrace and the idea of dignity in the first rape case in the one where he if forced to leave the university he then has to be because his dignity has been affronted and I think in some ways there's a parallel there with Zuma in the sense that the way that you

were saying the trial was told as Zuma was this upstanding citizen whose dignity had been challenged by Khwezi. I was wondering whether one could see it as in criticism by David by showing that his voice doesn't hold true because of all the other voices that echo around it and maybe in some ways the trial, the Zuma trial within the South African society plays a similar role and maybe that's something that the courts should be criticised for on a daily basis because there is no space for that.

Audience Member 3:

Thank you both, Lisa I think this is a question for you in just what you were saying around Khwezi's narrative and this idea that putting her mother first in the sort of sequence of people speaking about actually hurting her case because it implied that what the mother said was that potentially Khwezi was unstable psychologically that's what you said right. This is interesting because it gets to this question about the stock character because it seems to be that Khwezi's mother could have just as easily helped her case, but that has more to do with what we need to see as a stock character in this narrative, which is enabled by a person. So someone with mental health is not capable of being raped and that implies a whole different sort of agency or something in the language in the carrying out of the case. So I was wondering if you could say something about that that there is this sort of idea that has nothing to do with what actually happened it has more to do with I was there to see or to understand and enable in terms of this question.

Lisa:

Thank you, those were all really interesting questions and I also want to thank you to Judge Yacoob. I think as you are saying the trial is embedded in a whole range of multiple narratives and the broader narrative of this trial is also Zuma's story about a political conspiracy against him. So I think it was a part of it was being pulled into that, I think there was definitely more on multiple narratives some of which were there, but never really explored and brought into the trial. So what I have done is extracted two, but they are far from being the only narratives. I think that is the way to look at rape trials and I think that Judge Yacoob is also alluding to that is that when somebody is judging and they themselves are hearing a whole set of stories and interpretations around to whatever they are doing as well. It relates to the point I think just having worked as an expert witness, it is something to hear Judge Yacoob starting from a point that judges do not decide the truth. I don't know how much of the majority says that. In dealing with a fair number of judges and magistrates there is an assumption that it is the truth and that is why they are always so powerful because it says, "These are the facts, you were wearing a kanga, you did not have underwear on, therefore you were looking to be raped." So it puts out into the broader society that this is what women who lie do, this is how they behave. I think this is the power of the setup of truth is the way

in which it then says these are the facts and this is what happened. The question is suppose is how do we undermine that kind of authority, that kind of authorship and that kind of authority in order to allow for something that is a lot more freer, Judge Yacoob was saying to come into court and I think that then becomes really stabilising of law because if it does set itself up as the ultimate arbiter and authority when you start to suggest that actually it might be a lot more subjective, there might be many different ways of reading the things and who we are may be covering very strongly how things are decided and if there could have been a very different decision made had I been a different person on the bench. I think it is bound to start questions of where do we go with the law, where do we go with the conflict. So I think that is why most people would prefer the whole notion of the law as the authority, which is different. So I think what you pointed out about the narratives and having different kinds of narratives and acknowledging that there are multiple narratives. So let's try and get to the question of performance in the audience. In Zuma in particular, Zuma was a spectacular trial, there was both what was going in inside the court, but there was more in as much as a spectacular point as to what was happening outside the court. Where we had the complainant being stoned, where we had pictures of her being set alight, you had the campaign, a very small group of rape activists, there was hoards of Zuma supporters who had been bussed in, you had a battle inside court and a very different kind of battle going on outside the court, which is telling you something different as well. So I think there was a story being told outside court, which wasn't following what was going on in court. So there were almost two audiences going on in that trial, which was very interesting. Then we go onto the ones who were reading the paper, we were a different sort of audience as well and I think what was interesting about Zuma was how he understood very well which audience he was talking to. So like his choice to speak in a very traditional form of Zulu for example, the kinds of metaphors that he used. That was speaking to a very particular audience and establishing a very particular kind of credibility with them. So yes, I think those questions of performance on audience, how we speak, who we speak to are important. Going back to what Judge Yacoob was saying is that again cases a very carefully crafted towards who your judge is. Your first question you ask when you are asked to go to trial is, "Who is the judge?" So that one can figure out what is the kind of evidence they are likely to respond to, what is the kind of stuff you just don't put before him because it is going to send the matter into the water. Again that goes back to the question of how truthful and authoritative can law be. What sort of law would we have if we did come from a starting point to being authoritative? In terms of enablement I think what this trial did not do was the really full stigma around psychological difficulty, it didn't explore that in any way, it wasn't in any way sympathetic and it simply was not reinforced and it remains a problem to this day. You can just see it in the way funding is allocated to mental health services versus other kinds of services. So yes, Khwezi's mother could have maybe have intended to be a good witness

because here is a mother on behalf of her daughter, but that is not what happened and I think this is what makes trials so crack continuant because you can craft your story, but you don't know what's going to come out on the day while someone is performing. I think that was why in that case they were able to push the mother into the other narratives around mental instability in a stigmatising nature. So I don't know if that answers your question, but yes I think there were another whole set of stories being drawn and that is why Miss Olivier's case became so important about mental instability and how the minute you ever have one episode even in Khwezi's case we were talking about this more than twelve years ago, even in the present day you will continue to be tainted with that instability.

Yacoob:

Just to give you an idea of how serious the differences of opinion in these cases are I can say now that I'm not a judge, that I have very, very serious problems about the Zuma judgement and there is, having an open mind, there is more than 50% of a chance that if I had sat in an appeal on that case I would have set aside that judgement because I wouldn't have come to the conclusion that placed too much emphasis on the past. I would have gone on the basis that even a prostitute has a right not to be raped, I would have gone on the basis that a girl who has mental trouble has more of a chance of being raped than others because she is more vulnerable. So every conclusion which this judge made one way at a level of evaluative judgement I would probably have gone the other way, but coming back to some of the questions. I accept that journalists do represent certain cases in a somewhat different way and it's very important because quite often in big trials it is not the trials really that matter, in large trials the public perception becomes a very important issue and judges, some of them, in a subjective sort of way want to preserve their own credibility and somehow if there is a public opinion which is created one way you need to be a particularly strong personality to go against it and it does sometimes happen that the way in which something is projected in society does have some indications for a way in which a case is judged. About say the judge being the author, I wouldn't say the judge is author of the judgement, the difference is that this judge is not the author of fiction, the judge is the author who summarises something that happened in a particular case and when you put in a subjective element you get two judges to write the story of the same case they would write it absolutely differently even if their conclusions would be the same. And then about medical health I have already said that I think medical health is to an extent relevant because the worse her mental health the more likely it would be that it is inevitable that she had been raped. So I would have seen the medical health then going the other way.

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Audience Member 4:

I would like to continue with the last conclusion to the previous round of questions regarding the mental health issue and I'm wondering if that's not another aspect

of your paper Lisa that it focuses mainly on gender construction of narratives and I would like to submit that we may have to expand the scope beyond the frame of narratives and even beyond the scope of the narratives because the very structuration of narrative would go for appearing, plausibility, dilatibility, comprehensibility, integration, closure etcetera. Now in the case of so called mental instability I do believe that we are getting to a point in the philosophy of psychiatry where the law has not reached yet. I think we can seriously question the standard of the reasonable man in the relation that is often positive between intention and the action as criteria for moral agency. I think we can with particular moralistic and even mathematical possibilities explore and expand this idea of reasonable or overthrow the idea of reasonable doubt to implement things like different orders of intention and different positionalities in statements that are being made that would give us some indication of how those relations could be assessed, restructured and reframed. I would like to suggest that we aspire the scope of narrative structuration drawn from other kinds of statements and testimonies that would not at this stage be considered reasonable by law. Thanks.

Audience Member 5:

Thank you very much for two extraordinary thought provoking papers and in a sense my question picks up from yours in response to the last questions and it also picks up on your question of Coetzee's disgrace. So thank you Justice Yacoob, I really enjoyed what you were saying about art and having the power to change the field of perceptions of what counts and what matters and one of the things that really interests me and looking beyond narrative too, aesthetics more broadly. One of the meanings of aesthetics is the science of the conditions of sensory perception. So my question to you is yes art can change our view of perception and can alter our view of things, but how can the law and the world of the arts be more playfully integrated so that the conditions of sensory perception are changed. So that what before has been unheard can now be heard or what has been voiceless now has a hearing or what is invisible now features. So this puts me in mind of something that GK Chesterton said, he said, 'Morality like art means drawing the line somewhere'. So I think when you see the aesthetics of law in the role of the judge in that sense. Now just picking up on the first question to you Lisa about the information on Coetzee's disgrace, what is interesting about that is there are two rape cases or rape incidents and they are also open to the question to whether they count as rape or not, what really interests me in the case of Melanie Isaacs it is unclear that she wrote the charge herself, it looks as though the father and her boyfriend wrote this little report to get the ... out of his university position. And Melanie seems to, if you read that very carefully, I am not convinced that Melanie is the one who came up with the idea of making the charge and then this picking up of this idea of how do you make what the unheard heard. Well Lucy doesn't report her in and her reasons for that I think are very interesting in relation to this question about narrative because to put something into a

narrative is to use your phrasing, 'make sense of something' and there seems to be some things that are beyond sense, beyond reason and yet these are the terms and the conditions on which judgements are made. So I think if art has a role it is to be not necessarily the representation of something undignified, but to be such a disruptive force that it makes it possible to change that ambit of perception. So that even the irrational or the unreasonable or the thing that you can't make sense of can be something that can count and matter in making the judgement. Thank you.

Lisa:

We have actually got quite a rich scene of rape narratives in South Africa to look at beyond Coetzee, which is very interesting. Some of it is also biographical and it is interesting how even in stories written by rape survivors themselves you can see there is some sort of unconscious narrative or some kind of way of, "I need to tell my story in a particular kind of way." That in itself is really, really important. All these ideas of speaking out, how you must speak, when you must speak and what is it that you must speak of. So I think there is a lot there that we need to look at quite carefully where I think we can learn a great deal from literature and narrative as to how when something like that happens to you how you think of it and how you try to make sense of it to yourself and then what are the structures that we give to try and make sense of those things. I think that is why testifying in a rape trial is in some ways such an incomprehensible experience because on the one hand I think most of us like to think that we are the authors of our own lives, we are the authors of our own particular narratives and when you step into the trial what is so disruptive about it is when you suddenly discover that you have lost control and you have lost authorship. Somebody else is literally rewriting you and how they understood what happened to you and who you are and you become another person who is unfamiliar to yourself. So I think just testifying in itself is an extraordinary destabilising experience and very, very disruptive. So you have to rethink who you are and I think what also becomes quite difficult and interesting about that experience is that it's not only the court who is re-authoring you, it's the public who suddenly because they read about this in the newspaper or sitting in a trial they now have their own sets of perceptions and they slot whatever happened to you into their own sets of narratives. So I think there's a whole way in which if we are using the example of rape raising all these questions of who are the authors, who is the authorship, can I tell a coherent story, where are the gaps in my story, why can I not put things together and if one is having any sort of therapeutic encounter much of this is about how does one find narrative closure on this experience. So yes I think there is a close relationship in what happens in law and mental health wants you to tell your stories, how you want to make sense of yourself to yourself that could be looked at very fruitfully. I think you are raising some very interesting questions in that regard and I think that mental health is really kind of - and I mention what Judge Yacoob said is how does one alter and

transform law to allow different understandings of experience and voice into that arena because I think it is founded on questions of logic, rationality and reasonableness and I would be very interested to hear from the judge how one shifts that and allows for understandings of multiple interpretations of what is going on. I don't know how one does that and I would be very interested to hear from Judge Yacoob because most people think of well if there are enough judges, enough training they will think differently and we can restructure their thinking in a different way and I'm sure it's not that simple. So I would be interested to hear how one does allow for those different modes of thinking, being, whatever to come into court. Just to go back to dignity and notions of dignity, dignity is a very difficult value because in some ways it can be extraordinarily conservative and I think the example you gave Judge Yacoob of the principal who felt his dignity had been offended is an example of that. What he was suggesting in that is being represented as a gay man is offensive and it is an insult to my dignity and in itself that kind of sentence is something like the dignity of gay people and they can be undignified and that representation makes you undignified. So that dignity can be very troubling because of how it can be used in quite conservative ways and yet in some ways it is the basis of a human rights complaint because it is the way in which it embraces you and makes you feel undignified to different kinds of people. So dignity for me has always been a bit of a troubling value, it is one where we put a great store on I think in constitution as well, but it does allow people to think their dignity has been offended. Sometimes it should be because they are taking themselves too seriously, but sometimes their dignity does need to be defended. So I think as in the case of in Coetzee, that question you raised about who is telling the story, who is writing it and to what end, of course travels and all of that, but yes dignity is an interesting and challenging value.

Yacoob:

Now to start where Lisa left off it was not as crass as all that in the case, they didn't say that because they were gay that was a problem to which they have their dignity. They said they were protected, the principal and the deputy principal, gay or not were protected as having themselves photographed being engaged in public intimate acts amounting to sexual intercourse. That was really their problem. The kind of thing that they would do quietly behind closed doors they were represented as doing publicly and openly and that was really the problem there. I think the importance of the distinction between the truth and proof beyond a reasonable doubt is a very important point. That distinction must not be lost sight of because it is only when you are trying to arrive at the truth, which I am going to say it is impossible to do because human beings will not find it possible to find out exactly what is the truth and what is the circumstance that issues of taking into account different dimensions and so on and so on come into play. Unfortunately I would work on the basis that it is quite impossible for judges to determine what the truth is and I must say to Lisa that 99% of court judgements

make it perfectly clear that what they are finding is they are making a finding beyond a reasonable doubt. I think the public perception is that the judges arrive at the truth and the sooner the public begin to understand this, the better. As far as reasonableness is concerned obviously there are many conceptions of reasonableness and judges may refer to what reasonableness is, but I would suggest the only way around that problem is the important of context. So what is reasonable depends on the circumstances, what was reasonable twenty years ago will not be reasonable today, what was reasonable two hundred and fifty years ago will not be reasonable today. I will give you an example; two hundred years ago American and English society thought it was absolutely right to sentence people to death for cutting down trees and killing deer. Today no one would ever say that that is an appropriate proposition and yet you will not believe that two hundred years ago people actually thought that as a majority in society. Now thankfully our views about that penalty are different. So all I can say about that meaningfully is that judges do not find the truth, they cannot find the truth, that reasonableness in the law depends on context, depends on the circumstances, it changes from time to time and unfortunately because of the subjective element changes from person to person and that leads me to the question of integration of the law and the arts. The art is a part of society, all arts are a part of society, laws are a part of society and therefore subconsciously the level of integration continues to take place because judges as human beings are exposed to the arts to a greater or a lesser degree and I must say that the greater the degree to which judges are exposed to the arts of one sort or another the better the judges we will actually become and that integration is a societal process, which actually is determined by the quality of the human being of the judge on the one hand and the quality of the human being of the artist on the other and the quality of art and human being interacting with each other. I don't think one can take matters beyond that and I don't think therefore that judging can go beyond reason as it is understood at a particular point in time knowing that that understanding is different. The final thing I want to emphasize is that one must not work on the assumption that in rape cases that come before a court the man is necessarily guilty. There are two narratives, the woman does say one thing, the man often does say another and it is the duty of the judge to determine which is the narrative that can be said to be a narrative which is beyond a reasonable doubt. So in a way while the complainant suffers by having a narrative constructed for her, which is true, the accused also suffers because when the accused gives evidence the prosecution says to the accused, "I put this to you and I put that to you and my client denies that and my client denies this and I suggest that this happened and that happened," and so on and this is just a function of a confrontational legal system that we have. That kind of legal system avails in the United States of America, in many parts of Africa and in Europe, but there is a different legal system in Europe which is not confrontational, which allows judges to interrogate the cases before them. Not in terms of what people put forward

and not in terms of cross examination, but in a very different way, but that is a different question whether the legal system that our countries have, which pertains to two sides telling a story and it will depend on the judges deciding which side has been established beyond reasonable doubt on the balance of probability, which is a confrontational argumentative one is the right kind of legal system to have or whether the proper legal system to have is to let everyone say what they want to say, not in a confrontational way and then to try to bring the story together and to try and work out what happened in a very different way. That is the continental adjudication system and there is not enough debate in this country about what is the appropriate system. I mean these systems have been going on in our respective countries for hundreds of years and you will not find lawyers either in Europe or here except for a very few questioning whether their systems are better than other people's systems because they have been going on for hundreds of years.

Audience Member 6:

Also again thank you very much for your presentations. I am thinking about court cases in the context of what the judge has said is there is a numerical minority in terms of equality and how the narratives should actually plan its intention should be yes for the potential victim, but also to change the perceptions on the different understandings of the broader society. So that that numerical minority view then can become the dominant view and I think through managing things like that after the Zuma case the project around gender kind of really disappeared and I think that what that case, what the Zuma case did was that it actually destroyed that project. So it was just much more than him becoming scot-free, but it was also then put to the whole broader society's mind was that the whole idea of quality you know or abuse of women isn't really anything serious you know and I think for all the different kinds of equality that we do have I think that's one of our biggest problems is that even if it is litigation how do we then you know contextualise that narrative that actually goes further than just that very court case.