

**1 DAUGHTERS OF THE REVOLUTION:
SPECTACLE AND NARRATIVE IN *S V ZUMA***

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INTRODUCTION

“It must have been clear from the beginning,” announced Judge van der Merwe during the trial of Jacob Zuma for rape “that I would not have allowed myself to be influenced or distracted by anything or anybody. A judicial approach cannot be anything else than impartial, objective, fair and totally dedicated to the task lying ahead” (*S v Zuma* 2006: 1-2). Underlining the independence and integrity of his decision-making yet again some lines later, he sternly asserted “I at no stage whatsoever did I intend satisfying anybody and I will certainly not do it now” (*ibid*: 2). Indeed, he hoped that the live broadcast of his judgment would “serve as an educational tool” for the public, which would “now realise what enormous effort goes into a trial like this and with what objectivity and dedication it is approached” (*ibid*: 4)

Thus established, van der Merwe continued his public tutorial in judicial method: summarising witnesses’ evidence in a manner indicating his mind to be unswayed by favour or sentiment; applying formal legal procedures, such as the rules of evidence and the use of case law; and having strict regard for the facts, duly selected and properly admitted on grounds of their logical pertinency. On this basis he came to the conclusion that Jacob Zuma was innocent of the charge of rape and acquitted him accordingly.

This is certainly one way to understand how the final decision in *S v Zuma* 2006 WLD CC 321/05 was arrived at. Another is to see van der Merwe, like judicial officers generally, as having engaged in a far more imaginative process – one of “1...arrang[ing] the facts, properly evaluated, particularly with regard to the burden of proof, in a mosaic in order to determine whether the alleged proof indeed goes beyond reasonable doubt...” (*ibid*: 144).¹ This quote likens judicial decision-making to a process of sorting and ordering assorted bits and pieces of evidence into some sort of recognisable and coherent form of ‘The Truth.’ Implicit too in this metaphor of the mosaic, is the suggestion of an underlying template guiding and patterning this final truth-design. And because language and words (rather than small coloured pieces of glass) are the currency in which the law trades, this chapter argues that this template, or form, is the story.

On this basis I argue that the trial of Jacob Zuma for rape was a story-telling contest, one in which a narrative of traumatising father-daughter rape was pitted against another of “delicious” consensual sex, with the final judgement acting as the authoritative or master narrative. In characterising it as such, I am not claiming that legal decisions are works of fiction, but suggesting that these master narratives are stories about reality, rather than reality itself. Narratives are social practices that explain how the world works. They simultaneously reflect and constitute their own meaning as well as their protagonists’ various identities.

However, like any social practice, narratives are likely to reflect, sustain and reproduce dominant cultural meanings and power relations (Ewick and Silbey 1995: 211). In this way they contribute to hegemony by functioning as a means of social control, instructing about what is expected and warning about the consequence of non-conformity (Ewick and Silbey 1995: 222). I illustrate this argument by examining the more reproofing and admonitory aspects of the judgement, as well as the manner in which Judge van der Merwe assessed the credibility of Kwezi, the complainant in this matter.

Judicial narratives about rape: a theoretical framework

At least three elements need to be present before something can be qualified as a narrative. First, some sort of selective appropriation of past events and characters needs to be apparent; second, events should show some sort of temporal ordering into the beginning, middle and end; and finally, the events and/or characters must be related to one another and to some overarching structure, often in the context of opposition or struggle. This relationship between the parts where some cause, or others follow on from events or characters, constitutes the plot which drives the storyline. Temporal and structural ordering should produce both narrative closure and narrative causality – a statement as to why and how things happened as they did (Ewick and Silbey 1995: 200). These structural properties of storytelling provide a systematic means of organising the wealth of diverse information presented by witnesses during the course of a criminal trial into some sort of recognisable and coherent form (Bennett and Feldman, 1981).

Story construction enables three interpretive operations. First, stories assist listeners to identify and isolate the central action around which the story develops; and then, as a next step, establish relations between this action and its surrounding situational elements. In doing so, the listener sorts through the information and creates empirical, logical, language category, normative and aesthetic connections among the various bits and pieces presented. The interpretation that finally emerges from these processes can then be evaluated for its completeness and fit with stories of a similar type. Interpreters must know when sufficient connections have been established to make a consistent and confident interpretation, as well as what information is missing to finish an incomplete or inadequate story (*ibid*: 61). However, because the interpretation of stories requires the teller and the listener to share a set of norms, assumptions and behaviours, when witnesses and presiding officers hold differing understandings about society and social action, what makes sense to the one may be rejected by the other.

Narrative can therefore be thought about not only as content, but also as form and procedure (Brooks 2002: 2). In this chapter I analyse not only the content of the competing narratives in the Zuma trial, but also how these narratives are structured.

Rape narratives and the law

At a minimum, the basic storyline to which all rapes must conform in terms of South African common law is “intentional, unlawful sexual intercourse with a woman without her consent.” Legally, this is only the starting point, with a number of further legal requirements needing to be met before a rape narrative can be considered credible by a court. Plausibility will depend not only on how well the particular events of individual rapes conform to expectations, but also on the character of the victim.

Estrich (1987) argues that an informal distinction exists in practice between “real” rapes and “simple” rapes. Real rapes are perpetrated by violent strangers, who are typically also armed and ready to injure their victims. Simple rapes by contrast, typically occur between people known to, or intimately involved with, one another and rarely result in injury. In the absence of corroborating evidence, such as injuries, these cases typically pit one person’s word against another and turn rape trials into credibility contests. In narrative terms, this is the distinction between a stock story and a counter-story. Stock stories tend to be created by those in a position of dominance. The stories told by such insiders construct a shared, reality-affirming, in-group identity which normalises established power relations and hierarchies. The exclusion of alternative accounts, or counter-stories, both circumscribes and part-constitutes stock stories. The construction of stock stories is all the more powerful when endorsed by the law (Delgado,1989).

In terms of the stock account, true victims of rape are expected to tell others of the violation done to them at the first reasonable opportunity. Any delay in doing so raises doubt as to the veracity of their claims.² Stock rape narratives are also driven by virtuous female characters who are modest, chaste and upright and to be distinguished from malefactors with sexual histories, or who falsely cry rape. Legal decisions abound with these feminine caricatures: the sexual neurotic prone to fantasy, hysteria and subtle mental complexes - including an “unchaste mentality” which concocts imaginary sex incidents in which she is cast as victim or heroine (S v Balhuber 1987 (1) PH H22 (A); see also R v Rautenbach 1949 (1) SA 135 (A)); the unmarried, pregnant woman who accuses someone of sound financial standing of rape to ensure the child is provided for financially (Hoffman and Zeffert 1998: 579); the hysterical neurotic who imagines things that did not happen (*ibid*: 580); and the spurned woman who concocts false rape claims out of wounded vanity and spite (*ibid*). Her sister is the vengeful woman seeking redress for an affront to her pride and dignity (R v M 1947 (4) SA 489 (N)). Still others include the convincing liar gifted with the ability to implicate the wrong man (Hoffman and Zeffert 1989: 580); the woman who changes her mind after sex due to shame, disgust or remorse (S v Balhuber 1987 (1) PH H22 (A)); the woman with a motive falsely to implicate the accused for secret, hidden reasons difficult to divine (Hoffman and Zeffert 1989: 580); and finally, the unfaithful or dishonest woman who concocts a rape claim to cover up sex with a man other than her regular male sexual partner (S v Balhuber 1987 (1) PH H22 (A)).

The ever-present possibility of such female dangers was the basis of the cautionary rule around sexual offences which obliged judicial officers’ to treat rape complainants’ evidence with caution and to always be ready to speculate about hidden motives. While the Supreme Court of Appeal³ effectively abolished the blanket application of this particular cautionary rule in 1998, finding it to “unjustly stereotype” rape complainants, as well as to be both “irrational” and “outdated” it still left judges the discretion to apply a “cautionary approach” to particular cases.

Legal rape narratives thus do not strictly confine themselves to what occurred between the two protagonists but range further across time and space to include stories about

sexual relations with other men, under different circumstances and at different times. Usually the prosecution will seek to keep such stories out while the defence will seek their inclusion as necessary, or relevant, to the accused's narrative.

Finally, how rape narratives are recounted in court is also tightly controlled, with the adversarial question-answer format of trials ceding lawyers considerable power to direct, formulate and shape trial narratives (Bronstein, 1994; Matoeisian, 1995; and Ehrlich, 2001). In particular, the power to control the forms questions take (propositions, presuppositions, declaratives and selective (re)formulations) and thus the answers that may be given transforms "the cross-examination from dialogue into self-serving monologue" (Conley and O'Barr 1998: 26).

PLOTTING COMPETING NARRATIVES: THE PROSECUTION AND DEFENCE'S CASES

The prosecution's version

Because Kwezi and Zuma are known to one another, Kwezi was visiting the Zuma home of her own volition and she was left unmarked by any visible physical injury, Kwezi's experience does not accord with the standard 'real' rape narrative and is thus made more challenging to prove - although not impossible. Two elements of the legal definition - intentionality and lack of consent - are particularly relevant to her case and require her story to show that she did not consent to sex with Zuma; that Zuma was aware of her non-consent; and finally, even knowing this, he proceeded to force sex on her anyway. 1

Kwezi's story is one of father-daughter rape and its accompanying sense of betrayal. Its antecedents lie in a history of exile and the relational bonds and surrogate families it fostered. This father-daughter relationship is the essential causal link to the various events comprising Kwezi's story. Crucially, it explains why, once she realised that Zuma intended having sex with her, she was taken completely off guard and froze instead of resisting him.

Left confused and disbelieving by Zuma's incestuous violation of their relationship she decided against leaving the Zuma household and remained sleepless for part of the night. At one point she sent the following cryptic sms in the early hours of the morning to her friend Kimi: "malume had been looking at me sexually. (There must be something in my drawers. The mothers must not be told.)" Early the next morning, still dazed by events, she bathed, made a phone call and left for work. Some hours later that morning she broke down in tears. Later, when a friend phoned, she told her that she had been raped and arrangements were made for a medical examination to be carried out that evening. The rape was then reported to the police the following day. Thereafter various parties attempted to persuade Kwezi to withdraw the charges out of consideration for the political consequences for Zuma. Zuma also offered to make amends.

Courts very rarely accept stories at face value; additional witnesses must also be introduced to corroborate and add to the account placed before them. In the prosecution's

case these witnesses are Kwezi's mother, Dr Merle Friedman, Dr Likibi, Pinkie, Kimi, Commissioner Taioe, JCG le Roux, Yusuf Docrat, Desmond Martin and Superintendent Linda.

Kwezi's mother adds little to support Kwezi's version, her testimony being confined to the fact that Zuma apologised and offered, in reparation, to assist Kwezi with her studies and to fence off the mother's property. Presumably her evidence is tendered to imply that Zuma felt guilt and remorse after raping Kwezi and was therefore attempting to make amends to secure the silence of both Kwezi and her mother. However, if the prosecution intended to develop this aspect of their plot, then from a structural point of view, it would have strengthened their story to have immediately followed this evidence with that of the attorney, Yusuf Docrat, who testified to the calls made between the various parties and the intermediary role he played between Zuma and the K family. But six other witnesses precede his evidence to this effect, breaking the thread in this strand of the story.

This part of the story is also in the wrong place, being about events that took place days after the rape rather in the immediate aftermath. Logically it therefore belongs with the end of the story, rather than the beginning or middle. Thus in terms of pace and substance, the mother's evidence is somewhat peripheral to the central facts of the matter. Her testimony merely served to slow down the prosecution's case and enabled van der Merwe to observe, "The evidence of the complainant's mother does not really take the matter much further" (*Zuma*: 157) and he was not "much impressed by the complainant's mother's evidence" (*ibid*: 158). In fact, the mother's chief contribution is to the defence's story.

With the evidence of psychologist Dr Merle Friedman, the prosecution returns to events both during and immediately after the rape. This evidence is intended to authoritatively endorse Kwezi's account of her freezing during the rape and subsequent delay in reporting the attack.

Dr Likibi testified next about the findings of the forensic examination of Kwezi. Most significant was the finding of a small, fresh tear to the posterior fourchette. According to Dr Likibi such tears could be caused by having intercourse following an extended period of abstinence. Forcing penetration before the vagina was adequately lubricated could also result in such a tear. This evidence is linked to an earlier question asked of Kwezi by the prosecution which established that Kwezi last had sex with a man some 17 months before the alleged rape. Dr Likibi's finding is however ambiguous rather than unequivocal in supporting Kwezi's version. The tear, it is noted, could have arisen during "passionate" intercourse. Equally it could have been caused by a fingernail in the course of douching.

The evidence of Kwezi's friends Kimi and Pinkie move the focus to the immediate aftermath of the rape. The first two people Kwezi told about the alleged rape, they testified to uncharacteristic behaviour on her part, describing her as dismissive, abrupt, subdued and tearful - "Not her usual giggling self." The suggestion here is that because she is not behaving as she ordinarily does, something extraordinary - like a rape - must have happened to her.

The prosecution then shifts the focus away from Kwezi's behaviour to the police investigation. Commissioner Taioe does not fare well under cross-examination, his evidence allowing the defence to introduce a sub-plot suggestive of unconstitutional efforts to entrap Zuma. But rather than supporting the Commissioner's version by leading Superintendent Linda's evidence next, the prosecution took a detour via the evidence of witnesses JCG Le Roux, Attorney Docrat and Professor Desmond Martin.

Le Roux's evidence is an "impressive exercise" in tracing and analysing telephone calls and sms messages but because he testifies about facts not in dispute, his evidence adds nothing of substance to the prosecution's case. The attorney Mr Yusuf Ismail Docrat merely confirms the meetings that took place between the parties while Professor Martin plays primarily an educative role about the AIDS epidemic in South Africa. Superintendent Linda's evidence takes the prosecution's story back to the police investigation described earlier by Commissioner Taioe and concludes the state's case.

When the state closed its case, an application was brought by three organisations to enter as *amicus curiae* in the matter. Their application essentially sought to expand upon and develop Kwezi's narrative but was dismissed by the judge. Because the decision on this application was written up as a separate judgement, it is dealt with only in passing in the main judgement. While the *amicus* sought to further open Kwezi's story, the section 174 application brought immediately afterwards by Zuma's defence sought to shut it down, arguing that the state's story failed to make the legal grade. However, their attempt at narrative foreclosure was denied by the judge and so the trial continued with the defence now presenting their particular version of what happened in the early hours of 2 November 2005.

Unravelling Kwezi's case: The defence's narrative

In a nutshell, Zuma's story is that of the innocent man falsely accused. It portrays Kwezi as behaving in an increasingly more seductive fashion towards Zuma – to the point where she successfully inveigled her way into his bed. Her overtures to Zuma begin by establishing regular sms contact in the two months prior to the rape, with some fifty-four messages ending with references to love, hugs and kisses sent during this period. She then invited herself to the Zuma house on the evening of 2 November 2005 and at various points during the evening, insisted on seeing him. Her discussion of her sexual needs during these conversations and the fact that she was wearing a kanga and no underwear gave Zuma the impression that she wanted to have sex with him. Later that night she came to his bedroom where they engaged in consensual sex – an encounter that was subsequently and falsely reinvented as rape.

In an adversarial legal system, the defence's efforts at unravelling the prosecution's story begin with the cross-examination of state witnesses. Vital clues to the defence's upcoming story must be uncovered and embedded in the prosecution's case. If this is well-done, the planting of these traces begins anticipating the defence's story and creates suspense by tantalising the audience with the promise of what is to come.

The unravelling of Kwezi's version begins under cross-examination with a series of questions around the putative father-daughter relationship. The next component of the cross-examination focuses on the events of 2 November 2005 up to and including the rape, as well as Kwezi's actions after the incident. Those aspects of Duduzile and Zuma's evidence that conflict with Kwezi's version are put to her to answer. The decision records a number of concessions being made to the defence in relation to the rape.

The next portion of the cross-examination turns to Kwezi's previous sexual history. Up to this point, both Kwezi's evidence-in-chief and her cross-examination have been located in the present, except when she looks backward to provide a history of her relationship with Jacob Zuma. This move into the past now enables the defence to also create some mystery: what lies hidden in Kwezi's past? What needs to be uncovered to shed light on the present?

Typically, having a past imputes a certain disreputability which can work to undermine present self-representation. The current self may even be construed as a deceptive façade, or front, deliberately designed to keep the past self hidden. This suggestion that she has something to hide and is not revealing all is then reinforced by the dramatic and unexpected production in court of sixteen pages of a book Kwezi was writing. Her shock at being confronted by this writing and the questions subsequently asked on cross-examination further develop the suggestion that she is an unstable narrator - a teller of tales and a writer of fictions.

In answer to the daughter-mother pairing that began the state's case, the defence begins their case with the father-daughter pair of Jacob Zuma and Duduzile Zuma. Under cross-examination Kwezi's mother has revealed that Kwezi spent time in a psychiatric institution, is "confused and troubled" and indeed continues to see a psychologist. Worse, (from the point of view of Kwezi's story) Kwezi's mother does not emerge too well from cross-examination either when she concludes that she too may need a psychologist. This implicit contrast between the two families operates to Kwezi's detriment, setting up an irrational mother-daughter dyad against a protective daughter and her respected freedom-fighter-father with an illustrious political career.

After Jacob Zuma has presented his version of events on the night of 2 November, his daughter Duduzile testifies about her perceptions of Kwezi's behaviour prior to the rape. Not having been in the room at the time of the disputed sexual encounter, Duduzile's evidence cannot really corroborate either version but her appearance is absolutely crucial for at least two other reasons. First, as Zuma's real biological daughter she is an essential counterpoint to the pretender, Kwezi; and second, she is there to lend Zuma feminine respectability. While the latter role traditionally falls to the wife, in this case 'the wife' is conspicuous by her absence. Bringing a wife into Zuma's story would seriously complicate the defence's narrative, introducing aspects of Zuma's character and conduct that could lead to the development of a very different and potentially less-favourable plot.⁴ Duduzile thus plays the traditional womanly role of 'standing by her man' by protecting her father and employing her 'women's intuition'. Where her father, a man, is

not able to see feminine manipulation, she is immediately able to scent a conniving woman.

While Duduzile and Zuma both testify to the current events, the next set of witnesses resurrect the past and mount a series of very damaging attacks on Kwezi's credibility. Ntswaki Sigxashe, Mbuso Ncube (Mashaya), Sitembele Wellington Masoka, Duduzile Ncobo, Pastor Mbambo, Sandile Sithole and Oupa Matlhabe all testify to the previous false rape allegations. The action then moves back to the present with the witnesses Kumanas Majola, Nosizwe Vuso and Julaiga Mohammed. These three all testify to having called Zuma on the night of 2 November but deny having asked to see him urgently. At one level, whether Zuma did or did not have a visitor who wished to see him urgently, is not particularly relevant to the actual rape; it is not disputed that after wishing him good night, Kwezi returned to her room and that some time passed before Zuma left his study to go to the guest room. Whether this passage of time is accounted for by an urgent visit, or the completion of work is not germane to the rape. The significance of these three witnesses is to show that Kwezi is once again lying. Where the previous cluster of witnesses all testified to Kwezi's dishonesty in the past, the effect of the testimony is this crop of witnesses is to create a seamless and timeless flow between past and present dishonesty.

Modiyanewu Modise, Lungisa Manzi and Thulani Mpontshani return the defence's story to the past. They illuminate other aspects of the character of Kwezi being constructed by the defence, alleging assertiveness and permissiveness - even aggression - in Kwezi's sexual behaviour towards them. The inclusion of this evidence is intriguing, given that only Modise - and to a limited extent - testifies to a false rape allegation having been made against him.

In justifying his decision to allow evidence of Kwezi's previous sexual history, van der Merwe stated, "In my judgement of the purpose of the cross-examination and the evidence the defence wanted to lead concerning the complainant's behaviour in the past was not to show that she misbehaved with other men. In fact it was aimed at showing misconduct in the sense of falsely accusing men in the past. The cross-examination and evidence are relevant to the issue of consent to the present matter, the question of motive and indeed credibility as well. It was not aimed at showing the complainant was a woman of questionable morals." (*Zuma*: 37) Now neither Manzi nor Mpontshani testified to false allegations having been made against them but related instead incidents designed to show Kwezi as "a woman who is not scared to tell men of her sexual needs." (*ibid*: 166).

The finale to the defence's case is Dr Louise Olivier, who has "an impressive curriculum vitae" to which a paragraph is devoted - unlike Merle Friedman who is dispensed with in two-and-a-half lines earlier in the judgement. Like Duduzile Zuma, Dr Olivier is also a counterpoint, challenging Dr Merle Friedman's methods, approach and conclusions to claim ultimately, that Friedman's evaluation of Kwezi is "not in accordance with the ethical code of conduct of the professional body of psychologists" (*ibid*:). In story-telling terms, Olivier provides narrative closure by providing plausible 'scientific' explanations as to why Kwezi would lie about the sexual encounter with Zuma.

Overall, in terms of pace, sequencing and structure, the defence constructs a far stronger - and thus more plausible - narrative than that put forward by the prosecution. Where the temporal sequencing of the prosecution's case is made disjointed by leaping between different parts of their story, the defence clusters together all witnesses testifying about the same or similar events. Where the prosecution deadens and weakens their narrative pace by including witnesses that take their story nowhere, all of the defence witnesses build incrementally upon one another to create a climax that ties up all loose threads and achieves narrative closure. The prosecution story is almost ant-climatic by contrast. The last of the witnesses to bolster their case appears midway with the remaining witnesses not contributing anything that drives the story further. It thus literally loses the plot midway before petering out altogether. This enables the defence's story to appear both more ordered and coherent. Finally, by moving between past and present, the defence is also able to introduce suspense, intrigue, drama and mystery into their narrative, which makes their story more gripping and compelling.

Constituting and Reconstituting the Character of Kwezi

Plots are driven by characters as well as events. Good storytellers are thus required to pay as much attention to the development of their central protagonists as to the happenings in their stories. This next section examines how both the prosecution and defence construct different aspects of Kwezi's character.

"The Daughter"

Kwezi's understanding of family and kinship relations is expansive and fluid and does not neatly correspond with European notions of who constitutes family. For example, Kwezi describes one blood relative of hers, Nokozolo, as her daughter when Nokozolo is, in fact, her sister's daughter (and in Western terms, her niece).⁵ Further, it is clear from her evidence and that of others that there are at least two dimensions to her understanding of family: one constituted by blood ties and the other on bonds formed during the liberation struggle. Kwezi's "struggle" family includes Kimi (Nomthandazo Msibi) and Hlabe who are her "sisters". Kwezi and Kimi had grown up together in exile in Swaziland and, as a consequence, were very close friends. MamSamkele is like a mother to her and MamJane an "auntie" from exile. This struggle dimension to Kwezi's notion of family relationships is under-developed by the prosecution and for obvious, strategic reasons utterly ignored by the defence.

The prosecution establishes that Zuma and Kwezi's father, Mr K (as he is referred to in the judgement), were good friends, having spent time together both as members of the ANC Youth League as well as fellow-prisoners on Robben Island. After Mr K was killed in a car accident, Zuma took on particular importance in Kwezi's life. His knowledge of Mr K and his ability to recount stories of him as a young man appeared to provide Kwezi with a crucial link to her father that not only kept Mr K's memory alive, but also endowed Zuma with father-like qualities.

Kwezi had sporadic contact with Zuma during her years in exile and the early years of South Africa's political transition. Their contact with one another began increasing in

frequency from 1998 onwards. Although Zuma denied having seen Kwezi as his daughter, it is clear that he did feel some sort of obligation or duty towards her. She approached him for financial assistance with her studies in February 2005 and again in July of that year. He also paid for an air ticket enabling to see her mother in September 2005.

The defence relies on normative assumptions about the nature of biological father-daughter relationships to show that Kwezi cannot be characterised as Zuma's daughter. First, it is established that Kwezi predominantly refers to Zuma as 'malume' - the word for older men in exile, or uncles - rather than 'baba', the isiZulu word for father. Next, it is put to Kwezi that she had no contact with her 'father' for fourteen years, and nor did she tell Zuma immediately when she first learnt that she was HIV-positive. Zuma never phoned Kwezi on her birthday and Kwezi was not well-acquainted with two of Zuma's daughters. Van der Merwe is thus able to observe "The lack of contact between father and daughter during that period is strange" (*Zuma*: 39). But this is because father is being understood in a literal and biological sense, rather than in the symbolic and surrogate sense.

Kwezi also attempts to characterise herself as a responsible HIV-positive activist and educator with a burgeoning interest in healing others through homeopathy. Her character as a 'rape victim' is, to some extent, also developed through the psychological evidence presented by Dr Friedman. Overall however, the picture of Kwezi that emerges from the prosecution's case is sketchy and one that relies chiefly on listing a set of attributes, or characterisation, rather than detailed character development. It is the defence which puts some effort into developing their version of Kwezi's character.

An opportunistic interloper on the take

Duduzile's testimony begins challenging Kwezi's claim to being a victim, framing her instead as calculating, scheming and insinuating (emphasis mine):

She found the complainant and Kadusha sitting at the dining room table. The witness was immediately irritated. The reason for her irritation was because she immediately thought that *the complainant was looking for money from her dad* because, according to her, everyone does that...The witness said the complainant *did not look too concerned as a mother*. Later the complainant asked Kadusha to turn on the lights in the house, something that worried the witness as well. She formed the opinion *the complainant was getting too comfortable* (*Zuma*: 113)

...The witness said she was *getting an uneasy feeling about the complainant* and then offered her a ride home. She said that the uneasy feeling was that *there was something not right*. (*ibid*)

Ms Zuma was not happy about that because she now formed the opinion that *the complainant was trying to stay the night at the Zuma residence*. She again said that *there was something just not right about the complainant* and she was very protective of her father (*ibid*: 114).

The complainant was wearing a sarong which is a kanga...she could clearly see that *the complainant did not wear any underwear and thought it was most inappropriate in other people's houses (ibid: 115).*

...the witness said that she laid in bed trying to listen if she could hear footsteps going down the stairs to the guest room. She fell asleep without hearing any footsteps. She did that because she was convinced that *the complainant was trying to entice her father (ibid).*

The witness said her feeling was as a result of women's intuition (*ibid: 116*)

The 'failure' and 'sick' danger to others

The cross-examination of Kwezi's mother introduces the characterisation of Kwezi as someone "with a number of problems", "confused and troubled"; a failure incapable of completing her education; and "a zombi" (*ibid: 62 - 63*).

The witnesses Sandile Sithole and Duduzile Ncobo further amplify Kwezi's psychological instability (emphasis mine):

Sithole was worried about the complainant, saying that *she was mixed up and needed help (ibid: 122).*

The witness herself [*Duduzile Ncobo*] said in court that after having heard of the various allegations from the complainant and reading about it in the newspaper and because she loves the complainant, she just wanted to reveal all she testified about in court because *it may be the complainant has a problem*. She said that if the court can, *she will appreciate it if the child, the complainant, can be helped (ibid).*

"My expression is not that I am laughing. I am not actually laughing. I pity the poor complainant. *I think she is not well. She is sick, and she needs urgent attention, medical attention otherwise many families will be destroyed by her*" (*ibid: 129*)

The complainant is not well. She is sick (*ibid: 130*)

Concluding this theme, Dr Olivier then sets out some of the reasons why, according to her, someone would falsely claim rape. These include that the claimant suffers "an encapsulated delusion"; "has serious personality or emotional pathology"; has experienced previous trauma causing her to project "subconscious guilt feelings, resentment, anger and emotional turmoil"; "negative transference (such as 'punishing' the accused for a perceived wrong-doing)"; and finally, has "a hidden agenda" (*ibid: 139*).

Taken together, these depictions of Kwezi are highly unflattering and work to break sympathetic identification with her as a “victim”. Her claim to being a victim is challenged in other ways too.

“The victim”

Very particular connotations attach themselves to “victim”: suffering, helplessness, powerlessness, passivity and submissiveness. Thus for an experience to qualify as one of victimisation, some particular features need to be demonstrated: physical and/or psychological injury; the imposition of one person’s will upon another, or their subjugation by force or coercion; and an indication that such experiences were neither chosen nor sought but are marked instead by the complete absence or severe restriction of choice, volition and agency. Because such circumstances are so awful, any agency that is exercised will be directed towards escape, defence or resistance.

To some extent this is Dr Friedman’s evidence: that Kwezi was “completely overwhelmed and shocked” and behaved “as if she was in a ‘trance’” (*ibid*: 64). “[S]he was trapped, terrified and helpless and was unable to respond in any way other than freeze (*sic*)” (*ibid*: 65). Further, “confusion, inability to take decisions, great distress and avoidance of initial help-seeking, including reporting to the police..., are both entirely consistent with what may be expected from someone who is exposed to this kind of traumatic experience.” (*ibid*: 66)

The defence counters this representation in different ways, including portraying Kwezi as sexually assertive and demanding. Much of this characterisation is developed through the testimony of Modiyane Modise, Lungisa Manzi and Thulani Mpontshani. For example, “...she...told Mpontshani in no uncertain terms that she wanted to have sexual intercourse and that she wanted it immediately. It appears that she is a woman who is not scared to tell men of her sexual needs...Manzi...said that while he was having a bath the complainant came into the bathroom, undressed and got into the bath with him. It was not strange to her to be naked with a man whom she had met only a week before” (*ibid*: 166 - 167). And “...the complainant...told Thulani that she was frustrated with her boy-friend, that she needed sexual intercourse and that she needed it immediately” (*ibid*: 133).

These witnesses are not the only ones to smuggle in claims about Kwezi’s willingness to act on her sexual desires. During Dr Likibi’s evidence it is noted that Kwezi’s examination reveals her to be sexually active and it is also asked of Kwezi why the medico-legal examination found her hymen ring either to be disappearing, or having disappeared – a finding apparently associated with frequent penetrative sexual intercourse.

Zuma’s version of events also serves to cast Kwezi as the sexual initiator, with Zuma merely following her lead compliantly. She sought him out in his bedroom, she got into bed with him and she asked him to massage her. As they progressed towards sexual intercourse:

“he hesitated a bit which caused the complainant to say that he could not leave her in that situation and they continued to have sexual intercourse. He said that he

spoke to her during that process. She laughed and said that she was fine and the discussion about the ejaculation took place...she could have pushed him away. She is not a submissive woman. She is assertive and independent and she does not beat about the bush. She will say if she does not want anything.” (*ibid*: 102 – 103).

That this narrative came to dominate was due in no small part to the ‘real’ rape narrative embedded in judicial consciousness. Van der Merwe’s reasoning around why he rejected Kwezi’s version of events, clearly shows him to be measuring her behaviour against that he assumed “real” rape survivors exhibit. First, she failed to resist to the utmost: “[T]he complainant is not in any way threatened or physically injured. Her clothes are not damaged in any manner”; “she did not utter a single “no”...At no stage was there any call for help which was immediately available”; “[T]he complainant was at least a reasonably fair match physically for the accused, being 31 years old herself and weighing 85 kg compared with the accused who was at the time 63 years old and weighing 90 kg”; “the alleged rape took place within 10 metres of uniformed policeman with the accused’s grown-up daughter not far away” (*ibid*: 160); and “[S]he felt discomfort when he penetrated her... At no stage did she tell anybody of this discomfort” (*ibid*: 46)

Second, Kwezi failed to demonstrate the requisite distress and suffering:

After the “rape” the complainant was in the position to immediately phone the world and to tell them about it but she instead decided to report to her close friends in terms indicating that no rape taken place. The complainant was also in a position to leave the house immediately but she preferred to stay there for the rest of the night and not even locking the door. The next morning she wandered around the house for at least one and a half hour (*sic*). She took food from the fridge, she showered and made phone calls from the house’s landline before leaving for work...The complainant did not wash immediately and she does not suffer from depression. (*ibid*: 161)

Third, Kwezi’s description of the actual rape did not accord with the judge’s idea of rape: “[A]t no stage did the accused resort to physical violence or any threat...During the “rape” the accused uttered words of endearment to the complainant, not a single one whereof has the connotation of dominance or abuse” (*ibid*: 160).

Thus, with the assistance of Dr Olivier’s testimony, the judge was able to conclude that Kwezi was either “a sick person who needs help” because so traumatised in the past that she perceives “any sexual behaviour as threatening” or a woman who changed her mind, feeling “guilt, resentment, anger and emotional turmoil” after the event.

The law on trial: A response to my critics

Intertwined with this judicial rape narrative is a second judicial narrative, informed by van der Merwe’s perception that the law and by extension, his reasoning, is also on trial:

“As will be seen later herein criticism was at certain stages levelled at certain rulings I had made. I hope it will be seen from the reasons that are to follow that the criticism was unfounded. I hope that all concerned will carefully listen to the

reasons for my rulings and findings and I sincerely hope that they understand the reasons.” (*ibid*: 2).

This trial judgment therefore, is not only about deciding Zuma’s innocence or guilt, but is also a performance intended to impress upon the audience that the law is objective, impartial, neutral and fair. Indeed, implicit in his stated hope that the televised judgement would “serve as an educational tool”, is the suggestion that he intending ‘teaching a lesson’ in both the educative and punitive senses of the expression to the public. This lesson arose from his decision, in terms of section 227 of the Criminal Procedure Act, to allow evidence around Kwezi’s previous sexual history.

He underscores how fairly – even thoughtfully - the cross-examination was conducted in terms of this section: “The cross-examination was thorough but she had not been badgered or tricked during the cross-examination. The cross-examination was fair” (*ibid*: 38). “...it was clearly stated by Mr Kemp that he did not want to embarrass the complainant. He emphasised that he only needed to cross-examine in order to put up a proper defence for the accused. It therefore happened on occasion, with the cooperation of the state, that the question was put in writing and the reply was received in writing so that nobody could hear what was being asked and answered. That was obviously to prevent any embarrassment for the complaint.” (*ibid*: 49). ““He [*Kemp*] further submitted that the [*section 227*] application was couched in wide terms for the complainant’s protection” (*ibid*: 162)

Van der Merwe also characterized those who criticized him in very particular ways:

“A disconcerting aspect in this trial is the fact that all and sundry were prepared to and apparently claimed the right to, comment on my decision in terms of section 227 of the Act even before they knew the bases on which and the reasons why leave was granted to cross-examine the complainant on her past sexual experience and to lead evidence concerning aspects of that past. People commented on the ruling without having been in court or knowing anything about the contents of the application or the provisions of section 227 of the Act” (*ibid*: 24).

Critics of van der Merwe’s decision, it is thus implied, attempted to undermine his judicial prerogatives without having all the necessary information at hand. Further, such critics were partisan and self-promoting: “Different groups of people and organisations apparently tried to gain some mileage out of this trial...the pressure on the court in a matter like the present is big enough. It is not acceptable that a court be bombarded with political, personal or group agendas and comments” (*ibid*: 3).

The judge concluded his decision by admonishing his critics for having hastily jumped to ill-considered conclusions and came close to claiming that women’s rights activists actually harm the cause of rape complainants:

“This case is in my judgement a good illustration why pressure groups and individuals should not jump to conclusions and express criticism before having heard all the evidence...Instead of waiting some people stated categorically that rape victims will as a result of this case be hesitant to report incidents of rape

because of the treatment the complainant received, apparently also by the court. Much was also said about the protection the proposed new sexual offences act will afford to rape complaints...Instead of scaring off unfortunate rape victims it should have been pointed out and emphasised that unfortunate victims of rape will be treated differently because they are different from the complainant in this matter” (*ibid*: 170 - 171).

POLICY IMPLICATIONS OF A NARRATIVE THEORY OF LAW

Telling a counter story: the amicus intervention

Smart has argued that “It is law’s power to define and disqualify which should become the focus of feminist strategy rather than law reform as such. It is in its ability to redefine the truth of events that feminism offers political gains” (1989: 164). This chapter has attempted to illustrate how the law defines and disqualifies through the structuring, presentation and content of competing rape trial narratives. The subtleties and nuances of legal narrativity however, are not amenable to tools as blunt as law reform. How then does one introduce counter stories into courts comfortable with dominant and taken-for-granted ‘real’ rape narratives?

Clearly, at one level it falls to the prosecution services (as it does to the defence) to prepare and present a well-constructed narrative in court. However, the prosecution services have their own set of legal and bureaucratic interests which do not always coincide with the interests of the complainant (Frohmann, Cite). Another form of intervention in such instances is the *amicus curiae*, or friend of the court.⁶ Such a strategy was attempted by three organisations during the course of the trial, the Tshwaranang Legal Advocacy Centre (TLAC), the Centre for Applied Legal Studies (CALS) and the Centre for the Study of Violence and Reconciliation (CSVR).

In legal terms, the application sought to introduce a rights discourse into the trial, arguing that a court had to give proper consideration to the lived reality and context of individual rape complainant’s lives if it was to promote substantive equality. Specifically the organisations wanted to provide additional evidence around a host of issues, including the effects of childhood sexual abuse and the likelihood of child victims of sexual assault being revictimised as adults; delayed disclosure and reporting of sexual violence; the creation of circumstances of coercion and control – particularly within circumstances of entrenched loyalty and imbalanced power dynamics; and stereotypes and myths that operate to the detriment of rape complainants and provide accuseds with unfair trial advantages. The three organisations also asked to make arguments around the interpretation and relevance of Kwezi’s previous sexual history.

In narrative terms, the amicus application was seeking to create a new plot. The information they proposed introducing could have provided new causal links between some of the events described in court and thus allowed for different interpretations of those events and the creation of a different story. Because the previous allegations of rape formed part of the defence’s narrative, they were obviously presented in ways that were

intended to advance the defence's case. Kwezi was always responding to their formulation of these events, rather than presenting her account of what happened.

The amici's story was however, not welcomed by the prosecution or the defence and was excluded by the judge on the grounds that it did not tell the court anything new. While the amicus application provided the judge with yet another opportunity to admonish his critics, it is important to note that he did not dismiss such applications in future out of hand. The admission of amicus applications in criminal trials remains challenging. While a relatively common presence in Constitutional Court matters, they have never been admitted in criminal trials – *S v Engelbrecht* being the only exception to date.⁷

Conclusions

The liberation struggle, of which both Kwezi and Zuma were part, not only brought apartheid to an end but also ushered in an era of new-found and extensive freedoms for women. Many of the gains South African women now enjoy as a consequence are unprecedented in large parts of the world. This story about women's democratic victories post-1994 is dominant both in South Africa and internationally. The Zuma trial shows how convenient a fiction this narrative can sometimes be, and where some limited gains have been made in relation to aspects of the law on rape, this decision reclaims legal ground from feminist interventions by upholding and valorising conservative and exclusionary ideologies around rape, sexuality and gender relations.

Indeed, in the contrasting figures of Duduzile and Kwezi can be read the fate of women post-1994. Good daughters who uphold and protect their father's power will reap the benefits of the revolution while the lying pretenders and their supporters are to be as excluded from the new order as they were from the old.

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¹ Here he was in fact quoting from *S v Radebe* 1991(2) SACR 166(T) at 167j – 168h.

² First witness report, corroboration and “Hue and cry” rule

³ See *S v Jackson* 1998(1) SACR 470 (SCA)

⁴ Hints of this less-than morally impeccable conduct already emerged when the second judge appointed to hear the trial recused himself on the basis that Zuma had fathered a child with his sister. Zuma has numerous female sexual partners, having recently had an 18th child born to him at the age of 63.

⁵ Other examples: Kwezi describes Nokozolo’s son as her, Kwezi’s child, while Kimi describes this same child as Kwezi’s grandson or nephew and by Duduzile as Kwezi’s child.

⁶ Explain what an amicus is.

⁷ Prior to Zuma, the Institute for Security Studies applied to be admitted as amici in *S v Basson* but were also rejected on the grounds that they added no new evidence to the trial to warrant their inclusion.