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NARRATIVES OF FORCE, RESISTANCE AND MISTAKEN BELIEF IN CONSENT IN SOUTH AUSTRALIAN RAPE CASES

Abstract

This article explores the persistence of narratives of force and resistance in rape trials, informed by a thematic analysis of South Australian District Court and Supreme Court judgments delivered between 2012 and 2023. Reforms to South Australian criminal law in 2008 ostensibly sought to remove reference to elements of force and resistance from the legal definition of rape. However, force and resistance narratives continue to be used by prosecution and defence counsel to prove a lack of consent or to create reasonable doubt that an accused person was aware of non-consent. These narratives are not only tolerated but endorsed by the judiciary. This article argues that the use and endorsement of force and resistance narratives in this regard is problematic as it fails to reflect the reality of most rapes, ensures that scrutiny remains on victims' actions and permits accused persons to 'mistake' a victim's fear as consent. Overall, this article reflects the limits of the current law in securing justice outcomes for victims and recommends that South Australia considers comprehensive reforms to improve how its justice system responds to rape.

I Introduction

Historically, the crime of rape required proof of physical force and resistance.[1] Empirical evidence, however, has exposed the limits of this legal requirement, as most rapes do not involve violent force or forceful resistance.[2] Feminist legal reforms reflective of this have sought to ameliorate reliance

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1 See, eg, Cyril J Smith, 'History of Rape and Rape Laws' (1974) 60(4) *Women Lawyers Journal* 188, 189–91; Joan McGregor, *Is It Rape? On Acquaintance Rape and Taking Women's Consent Seriously* (Routledge, 2005) 27–8 ('*Is It Rape?*').

2 Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (Report, 2017) 6–7; Nina Burrowes, *Responding to the Challenge of Rape Myths in Court: A Guide for Prosecutors* (Report, NB Research, 2013) 18–19. See also: Antonia Quadara, Bianca Fileborn and Deb Parkinson, 'The Role of Forensic Medical Evidence in the Prosecution of Adult Sexual Assault' (Issues Paper No 15,

on force and resistance as evidence of rape by removing their express reference from legal definitions and introducing a consent standard based upon free and voluntary agreement. However, research from other Australian jurisdictions[3] shows that, notwithstanding such reforms, the law continues to permit evidence of force and resistance as proof of non-consent and an accused person's awareness of this, the onus of proof in effect remaining on the victim[4] to corroborate her[5] rape through her resistance.

Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, 2013) 26–8; Mary Carr et al, 'Debunking Three Rape Myths' (2014) 10(4) *Journal of Forensic Nursing* 217, 223.

3 See, eg: Helen Mary Cockburn, 'The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials' (PhD Thesis, University of Tasmania, 2012); Anastasia Powell et al, 'Meanings of "Sex" and "Consent": The Persistence of Rape Myths in Victorian Rape Law' (2013) 22(2) *Griffith Law Review* 456; Rachael Burgin, 'Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform' (2019) 59(2) *British Journal of Criminology* 296; Annie Cossins, 'Why Her Behaviour Is Still on Trial: The Absence of Context in the Modernisation of the Substantive Law on Consent' (2019) 42(2) *University of New South Wales Law Journal* 462; Gail Mason and James Monaghan, 'Autonomy and Responsibility in Sexual Assault Law in NSW: The *Lazarus* Cases' (2019) 31(1) *Current Issues in Criminal Justice* 24; Jonathan Crowe and Bri Lee, 'The Mistake of Fact Excuse in Queensland Rape Law: Some Problems and Proposals for Reform' (2020) 39(1) *University of Queensland Law Journal* 1; Rachael Burgin and Asher Flynn, 'Women's Behavior as Implied Consent: Male "Reasonableness" in Australian Rape Law' (2021) 21(3) *Criminology and Criminal Justice* 334; Ashlee Gore, 'It's All or Nothing: Consent, Reasonable Belief, and the Continuum of Sexual Violence in Judicial Logic' (2021) 30(4) *Social and Legal Studies* 522; Jonathan Crowe, Rachael Burgin and Holli Edwards, 'Affirmative Consent and the Mistake of Fact Excuse in Western Australian Rape Law' (2023) 50(1) *University of Western Australia Law Review* 284.

4 The term 'victim' is used to reflect the fact that women generally do not lie about being raped and even when a court finds an accused not criminally responsible the victim still experiences victimisation. Studies estimate approximately 2–10% of sexual crime allegations are false: David Lisak et al, 'False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases' (2010) 16(12) *Violence Against Women* 1318. See also Liz Wall and Cindy Tarczon, 'True or False? The Contested Terrain of False Allegations' (Research Summary, Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, November 2013).

5 This article uses female pronouns when referring to victims and masculine pronouns when referring to accused persons. This is not to deny that men can be victims of rape or that women can be perpetrators, nor to perpetuate myths of female victimisation and male aggression. Rather, it is to properly reflect the fact that women are far more likely to be victims of rape (84% of reported sexual assaults in Australia (2022)) and that most rapists are men (93% of reported sexual assaults in Australia (2021–22)): Australian Bureau of Statistics, *Recorded Crime — Victims* (Catalogue No 4510.0, 29 June 2023) <https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-victims/latest-release>; Australian Bureau of Statistics, 'Recorded Crime: Offenders, 2021–22' (Catalogue No 4519.0, 09 February 2023) <https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-offenders/2021-22#data-downloads>.

This article explores the extent to which prosecution and defence counsel mobilise myths of force and resistance in South Australian rape trials. Further, it observes how the judiciary responds to the use of force and resistance narratives and argues that the judicial condoning of these myths reinforces harmful stereotypes of rape victims. This article is not, however, concerned with analysing how the use of, or judicial reference to, force and resistance myths impact guilty verdicts. Instead, it aims to criticise the law's failure to reflect feminist concerns. It additionally seeks to provide an empirical basis for South Australia to improve its justice responses for rape victims.[6]

The engagement of force and resistance narratives at trial by both the prosecution and defence leaves intact the myth that a victim will resist unless and until she is overpowered by force.[7] Repeated use of this myth can potentially influence the respective decisions of other victims, police or prosecutors to report, investigate or prosecute.[8] It can also have negative implications for primary victims. The justice needs of victims can extend beyond a successful verdict and encompass the totality of a victim's experience in the criminal justice system, including the need to be heard, believed and have control over her story.[9] A contest, for example, over whether a victim's resistance was 'adequate', may place the onus upon victims to prove their own rapes, potentially shaming victims whose responses do not conform to 'expectations' or ideals.[10] Thus, the deployment of force and resistance myths in trials may re-traumatise and re-victimise victims.[11]

6 See also: Kathleen Daly, 'Conventional and Innovative Justice Responses to Sexual Violence' (Issues Paper No 12, Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, 2011); Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending: Pathways to Better Outcomes for Victims, Offenders and the Community* (Report, RMIT University, May 2014).

7 Julia Quilter, 'Re-Framing the Rape Trial: Insights from Critical Theory about the Limitations of Legislative Reform' (2011) 35(1) *Australian Feminist Law Journal* 23, 31 ('Re-Framing the Rape Trial').

8 Mary White Stewart, Shirley A Dobbin and Sophia I Gatowski, '"Real Rapes" and "Real Victims": The Shared Reliance on Common Cultural Definitions of Rape' (1996) 4(2) *Feminist Legal Studies* 159, 159; Jacqueline M Wheatcroft, Graham F Wagstaff and Annmarie Moran, 'Revictimizing the Victim? How Rape Victims Experience the UK Legal System' (2009) 4(3) *Victims and Offenders* 265, 272–5. See Rebecca Campbell et al, 'Preventing the "Second Rape": Rape Survivors' Experiences with Community Service Providers' (2001) 16(12) *Journal of Interpersonal Violence* 1239, 1240–1.

9 See, eg: Judith Lewis Herman, 'Justice from the Victim's Perspective' (2005) 11(5) *Violence Against Women* 571, 574; Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice: Implementation, Current Practice and Future Directions* (Research Report No 27, Australian Institute of Family Studies, April 2014) 21–3.

10 Susan Estrich, 'Rape' (1986) 95(6) *Yale Law Journal* 1087, 1098; Mary P Koss, 'Blame, Shame, and Community: Justice Responses to Violence against Women' (2000) 55(11) *American Psychologist* 1332, 1345–6; Stewart, Dobbin and Gatowski (n 8) 161. See also Carol Smart, *Feminism and the Power of Law* (Routledge, 1989) 34–5.

11 See, eg, Herman (n 9) 582.

Reliance on such narratives remains problematic even when a case is successfully decided for the prosecution as it reinforces the effectiveness of relying upon such myths and legitimises their use by defence counsels.[12] This article, therefore, fits within the broader body of feminist research exploring the ways the criminal justice system can re-victimise the victims it ostensibly seeks to protect, with what some have described as akin to a secondary rape.[13]

Before analysing the case law in detail, Part II considers the trajectory of force and resistance narratives in historical definitions of rape to provide context for their contemporary endurance before briefly explaining the legal elements of the crime in South Australia. Parts III and IV thereafter will explore how narratives of force and resistance emerged in the case law, particularly their utilisation in either negating or establishing a mistaken belief in consent. Overall, this article evidences feminist concerns regarding the legal reliance upon and endorsement of force and resistance narratives and argues that South Australia's laws continue to constrain justice outcomes for victims of rape.

A *Methodology*

The cases discussed in this article were identified by searching the South Australian reported cases in the LexisNexis,[14] WestLaw[15] and Australasian Legal Information Institute (AustLII)[16] databases for references to ss 46, 47 and 48 of the *Criminal Law Consolidation Act 1935* (SA) ('*CLCA*') and keywords such as 'rape' and 'consent'. The search was limited to adult rape cases decided between 2012 and 2023 to limit the sample size and to consider the most recent application of the relevant sections. The sampling framework drew from both judge-only trials and appellate decisions. The reasoning for this was twofold. First, District and Supreme Court decisions are publicly available on the databases, while there is no record of judgment for jury trials. Secondly, drawing from trial and appellate judgments provided a larger sampling pool. This search method returned a dataset of 48 cases. A full list of the cases is contained in Appendix A.

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12 Quilter, 'Re-Framing the Rape Trial' (n 7) 31. See also Wendy Larcombe, 'The "Ideal" Victim v Successful Rape Complainants: Not What You Might Expect' (2002) 10(2) *Feminist Legal Studies* 131, 132. But see Ellen Daly, *Rape, Gender and Class: Intersections in Courtroom Narratives* (Palgrave Macmillan, 2022) 20–1.

13 Morrison Torrey, 'When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions' (1991) 24(4) *UC Davis Law Review* 1013, 1030; Campbell et al (n 8) 1240–1.

14 'LexisNexis Australia', *LexisNexis* (Web Page) <https://www.lexisnexis.com.au/en>.

15 'Westlaw', *Westlaw* (Web Page) <https://aulaw.thomsonreuters.com>.

16 'Australasian Legal Information Institute', *Australasian Legal Information Institute* (Web Page) <http://www.austlii.edu.au/>.

After the sample group was gathered, cases were coded and analysed using thematic and systematic content analysis. Systematic content analysis in legal research is a technique whereby a wide set of judicial texts are read to find patterns and common themes.[17] Systematic content analysis does not 'explicitly aim to evaluate the legal correctness of judicial opinions'.[18] Rather, it seeks to systematically and objectively document patterns or trends in cases.[19] Likewise, a thematic analysis aims to identify, analyse, organise and describe patterns within a dataset to locate specific themes.[20] Given the focus on force and resistance narratives, cases were read and coded using keywords such as 'resistance', 'force', 'injuries', and 'violence'.

Force and resistance narratives were raised in 37 of the 48 cases. Fourteen cases were chosen as warranting detailed discussion in this article. Eleven of the 14 cases selected were from judge-only trials. They were chosen because they contained detailed summaries of counsel submissions and significant judicial comments regarding force and resistance narratives. Three appeal decisions were chosen because they concerned a mistaken belief in consent, provided sufficient insight into issues at trial, and featured judicial discussion regarding force and resistance. Of the remaining cases, many offered only partial insight into trial issues or concerned appellate procedural issues. A decision was also made to omit some cases for brevity.

II Rape Laws Historically: From a Property Crime to Consent

This Part explores the trajectory of rape's criminalisation within the Western legal tradition — from a property crime to its current consent-based definition — to explain the perseverance of force and resistance myths in contemporary rape trials. Understanding the historical reasons for rape's criminalisation will contextualise the continual reliance on expectations of force and resistance in rape trials.

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[17] Mark A Hall and Ronald F Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96(1) *California Law Review* 63, 64. See also: Or Brook, 'Politics of Coding: On Systematic Content Analysis of Legal Text' in Marija Bartl and Jessica C Lawrence (eds), *The Politics of European Legal Research: Behind the Method* (Edward Elgar, 2022) 109, 120–1. See generally Deborah Finfgeld-Connett, 'Use of Content Analysis To Conduct Knowledge-Building and Theory-Generating Qualitative Systematic Reviews' (2014) 14(3) *Qualitative Research* 341.

[18] Hall and Wright (n 17) 88.

[19] Ibid 66, 88.

[20] Jennifer Morey Hawkins, 'Thematic Analysis' in Mike Allen (ed), *The SAGE Encyclopedia of Communication Research Methods* (SAGE Publications, 2018) 1756; Lorelli S Nowell et al, 'Thematic Analysis: Striving To Meet the Trustworthiness Criteria' (2017) 16(1) *International Journal of Qualitative Methods* 1, 2.

Susan Brownmiller provided the first extensive feminist account of rape's history, arguing that rape was initially criminalised to protect male property interests in women.[21] According to Brownmiller, the physical and imagined threat of rape has, for history, kept women in a state of fear.[22] The price of male protection from this threat was the imposition of virginity, chastity and fidelity, a woman's adherence to which became valuations of her virtue.[23] By binding a woman's worth to her chastity, she was reduced to the sexual property of men.[24] Laws around rape emerged to punish those who harmed another man's property.[25] Rape laws therefore mandated an element of force to prove the victim was 'taken away' from her lawful male owner.[26] Active resistance was necessary to show not only that she was taken forcefully but to demonstrate that she had tried in the utmost to protect her chastity.[27]

English common law continued to reflect this idea of women as property. The requirements of force and resistance were absorbed within the 17th-century definition

21 Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Random House, 1975) 18–22. The literature reviewed in this Part is from Western, white feminists in the Global North. While women's status as property under the patriarchy is largely accepted within the white feminist, anti-rape movement, it has been criticised by Black feminists for its failure to address the history of rape as experienced by women of colour. Rather, in its reckoning of rape's history, the feminist movement has defaulted to the experience and interests of white women and applied that experience unilaterally. It was Black feminists who showed how the history of colonialism, imperialism and slavery intersected with patriarchal norms and expectations with respect to sex to further oppress and de-humanise Black women: see: Angela Y Davis, 'Rape, Racism and the Capitalist Setting' (1981) 12(6) *Black Scholar* 39; Deborah K King, 'Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology' (1988) 14(1) *Signs: Journal of Women in Culture and Society* 42; Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color' (1991) 43(6) *Stanford Law Review* 1241; Larissa Behrendt, 'Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourse' (1993) 1(1) *Australian Feminist Law Journal* 27; bell hooks, *Ain't I a Woman: Black Women and Feminism* (Routledge, rev ed, 2015).

22 Brownmiller (n 21) 15.

23 Susan Griffin, 'Rape: The All-American Crime' (1971) 10(3) *Ramparts* 26, 30; Brownmiller (n 21) 17; McGregor, *Is It Rape?* (n 1) 29. See also Barbara Toner, *The Facts of Rape* (Hutchinson, 1977) 86.

24 Griffin (n 23) 30; McGregor, *Is It Rape?* (n 1) 3.

25 Anna Clark, *Women's Silence, Men's Violence: Sexual Assault in England, 1770–1845* (Pandora, 1987) 24; McGregor, *Is It Rape?* (n 1) 3; Julia Quilter, 'From *Raptus* to Rape: A History of the "Requirements" of Resistance and Injury' (2015) 2(1) *Law and History* 89, 101 ('From *Raptus* to Rape').

26 See Quilter, 'From *Raptus* to Rape' (n 25) 97.

27 McGregor, *Is It Rape?* (n 1) 29; Sara Buck Doude, 'History of Rape' in Frances P Bernat and Kelly Frailing (eds), *The Encyclopedia of Women and Crime* (John Wiley & Sons, 2019) 1, 3. See: Griffin (n 23) 32; Anne M Coughlin, 'Sex and Guilt' (1998) 84(1) *Virginia Law Review* 1, 8.

of rape as 'carnal knowledge of a woman forcibly and against her will'.[28] Force was equated with the level of physical violence necessary to overcome a woman's active resistance.[29] Evidence of injuries, torn clothing or cries for help corroborated her resistance.[30] Not only did such evidence demonstrate the breaking of a woman's will, but it placated the courts (and society) that she was not complicit in her violation and, therefore, worthy of protection.[31]

The offence of rape in Australian criminal law retained its English origins and it was only in the 1970s that rape laws in Australia began to shift towards a statutory definition based on consent, with South Australia being one of the first jurisdictions to reform its laws.[32] Rape is now defined in South Australia as sexual intercourse without consent.[33] Consent is further defined as free and voluntary agreement.[34] The adoption by the Australian jurisdictions of a statutory definition of consent was intended to move beyond the historical focus on a victim's resistance and instead emphasise the sexual autonomy of the parties to agree to have sex freely.[35]

The *CLCA* also includes a list of vitiating factors where consent is deemed to be negated.[36] For example, a person is taken not to consent freely and voluntarily if they agree because of 'the application of force or an express or implied threat of the application of force'.[37] The legislative intention for the inclusion of circumstances where consent is vitiated was to recognise that 'sexual offending often occurs in situations where there is unlikely to be any physical sign of violence'.[38] Amendments were made to the *Evidence Act 1929* (SA) ('*Evidence Act*') to reflect this, and trial judges must now direct a jury when necessary that a person is not to be regarded

28 William Blackstone, *Commentaries on the Laws of England: Of Public Wrongs*, ed Ruth Paley (Oxford University Press, 2016) bk 4, 139 [209]; Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (1736) vol 1, 628.

29 Estrich (n 10) 1105; Garthine Walker, 'Rereading Rape and Sexual Violence in Early Modern England' (1998) 10(1) *Gender and History* 1, 8; McGregor, *Is It Rape?* (n 1) 29. See also Griffin (n 23) 32.

30 Quilter, 'From *Raptus* to Rape' (n 25) 98; Doude (n 27) 2.

31 McGregor, *Is It Rape?* (n 1) 29; Doude (n 27) 2.

32 Gail Mason, 'Reforming the Law of Rape: Incursions into the Masculinist Sanctum' in Diane Kirkby (ed), *Sex, Power and Justice: Historical Perspectives of Law in Australia* (Oxford University Press, 1995) 51, discussing Moira Carmody, 'A Historical Look at Attitudes to Rape' in Jan Breckenridge and Moira Carmody (eds), *Women, Violence and Social Control* (Allen & Unwin, 1992) 7–17. See, eg, *Criminal Law Consolidation Act Amendment Act 1976* (SA).

33 *Criminal Law Consolidation Act 1935* (SA) s 48 ('*CLCA*').

34 Ibid s 46(2).

35 Julia Quilter, 'Getting Consent "Right": Sexual Assault Law Reform in New South Wales' (2020) 46(2) *Australian Feminist Law Journal* 225, 227.

36 *CLCA* (n 33) s 46(3).

37 Ibid s 46(3)(a)(i).

38 South Australia, *Parliamentary Debates*, Legislative Council, 26 February 2008, 1756 (Paul Holloway).

as having consented merely because they did not say or do anything to indicate non-consent, protest or physically resist, or sustain physical injuries.[39]

The crime of rape requires proof of a mental element. In South Australia, for example, the prosecution must prove that the accused acted with knowledge of or was reckless as to non-consent.[40] Knowledge is a subjective test.[41] It requires proof beyond reasonable doubt that an accused knows the victim was not consenting. Recklessness has three alternative meanings in the *CLCA*: (1) an accused is aware of the possibility of non-consent or the withdrawal of consent and decides to proceed regardless of that possibility;[42] (2) an accused is aware of the possibility of non-consent or the withdrawal of consent and fails to take reasonable steps to determine consent or its withdrawal;[43] or (3) an accused gives no thought as to consent or whether consent has been withdrawn.[44]

The mental element of the offence may be negated where an accused mistakenly but honestly believes the victim is consenting.[45] That is, even where the prosecution can prove non-consent, an honest belief that consent was nonetheless present may negate criminal responsibility when such a belief is inconsistent with the requisite state of mind necessary to prove rape. At common law, a mistaken belief needs only to be honestly held, it does not need to be reasonable.[46] While the common law has been modified by statute in all other Australian jurisdictions to encompass a test of reasonableness,[47] s 47 of the *CLCA* does not impose such a test.

While the South Australian government initially canvassed the introduction of an objective test,[48] it was emphatically rejected[49] after consultations indicated support for retaining the subjective, common law approach.[50] Accordingly, the common law

39 *Evidence Act 1929* (SA) s 34N(1)(a)(i)–(iii) ('*Evidence Act*').

40 *CLCA* (n 33) s 48(1)–(2).

41 Mary Heath and Kellie Toole, 'Sexual Offences' in David Caruso et al, *South Australian Criminal Law and Procedure* (LexisNexis Butterworths, 2nd ed, 2016) 263, 279 [7.39].

42 *CLCA* (n 33) s 47(a).

43 Ibid s 47(b).

44 Ibid s 47(c).

45 *DPP v Morgan* [1976] AC 182.

46 Ibid 202–3 (Lord Cross).

47 *Crimes Act 1900* (ACT) ss 67(4)–(5); *Crimes Act 1900* (NSW) s 61HK; *Criminal Code Act 1983* (NT) ss 32, 43AW; *Criminal Code Act 1899* (Qld) s 24; *Criminal Code Act 1924* (Tas) s 14A(1); *Crimes Act 1958* (Vic) ss 36A, 38(1)(c); *Criminal Code Act Compilation Act 1913* (WA) s 24.

48 See South Australia, *Parliamentary Debates*, Legislative Council, 1 April 2008, 2170 (Robert Lawson).

49 Ibid 2170–1 (Paul Holloway).

50 South Australia, *Parliamentary Debates*, House of Assembly, 12 February 2008, 1894–5 (Isobel Redmond).

position that an accused must be acquitted if he can show that he had a genuine but mistaken belief in consent, notwithstanding the objective unreasonableness of that belief, was codified.[51] Thus, despite some academic conjecture,[52] South Australia is the only state or territory in Australia that maintains the common law test of an honest but mistaken belief in consent.

The following Parts observe how myths of force and resistance emerge within the case law. Part III focuses on prosecutorial constructions of force and resistance myths as evidence of both non-consent and to negate reliance by an accused on a mistaken belief in consent. Part IV will explore how accused persons may rely upon the absence of force and/or resistance to create the factual foundation for their mistaken belief in consent. Both Parts analyse how judicial treatment of force and resistance myths may reinforce harmful stereotypes regarding rape and its victims.

III Prosecutorial Narratives of Force and Resistance

To establish a lack of consent and pre-empt reliance on a mistaken belief in consent, prosecutors may emphasise evidence of resistance as proof that the victim's non-consent was communicated to the accused.[53] For example, in the cases of *R v K, JS* ('*K, JS*'),[54] and *R v Coutts* ('*Coutts*'),[55] prosecutors relied upon the victim's active resistance to establish the physical elements of the crime beyond reasonable doubt and to prove that the accused could not have been unaware of the possibility of her non-consent.[56]

In *K, JS*,[57] for example, the prosecution case at first instance was that, in the face of abuse and threats of violence, the victim verbally made her lack of consent clear by repeatedly saying 'please stop', 'don't hurt me' and 'I don't want to do this'.[58] Her evidence was that she continued to cry and verbally protest but took her clothes off when asked as she was afraid of escalating violence.[59] When the accused pushed her onto the bed and forced his body weight on her, she tried to push him away and close her legs, but he was too strong and forced his penis into her vagina.[60] The victim's

51 See South Australia, *Parliamentary Debates*, Legislative Council, 1 April 2008, 2171 (Paul Holloway).

52 See, eg, Andrew Hemming, 'In Search of a Model Provision for Rape in Australia' (2019) 38(1) *University of Tasmania Law Review* 72, 90.

53 See Lani Anne Remick, 'Read Her Lips: An Argument for a Verbal Consent Standard in Rape' (1993) 141(3) *University of Pennsylvania Law Review* 1103, 1111.

54 *R v K, JS* [2013] SADC 177 ('*K, JS*').

55 *R v Coutts* [2013] SASCFC 143 ('*Coutts*').

56 See generally Estrich (n 10) 1099.

57 This decision was overturned on appeal: *R v Kinnear* [2014] SASCFC 30.

58 *K, JS* (n 54) [35]–[36].

59 Ibid [36].

60 Ibid.

evidence was supported by testimony from her father, who found the victim the next day, as well as by an initial complaint to a registrar.[61]

Justice Bampton was satisfied that the victim 'made it clear by her words and her actions that she did not consent' and that her acquiescence thereafter (by taking her clothes off) was due to her fear that the accused would apply more force if she did not comply.[62] Therefore, it was not open for the accused to rely upon a mistaken belief in consent.[63] Thus, despite the law not requiring physical or verbal manifestations of resistance, without the victim communicating her non-consent, the accused may have been able to rely upon a lack of resistance as grounding a mistaken belief in consent.

Likewise, the prosecution in *Coutts* relied upon the victim's evidence of resistance to support her allegations of rape. In *Coutts,* the accused was charged with multiple counts of rape over four months against his partner. The counts 'were often accompanied by acts of violence'.[64] The victim's evidence was that, on each count, she told him she did not want to participate, cried or screamed in pain, requested that he stop or pushed him away.[65] Given the ongoing nature of the sexual violence, the victim secretly recorded counts 6, 7 and 8 on her phone, which captured the 'violent and abusive' events.[66]

The accused was found guilty of eight counts of rape and one of assault.[67] On appeal, he argued that the trial judge had misrepresented to the jury that the critical issue at trial was non-consent.[68] Rather, the accused argued that even if the prosecution could prove non-consent beyond a reasonable doubt, the issue was whether he was honestly mistaken as to consent.[69] The Court of Criminal Appeal of South Australia dismissed this argument, stating that if the jury accepted the victim's evidence regarding the nature of the events, as verified by her recordings, 'then there could be no question of belief in consent'.[70] That is, if the jury accepted the victim's evidence of his violence and her resistance, and they were satisfied beyond reasonable doubt that it was not consensual, then it must convict because 'it must have been obvious that she was not consenting and the accused must clearly have been aware that she was not consenting'.[71] The use of the word 'obvious' in this case

61 Ibid [96].

62 Ibid.

63 Ibid.

64 *Coutts* (n 55) [17], [20].

65 Ibid [32]–[38].

66 Ibid [20], [36]–[37].

67 Ibid [17].

68 Ibid [31].

69 Ibid.

70 Ibid [37] (Vanstone J, Sulan and Blue JJ agreeing at [1]).

71 Ibid [40], quoting the trial judge.

and 'clear'[72] in *K, JS* imply that the onus is on victims to patently demonstrate their resistance, as without this, it is more arduous for the prosecution to prove not only the physical elements of rape but also that an accused was aware he was committing a crime.

These cases demonstrate how expectations of active resistance remain 'an unacknowledged yardstick for courts when evaluating evidence of force and consent'.[73] Judicial expectations of active resistance continue to receive support in 2023, where Judge Tracey, in the case of *R v Esposito* ('*Esposito*'),[74] found the accused not guilty because she could not 'be satisfied beyond reasonable doubt that [the victim] told the accused she was not having sex with him'.[75] Judicial comments such as this endorse legal and societal myths that 'legitimate' victims will resist rape. This endorsement by the judiciary justifies prosecutorial and defence deference to force and resistance narratives, which can hinder other victims' decisions to report and/or proceed to trial. Additionally, the focus on and expectation of resistance requires the victim to, in essence, prove her rape. This ensures legal and societal scrutiny remain on her actions and behaviour rather than on the accused's alleged culpability, effectively placing the victim on trial and potentially contributing to her secondary victimisation.[76]

Where there is limited or insufficient evidence of resistance, however, the prosecution may instead focus on the accused's acts of violence to explain why a victim did not resist, as well as prevent the accused from relying upon her lack of resistance to ground his mistaken belief in consent. For example, in the cases of *R v Thorpe* ('*Thorpe*')[77] and *R v L, J* ('*L, J*'),[78] the prosecution used each accused's history of violence to 'excuse' the absence of resistance and prove his awareness of non-consent beyond a reasonable doubt. While judicial recognition of circumstances whereby victims cannot resist may prove useful in individual cases — for example, when they are 'inured to violence and mistreatment … [causing them] to react in a way that a person from a more normal domestic relationship would not'[79] — it reinforces the

72 *K, JS* (n 54) [92], [96].

73 Remick (n 53) 1113.

74 *R v Esposito* [2023] SADC 64 ('*Esposito*').

75 Ibid [102], [108], [110].

76 Torrey (n 13) 1030; Coughlin (n 27) 16; Bluett-Boyd and Fileborn (n 9) 12. See also: Wheatcroft, Wagstaff and Moran (n 8); Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen's University Press, 2018).

77 *R v Thorpe* [2016] SADC 25 ('*Thorpe*').

78 *R v L, J* [2018] SADC 143 ('*L, J*').

79 Ibid [168]. See also Louise Ellison and Vanessa E Munro, 'Better the Devil You Know? "Real Rape" Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17(4) *International Journal of Evidence and Proof* 299, 315 ('Better the Devil You Know?').

myth that the 'normal' response to rape is to resist.[80] Therefore, women in 'normal domestic relationships' may have fewer excuses not to follow these expectations.

In the case of *L, J*, the accused was charged with six counts of assault, rape, and sexual manipulation.[81] The victim gave evidence of a sexual relationship framed by the accused's jealousy, abuse and violence.[82] The counts of rape, she said, were initiated by his threats and were physically violent.[83] During examination-in-chief, the victim said she submitted to the sexual acts because she was forced to.[84] While the accused admitted he was violent towards the victim, he denied the counts of rape and said she 'liked it "rough"'.[85] Before the trial, the prosecution sought to tender evidence of the accused's uncharged acts of violence against the victim to, inter alia, 'explain why she submitted to the accused in relation to the sexual offences'.[86] Judge Millsteed allowed the evidence of ongoing, prior violence because '[her] failure … to resist him on the charged occasions c[ould] only be properly understood in the light of the history of abusive conduct to which she was subjected.'[87] This suggests, therefore, that if the charged offences were the only (admissible) allegations of violence, the victim's evidence of non-consent may have been dismissed as unreliable, and it was only the accumulation of violent acts that supported her testimony, thereby 'justifying' her lack of resistance.

Overall, Judge Millsteed accepted the victim's evidence in this case.[88] Given the accused's threats and violence, his Honour was satisfied that the accused must have known of her lack of consent or was, at the very least, recklessly indifferent to it.[89] It is difficult, however, to envisage a situation where an accused could threaten and physically assault someone and not be at the very least conscious that she may not be consenting, suggesting that the threshold to prove knowledge is a substantial one. This is discussed further in Part IV.

Similarly, in the case of *Thorpe,* the victim and accused's relationship was defined by frequent incidents of violence and threats.[90] With respect to the charged offences, the victim gave evidence that the accused broke into her house, was acting aggressively, threatened her with a knife and pestered her for sex.[91] She gave evidence

80 Cf Fiona Mason and Zoe Lodrick, 'Psychological Consequences of Sexual Assault' (2013) 27(1) *Best Practice and Research Clinical Obstetrics and Gynaecology* 27.

81 *L, J* (n 78) [1].

82 Ibid [9]–[10].

83 Ibid [67]–[68], [74]–[76].

84 Ibid [76].

85 Ibid [68], [105]–[107].

86 Ibid [138].

87 Ibid [146].

88 Ibid [159]–[161].

89 Ibid [170].

90 *Thorpe* (n 77) [33].

91 Ibid [50]–[53], [58], [60].

of repeated verbal resistance, but as she was terrified of being killed or stabbed, she 'essentially capitulated'.[92] Her evidence was that, 'to calm him down I just submitted to him … I did not want to be doing [it], I couldn't see another way out'.[93]

The accused testified of multiple acts of anger and violence towards the victim, including threats to kill her or inflict self-harm.[94] He had previously been charged with offences of property damage, assault and breaching an intervention order.[95] He admitted that on the day of the incident, he 'pestered [the victim] a little bit, maybe even begged her a little bit, for sex'.[96] When she declined, he got angry, struck her car and threatened to kill himself.[97] However, when he went into the victim's bedroom thereafter, he said she followed him, closed the door and turned off the light.[98] He said he took this to mean that she wanted to have sex.[99]

Overall, Judge Stretton was satisfied that the victim's lack of consent was evidenced by her repeated refusals in light of his threats and her tears throughout.[100] His Honour was likewise satisfied that the accused knew the victim 'was complying *only* because he had threatened to kill her and was continuing to threaten her'.[101] If the accused had not threatened the victim, Judge Stretton's comment implies that he may have been able to rely upon myths of seduction and token resistance to justify his belief in consent.

Seduction myths regard men as sexual aggressors and women as passive participants, where the latter will offer token resistance to sex to maintain their roles as sexual gatekeepers.[102] These myths presume it reasonable for men to try to overcome

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92 Ibid [63], [65]–[73]. Her evidence was that she continued saying 'no' and was crying throughout the sexual activity.

93 Ibid [35]–[36].

94 Ibid [132]–[136], [139], [142]–[143], [150]–[155].

95 Ibid [135], [143].

96 Ibid [166].

97 Ibid [166]–[168], see [170].

98 Ibid [169], [171].

99 Ibid [171].

100 Ibid [222], [224].

101 Ibid [222] (emphasis added), see also [224].

102 Lois Pineau, 'Date Rape: A Feminist Analysis' (1989) 8(2) *Law and Philosophy* 217, 224, 228; McGregor, *Is It Rape?* (n 1) 207; Louise Ellison and Vanessa E Munro, 'Of "Normal Sex" and "Real Rape": Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' (2009) 18(3) *Social and Legal Studies* 291, 295 ('Of "Normal Sex" and "Real Rape"'); Katie M Edwards et al, 'Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change' (2011) 65(11–12) *Sex Roles* 761, 765; Nicola Gavey, *Just Sex? The Cultural Scaffolding of Rape* (Routledge, 2nd ed, 2018) 99; Burgin (n 3) 301. See also Charlene L Muehlenhard and Marcia L McCoy, 'Double Standard/Double Bind: The Sexual Double Standard and Women's Communication about Sex' (1991) 15(3) *Psychology of Women Quarterly* 447, 449.

a woman's initial reluctance, and in the absence of subsequent, resolute resistance, her consent may reasonably be inferred from her inaction or submission.[103] That is, the victim can say 'no' (although not a requirement to prove non-consent), and an accused may rely upon his powers of 'seduction' to satisfy himself that she did, in fact, consent.[104] The problem is that women may suffer what men term 'seduction' as rape.[105] Judge Stretton's comments in *Thorpe* that it was only the threat of overt violence which explained the victim's acquiescence, therefore, suggests that the line between seduction and rape is pegged at the accused's violence rather than at a woman's desires, as it was his violence in this case which turned his attempts at seduction from an excusable mistake to rape under the law.

The case of *R v Tennant* ('*Tennant*')[106] provides a further example whereby the prosecution framed its case around an accused's violence to mitigate the latter's reliance on a mistaken belief in consent. In this case, the accused was charged with one count of aggravated assault and two counts of rape.[107] The victim gave evidence of two days of violence, rape and imprisonment in the accused's house before she freed herself and approached police.[108] Her evidence was that she constantly said 'no', screamed at the accused, struggled to escape, told him she had her period and physically resisted.[109] Evidence of her physical injuries was confirmed by police recordings as well as through forensic medical evidence.[110] The defence conceded that the physical elements of the offences were proven but disputed that the accused had the relevant state of mind.[111] His counsel submitted that 'comments made by the accused of "making love" and his actions at the time, are such as to give rise to a reasonable doubt the [sic] he knew the [victim] was not consenting'.[112] Defence counsel further argued that the accused's calm moods, when contrasted with the victim's evidence of his explosive behaviour during the incident, indicated a person with minimal capacity to reason when in a heightened state, thereby suggesting that he could have honestly been mistaken as to consent.[113]

Judge Davison stated that it may have been possible to infer from the accused's comments that he thought he was engaging in consensual intercourse.[114] However, her Honour was ultimately satisfied that there was sufficient evidence of

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103 McGregor, *Is It Rape?* (n 1) 209; Cossins (n 3) 470–2.

104 Pineau (n 102) 220–1.

105 Ibid 222–5; Powell et al (n 3) 459–60.

106 *R v Tennant* [2021] SADC 95 ('*Tennant*').

107 Ibid [5], [7].

108 Ibid [23]–[39].

109 Ibid [30].

110 Ibid [49], [54], [59]–[63], [65]–[66].

111 Ibid [73].

112 Ibid.

113 Ibid.

114 Ibid [83].

force[115] and resistance[116] to prove beyond reasonable doubt that the accused knew the victim was not consenting.[117] The totality of the evidence of the accused's physical force and violence, coupled with the victim's physical and verbal resistance, satisfied her Honour that the accused was not confused or mistaken.[118] However, without the supporting police, medical and forensic evidence substantiating the victim's physical injuries and emotional distress post-incident, her Honour may have been more inclined to accept the accused's belief in consent, particularly as there was no prior history of physical violence.[119] Thus, where a victim's testimony of force and/or resistance is not supported by evidence or a history of violence, accused persons may be able to rely upon a mistaken belief based on little more than their internal state of mind. This is expanded upon in Part IV.

These cases demonstrate how prosecutors may use narratives of resistance, buttressed by evidence of physical injuries, continued abuse, or acts of violence, to establish both non-consent and an accused's awareness of this. While this may be a successful prosecution strategy, when rape laws are viewed holistically, acceptance by the judicial system of these narratives can continue to blame and shame victims when their rape does not conform to these expectations.[120] This was reflected in the comments of Kelly J in the case of *R v H, R* ('*H, R*').[121] In this case, her Honour accepted the victim's evidence that she was restrained by the accused while they had sex, and this caused her extensive physical injuries.[122] However, her Honour was 'unsure what to make of [the victim's] silence throughout the episode' given her sexual history with the accused, insinuating instead that the victim felt 'shame about the situation she found herself in' in not making her lack of consent clear.[123] The victim was, therefore, blamed for not responding 'assertively and decisively'[124] and thus presumed to be consenting.

Judicial statements such as those by Kelly J in *H, R*, and Judge Millsteed in *L, J*, reinforce presumptions of resistance in the absence of a history of physical violence.

115 Ibid.

116 Ibid.

117 Ibid [84].

118 Ibid [90].

119 Ibid [42].

120 Craig (n 76) 10–11. For similar findings regarding implicit judicial acceptance of rape narratives, see: Jennifer Temkin, Jacqueline M Gray and Jastine Barrett, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) *Feminist Criminology* 205, 218–21; Burgin (n 3) 305–7. For a discussion on the shame and blame inherent in the adversarial trial, see Koss (n 10) 1335.

121 *R v H, R* [2017] SASC 67 ('*H, R*').

122 Ibid [32]–[34].

123 Ibid [26], [35].

124 Lise Gotell, 'Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women' (2008) 41(4) *Akron Law Review* 865, 880.

This suggests that the absence of resistance may be explainable in circumstances of ongoing violence or abuse. However, the further a situation deviates from this, the greater the responsibility placed upon victims to show that they made an accused aware of their non-consent by resisting. This not only fails to recognise the plurality of reasons why victims may not resist or express a lack of consent (discussed below) but also is contradictory to the legally recognised principle that a person must not be deemed to have consented to sexual activity merely because they did not resist or say anything to indicate non-consent.[125]

IV Defence Narratives of a Mistaken Belief in Consent

While the prosecution may use force and resistance myths to establish the physical elements of rape beyond a reasonable doubt, they may also be used by accused persons to create reasonable doubt that they possessed the requisite state of mind necessary for the offence. As the cases below demonstrate, a victim's passive compliance, particularly when there is no 'violence', may be sufficient to ground an accused's belief in consent, thereby creating reasonable doubt that he possessed the requisite state of mind. This permits finders of fact to find simultaneously that non-consensual intercourse occurred but that the accused was not legally culpable because he believed, due to her lack of resistance, that she was consenting.

This is seen in the case of *R v Moores* ('*Moores*'),[126] where the accused relied upon the victim's less-than-forceful resistance to support his mistaken belief in consent. In this case, the accused was charged with three counts of rape and one count of intent to cause harm.[127] He agreed that two counts of intercourse had occurred but said he had believed them to be consensual.[128] He denied the occurrence of counts 3 and 4.[129] At first instance, the accused was found guilty of counts 3 and 4 but not guilty of counts 1 and 2.[130] He appealed on the basis, inter alia, that the guilty verdicts were inconsistent with the not guilty verdicts because if the jury had accepted his evidence as truthful with respect to counts 1 and 2, then there was a reasonable possibility that he was telling the truth with respect to counts 3 and 4.[131]

However, the Court of Criminal Appeal found that the verdicts could be reconciled.[132] With respect to counts 3 and 4, the evidence between the victim and accused was divergent. That is, the accused denied they occurred at all. Thus, it was

125 *Evidence Act* (n 39) s 34N(1)(a)(i)–(ii).

126 *R v Moores* (2017) 128 SASR 340 ('*Moores*').

127 Ibid 343 [9].

128 Ibid 345 [15]–[16].

129 Ibid 375 [192].

130 Ibid 343 [9].

131 Ibid 375 [191]–[192].

132 Ibid 375 [195] (Blue J, Vanstone J agreeing at 343 [7], Doyle J agreeing at 376 [199]).

open to the jury to accept that the victim was truthful on these counts.[133] In contrast, the critical issue with respect to counts 1 and 2 was consent. Therefore, the Court of Criminal Appeal found it was open for the jury to have accepted the victim's evidence that she did not consent to these counts but to have retained doubt 'that a lack of consent was communicated to and understood by the [accused]'.[134] This is a mistake of law as there is no requirement in South Australian law that a lack of consent be communicated to an accused. On the contrary, jury directions specifically note that a person is not to be regarded as having consented merely because they did not say or do anything to indicate non-consent.[135]

In any event, the prosecution's case was that the victim resisted counts 1 and 2 by making her body rigid, manoeuvring away from the accused, pushing his penis away and telling him to stop.[136] Nonetheless, the Court found it was open for the jury to accept the possibility that the accused believed the victim was consenting, particularly as she had consented to prior acts of intercourse with him and had not communicated her lack of consent to counts 1 and 2 verbally, 'but only by bodily movements'.[137] Therefore, the accused could rely upon the victim's inadequate resistance to ground his mistaken belief in consent, blaming the victim for not communicating her non-consent sufficiently.[138] Further, he was also dispelled from the requirement to seek fresh consent for each new sexual activity.[139]

Likewise, in the case of *R v Sultani*, the accused was able to rely upon the victim's 'insufficient' resistance as the basis for his mistaken belief in consent.[140] In this case, the victim and accused were having an affair for a period of seven months.[141] When the relationship ended, the victim's evidence was that the accused forced her into sexual activity, repeatedly threatened to distribute sexual images of her, threatened her with a knife, to kill her, to report her visa status and to tell her husband of their affair.[142] While Judge Cuthbertson agreed that the victim was subject to an ongoing threat that the accused would release photographs of her, his Honour had doubts, inter alia, as to the accused's knowledge or recklessness regarding her lack of consent.[143] In particular, the victim said she had either gone along with the sexual

133 Ibid 375 [194].

134 Ibid 375 [193]–[194].

135 *Evidence Act* (n 39) s 34N(1)(a)(i).

136 *Moores* (n 126) 345 [15]–[16], [18]. Her testimony was supported by her immediate reports, medical evidence and messages from the accused apologising: at 346 [21]–[24].

137 Ibid 375 [194].

138 See Cossins (n 3) 475.

139 Cf Pineau (n 102) 230.

140 *R v Sultani* [2019] SADC 26, [50].

141 Ibid [4], [9].

142 Ibid [7], [23], [26].

143 Ibid [45], [50].

activity or pretended to be happy about it.[144] She said she 'thought she had no choice but to submit', that 'she would … do whatever he demanded', and that 'she would stay with him'.[145] There is no mention of whether the victim verbally or physically resisted to any further degree.

Despite the ongoing threat of the distribution of photographs, as well as threats of violence, Judge Cuthbertson found that the victim's lack of resistance and 'happ[iness]' at 'go[ing] along' with the sexual activity was sufficient to cause doubt that the accused was aware of or reckless as to her lack of consent.[146] Thus, the accused could rely upon the victim's submission in the face of threats to 'justify' his belief in consent. This reasoning normalises coercion within heterosexual sex[147] and again forces victims to prove they did not consent, repeatedly blaming and shaming victims when they do not meet this threshold.[148]

Comments by Judge Stretton in the case of *R v Austin*[149] likewise suggest that if a victim does not resist at the outset, then the accused may be able to rely upon a mistaken belief in consent to negate the mental element of the crime. In this case, the accused had briefly met the victim during a party at her house.[150] He returned later that night, broke into her house, threatened to stab her and then raped her.[151] The victim's evidence was that she initially screamed and tried to push him off but stopped when she realised it was useless and became passive.[152] His Honour found that, given her active resistance at the outset of the sexual activity, the accused must have known that the victim was not consenting.[153]

However, at some point during the rape, when the victim stopped resisting, Judge Stretton found the accused became merely 'recklessly indifferent to whether she was consenting, possibly thinking that she might no longer be objecting'.[154] His Honour made this finding 'on the basis of [the accused's] conduct immediately after the event, when he sat there talking to her with a degree of normality, as if things might be OK'.[155] This comment suggests that his Honour supposed it conceivable that a person may suddenly, during a rape, change her mind and desire sex with her rapist. This reasoning not only rests on dangerous myths that women enjoy

144 Ibid [50].

145 Ibid [22].

146 Ibid [50].

147 See Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989) 168.

148 Estrich (n 10) 1098–100. See also Remick (n 53) 1112.

149 *R v Austin* [2012] SADC 19.

150 Ibid [21].

151 Ibid [25]–[29].

152 Ibid [30].

153 Ibid [117].

154 Ibid.

155 Ibid.

rape[156] but also implies that even when faced with violence, the onus remains on victims to continually express their non-consent, notwithstanding the futility or risk of escalation.

Judge Stretton's comments regarding the accused's actions post-rape as indicative of the possibility that he thought the victim was not objecting were echoed by Judge Tracey in *Esposito*. In this case, her Honour did not accept that the accused possessed the requisite state of mind because the victim had not 'told [him] she was not having sex with him'.[157] Rather, she noted that '[i]t did appear that the accused was genuinely surprised by the allegations and somewhat clueless as to what the fuss was about, perhaps a reflection of not having thought much about whether [the victim] was in fact consenting'.[158] These comments place the responsibility on victims to actively evidence their resistance while rewarding ignorance and removing culpability, unless and until an accused's use of force reaches the threshold of violence and abuse as described, for example, in *Coutts*[159] or *Tennant*.[160]

The case of *R v Cleland* ('*Cleland*') is a further example whereby the alleged rape was not accompanied by physical threats or violence.[161] Accordingly, Judge Griffin conceptualised the victim's passive acquiescence as 'implied consent'.[162] The accused in this case was charged with two counts of rape.[163] The victim's evidence was that she met the accused while out with friends, and the group attended a party on the river bank.[164] The victim and accused walked along the river path and sat on a footbridge, talking and smoking.[165] She said the accused kissed her, which she said '[s]he was ok with' but conceded 'that alcohol may have played a part in that'.[166] She then alleged two counts of digital and penile penetration, neither of which she said she consented to.[167] The victim's evidence was that she verbally resisted both counts by saying 'no' and 'stop'.[168] She conceded that she did not initially resist in

156 See: Estrich (n 10) 1127; Edwards et al (n 102) 765–6.

157 *Esposito* (n 74) [108]–[109].

158 Ibid [106].

159 Where the victim was subjected to multiple acts of violent rape and physical abuse over four months, including choking to the point of losing consciousness: *Coutts* (n 55) [20], [32]–[37].

160 Where the victim was in a coercive relationship culminating in her physical restraint, assault, and rape: *Tennant* (n 106) [42], [83].

161 *R v Cleland* [2012] SADC 42 ('*Cleland*').

162 Ibid [93].

163 Ibid [1].

164 Ibid [9], [11]–[13].

165 Ibid [15], [19].

166 Ibid [19], [39].

167 Ibid [19]–[20].

168 Ibid.

an angry or demanding tone, but when he persisted, her rejections became angrier and louder.[169]

In contrast, the accused's evidence was that 'they were both willing participants' and '[the victim] also appeared to be enjoying it'.[170] It is unclear from the judgment the basis upon which the accused ascertained her enjoyment, but from Judge Griffin's summation of his testimony, it appears that enjoyment was assumed from either her behaviour or lack of resistance as the accused gave no affirmative evidence of her consent or pleasure.[171] Importantly, his Honour paraphrased the accused as testifying that '[s]he did not resist, say anything to him to suggest that she did not want him to be touching her that way and he believed that what was happening was consensual'.[172]

Overall, Judge Griffin was sceptical of the victim's testimony and had doubts as to the veracity of her evidence.[173] His Honour was particularly critical of the victim's failure to say no firmly or in an angry tone, particularly when: she voluntarily went with him to a secluded place; they were acting congenially; there was no overt physical violence; she was flattered he was interested in her; and she consented to kissing.[174] Instead, Judge Griffin found that the accused's version of events, that the physical acts were done with '[the victim's] implied consent', 'appealed to my commonsense' as a 'realistic and sensible account of how the events unfolded'.[175]

His Honour's acceptance of the accused's account as 'common sense' reinforces the myth that women can and will actively exercise their sexual autonomy to say 'no' and, further, that if sex is truly unwanted, then forceful resistance is the 'rational' response to the threat of rape. In reality, a woman's ability to express consent or lack thereof is inherently tied to the historical system of unequal power dynamics between men and women,[176] which can make the ability to resist illusory and constrain the latter's capacity to make autonomous sexual choices.[177]

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169 Ibid.

170 Ibid [78].

171 Ibid [78]–[79].

172 Ibid [79].

173 See, eg, ibid [39], [41].

174 Ibid [39].

175 Ibid [93].

176 Martha Chamallas, 'Consent, Equality and the Legal Control of Sexual Conduct' (1988) 61(4) *Southern California Law Review* 777, 814; MacKinnon (n 147) 173–4; Lynne Henderson, 'Rape and Responsibility' (1992) 11(1–2) *Law and Philosophy* 127, 143; Vanessa E Munro, 'Constructing Consent: Legislating Freedom and Legitimating Constraint in the Expression of Sexual Autonomy' (2008) 41(4) *Akron Law Review* 923, 925; Gavey (n 102) 252.

177 Kathleen C Basile, 'Rape by Acquiescence' (1999) 5(9) *Violence Against Women* 989. See also: Estrich (n 10) 1127, 1045–51, 1054; Cossins (n 3) 471; Gavey (n 102) ch 4.

Judge Griffin was also sceptical of the victim's comment that she did not resist because she 'was not a mean person'.[178] His Honour was also suspicious that she did not call out for help from three bystanders and found her reasoning, that she did not think men would help her in the situation, to be a fabrication.[179] It appears that Judge Griffin was, as a male with considerable social capital,[180] seemingly imagining what he would have done in the scenario.[181] However, when one considers the social conditioning of women to be polite, to avoid embarrassing men and to negotiate their way out of violence, her failure to call out or fight back when faced with a physically stronger man and instead 'play nice' seems a reasoned response to fear and to avoid triggering an escalation of violence.[182]

Further, the likely difference in physical strength between the accused and the victim, by virtue of their sex, as well as the difference in social power between men and women, can likewise constrain one's ability to resist.[183] For example, where a person has greater social power in society, their version of events is more likely to be believed by those in power.[184] When the victim's failure to call out is considered in this light, it offers a credible explanation as to why she did not alert bystanders as she (justifiably) feared not being believed by other men.[185] Additionally, the accused

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178 *Cleland* (n 161) [39].

179 Ibid [41].

180 See Gavey (n 102) 200 n 10, 250–2 for a discussion of what Gavey terms 'masculine capital'.

181 There is no 'normal' reaction to sexual victimisation: Mason and Lodrick (n 80) 31; Cameron Boyd, 'The Impacts of Sexual Assault on Women' (ACSSA Resource Sheet, Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, April 2011) 1.

182 Brownmiller (n 21) 256; MacKinnon (n 147) 179; Remick (n 53) 1118; Paula S Nurius et al, 'Women's Situational Coping with Acquaintance Sexual Assault: Applying an Appraisal-Based Model' (2004) 10(5) *Violence Against Women* 450, 453; Melanie Randall, 'Sexual Assault Law, Credibility, and "Ideal Victims": Consent, Resistance, and Victim Blaming' (2010) 22(2) *Canadian Journal of Women and the Law* 397, 420; Nicole E Conroy, Ambika Krishnakumar and Janel M Leone, 'Reexamining Issues of Conceptualization and Willing Consent: The Hidden Role of Coercion in Experiences of Sexual Acquiescence' (2015) 30(11) *Journal of Interpersonal Violence* 1828, 1841; Gavey (n 102) 136.

183 See: Leslie M Kerns, 'A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance' (2001) 10(2) *Columbia Journal of Gender and Law* 195, 209; Conroy, Krishnakumar and Leone (n 182) 1834.

184 For a discussion of why many victims do not report their rape, see: Torrey (n 13) 1029–30; Stewart, Dobbin and Gatowski (n 8) 164–5; Bonnie Mann, 'Rape and Social Death' (2023) 24(3) *Feminist Theory* 377.

185 See, eg, Judith E Krulewitz, 'Reactions to Rape Victims: Effects of Rape Circumstances, Victim's Emotional Response, and Sex of Helper' (1982) 29(6) *Journal of Counseling Psychology* 645, 647: 'men in general are more likely to take the rapist's side, share the rapist's perspective, and blame the rape victim'.

continued to persist despite her verbal resistance. Therefore, it seems illogical to continue resisting and risk further physical injury beyond the rape itself.[186]

The reasoning in this case further ignores the ways women experience force and respond to fear and threats living under a system of male dominance and power by assuming that the threat of rape only appears when an accused is physically violent.[187] While the facts of *Cleland* may not, for example, appear violent or threatening as identified by men, for women, coercion against their desires is the very definition of force. The victim's evidence of unwanted undressing, being grabbed and pushed down[188] are acts of physical violence against her bodily integrity and sexual agency, notwithstanding the lack of an overt 'attack'.[189] Further, the very presence of a man, particularly a stranger, at night and in a secluded area can be an aggressive and threatening act when viewed by women living under the threat of sexual violence.[190] When consideration is given, therefore, to how women experience the fear and threat of rape in a culture designed by and for the benefit of men, the victim's behaviour no longer appears illogical but rather the actions of a fearful woman at risk of male aggression.

The case of *R v L-D* ('*L-D*')[191] further illustrates how defence counsel can reconstruct a victim's response to fear as passive acquiescence and how, in the absence of forceful violence, this can be sufficient to ground an accused's mistaken belief in consent. In this case, the accused was charged with one count of rape.[192] There was no dispute in the case that sexual intercourse had occurred. The issue was whether it was consensual.[193] The victim's evidence was that she repeatedly said 'no' and 'we can't do this. … This is not what I want to do'.[194] In contrast, the accused's evidence

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186 Brian P Marx et al, 'Tonic Immobility as an Evolved Predator Defense: Implications for Sexual Assault Survivors' (2008) 15(1) *Clinical Psychology: Science and Practice* 74, 79; Jennifer S Wong and Samantha Balemba, 'Resisting during Sexual Assault: A Meta-Analysis of the Effects on Injury' (2016) 28(1) *Aggression and Violent Behavior* 1, 7; Carr et al (n 2) 223.

187 See Joan McGregor, 'Why When She Says No She Doesn't Mean Maybe and Doesn't Mean Yes: A Critical Reconstruction of Consent, Sex, and the Law' (1996) 2(3) *Legal Theory* 175, 178–80 ('Why When She Says No She Doesn't Mean Maybe and Doesn't Mean Yes'). See also: Brownmiller (n 21) 377–8; Estrich (n 10) 1107–8; MacKinnon (n 147) 173.

188 *Cleland* (n 161) [19].

189 Robin L West, 'Legitimating the Illegitimate: A Comment on "Beyond Rape"' (1993) 93(6) *Columbia Law Review* 1442, 1448. See also Estrich (n 10) 1109.

190 Estrich (n 10) 1115; McGregor, 'Why When She Says No She Doesn't Mean Maybe and Doesn't Mean Yes' (n 187) 178.

191 *R v L-D* [2018] SADC 126 ('*L-D*').

192 Ibid [1].

193 Ibid [103].

194 Ibid [22], [25]–[26].

was that the victim 'gave no verbal or physical indication that she did not want to have sexual contact with him' and that all sexual activity was consensual.[195]

While Judge Millsteed noted the victim's evidence that she verbally protested, his Honour stated twice that she offered little to no physical resistance[196] despite resistance not being necessary to prove non-consent. Instead, his Honour concluded that her failure to resist supported the accused's belief that her actions were consensual.[197] His Honour further accepted that the victim kissed the accused back and 'allowed him to touch her vagina to the point of becoming sexually aroused'.[198] How Judge Millsteed concluded that the victim 'allowed' the accused to touch her is unclear and infers acquiescence or submission as tantamount to consent, reiterating myths of women as passive parties to sexual activities.[199] His Honour then explained that by 'allowing' the accused to touch her, it was reasonable to infer that the victim freely and voluntarily engaged in these activities as there was no evidence to the contrary.[200] Regardless of the victim's consistent evidence that she said no and pushed the accused away, consent was inferred from her inaction.[201] Again, Judge Millsteed relied upon the myth that coercion is a reasonable means to dissipate a woman's verbal resistance.[202] Accordingly, the accused could use the victim's passive acquiescence in the face of his coercion to ground his belief in consent.

To explain why she did not physically resist further, the victim gave evidence that she 'blanked out' and lapsed into a dissociative state twice during the encounter.[203] His Honour did not accept this possibility as a credible response to the accused's unwanted advances because, amongst other things: 'the accused had not used, or threatened to use, any form of violence … before he kissed her'; they 'were on friendly terms before the incident'; and such 'relatively benign conduct' could not cause dissociation.[204] Thus, he dismissed the victim's allegation of dissociation

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195 Ibid [3], [41].

196 Ibid [113], [116].

197 Ibid [116].

198 Ibid [113]–[114]. Sexual arousal does not mean that consent was freely and voluntarily given. Sexual arousal can occur inconsequentially to unwanted sexual behaviour and is not evidence of consent: see Ellison and Munro, 'Better the Devil You Know?' (n 79) 318. See generally Amanda Denes, 'Biology as Consent: Problematizing the Scientific Approach to Seducing Women's Bodies' (2011) 34(5) *Women's Studies International Forum* 411.

199 See Smart (n 10) 34. See also Chamallas (n 176) 814–15.

200 *L-D* (n 191) [114].

201 Ibid [116].

202 See: Pineau (n 102) 224–5; Ellison and Munro, 'Of "Normal Sex" and "Real Rape"' (n 102) 296.

203 *L-D* (n 191) [23]–[24], [31]–[32].

204 Ibid [114].

because the accused was not a 'violent' stranger, and the victim had engaged in consensual touching prior to the rape.[205]

His Honour appeared to presume that dissociation would only ever occur in circumstances of physical aggression, threats or violence, as that is how men generally view threats to their bodily autonomy.[206] Dissociation is 'a sense of being cut off' from an actual situation and results from extreme fear, allowing a victim to endure what is happening.[207] However, the perception of the threat of danger rather than the actual threat can trigger a dissociative response.[208] This is supported by research into tonic immobility, a common, involuntary response to rape, characterised by fear, physical immobility, unresponsiveness and, at times, dissociation.[209] Tonic immobility may also occur outside of threats to life.[210] It can arise from the humiliation, dehumanisation or objectification experienced by rape victims,[211] when a victim fears entrapment or additional physical harm, or when escape or resistance appears futile.[212]

Judge Millsteed, however, dismissed the victim's dissociation as an irrational response to the accused kissing and touching her vagina.[213] This is problematic as it suggests that there is a rational response to sexual violence and that victims must respond accordingly.[214] Further, it trivialises the victim's experience as insufficient to trigger dissociation or tonic immobility because the rape was 'non-violent'. Such reasoning implies that more force than the force needed to have sex with a woman against her desires is required to prove rape. This is blind to how unwanted sexual touching is in and of itself force.[215] It also ignores the disbelief and dehumanisation

205 Ibid. Cf Avigail Moor et al, 'Rape: A Trauma of Paralyzing Dehumanization' (2013) 22(10) *Journal of Aggression, Maltreatment and Trauma* 1051, 1053: 'it is not unusual for rape cases to be devoid of severe physical injury or life threat, and yet, be extremely traumatic' due to 'the tremendous emotional pain entailed'.

206 Estrich (n 10) 1105. In contrast to his Honour's implication, see Grace Galliano et al, 'Victim Reactions during Rape/Sexual Assault: A Preliminary Study of the Immobility Response and Its Correlates' (1993) 8(1) *Journal of Interpersonal Violence* 109, 112. See also Mason and Lodrick (n 80) 29.

207 Mason and Lodrick (n 80) 29.

208 Ibid.

209 Ibid; Moor et al (n 205) 1055; Anna Möller, Hans Peter Söndergaard and Lotti Helström, 'Tonic Immobility during Sexual Assault: A Common Reaction Predicting Post-Traumatic Stress Disorder and Severe Depression' (2017) 96(8) *Acta Obstetricia et Gynecologica Scandinavica* 932, 935–6. See Marx et al (n 186) 81, 83.

210 Marx et al (n 186) 76; Mason and Lodrick (n 80) 29.

211 Moor et al (n 205) 1054–6, 1062–3.

212 Marx et al (n 186) 83; Moor et al (n 205) 1065; Möller, Söndergaard and Helström (n 209) 932.

213 *L-D* (n 191) [114].

214 See, eg, Burgin (n 3) 305.

215 McGregor, *Is It Rape?* (n 1) 114; Burgin (n 3) 307. 'Force is present because consent is absent': MacKinnon (n 147) 172.

victims experience when facing unwanted sexual advances and how those feelings may adversely affect one's ability to react.[216] Instead, Judge Millsteed's reasoning allows an accused person to coerce consent, and when a victim does not resist to the requisite degree, he can use her passive acquiescence to create reasonable doubt that he was aware of her non-consent. Thus, the violence and dehumanisation inherent in the act of unwanted sex and the physical and psychological pain of rape, both of which can leave no physical indicia of violence, go unacknowledged.[217]

Additionally, Judge Millsteed assumed that when faced with fear and force, the bargaining (or physical) power between the accused and the victim was equal[218] and that when confronted with unwanted sexual advances, the latter was able to communicate her free choice voluntarily. However, this does not consider that for a woman, her vulnerability and potential fear for her physical and social safety, that is, the external and internal shame inflicted on women who make allegations of rape, may constrain her ability to act.[219] Like Judge Griffin *Cleland*, Judge Millsteed in *L-D* was surprised that the victim did not wake other people in the house as he assumed the embarrassment would be less severe than the rape.[220] However, this again downplays the humiliation, disbelief and shock experienced during rape that can lead to a loss of agency and inability to respond, for example, by calling out,[221] as well as ignores the multitude of ways women are blamed for their victimisation.[222] Instead, in both cases, the Judges looked for evidence of force and resistance to substantiate the victims' claims of non-consent and, when their Honours did not see evidence of either, concluded that their acquiescence equalled consent.

Likewise, in *R v De Wilde* ('*De Wilde*'), despite the victim's evidence that she was 'very scared and terrified', Judge Tracey, foreshadowing her Honour's comments in *Esposito*, was not satisfied 'that [the victim] gave any physical or verbal sign to the accused that she was not a willing participant in the sexual activity'.[223] The reasoning of Judge Tracey, Judge Griffin and Judge Millsteed provides men with permission to 'mistake' a woman's fear for consent. This removes the agency of any victim to determine the terms on which she wishes to engage in sexual activity

216 Moor et al (n 205) 1054–5, 1063.

217 Clark (n 25) 28; Quilter, 'Re-Framing the Rape Trial' (n 7) 43; Moor et al (n 205) 1053; Burgin (n 3) 310.

218 Cf, eg: Carole Pateman, 'Women and Consent' (1980) 8(2) *Political Theory* 149, 162; MacKinnon (n 147) 174; Munro (n 176) 938.

219 Henderson (n 176) 164; Remick (n 53) 1112–13; Paula S Nurius et al, 'Interpreting and Defensively Responding to Threat: Examining Appraisals and Coping with Acquaintance Sexual Aggression' (2000) 15(2) *Violence and Victims* 187, 202–3; Moor et al (n 205) 1054; Mann (n 184) 383.

220 *L-D* (n 191) [115].

221 Moor et al (n 205) 1055, 1062–3.

222 See, eg: Krulewitz (n 185) 646; Amy M Buddie and Arthur G Miller, 'Beyond Rape Myths: A More Complex View of Perceptions of Rape Victims' (2001) 45(3–4) *Sex Roles* 139, 139–40; Craig (n 76) 9. See also Mann (n 184) 384–5.

223 *R v De Wilde* [2022] SADC 116, [55], [171] ('*De Wilde*').

by permitting accused persons to override '[the victim's] apparent wish'[224] that she made her non-consent more explicit. Again, in *De Wilde*, Judge Tracey placed the onus on the victim to actively resist while excusing the accused when his actions did not meet the masculine definition of violence.[225]

Lastly, even when an accused uses violence, the acts of a victim who 'complies' through fear or futility may provide the foundation for a belief in consent. This is illustrated in the case of *R v S*.[226] The accused in this case was charged with four counts of aggravated assault and five counts of rape against his wife, which occurred between 2009 and 2013.[227] Of relevance to the appeal were counts 4 (aggravated assault) and 5 (rape), which occurred in 2012. The victim's evidence with respect to these counts was that the accused was angry with her and hit her with a wooden dowel (count 4), after which he raped her (count 5).[228] At first instance, he was found guilty of count 4 and not guilty of the remaining charges, including count 5.[229] The accused appealed on the basis that the guilty verdict on count 4 was inconsistent with the not guilty verdicts, particularly the jury's finding of not guilty with respect to count 5.[230]

The accused argued that the prosecution case depended on the credibility and reliability of the victim's evidence.[231] Accordingly, the fact the jury delivered a verdict of not guilty on count 5, which took place immediately after the count 4 assault, was, the accused argued, fatal to her veracity and reliability.[232] The Court of Criminal Appeal ultimately found that the guilty and not guilty verdicts could stand together because the only issue in relation to count 4 (assault) was whether the physical elements of the assault occurred, whereas, for count 5, the prosecution needed additionally to prove that the accused was reckless as to consent.[233]

The Court of Criminal Appeal reasoned that the jury may well have accepted the victim's evidence that the physical elements of counts 4 and 5 occurred beyond reasonable doubt.[234] However, the Court of Criminal Appeal found that it was open for the jury to have had reasonable doubt that the accused was aware that the victim

224 Ibid [171].

225 The victim described the accused trying to kiss her as 'forceful and … disgusting' while her Honour was not satisfied that the accused forced her to kiss him: ibid [52], [171].

226 *R v S* [2015] SASCFC 179.

227 Ibid [5]–[18].

228 Ibid [9]–[10].

229 Ibid [3].

230 Ibid [4].

231 Ibid [51].

232 Ibid.

233 Ibid [53] (Blue J, Kelly J agreeing at [1], Stanley J agreeing at [99]).

234 Ibid [57], [60].

'was not consenting as opposed to acquiescing in the intercourse'.[235] The victim's evidence was that she did not say or do anything to suggest that she did not agree to the sexual intercourse, nor did she try to push him away or otherwise resist physically or verbally.[236] Instead, she went along with it as '[she] knew it would be finished then'.[237] Further, while she said in evidence that she was crying, she admitted this was due to the assault and not intercourse.[238] The Court of Criminal Appeal found these matters may have caused the jury to have had reasonable doubt that the accused 'appreciated' that she was not consenting, particularly in light of his evidence that he believed she was.[239]

The Court's reasoning is particularly alarming with respect to the non-guilty verdict for the count 5 rape. Notwithstanding that the jury found the accused guilty of an aggravated assault immediately preceding the rape (count 4), the Court of Criminal Appeal found it was open for the jury to have reasonable doubt that the accused was aware of her non-consent. In circumstances where the accused was found guilty of assault, it seems incomprehensible that he was not at the very least cognisant of the possibility that she might not have been consenting. Further, at no stage did the Court of Criminal Appeal consider s 46(3)(a)(i) of the *CLCA,* which provides that consent cannot be given freely and voluntarily because of the application of force. Rather, the Court looked for expectations of resistance and once again reinforced the myth that male aggression is a normal part of seduction, the onus remaining on the woman to 'fight back' to prove non-consent.[240]

The cases discussed in this Part show how accused persons may rely upon victims' lack of 'sufficient' resistance or passive acquiescence to exculpate themselves on the basis that they believed the sexual encounter to be consensual. This is particularly concerning as, first, it allows accused persons to disregard a woman's sexual agency and presume consent is present unless and until she resists. Secondly, it places the responsibility on women to prevent their rape, notwithstanding the fear of forced sexual violation. Lastly, by allowing accused persons to rely upon a lack of resistance to create the foundation for an alleged mistake, the intention of the South Australian Parliament in seeking to eliminate the incursion of rape myths regarding resistance into informing rape trials is undermined.[241] Instead, these cases show that myths of resistance persist within contemporary legal conceptions of rape.

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235 Ibid [53].

236 Ibid [55].

237 Ibid [13].

238 Ibid [55].

239 Ibid [55]–[57].

240 See also Pineau (n 102) 224–5.

241 See, eg, South Australia, *Parliamentary Debates*, House of Assembly, 25 October 2007, 1468–9 (Michael Atkinson, Attorney-General).

V Conclusion

This article shows how narratives of force and resistance are drawn upon in rape trials despite their ostensible removal from formal, legal definitions of rape. This is evident in the emphasis on, and judicial endorsement of, victims' verbal and physical resistance as evidencing their communication of non-consent as well as in the acceptance of passive acquiescence as sufficient to create reasonable doubt that an accused was aware of her non-consent. Reliance on and endorsement of force and resistance narratives in this regard are problematic because not only do most rapes not conform to these narratives, but such myths also obligate women to justify their actions or inaction, according to masculine standards of force and resistance, at odds with how women experience the threat of rape. This puts victims on proof of their own victimisation and risks their further traumatisation through the justice system. Accordingly, the prosecution of sexual violence through the South Australian legal system as it currently stands is insufficient to support the totality of victims' justice needs. This research, therefore, forms a basis upon which to urge South Australia to review and address its justice responses to rape.

VI Appendix A

R v Austin [2012] SADC 19

R v Cleland [2012] SADC 42

R v El Rifai [2012] SASCFC 98

R v S, GJ [2012] SADC 150

R v Thoring [2013] SASCFC 35

R v Edson [2013] SADC 139

R v Coutts [2013] SASCFC 143

R v K, JS [2013] SADC 177

R v Brady [2014] SASCFC 7

R v Latifi [2014] SADC 27

R v S, P [2014] SADC 77

R v Wilson [2014] SADC 139

R v Pelly [2015] SASCFC 25; (2015) 122 SASR 84

R v S [2015] SASCFC 179

R v Duncan [2015] SASCFC 191

R v Thorpe [2016] SADC 25

R v Green [2016] SADC 29

R v T, D [2016] SADC 75

R v P, S [2016] SASCFC 97; (2016) 261 A Crim R 329

R v Robertson [2016] SASCFC 133

R v H, R [2017] SASC 67

R v Moores [2017] SASCFC 95; (2017) 268 A Crim R 106; (2017) 128 SASR 340

R v Kennedy [2017] SASCFC 170

R v Kennett [2018] SASCFC 112

R v Smart [2018] SASCFC 123

R v L-D [2018] SADC 126

R v Bristow [2018] SADC 128

R v L, J [2018] SADC 143

R v Van Wyk [2018] SASCFC 138; (2018) 275 A Crim R 584; (2018) 132 SASR 46

R v Sultani [2019] SADC 26

R v Crafter [2019] SASCFC 25

R v Dhir [2019] SASCFC 55; (2019) 133 SASR 452

M, B v Police [2019] SASC 58; (2019) 134 SASR 575

R v Hanks [2019] SADC 139

Ekisa v The Queen [2019] SASCFC 159

R v Oludare [2020] SADC 15

R v Webb [2020] SADC 16

SPC v The Queen [2020] SASCFC 43

Gray v The Queen [2020] SASCFC 46

R v Rogers [2020] SADC 72

R v Tennant [2021] SADC 95

Weragoda v R [2021] SASCA 123

R v L OS [2021] SADC 125

R v Nawroazi [2021] SADC 143

R v Dobbs [2022] SADC 53

R v De Wilde [2022] SADC 116

R v AP [2022] SADC 136

R v Esposito [2023] SADC 64