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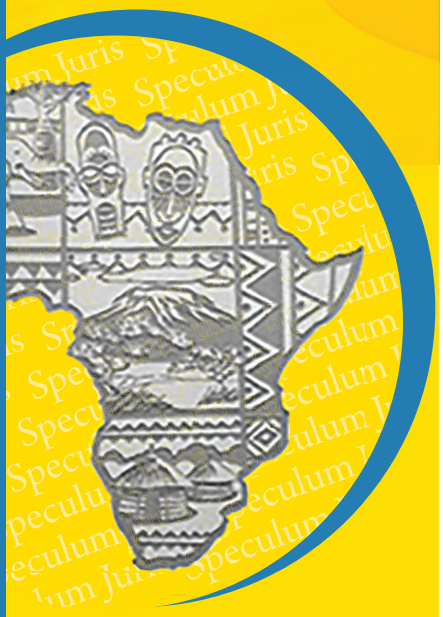

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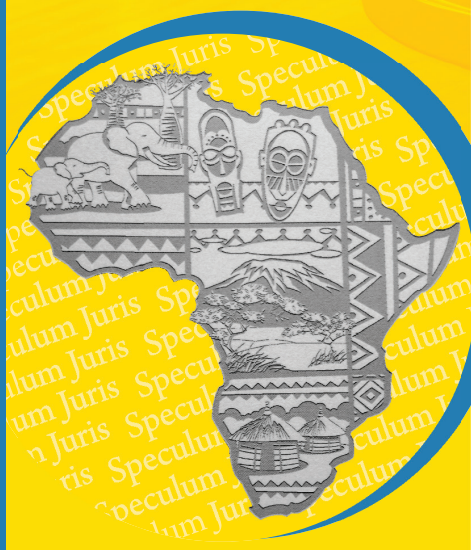

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Telling the Untold in Rape: Khamphepe J's Separate Judgment in *Tshabalala v S; Ntuli v S*

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Abstract

Violence against women including rape as a criminal offence in South Africa is a topical issue and the Constitution has provided the much-needed legal framework to tackle its spread. In 2019 the Constitutional Court ruled that an act of one is imputed to all in the commission of group/gang rape in the decision of S v Tshabalala, S v Ntuli. This judgment is hailed as both constitutionally compliant and feminist in its altering the common law principle of common purpose in rape. In this Note, it is submitted that though rape is gender-power-exercised by men over women, combating sexism also means confronting other equal power/control dynamics in rape, including race. In this judgment, Khamphepe J's separate judgment introduced race and gender in the adjudication of sexual violence by the Constitutional Court. Her judgment is perceived here as having set the scene for a subversive, unconventional theorisation of rape that upholds an African/black feminist lens of rape which unsettles the prevalent monolith conceptualisation of rape in gender equality jurisprudence.

Keywords: African/black feminist thought; womanism; intersectional approach; sexual violence/rape; feminist legal theory; gender equality

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1 INTRODUCTION

Khamphepe J's separate judgment in *Tshabalala v S; Ntuli v S*[1] took an unprecedented step in addressing sexism and racism as intertwined in the Constitutional Court (Court) that has avoided the politics of race in rape in a post-apartheid era. The novelty of her judgment was its surfacing of the sexual wound which explains the abjection of the racialised body,[2] often overlooked in rape adjudication in South Africa, illuminating the continuing injustice of rape.

This note comes five years after the court's judgment which was given in late 2019 and yet its political and legal significance cannot be under-estimated. The genesis and effects[3] of the rigid legal rules that institutionalised colonialism and apartheid which "privilege(d) the maintenance of racial boundaries"[4] have enjoyed silence for a long time in rape. This is despite the race and gender rifts these caused and continue to perpetuate through silence, particularly in rape legal discourse. It could be argued that part of the South African rape culture[5] is the normalisation of the rape of black women,[6] which can be traced back to colonial race-based laws.[7] For feminists, this judgment embodies Audre Lorde's call for action "the transformation of silence into language".[8] Khamphepe J's efforts to confront both the tyrannies of gender and race as manifestations of power in sexual violence cannot be ignored. Her separate judgment appears to be an attempt to close the "the'patriarchy' thesis"[9] gap in the adjudication of rape in South Africa. It makes a breakaway from the singling out of gender as the sole culprit in inequality discourse, including rape adjudication.

Since the coming into effect of the Constitution and the law-changing decision of *Masiya v Director of Public Prosecutions (Pretoria) and Others*[10] gender has remained and maintained the sole focus of critique of power relations in rape adjudication, to the exclusion of other intersecting oppressions like race and class. From this decision, it could be inferred that under the Constitution rape should be viewed within the context of the rights of all women, including the rights to dignity, autonomy, bodily integrity and security of the person.[11] This constitutional generalisation has the potential to conflate certain experiences, identities and subjectivities that historically, have been shaped differently by rape laws through slavery, colonialism and apartheid.

In *Tshabalala v S; Ntuli v S,* Khamphepe J sought to approach racism and sexism as inter-connected abominations and situated both within the equality jurisprudence of rape. Though

1 2020 (2) SACR 38 (CC).

2 Coetsee and Du Toit "Facing the Sexual Demon of Colonial Power: Decolonising Sexual Violence in South Africa" 2018 *European Journal of Women's Studies* 1. See also Khamphepe and Van Heerden "Dismantling South Africa's Scourge-the Constitutional Court Rules Rape an Abuse of Power: *Tshabalala v S; Ntuli v S* 2022 *Journal of the South African Chapter of the International Association of the Women Judges*, Issue 111.

3 Nash and Pinto "A New Genealogy of 'Intelligent Rage,' or Other Ways to Think about White Women in Feminism" 2021 *Signs: Journal of Women in Culture and Society* 883.

4 Thornberry "Rape and Racial Boundaries" 2016 *Journal of Urban History* 194.

5 Mosiana "Rape is a Product of Systemic and Institutionalised Patriarchy" https://www.dailymaverick.co.za/ opinionista/2017-05-24-rape-culture-is-a-product-of-systemic-and-institutionalised-patriarchy/ (accessed 03-03-2024).

6 Gqola *Rape: A South African Nightmare* (2015) 5.

7 Scully "Rape, Race, and Colonial Culture: The Sexual Politics of Identity in the Nineteenth-century Cape Colony, South Africa" 1995 *The American Historical Review* 339.

8 Lorde, *Sister Outsider* (1984) 40.

9 Buiten and Naidoo "Framing the Problem of Rape in South Africa: Gender, Race, Class and State Histories" 2016 *South African Review of Sociology* 540.

10 8 BCLR 827 (CC).

11 Naylor "The Politics of a Definition" in Artz and Smythe (eds) *Should we Consent? Rape Law Reform in South Africa* (2007) 42.

lacking any persuasive force, this judgment illustrates how the court sometimes grapples with the interpretation and application of equality while also giving us "a window into Black women's"[12] rape, something that has hardly been discussed in South African law.

1 1 The Facts of *Tshabalala v S; Ntuli v S*

Briefly, the facts of the case are as follows: In September 1998 a group of young men rampaged through the Umthambeka Section of Tembisa, in the district of Kempton Park. They forced entry into several shacks and, once inside, assaulted, robbed and raped the occupants. Not only did this group of young men forcibly enter their shacks, but they also demanded money and took turns raping the victims. The youngest of these victims was 14 years old. Another victim was a woman who was visibly pregnant, but this did not deter the group. While some of the men raped the female occupants, other members of the group were posted outside to act as look-outs. The court was asked to determine whether a co-accused can be convicted of the common law crime of rape based on the doctrine of common purpose in circumstances where he did not himself penetrate the victim.[13]

The applicants (Ntuli and Tshabalala) argued that the offence of rape is an instrumentality offence and they ought to be exonerated as they had not participated in the actual committing of the offence itself.[14] Their presence during the acts themselves did not make them similarly guilty as rapists. The state presented its case on why the common law principle of common purpose should apply to group/gang rape and argued that there had been prior agreement on the part of the group and that common purpose must have been formed before the attacks commenced.[15] Another argument by the state was that applying the doctrine was not out of the ordinary but in keeping with modern international standards.[16]

The Gender Commission made two submissions to the court, one of which was that the *stare decisis* rule was being challenged by failure to follow previous court decisions and the other was that the instrumentality approach was flawed.[17] Mathopo AJ, delivering the majority judgment ruled against both Tshabalala and Ntuli, finding that the instrumentality argument did not hold, finding it to be "unsound, unprincipled and irrational".[18] Owing to the fact that the group had the advantage of dominance and control, Snyman's argument (on instrumentality), which was relied upon, was found to be faulty in its perpetuation of gender inequality and discrimination. [19]According to the court, the other reason for the doctrine to apply was the fact that during rape, some of the perpetrators wanted simultaneous penetration.[20]

2 CRIMINAL LAW SCHOLARSHIP ON *TSHABALALA v S; NTULI v S*

Rape is a statutory crime which is defined in the Criminal Law (Sexual Offences and Related

12 Nash and Pinto 883.

13 *Tshabalala v S; Ntuli v S* para 22.

14 *Ibid* para 33.

15 *Ibid Tshabalala v S; Ntuli v S* para 37.

16 *Ibid* para 40.

17 *Ibid* para 43.

18 *Ibid* para 53.

19 *Ibid* .

20 *Ibid* para 61.

Matters) Amendment Act[21] (SORMA). According to section 3 of SORMA:

> Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape.

This case, as expected, garnered legal attention, particularly from criminal law scholars whose technical analysis of the case varied. Mokone approached it from a human rights/constitutional framework, rendering a critical analysis of the role of the Constitution in the adjudication of cases of sexual gender-based violence, with a focus on section 39(2).[22] Another perspective gave a more technical approach to understanding common purpose as a criminal law doctrine, giving a thorough background of the principle and its acceptance into South African law. It showed how, based on the Court's judgment, "the scope of the common purpose extends to those criminal consequences that each accused subjectively foresaw occurring while pursuing their common purpose".[23]

Le Roux's critique identified several technical flaws in the judgment, including the disregard for the qualitative differences between rape where the *actus reus* consists of sexual penetration; and sexual assault where the *actus reus* consists of sexual violation, which is why the legislature differentiates between these two offences.[24] She also indicated that it was not correct that co-perpetrators would escape liability (as the court indicated) as they would still be liable as accomplices though likely to receive less harsh sentences than the perpetrators.[25] Lastly, even though a perpetrator has the necessary *mens rea* to commit the crime, the accomplice does not have the *mens rea* required for the commission of the crime, but to facilitate the commission of the crime by the perpetrator and by turning accomplices into co-perpetrators might pose practical legal challenges if no distinction is drawn.[26] This view was also shared by Maphosa that though the Court's decision is laudable, it could have ruled on common purpose without having to denounce instrumentality as a central element of the crime and should have taken into account that rape is a conduct/instrumental crime.[27]

3 SEXUAL VIOLENCE/RAPE AND VIOLENCE AGAINST WOMEN IN *TSHABALALA v S; NTULI v S*

The court used both rape and sexual violence interchangeably throughout the judgment. The same applies to this Note. Whereas rape is defined in SORMA, sexual violence is defined by The World Health Organization (WHO) as:

> any sexual act, attempt to obtain a sexual act, or other act directed against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting. It includes rape, defined as the physically forced or otherwise coerced penetration of the vulva or anus with a penis,

21 32 of 2007.

22 Mokone "The Constitutional Role of the Judiciary in Cases of Sexual GBV: An Analysis of *Tshabalala v S; Ntuli v* S 2020 (5) SA 1 (CC)" 2022 *Obiter* 406.

23 Khan and Hagglund "An Analysis of the Common Purpose Doctrine and Rape in South Africa With Special Focus on *Tshabalala v The State* [2019] ZACC 48" 2022 *Obiter* 404.

24 Le Roux-Bouwer "The Krugersdorp Gang Rapes -Another Tshabalala v S; Ntuli v S?" 2023 *SALJ* 14–16.

25 *Ibid* 14 15.

26 *Ibid* 16.

27 Maphosa "Progressive or Repressive Rape Law? *Tshabalala v S; Ntuli v S* 2020 2 SACR 38 CC South African" 2022 *Crime Quarterly* 5–11.

> other body part or object, attempted rape, unwanted sexual touching and other non-contact forms.[28]

SORMA also recognises the statutory crime of sexual assault, applicable to all forms of sexual violation without consent.[29] It is also noteworthy that like rape, sexual violence can take diverse forms, including violence against children or male-to-male violence.[30] Violence against women, is pervasive around the world[31] and in South Africa 115 women are raped every day.[32] It is for this reason that the sole focus of this note is on violence against women, as opposed to gender-based violence, even though the Court and most scholars would consistently use the latter, which like sexual violence can involve violence against any sex.[33] But because the emphasis of this note is feminist, it seeks to be specific on violence against women. Though not the only international legal instrument on violence against women, the 1993 UN Declaration on the Elimination of Violence against Women defines it as:

> … any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.[34]

In *Tshabalala v S; Ntuli v S,* the court committed itself to "developing and implementing sound and robust legal principles that advance the fight against gender-based violence to safeguard the constitutional values of equality, human dignity and safety and security".[35] When reading *Tshabalala v S; Ntuli v S,* the dominant theme of a gender-sensitive judiciary does not go unnoticed. Though not the first case of rape[36] to underscore male dominance and power relations, *Tshabalala v S; Ntuli v S* stands among a growing number of cases that, since 1994, have consistently framed rape around the masculine and violence . Drawing from *Masiya* and *S v Chapman*[37] Mathopo J began his majority judgment with a stern, fed-up tone, stating that:

> … for far too long rape has been used as a tool to relegate the women of this country to second-class citizens, over whom men can exercise their power and control, and in so doing, strip them of their rights to equality, human dignity and bodily integrity.[38]

This strong introductory wording against the despicable acts of sexual violence and rape captures the frustration of many. Rape is a nightmare,[39]a scourge[40] and a terror that seems to occur

28 https://www.who.int/news-room/fact-sheets/detail/violence-against-women (accessed 10-03-2024)

29 Snyman *Criminal Law* (2014) 341.

30 Deane "Sexual Violence and the Limits of Laws' Powers to Alter Behaviour: The Case of South Africa" 2018 *Journal of International Women's Studies* 86.

31 Klugman "Gender-based Violence and the Law" *World Development Report* 2017 1.

32 https://theconversation.com/rape-is-endemic-in-south-africa-why-the-anc-government-keeps-missing-the-mark-188235 (accessed 15-04-2024).

33 "Gender-based violence (GBV) is violence committed against a person because of his or her sex or gender. It is forcing another person to do something against his or her will through violence, coercion, threats, deception, cultural expectations, or economic means. Although the majority of survivors of GBV are girls and women, LGBTIQ+, boys and men can also be targeted through GBV" https://help.unhcr.org/turkiye/information-and-resources-on-protection-from-violence/what-is-gender-based-violence/ (accessed 15-04-2024).

34 "Declaration on the Elimination of Violence against Women" UN Doc A/RES/48/104 (20 December 1993), http://www.un.org/documents/ga/res/48/ a48r104.htm (accessed 15-04-2024).

35 *Tshabalala v S; Ntuli v S* para 63.

36 *Masiya v Director of Public Prosecutions (Pretoria) and Others,* 2007 8 BCLR 827 (CC).

37 [1997] ZASCA 45; 1997 3 SA 341 (SCA).

38 *Tshabalala v S; Ntuli v S* para 1.

39 Gqola 21–22.

40 *Tshabalala v S; Ntuli v S* para 31.

unabated, no matter the legislative changes[41] and reform on sentencing.[42] The Court continued:

> To jettison the sound doctrine as the applicants urge us to, would do a grave injustice to direct and indirect victims of gender-based violence. This would give power to men or perpetrators who have raped women with impunity in the knowledge that the doctrine would not apply to them.[43]

Similarly, in *S v Pepping*,[44] the court decried the ineffectiveness of the imposition of lengthy sentences in curbing the spread of violence, noting that despite this legislative reform, violence against women remained prevalent in society.[45]Judgments like *S v Dyonase*[46] also highlighted the adverse effects of violence against women on their mental well-being,[47] while the SCA in *AK v Minister of Police*,[48] condemned the longevity of sexual violence and its continuity.[49] From the above, it becomes quite clear that from a human rights perspective, the South African judiciary strongly condemns violence against women.

4 FEMINISM AND *TSHABALALA v S; NTULI v S*

The majority judgment framed rape as gendered, which involved the use of violent male dominance and control over women. One of the reasons for this was that "(H)ardly a day passes without any incident of gender-based violence being reported".[50] Because of this common theme throughout the judgment as well as the explicit feminism of Victor J's separate judgment, the court is cited as having used feminism as a starting point for understanding the plight of women in rape cases, affirming its solidarity with women facing sexual violence.[51] Mokone, though not particularly feminist, pointed out that violence against women has reached alarming rates in South Africa, in a country referred to as the "femicide nation" and the "rape capital of the world".[52] The judgment also received praise, for its chipping away at the system of patriarchy and its ills, through the sexist application of the common law doctrine of common purpose.[53]

Matlala indicated that on matters concerning rape and violence against women, Victor AJ's views were confirmation that the subordination of women by men, established and perpertuated through patriarchy results in the exclusion of women, discrimination and sexual violation.[54] Victor J's judgment is indeed explicitly feminist, beginning with her words that "I write this concurrence … to engage with insights from feminist legal theory that were raised during argument which seek to centre the debate on the dignity and privacy of women".[55] She further

41 Combrinck "The Dark Side of the Rainbow: Violence Against Women in South Africa After ten Years of Democracy" 2005 *Acta Juridica* 171.

42 *Tshabalala v S; Ntuli v S* para 31. See Botha and Peens "The Adequacy of Rape Criminalisation in Modern South Africa: A Comparative Study" 2023 *South African Journal of Criminal Justice* 83.

43 *Tshabalala v S; Ntuli v S* para 52.

44 (CC03/2021) [2023] ZAECMHC 3.

45 *S v Pepping* para 29.

46 (CC47/2018) [2020] ZAWCHC 137.

47 *S v Dyonase* para 16.

48 [2022] ZACC 14.

49 *AK v Minister of Police* para 2.

50 *Tshabalala v S; Ntuli v S* para 61.

51 Matlala "Introducing Feminist Legal Theory as a Basis for South African Judicial Jurisprudence: Insights from *S v Tshabalala*" 2022 *SALJ* 274.

52 Mokone 2022 *Obiter* 406.

53 Sibanda "Constitutional Court Strikes a Decisive Blow Against Rape" https://www.dailymaverick.co.za/opinionista/2019-12-13-constitutional-court-strikes-a-decisive-blow-against-rape/ (accessed 24-03-2023).

54 Matlala *SALJ* 282.

55 *Tshabalala v S; Ntuli v S* para 79.

stated as follows:

> As stated in the main judgment, rape by instrumentality and the inconsistent application of the common purpose doctrine have been a blight on our jurisprudence and have no place in our modern society.A historical overview of these legal barriers in our South African jurisprudence demonstrates a number of embedded patriarchal gender norms in the procedural rules of evidence in relation to rape. This Court has recognised this, for example in *Masiya*, where Nkabinde J referred to the statutory developments in the definition of the crime of rape in recent decades. In 1993, for example, the rule that a husband could not rape his wife, the so-called marital rape exemption, was abolished. Other legal impediments to the conviction of a rape offender included excessive shielding of the perpetrator, the medieval hue and cry rule, and the cautionary rules and as relevant in this case the concept of instrumentality and common purpose in the crime of rape.[56]

From a black feminist legal perspective, the contention made here is that references to "gender, power, and control" by men over women are not understood as entirely feminist for as long as they pertain to a single focus of power. The court's sole concentration on male violence risks the denial of the complexity of rape/sexual violence against women which is the converse of feminist legal theory.[57] The court's contemporary dominant understanding of sexual violence as simply gendered, masks economic power[58] and racial oppression associated with sexual violence.[59] Underlying this framing of sexual violence is the unspoken assumption that rapists are black men living in poverty, revisiting the old apartheid narratives that demonised black men as incontinent savages.[60] This is supported by the deeply entrenched societal view on black masculinity, being described as dangerous, patriarchal, out of control, and "culturally" prone to rape.[61]

It is not the author's intention to discredit the court's laudable work. The policy-based approach taken by the court to curb the spread of violence against women is a victory for feminism, largely because feminists have for decades campaigned and carried out research on the gendered nature of sexual violence. With the emergence of the globally popular hashtag feminism, which found its way to the global South during the 2015–2016 #feesmustfall protests[62] South African feminism took a different turn. It assumed a radical feminist stance that was rare in the older generation of black feminists, providing a distinct ontological break with past enunciations of feminism among African women, who have an uncomfortable relationship with feminism that is "often viewed as a white, Western import".[63] African women mobilised around pervasive violence against women and institutional cultures that normalise this violence.[64]

This feminist radical turn endorses an intertesectional understanding of feminism through campaigns such as "#EndRapeCulture campaign which foregrounded race, gender and sexuality and the dynamic and fluid relations among them".[65] Not to be misinterpreted or misapplied, an intersectional approach should be understood as the ontological status of and need to fix epistemic interventions influencing analysis and methodologies for addressing amalgamated

56 *Ibid* para 80.

57 Harris "Race and Essentialism in Feminist Legal Theory" 1990 *Stanford Law Review* 598.

58 Baderoon "Surplus, Excess, Dirt: Slavery and the Production of Disposability in South Africa" 2018 *Social Dynamics* 260.

59 Gqola 38.

60 Moffett "'These Women, They Force us to Rape Them': Rape as Narrative of Social Control in Post-Apartheid South Africa" 2006 *Journal of Southern African Studies* 135.

61 Buiten and Naidoo 2016 *South African Review of Sociology* 542.

62 Lewis and Hendricks "Epistemic Ruptures in South African Standpoint Knowledge-making: Academic Feminism and the# FeesMustFall Movement" 2017 *Gender Questions* 2.

63 Gouws "Feminist Intersectionality and the Matrix of Domination in South Africa" 2017 *Agenda* 19.

64 *Ibid* 24.

65 *Ibid* 20 and 24.

subject-positioning, rather than fragmenting and isolating identities like gender.[66] Seen beyond identity politics, intersectionality reoriented energies toward the injury of gendered and queer subjects recrafting old politics and creating new ones.[67]

In the past, the discourse and activism on rape was dominated by Western ideology, with little research on the specifics of sexual violence in South Africa at the time, with most research drawn almost exclusively from the United States and Europe.[68] White activists in South Africa at that time failed to realise that their version of feminism, which was solely concerned with sexism was exclusionary.[69] Recent formulations of rape reform seem to be forgetful that rape in South Africa drew largely from Western feminism and global shifts in thinking about sexual violence, crime, and race and by national and local specifics: the anti-apartheid struggle; apartheid's power dynamics; and women's intersecting racial, gendered, and economic oppression.[70]

As such, analysing sexual violence as intersectional (as introduced by Khamphepe J) aligns the legal environment with contemporary feminist developments in South Africa and in international law.[71] It also avoids the trap of generalising rape as a symptom of patriarchy, which poses the potential for the neglect of particular manifestations of patriarchies, within different contexts.[72] It was also this intersectional approach that unified black women, trans, and queer students alike, centering their issues of gender and sexuality in struggles to decolonise South African society at large and to name patriarchy and rape culture during #feesmustfall.[73] The LGBTQI+ community "is one fraught with severe homo- and trans-prejudice and many forms of dehumanising violence"[74] (e.g. the rape and murder of lesbians/harassment of trans/intersex).

This is the reason that violence against women cannot solely be understood as a heterosexual phenomenon as this would amount to silencing gendered discrimination and abuses suffered by other genders whose expressions and identities are erased or demonised by gender binaries.[75] It also becomes clear that the feminism in *Tshabalala v S; Ntuli v S* is an obsolete form of South African feminism that appears to be oblivious to the shared gender bond of emancipatory and progressive politics between feminism and the LGBTQI+ community.[76]

4 1 The Separate Judgment of Khamphepe J

The approach by Khamphepe J's separate judgment in *Tshabalala v S; Ntuli v S* on the other hand appears to be an attempt to realign legal feminism and also introduce a different perspective on rape within the established feminist legal tradition in South Africa. Her reasoning in the first part of her separate judgment differs slightly from Mathopo J's majority's judgment, yet

66 Lewis and Hendricks 2017 *Gender Questions* 10.

67 Roy "From Travel to Arrival: Mapping Intersectionality's Landings in the Global South" in Nash and Pinto (eds) *The Routledge Companion to Intersectionalities* (2023) 236.

68 Bridger "Apartheid's 'Rape Crisis': Understanding and Addressing Sexual Violence in South Africa, 1970s–1990s" 2023 *Women's History Review* 2.

69 *Ibid*.

70 *Ibid*.

71 Davis "Intersectionality and International Law: Recognizing Complex Identities on the Global Stage" 2015 *Harvard Human Rights Journal* 205.

72 Buiten and Naidoo 2016 *South African Review of Sociology* 53.

73 Roy 2023 *The Routledge Companion to Intersectionalities* 241.

74 Matthijsen "Coming Together. Experiences and Lessons from an LGBTQI Project in three Countries" 2018 *Gender & Development* 142.

75 Otto "International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry" in Davies and Munro (eds) *A Research Companion to Feminist Legal Theory* (2013) 1.

76 Habed *et al.* (eds) *Blurring Boundaries-'Anti-Gender'Ideology Meets Feminist and LGBTIQ+ Discourses* (2023) 8–9.

both reach the same conclusion. Pushing the boundaries of gender equality beyond its limiting binary/asymmetry framework, she introduces black feminist thought on rape and violence into South African law, by recalling the classical "womanist" work[77] of Alice Walker. She further locates sexual violence within the renowned foundational black legal feminist scholarship of Kimberle Crenshaw, Regina Autin, Angela Harris, Marie Matsuda, Adrienne Wing, Dorothy E. Roberts, Adrienne Davis, to mention a few.

Her separate judgment stretches from paragraphs 68 to 78. In it, the first paragraph is the only one that alludes to an intersectional approach and the only other mention is situated in the footnotes. This note is largely based on the beginning of the judgment, without undermining the value of the rest of the paragraphs in the judgment. For example, she also sought to debunk certain myths associated with rape[78] and highlighted the nature of rape as being a structural and systemic issue, stating that "it would be irrational for the doctrine of common purpose not to be applicable to the common law crime of rape while applying to other crimes".[79]

Though all women are not safe from sexual violence, Khamphepe J's separate judgment began by making race in sexual violence visible. This is because historically, black women have stood as outsiders of rape law, the indifference shown towards their sexuality constituting racial insubordination and marginalisation.[80]Highlighting their plight with regard to sexual violence, she started as follows:

> Who knows what the black woman thinks of rape? Who has asked her? Who *cares*?" This matter comes before this Court due to an abhorrent night wherein certain women in the Umthambeka section located in the township of Tembisa were raped by young men, some of whom were known to them, who broke into their homes.[81]

The colonial patriarchal meaning of racism in sexual violence was designed to serve the interests of elite white men. It did not treat black and white female sexuality as identical, with black women's sexuality diverging from, and often contradicted with that of her white counterpart.[82] Racism and patriarchy are :

> … two interrelated, mutually supporting systems of domination and their relationship is essential to understanding the subordination of all women … Racism is patriarchal. Patriarchy is racist. We will not destroy one institution without destroying the other.[83]

The purpose of Khamphepe J's opening sought to centre the experiences of the *women in this case*, who also happen to represent the most marginalised in our society. What is troubling about Khamphepe's separate judgment though is her delegation of certain aspects of sexual violence towards black women to the bottom of the page of her judgment. This minimises the powerful impact of her delivery. Her separate judgment comes across as motivated by a need to put a very critical point across, yet at the same time it is undermined by the footnoting of black female sexuality and its experience of violence. It constitutes an irony, in view of the fact that she was arguing against intersectional erasure. Footnoting crucial content in this manner, minimises black women's sexuality and the violence directed at it that is often ignored in rape

77 "'Womanism'-feminist intellectual Framework that Focuses on the Conditions and Concerns of Women of Color, Especially Black Women. Womanists Work to Address Injustices Tat Have Not Been Generally Recognized Within Mainstream Ffeminism." in Weida "Womanism" *Encyclopedia Britannica* (2023) https://www.britannica.com/topic/womanism (accessed 14-04-2024).

78 *Tshabalala v S; Ntuli v S* para 74.

79 *Ibid* para 78.

80 Thornberry 2016 *Journal of Urban History* 193.

81 *Tshabalala v S; Ntuli v S* para 68.

82 Scully 1995 *The American Historical Review* 336.

83 Roberts "Racism and Patriarchy in the Meaning of Motherhood" 1993 *Journal of Gender and the Law* 3.

adjudication.[84]

For this Note, the rest of what is relevant in her separate judgment appears in the footnotes, where she stated that:

> Rape is a scourge that affects women of all races, classes and sexual orientations, but we know that in South Africa rape has a pernicious effect on black women specifically. To erase the racial element in this epidemic is to erase the experiences of the women of that horrendous night. This "intersectional erasure" is a rhetorical gesture that not only negates the lived experience of women at these intersections of oppressed identities but also means that our response to the crisis will always be deficient and under-inclusive. Speaking of rape on these terms is not a preoccupation with personal identity but an analysis of how power impacts particular women.[85]

The reading of Khampepe J's judgment could be interpreted as an effort to recraft the feminist constitutionalisation of rape, to make visible the exclusionary impulses that still exist in judicial making. At the same time, it exposes the South African legal order as steeped in Eurocentric understandings of rape that marginalise black female sexuality. Theoretically, the racial aspects of rape have been overlooked[86] and as a result, black women as subjects of inquiry in rape law reform post-1994 have been marginalised. This lacuna is historical and has been accounted for with the "downplaying of sexual violence within Black communities, particularly in the ANC, and to this day continue to silence histories of rape within townships and the liberation movement".[87]

Du Toit, focused specifically on the Truth and Reconciliation Committee (TRC) stated that:

> The pre-1994 rapes were 'justified' or excused within discourses during the TRC process in terms of their function within the political, male-dominated struggles and counter-struggles. However when the official story of those struggles was forged during the TRC hearings and consequent report writing, rape was eclipsed by other forms of oppression and violation where men were the vast majority of victims. Framing the 'struggle' in terms of men's struggles, leaving women on the roadsides of history.[88]

Implicit in the majority judgment of *Tshabalala v S; Ntuli v S* is the resistance of "whiteness as the orientation which takes its privilege as normal and appropriate".[89] It is an inherited colonial and apartheid logic in rape adjudication that constructs white femininity as highly vulnerable, passive and private, specifically concerning the imputed hypersexuality of the black males.[90] Reconstructing the history of white supremacy that was characterised by "the western or white biases of the feminist anti-rape movement of the 1970s",[91] contemporary gender equality discourse in rape fails to break away from these colonial-apartheid dominant understandings

84 Crenshaw "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" 1989 *University of Chicago Legal Forum* 158.

85 *Tshabalala v S; Ntuli v S*, fn 38.

86 Modiri "The Rhetoric of Rape: An Extended Note on Apologism, Depoliticisation and the Male Gaze in *Ndou v S*" (2014) 30 *SAJHR* 148 fn 95.

87 Bridger 2023 *Women's History Review* 11.

88 Du Toit *The Making and Unmaking of the Feminine Self* (PhD thesis, UJ, 2005) 11.

89 Steyn and Foster "Repertoires for Talking White: Resistant Whiteness in Post-apartheid South Africa" 2008 *Ethnic and Racial Studies* 26.

90 Coetzee "'[I]f I am Alone I feel like a Target Sometimes': The Making and Unmaking of the Vulnerable White Woman in Strange Encounters with the Black Man in the South African (Post)Colony" 2022 *Feminist Encounters Journal of Critical Studies in Culture and Politics* 13.

91 Bridger 2023 *Women's History Review* 2.

of rape.

When they were initially introduced, rape laws were not intended to shield black sexuality, from the period of slavery in the Cape colony[92] and during apartheid.[93] White supremacy as an ideology centred on the long-held myth of "black danger" with white people gripped by fear of black rape.[94] This discourse around black peril not only justified key pieces of segregationist legislation, but it also succeeded in eliding women's actual experiences of sexual violence.[95] During apartheid, rape was also largely silenced or side-lined by the state and local communities, overtaken by larger problems of either maintaining or resisting apartheid.[96]

Khamphepe J accomplished the project of black feminists' re-imagination of rape in contemporary legal discourse by making it concrete, recasting the gender/power narrative. She echoed black feminists' critique of the inter-connectedness of race and gender and brought to the fore an anti-colonial feminist engendering of the historical/modern manifestations of violence as silencing.[97] The universalising of the subject as a homogeneous category that is subject to homogeneous oppression is widely criticised in anti-colonial feminist writings.[98] One way this is done is through the description of women as victims of male violence, where such violence is committed to assert male control or power.[99] Instead what anticolonial feminist scholars call for is the specific attention to history and culture in understanding women's complex agency as situated subjects.[100]

Therefore the departure of Khamphepe J's judgment from the established gender equality jurisprudence on rape decenters the tendency to treat women as a monolith subject, which in turn, produces the image of an "average third-world woman".[101] This results in formal equality and reductive feminist theorising with little attention being afforded simultaneous power dynamics involving violence that are inter-connected and inter-related and how these produce inequality.[102] Khamphepe J's separate judgment makes known for the first time the rape of black women within the constitutional/criminal law discourse as well as situates it within the broader frame of anti-colonial feminist theorising on sexual violence from the Global South.

5 CONCLUSION

Tshabalala v S; Ntuli v S was declared "as one of the most ground-breaking and fearless judgments of our times"[103] and indeed it is. It would have been a welcome change though had Khamphepe J's exploration extended further than her opening, but maybe it is enough for now

92 Graham "Keep the Boys Happy: A Critical Investigation into Rape Trends at the Cape, 1795–1895" (MA-dissertation, SU, 2018) 1; see also Scully 1995 *The American Historical Review* 337.

93 Anderson "Rape in South Africa" 2000 *Georgetown Journal of Gender and the Law* 791. See also Moffett 2006 *Journal of Southern African Studies* 134.

94 Etherington "Natal's Black Rape Scare of the 1870s" (1988) *Journal of Southern African Studies* 36.

95 Thornberry 2016 *Journal of Urban History* 201.

96 Bridger 2023 *The American Historical Review* 3.

97 Banerjee *et al.* "Engendering Violence: Boundaries, Histories, and the Everyday" (2004) *Cultural Dynamics* 125.

98 Mohanty "Under Western Eyes: Feminist Scholarship and Colonial Discourses" 1988 *Feminist Review* 63.

99 *Ibid* 66.

100 Mohanty "Transnational Feminist Crossings: On Neoliberalism and Radical Critique" 2013 *Signs: Journal of Women in Culture and Society* 967.

101 Mohanty 1988 *Feminist Review* 65.

102 Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" 1989 *Stanford Law Review* 1299.

103 Sibanda https://www.dailymaverick.co.za/opinionista/2019-12-13-constitutional-court-strikes-a-decisive-blow-against-rape/ (accessed 24-04-2023).

that she has set the scene. Her separate judgment, though lacking legal force, illustrates how the dominant critique of gender alone creates a gap in the law to give a better understanding of sexual violence from a wider context. It opens the space for further theoretical exploration on gender and race in sexual violence. For example, an assessment of how poverty, which is prevalent amongst African women, makes some women more vulnerable to sexual violence than others and how this situation can be mediated through legal reform; how employing an intersectional lens on certain concerns about the current dropping of rape charges[104] and the failure to report rape[105] could also locate these in colonial and apartheid history.

Because it dared to be explicit about both gender and race, this judgment could also be seen as laying the foundation for exploring rape through an indigenous jurisprudence lens by both legal feminism and indigenous law scholars. The unacceptably high levels of sexual violence in rural communities[106] and the argument of rape as a structural problem also implicates the geopolitical nature of sexual violence. This invokes subalternity in geographical positioning where black women are situated in large numbers as the most underprivileged living in semi-urban and rural communities. It would require an assessment of an interplay between geographies of domination such as spatial injustices of historical violence in rural, settlement shacks and villages alike, through black women's geopolitical knowledge, experiences, and their mediation of sexual violence.[107] This would strengthen and help re-evaluate the legal position on what constitutes cultural differences on acts involving sexual violence and what comprises bad behaviour where cultural defences are raised.[108]

Khampepe J's separate judgment is brave in its charting of terrains that though known, have been left unattended and perhaps had hers been a majority judgment endowed with juridical influence, it would have affected law and legal practice.[109] However, it remains an invitation for feminist scholars particularly in the Global South, to think long and hard about the goals of feminism and its influence in law. The disavowal of the racialised sexual wound does not only constitute a negation of certain realities about rape, it also perpetuates pernicious assumptions about race and rape.[110] As such, it is hoped that though it lacks validity, Khamphepe J's separate judgment's recasting of rape through the introduction of the sexual wound of coloniality,[111] might stimulate a robust theoretical discourse on the topic from a legal perspective.

104 Machisa *et al.* "Factors Associated with Rape Case Attrition in the South African Criminal Justice System: A National Cross-sectional Study" 2023 *The British Journal of Criminology* 588.

105 Jewkes 2012 *South African Crime Quarterly* 11.

106 Mazibuko and Umejesi " Domestic Violence as a 'Class Thing': Perspectives from a South African Township" 2015 *Gender & Behaviour* 6585.

107 McKittrick *Demonic Grounds: Black Women and the Catographies of Struggle* (2006) x.

108 Volp "Blaming Culture for Bad Behaviour" 2000 *Yale Journal of Law & the Humanities* 89.

109 Rhode "The 'No-Problem' Problem: Feminist Challenges and Cultural Change" 1991 *The Yale Law Journal* 1732.

110 Moffett 2006 *Journal of Southern African Studies* 131.

111 Coetzee and Du Toit 2018 *European Journal of Women's Studies* 1.