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"HAVE YOU HEARD THE ONE ABOUT THE LAWYER, THE POLITICIAN AND THE PSYCHOLOGIST?": SOME OTHER ISSUES RAISED BY THE *STATE V JACOB ZUMA* RAPE TRIAL *

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In the mid-afternoon of 8 May 2006, Willem van der Merwe, presiding judge in the *State v Jacob Gedleyihlekisa Zuma* rape trial, concluded his judgement with these words: "[The] state has not proved the accused's guilt beyond reasonable doubt. The accused is found not guilty and is discharged" (HCSA, 2006:174). At the end of this inimical trial and after the media frenzy surrounding it abates, it seems we want to move too quickly on to the next thing. We want succinct, non-taxing commentaries about the trial from experts and from leaders, both moral and political, so that we can get on with dealing or not dealing with, as Arundhati Roy suggests, life in a country of disparity (Roy, 2002:169). Consider, for example, an appraisal of the trial which was offered recently by one legal expert: "The judge in preferring the Zuma version, was assisted by two fundamental problems in the state case: shoddy police work led to the rejection of state evidence on some key issues that may have pointed to the improbability of the Zuma version; and an inadequate [sic] use of accepted psychometric testing by the state's expert witness to justify her opinion as to the probable responses of the complainant when faced with impending rape" (Ridl, 2006:1). In a country where there are too many examples of police and professional incompetence, no toll is exacted on us when we accept such opinions at face value: there is no need for us to act and we, the passive citizenry, can continue to leave the project of societal transformation up to someone else. These and some other issues, including the few with which I grapple here that are specific to psychology, are raised by the *State v Jacob Gedleyihlekisa Zuma* rape trial.

Two professionals, Dr Merle Friedman, a clinical psychologist, and Dr Louise Olivier, a clinical and counselling psychologist, gave expert testimony. Dr Friedman was described as a "trauma expert" and Dr Olivier as having "worked on the development of a psychometric test regarding the evaluation of sexual functions and adaptation of adults in South Africa" (HCSA, 2006:135). I'm not acquainted with either of these women, nor am I an expert in their focus areas. What each of them said and what was contained in their reports was not directly available to me at the time of writing this briefing. I have relied on journalists' accounts and the 174-page judgement document to form my understanding of what they said to the court.

Expertise for the state was provided by Dr Friedman who "used her clinical skills which she has been using for a number of years" (HCSA, 2006:67) to inform her conclusions

about the complainant's behaviour during and after the alleged rape. The conclusion she drew about the complainant's behaviour was: "Freezing and submitting during the course of the rape, and confusion, inability to take decisions, great distress and avoidance of initial help-seeking, including reporting to the police after the rape, are both entirely consistent with what may be expected from someone who is exposed to this kind of traumatic experience" (HCSA, 2006:66).

During the first part of Dr Friedman's testimony, attention was focused on the complainant and what had allegedly happened between her and the accused, and what she felt, thought and subsequently did. Under cross-examination, though, focus shifted and the defence team's questions zoomed in on Dr Friedman's method for collecting information from and about the complainant, and its appropriateness for determining post-traumatic stress disorder (PTSD) arising from rape. Evident even in journalists' accounts of Dr Friedman's cross-examination, is that like a mirage, the presence of the complainant drifted in and out of view. Not unexpectedly, and in part because of how the legal system defines burden of proof in rape trials, mention of the accused was almost entirely absent.

Method was a key theme, too, in Dr Olivier's testimony. As expert witness for the defence, Dr Olivier explained that she was refused permission by the complainant to undertake a psychological assessment (HCSA, 2006:136). Efficiently but sadly, in pointing this out so early, the defence team subtly reminded the court that the complainant was capable of delivering a clear and emphatic "no" when she chose to. It did, though, also reveal that Dr Olivier's testimony was based only on source material derived from "listen[ing] to the evidence given by the complainant and … read[ing] the record which *inter alia* includes Dr Merle Friedman's report" (HCSA, 2006:136). Dr Olivier did not interview the complainant, and as far as I can tell, she did not interview the accused either.

During her testimony, Dr Olivier offered an abridged taxonomy of the profession, explaining that clinical psychologists can perform clinical and forensic work. The judge paraphrased her clarification of this distinction as follows: "[A] clinician deals with the perception of the patient [sic]. The patient is then treated for the perception and to try and heal that person. In forensic work, the perception as such is investigated in detail in order to find whether the perception represents the factual situation" (HCSA, 2006:138). According to Dr Olivier, forensic work is carried out by a forensic psychologist who uses psychometric tests to compile a psychological assessment. Paraphrasing her, the judge says: "[When] a forensic psychologist [is] preparing a report for evidence in court, a whole battery of psychometric tests are undertaken. Each specific test … can assist coming to conclusions" (HCSA, 2006:136).

What is significant is what happened conceptually during Dr Olivier's testimony: forensic concepts and acts were conflated and used interchangeably with psychometric ones. It was a fusion that permitted a whole series of questionable statements to be made, starting with the one that because Dr Friedman's investigation was not forensic and had not used psychometric tests it was "of no value whatsoever" (HCSA, 2006, 137). I wondered whether anyone in the courtroom gasped when they learnt that Dr Friedman had made the "allegation that the Wechsler Adult Intelligence Scale 3 test is of no value" (HCSA, 2006:136). But that wasn't all. Malingering by a complainant, said Dr Olivier,

could only be determined “once one knows the results of the battery of psychometric tests”. I gasped when I learnt that Dr Olivier had stated “it is of the utmost importance to find out everything about a complainant in order to make an assessment” (HCSA, 2006:136-7). Finding out everything? Not only is that an impossible psycho-legal brief to fulfil but it is also just a hop, skip and a jump away from the sorts of views in which the psychologist, of a particular variant of course, is portrayed as the all-seeing, all-knowing arbiter and ultimate purveyor of truth.

That the court regarded psychometric tests as tools for authoritatively and objectively differentiating malingering and lying from the varied, complex, sometimes contradictory responses of rape victims is obvious. Again quoting the judge: “[Dr Olivier] conceded that 10% of all women freeze during a rape but one can only say that it is not malingering once one knows the results of a battery of psychometric tests and had gone into the detail referred to [in her testimony]” (HCSA, 2006:137). The argument which the defence team had presented was this: given the fact of the absence of psychometric tests used by the state’s expert, not only was the expert’s conclusion about the complainant’s behaviour unreliable but her chosen method was “not in accordance with the ethical code of conduct of the professional body of psychologists” (HCSA, 2006:138). The judge agreed. He also accepted that responses to rape could be neatly labelled and reliably measured. His judgment is a declaration that psychologists who provide psycho-legal testimony about rape and who do so using the clinical interview method, are likely to have had an incomplete understanding, to have drawn unreliable conclusions, and to have acted outside of the ethical code of the profession.

Given how thorough he was in reviewing other sources, I assume that the judge took time to read our professional code, like I did, and located precisely in it, unlike I did, where that alleged ethical discordance lay. Chapter seven of the Professional Board’s Rules of Conduct Pertaining Specifically to Psychology (HPCSA, 2004:18-19) states, among other things, that: “A psychologist who performs psycho-legal (including forensic) functions, such as assessments, interviews, consultations, reports or expert testimony, shall comply with all the other provisions of the rules to the extent that they apply to such activities. In addition, a psychologist shall base his or her psycho-legal work on appropriate knowledge of and competence in the areas underlying such work, including specialised knowledge concerning specific populations” (HPCSA, 2004:18). With regard to what techniques or approaches are best suited to doing that, the code requires that “psycho-legal assessments, recommendations and reports are based on information and techniques sufficient to provide appropriate substantiation for the findings.” The code does not state, at least not anywhere that I could locate in it, that all psychologists undertaking psycho-legal work must exclusively, always and forever, use batteries of psychometric tests.

Alas, the judgement sent out exactly that message to the South African public about what constituted reliable psychological knowledge and competence in a rape trial. That message was that reliable psycho-legal evidence was scientific; it was forensic; it was psychometric. I will return later to the emphasis on the label “forensic” in psycho-legal work. For now, though, let’s look a bit closer at the acceptance of psychometric testing in South Africa. The pro-test view endorsed by Judge van der Merwe is not uncommon. In a 2004 study on psychological assessment and testing in South Africa, commissioned by the Human Sciences Research Council, psychological testing was

seen as central to the work of psychologists (Foxcroft, Paterson, le Roux and Herbst, 2004). The study found that tests were used across a range of settings, including psycho-legal work in the criminal justice system, and by a range of psychologists and psychometrists. Respondents told the HSRC researchers that tests provided “structure … and help[ed] practitioners write more objective reports” (Foxcroft et al, 2004:64); and further, that tests delivered “scientific, objective information … [which] is of importance in forensic assessment” (Foxcroft et al, 2004:69). Even the HSRC report, though, acknowledged some limitations to test use. Here is what respondents had to say about testing for psycho-legal purposes: “[It] had become difficult to use tests for forensic purposes because the same test could be interpreted differently by different experts / professionals” (Foxcroft et al, 2004: 88).

At the end of the trial, did psychology emerge as a self-critical discipline and progressive profession working in sync with the values enshrined in our 1996 Constitution? I think it did not. The psychology I saw on display in that courtroom I did not like. No, I do not believe that psychology is perfect: we have skeletons in our closet. But what I did like about this discipline and profession was that most jokes about psychologists, unlike those about lawyers, had punch lines that did not compare us unfavourably with sharks, corpses and the devil. I liked that psychology was populated with diverse theories, methods, practices and people. And I liked, too, being associated with a discipline capable of looking at itself critically while also being responsible for producing professionals and activists whom I respect and admire for their contributions to the reconstruction and development of this society.

During the *State v Jacob Gedleyihlekisa Zuma* rape trial, I heard no acknowledgement of the fact that many methods, tools and sources of information can be used to compile a psychological assessment for legal purposes. No-one, or so it appeared to me, tactfully reminded the court that PTSD can be assessed by clinical interview or psychometric test or psycho-physiological measurement, but preferably by a combination of methods. No one advocated the view that psychological assessments of rape victims are meant fundamentally to be about them as human beings and of value to them as survivors, and not about the publications or professional status of those using them. It seemed as if the court ignored the fact that psychological assessments have a purpose, an ethical one at that, beyond the narrow, legal requirements of the courts. And here it is important to consider the nature of the brief given to Dr Friedman. I do not know what were the exact terms of reference given to her in the state’s brief. As a trauma expert, she may have been asked to find evidence of trauma rather than to undertake a forensic psychological assessment of the complainant. If that was the case, then the state’s legal team is accountable for providing Dr Friedman with an inappropriate, incomplete brief. But psychologists cannot be passive. We must clarify the terms of reference for our psycho-legal work even if it requires wrangling with the unsophisticated hydras living inside the country’s criminal justice machinery.

From the judgement document and the journalists’ accounts, I did not hear or read it said that the court had learnt that alternatives to psychometrically-based approaches to psychological assessment exist (e.g. dynamic assessments). Little or nothing seemed to be said about the fact that even if a battery of psychometric tests had been used, valid criticism could be raised about which ones and how they were used or interpreted because many tests are “outdated”, “lacking in cultural appropriateness”, or simply not

available in languages other than English or Afrikaans. Others may offer stronger opinions about psychometrics than I do here, possibly even demanding the wholesale eradication of tests in psycho-legal work. In raising these criticisms of testing all I ask, which surely is not too much, is that the pro-test proponents do more to adopt a self-critical position on psychometric testing than that which was laid out in that courtroom.

As for Mr Kemp J Kemp's defence strategy, it may have picked on our vanities and weaknesses but it was not responsible for creating them.

We live in a time where many regard technology, science and profits as the pinnacles of human development. Geek scientists are the new sex symbols of entertainment (think Jamie and Adam on *Mythbusters*) and global heroes of palatable subversion (think Bill Gates and Mark Shuttleworth). Science is also integral to entertainment. Television networks glamourise the ugly world of violent crime with programmes such as *CSI, Medical Detectives* and *Law and Order*. Crime investigation work is sexy science. And it makes for compelling television viewing. Attractive scientists solve crimes of astounding levels of horror and gore with chemistry, ballistics, polygraphs and psychometric tests. "Witnesses may lie but the evidence never does" is a mantra we all believe, especially those criminals who mask their deeds with the tricks and household products for destroying physical evidence shown on *CSI.* Compared with the sleek aluminium edges of *CSI*'s laboratories, Dr Phil McGraw, the public face of popular psychology, seems moth-eaten and tattered. No coincidence, then, that heightened emphasis on forensics in psycho-legal work happens as popular culture's obsession with sex, crime and technological science intensifies.

As for our weaknesses, historians might be better able to identify those than we are, but some of us have tried to pick out a few. Ten years ago, a briefing in this journal on a qualitative methods conference opened with these words: "One of the principal fault lines psychologists have come to accept as a natural feature of their discipline is that which runs between two distinct sources of knowledge about the person: Quantitative 'scientific' research and qualitative 'clinical' insight. This dichotomy is of course not unique to academic psychology, but reproduces common-sense perceptions of the person as knowable through either objective measurement or subjective experience" (Terre Blanche, 1996:78). I agree with the point about dichotomy – glaringly evident in the *State v Jacob Gedleyihlekisa Zuma* rape trial – but I would have used a different metaphor. A "fault line" implies a division made not by human agency but by "natural" forces beyond our control, much like geological forces create fault lines in the tectonic plates. Chunks of continent do break off from even bigger chunks: *naturally*. Sailing away on a metaphorical *HMS Beagle* to observe a species of psychologist evolving on its own breakaway landmass might be a romantic image but it disguises the human agency actually involved in achieving that "splendid isolation". From where I sit, outside of the academe and organising structures of the profession, I am concerned that some of us, on both sides of the quantitative-qualitative dichotomy, actually want a homogenised, "cleansed" psychology. Some of us have constructed specialist ghettos, (maybe a "gated community" is a more appropriate metaphor in South Africa), from which to defend ourselves against what we perceive to be most threatening: other psychologists. When we construct the dichotomy as oppositional, we invite cessions, arrogance and inflexibility into psychology. And by taking our oppositional politicking into a rape trial as we did, we lose sight of far more important things like upholding human

dignity and eradicating sexism, and we align ourselves with sharks, corpses and devils. Or some very flawed leaders.

REFERENCES.

Foxcroft, C, Paterson, H, le Roux, N and Herbst, D (2004) **Psychological assessment in South Africa: A needs analysis. The test use patterns and needs of psychological assessment practitioners.** HSRC: Pretoria.

Health Professions Council of South Africa (January 2004) **Professional Board for Psychology's rules of conduct pertaining specifically to Psychology.** http://www.hpcsa.co.za/hpcsa/UserFiles/File/PsychEthicalRulesOfConductForm223.doc

High Court of South Africa (4 May 2006) **The State Versus Jacob Gedleyihlekisa Zuma Judgment.** Witwatersrand Local Division.
http://www.legalbrief.co.za/filemgmt_data/files/State%20v%20Jacob%20Zuma.pdf

Ridl, J (24 May, 2006) So, what was the Zuma trial all about? *Reporter.co.za* http://www.reporter.co.za/article.aspx?ID=RP21A198212

Roy, A (2002) **The algebra of infinite justice.** Flamingo: London.

Terre Blanche, M (1996) A spanner in the works of the factory of truth: The Wits Qualitative Methods Conference. **PINS, 21***,* 78-80.