Judicial and Legal Responses to Gender Based Violence and Femicide

Justice Mandisa Maya
President: Supreme Court of Appeal
Gender Violence and Femicide Summit, Pretoria
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Programme Director, Mme Minister Shabangu
His Excellency, the Honourable President of the Republic of South Africa, Ntate Ramaphosa
Honourable Speaker of the South African Legislature, Mama Mbete
Honourable Ministers Masutha, Pandor, and other Cabinet Ministers present,
Premier Lucas
Dignitaries from the diplomatic corps
Traditional leaders
Gender activists who tirelessly keep the woman's cause on the nation's agenda
Esteemed guests,
Ladies and gentlemen

Good morning

A

Introductory Remarks

I do not really know what to say after listening to the powerful and heartrending stories of unspeakable crimes perpetrated against innocent women, whose spirits however remain unbroken against all odds. But such is the resilience of Woman. I am truly ashamed that I am part of the society and the justice system that visited horrendous pain upon you. I am tremendously proud of your courage and bravery.

These gruesome stories remind me of **Karabo Mokoena** from Johannesburg, whose charred remains were found in a shallow hole, buried like vermin; **Reeva Steenkamp**; former Banyana Banyana footballer, **Eudy Simelane** from KwaThema, who was gang raped and grossly stabbed to death merely because she was lesbian; the brutal rape and killing of 17 year old **Anene Booysen** from Bredarsdorp. How have we been able to carry on as a functioning society after the horrific rape of 9 month old **baby Tshepang** from Upington by a group of adult men in 2002? Just yesterday, the KwaZulu-Natal High Court imposed three life terms of imprisonment against a father who raped his young daughters. Many examples of these atrocious incidents abound and they continue unabated. And more frightening is the fact that many more of these acts occur behind closed doors and remain unreported and undocumented for a whole variety of reasons.

The stories also evoke memories of my own childhood and youth. The memories are very warm and sentimental and they stretch as far back as age five when I started school and began growing my network of friends and in turn gained surrogate parents who would watch over me and more homes at which I could play. I remember walking long distances to school, alone, with other young children; playing at school, at my home, at friends' homes, in the street, running errands in my neighbourhood, going to the shops, far and near, in broad daylight and after dark. It was a long time ago so the memories are mostly hazy. But what stands out vividly in my mind is the sense of lightness, of safety, being carefree – the sense of innocence and freedom. And the loss of this quality in our society – providing safety and protection for its most vulnerable members, is in my view,

the biggest tragedy of our times. When we no longer can let our children out of sight even for a second lest they are abducted, raped, maimed and killed by some sick perverted man; often a family friend, a close relative and even a father. And almost every second of the hour a woman is sexually assaulted and or killed by a man, often a husband, a lover, but seldom a stranger. And in a significant number of those incidents there is no justice for the victim.

It is a truly shameful indictment against our beautiful country, her people, us, that we should have to meet like this to deliberate on how to stop ourselves from cannibalizing our own children and women. But it is our reality and we must deal with it. And it is most encouraging that our president has recognized the need to convene this gathering. Acknowledging that there is a problem in one's homestead is the beginning of the solution and, hopefully, healing.

B

What is this scourge?

The challenge demands a substantive definition that addresses the multifaceted and complex nature of this pervasive trend in our society. The most appropriate and substantive definition of gender based violence is found in the feminist research, study and discourse developed over decades which describes it as: 'violence that is directed at an individual based on his or her gender. It includes physical, sexual, and psychological abuse; threats; coercion; arbitrary deprivation of liberty; and economic deprivation, whether occurring in public or private life. Gender Based Violence takes on many forms and can occur throughout the lifecycle'.

Its many forms include female infanticide, harmful traditional practices such as early and forced marriage, 'honor' killings, female genital cutting, child sexual abuse and slavery, trafficking in persons, sexual coercion and abuse, neglect, domestic violence, and abuse of the elderly.

As we know, women and girls are the most at risk and are the most affected by gender based violence. As a result, the terms 'violence against women' and 'gender-based violence' are often used interchangeably. However, boys and men can and do also experience gender based violence, as can sexual and gender minorities such as men who have sex with men and transgender persons. Regardless of the target, gender based violence is rooted in structural inequalities between men and women and is characterized by the use and abuse of physical, emotional, or financial power and control.

Gender based violence is a not a phenomenon peculiar only to South Africa. But whilst it is a serious challenge in other countries as well it has just struck us with particular ferocity and threatens to engulf our country. It seems fair to assume that our violent racially discriminatory and oppressive history may be a contributory factor in exacerbating the scourge in our society.

C

Mechanisms in place

A vital dimension of our constitutional project has been addressing the sequelae of apartheid – marginalization, subjugation and violence – meted out to black people and women in our society. It is a proud achievement that our government has dedicated an entire Cabinet ministry to safeguard and advance the cause and position of women in our society. (Whether we have used the resource maximally is a question that we must ask ourselves when we begin deliberations later.) Our Legislature has also enacted a number of statutes aimed at addressing women-oriented challenges.

The Courts have played their part too in protecting women's rights. They have consistently highlighted that women are a vulnerable group whose wellbeing and safety is precarious in our patriarchal society arising from factors related to their

historical oppression and exclusion from economic activity. The jurisprudence of our Courts has thus been developed to offer a gender-sensitive and socio-political approach to cases and interpretation of legal and other relevant instruments.

It has been pointed out that the legal mechanisms in place are seemingly inefficient in light of the rampant gender based violence in our country. But I will discuss them anyway so that as we deliberate we know precisely what we already have in our arsenal and if indeed it is inadequate or the problem lies elsewhere. In the interest of time I will just highlight some of the key legal mechanisms that have been created to address gender based violence in the country and what the Courts have done in the fight against the scourge.

D

Legal Framework

One of the insidious qualities of gender based violence and femicide is its far reaching, adverse impact on all aspects of a victim or survivor's life and its devastating impact on a number of their constitutional rights. The key, foundational of these rights are found in sections 10, which guarantees human dignity, 11, which guarantees life and 12, which guarantees freedom and security of persons, of the Constitution of the Republic of South Africa, 1996. These rights illustrate our nation's commitment to the creation of a society that is free from violence of any nature and puts a high premium on a person's bodily integrity. Gender based violence and femicide directly violate these foundational principles of our Constitution.

In addition to these constitutional provisions, South Africa has a vast array of legal instruments that are meant to address the challenge. The National Crime Prevention Strategy (NCPS) of 1996 established crimes of violence against women and children as a national priority. Thus we have the mandatory minimum sentences for certain rapes in terms of the Criminal Law Amendment Act 105 of

1997. The Criminal Procedure Second Amendment Act 85 of 1997 allows for bail conditions to be tightened in cases of those charged with rape. The Domestic Violence Act 116 of 1998 seeks to afford women protection from domestic violence by creating various obligations on law enforcement bodies such as the police to protect victims as far as possible and makes provision for example, for interim protection orders and restraining orders.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 was promulgated in response to the extremely high levels of gender based violence and femicide and brought about radical changes in respect of a multitude of criminal offences. Some of the changes were the broadening of the definition of rape and other sexual offences (such as proxy rape, object rape etc.) and the introduction of new offences to deal with contemporary issues of violence including those that bear on Gender Based Violence such as the digital distribution of pornography etc. To further curb the prevalence of rape and sexual offences, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 6 of 2012 was passed to provide for the effective prosecution and conviction of offenders. There is also the Maintenance Act 99 of 1998 which provides for garnishee orders, attachment of emoluments and orders by default. Sadly, there is still a lack of awareness and these means of protection are not fully utilised as many do not know of their existence.

The mainstay of the fight against gender based violence are the Sexual Offences courts (and Thuthuzela Care Centres) which were introduced to focus on the expeditious adjudication of cases involving crimes and transgressions of a sexual nature in specialized courts that are properly equipped to deal with this unique crime.

E

Implementing the Legislative mechanisms

The responsibility of ensuring that those responsible for committing gender based crimes are brought to account rests on the criminal justice system. The various relevant role-players such as the police and the prosecution, health-care providers, social services, etc, all need to combine their efforts in order to guarantee justice for victims of these crimes. Where for example the police do not carry out their constitutional duty and fail to investigate crimes properly, the whole process collapses. The offender is then released back to society with the possibility of re-offending. If the victims do not know what remedies are available to them then it is all meaningless.

The Courts, guided by various principles our legal system, which is adversarial in nature, play a crucial role in ensuring just outcomes in these cases and alleviating the problem. They bear the difficult task, when the guilt of an offender has finally been proved, of finding the right balance between a just sentence on one hand, and a clear message that will deter gender based violence in society on the other. On that note, it needs be said that it is quite evident from the resurgent nature of these crimes that would-be offenders are generally not deterred. And this just goes to show that gender based violence is not a problem that can solely be addressed through the courts. It demands a structured attack by various sectors of our society, starting in our homes where we raise our children, especially our sons and the moulding of their world view and the place of women in it begins.

The Courts have tried to play their part. They have, in various judgments, delineated the obligations imposed by the Constitution and the law on the relevant role-players to ensure that justice is served. For example, in the *Carmichele v Minister of Safety and Security*[1] decisions, the High Court and the Constitutional Court held that the common law of delict required development in order to reflect

[1] *Carmichele v Minister of Safety and Security & another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC)).

the constitutional duty on the State and, in particular, the police and the prosecution, to protect the public in general, and women in particular, against the invasion of their fundamental and guaranteed rights by the culprits of violent crime. The Constitutional Court in *S v Baloyi & others*[2] highlighted that the Constitution imposes a direct obligation on the State to protect the rights of all persons to be free from domestic violence.

The Courts have also delivered numerous, important cases which emphasize the rights of victims of gender-based violence and continue to send out strong messages by imposing tough sentences and through direct remarks that gender violence is not acceptable and that the State will be held accountable for upholding the rights of women. Landmark cases include *Omar v Government of the Republic of South Africa & others*[3] which upheld the provision for protective orders in the Domestic Violence Act. *Van Eeden v the Minister of Safety and Security*[4] found the Minister responsible for damages in a rape case involving three off-duty police officers and *Carmichele v the Minister of Safety and Security & another*,[5] held the Ministers liable, in a case of rape, for negligence in that the State did not take measures to protect the victim as the prosecutor failed to inform the presiding officer that the accused had previously physically assaulted the victim so that he was not afforded bail.

Recently, the Constitutional Court upheld a confirmation case of the High Court, in *Levenstein & others v Frankel*[6] which ruled that the Criminal Procedure Act should be amended to abolish the prescription period of 20 years for sexual offences and other forms of gender-based violence. The Court held that the effect

[2] *S v Baloyi & others* (CCT29/99) [1999] ZACC 19; 2000 (1) BCLR 86; 2000 (2) SA 425 (CC) (3 December 1999).
[3] *Omar v Government of the Republic of South Africa & others* (CCT 47/04) [2005] ZACC 17; 2006 (2) BCLR 253 (CC); 2006 (2) SA 289 (CC) (7 November 2005).
[4] *Van Eeden v Minister of Safety and Security* (176/01) [2002] ZASCA 132; [2002] 4 All SA 346 (SCA) (27 September 2002).
[5] See fn 1.
[6] *Levenstein & others v Estate of the Late Sidney Lewis Frankel & others* (CCT170/17) [2018] ZACC 16; 2018 (8) BCLR 921 (CC); 2018 (2) SACR 283 (CC) (14 June 2018).

of the impugned s 18 is two-fold: (i) it over-emphasises the significance of the nature of the offence, at the expense of the harm it causes to survivors thereof, and therefore fails to serve as a tool to protect and advance their interests; and (ii) it penalises even a complainant whose delay was caused by or due to his or her inability to act by preventing him or her from pursuing a charge even if he or she may have a reasonable explanation for the delay. The Court further held that the impugned section undermines the State's efforts to comply with its international obligations, which impose a duty on the state to prohibit all gender-based discrimination. The Court confirmed the High Court's order that s 18 is irrational and arbitrary, and therefore unconstitutional, insofar as it does not afford the survivors of sexual assault other than rape or compelled rape the right to pursue a charge, after the lapse of 20 years from the time the offence was committed. Importantly, the declaration of invalidity is retrospective to 27 April 1994. And, subsequent to that hearing, Minister Masutha delivered his 2018/2019 budget speech for the Departments of Justice and Correctional Services and stated that the Criminal Procedure Act would need to be reviewed for, amongst other things, this very purpose.

All considered, it is fair to argue that South Africa's legal framework and jurisprudence are pioneering.

But that said, the Courts must be constantly reminded that as the final arbiters in matters involving gender based violence, they have the power to protect abused women and to effectively punish the offenders, and in so doing send a clear message to perpetrators that such conduct will not be condoned. That they have the inherent ability to ensure that court room policies and procedures are sensitive to the victims, and that the victims who go through the legal system are not subjected to secondary trauma in the form of harsh, humiliating and unnecessary cross-examination when they present themselves to testify.

This is crucial because as a Colleague, Justice Cameron, once observed, 'Judges do not enter public office as ideological virgins. They ascend the Bench with built-in and often strongly held sets of values, pre-conceptions, opinions and prejudices. These are invariably expressed in the decisions they give, constituting "inarticulate premises" in the process of judicial reasoning'. Judges are the creations of their societies and naturally carry all sorts of prejudices and stereotypes of which they may not even be aware.

So while there has been a marked ideological shift in the ways Judges adjudicate matters relating to gender based violence and femicide in recent times, including the abolition of cautionary rule in respect of sexual offences, and the conduct of many judicial officers can be commended, the fate of these victims should not be left to the off-chance that the individual Judges hearing their cases will be attuned to the sensitivities. There should be a formalization and standardization of these norms so that it is incumbent on the Courts to pay particular attention to the treatment of victims in these cases.

Needless to say, legal representatives, especially those who represent the offenders, must also contribute to the improvement of judicial responses in matters of gender based violence to ensure that justice is achieved and other victims are not discouraged from reporting their complaints and participating in court proceedings by the possibility of a hostile court environment. Judicial officers, prosecutors, defence lawyers and the relevant court personnel such as court interpreters, would all benefit from awareness or social context training in this regard so that they fully understand the relevant dynamics and have the ability to handle matters of a sensitive nature.

There is always a large scope for improvement and I do not doubt that there are many other things the Courts can do better in the execution of their judicial function to effectively adjudicate these crimes. I look forward to hearing from

you as we go forward with the deliberations on how the Courts and the legal system can be so improved.

F

In closing: many laudable strides have been taken in the legal sphere to address the scourge of gender based violence and femicide and the social consequences associated with it in our society. But those strides have simply not been up to the challenge. As I mentioned before, the Courts alone cannot alleviate let alone eliminate the scourge. It demands the concerted effort of all South Africans, and more particularly, clear and achievable plans particularly from the executive sphere of our government, some as were identified by the earlier speakers and the demands of the gender activists at whose instance this summit is taking place.

The questions which we must ask ourselves are extremely difficult to answer. Why is this happening; what is the cause? Why are the extensive measures that have been put in place so far not effective? What must we do to fight the scourge effectively?

But I am very hopeful that with the collective will and the many minds gathered in this room and most importantly, the President's willingness to be used as a weapon to fight the scourge, we will make headway in these two days and I trust that we will have successful deliberations.

Thank you for your attention.