

# May doctors refuse to treat rape survivors in order to avoid having to give evidence in court?

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It has been reported recently that private doctors often refuse to treat rape survivors because they do not want to give evidence in court. Private doctors and hospitals must treat patients in emergency situations, but may otherwise refuse to treat patients provided such refusal is not unconstitutional. Rape survivors require emergency medical treatment and should not be refused treatment by private doctors and hospitals because practitioners do not wish to give evidence in court. Such refusal is unconstitutional. Sexual assault evidence kits may be used by both private doctors and hospitals. Given the high rate of sexual violence in South Africa it is recommended that both private and state doctors should have stocks of sexual assault kits, and the National Police Commissioner's national instruction for providing assistance to survivors of sexual offences. District surgeons 'on call' must treat rape survivors as requiring emergency medical treatment. They may not defer seeing them until the next day as this violates their constitutional right to dignity and exposes them to secondary victimisation.

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It has been reported recently that '[m]any doctors are reluctant to take on rape cases because they fear the courtroom and are horrified by the brutality of the crime' and that this failure by them is 'contributing to South Africa's (SA) dismal conviction rate for sexual offences'.<sup>[1]</sup> It was also reported that '[o]verstretched health workers and police also fail to prioritise sexual assault' and that there is a less than 9% conviction rate for the 62 649 sexual offences reported during 2013 - 2014.<sup>[1]</sup> If doctors refuse to treat rape survivors as victims of sexual offences and do not record the necessary medico-legal evidence correctly there is little chance of rape survivors who lay criminal charges against alleged offenders having their day in court and receiving justice.

Consider the following facts:

*A woman is attacked and raped by two men over a period of three and a half hours in the late afternoon and early evening. She is also stabbed, has second-degree burns inflicted on her breasts and torso with an iron, her face is bruised all over and her eardrum is burst. When she arrives at a private hospital by ambulance, the two sisters on duty inform her that a rape kit has to be taken within hours of the rape, and must be done at a provincial hospital and rape crisis centre, which are only open during office hours. A doctor at the hospital refuses to treat her injuries – without even examining her – because he says that he would be tampering with the evidence. The doctor does not offer her a painkiller. She is later told that the private hospital's protocol is that they will only assist if the rape survivor's life is in danger. She goes to a provincial hospital which opens its rape crisis centre and the survivor is attended to by a nursing sister who telephones the district surgeon 'on call'. The district surgeon 'on call' does not respond to the sister's calls. Hours later the sister is given authority to give the survivor a painkiller and an intern treats her wounds. The district surgeon arrives the next morning to see her.<sup>[2]</sup>*

The above scenario begs the following questions:

- Are nursing staff and doctors at private hospitals legally obliged to treat rape survivors?
- Can sexual assault evidence collection kits only be used at public hospitals?
- Can a district surgeon who is 'on call' refuse to examine a patient until the morning after she was raped the evening before?

## Are nursing staff and doctors at private hospitals legally obliged to treat rape survivors?

As a general rule healthcare practitioners in private practice or private hospitals are not obliged to treat people unless it is a medical emergency or the refusal to treat is unconstitutional.<sup>[3]</sup> A medical emergency is defined as a situation where a person 'suffers a sudden catastrophe which calls for immediate medical attention'.<sup>[4]</sup> In such instances a patient should not be turned away from a hospital which is able to provide the necessary treatment.<sup>[3]</sup> In emergency situations there is a duty to treat and stabilise a patient who cannot afford the services of a private practitioner or hospital before referring them to a public hospital or clinic.<sup>[5]</sup>

It has been suggested that 'there can be little doubt that a rape survivor in the South African context, given the high probability of HIV infection, qualifies for the constitutional right to emergency medical treatment as defined by the Constitutional Court'.<sup>[5]</sup> This is particularly so where the 72-hour limit for successful prevention of HIV infection is approaching.<sup>[5]</sup>

Even if all rape cases were not treated as emergencies, rape survivors who can afford the services of a private practitioner or hospital cannot be refused treatment on unconstitutional grounds. Obvious examples are if private practitioners or hospitals refuse to treat people on the grounds of their race, religion, gender or

any of the other listed grounds in the Constitution that outlaw discrimination.<sup>[6]</sup> Any other unlisted grounds of unfair discrimination are also unconstitutional.

It is submitted that a refusal by private practitioners or hospitals to treat rape survivors who can afford their services on the grounds that the doctors or hospital staff do not wish to give evidence in court is 'unfair discrimination'. Such a refusal undermines the constitutional right of rape survivors to have their dignity respected.<sup>[7]</sup> It also violates their right not to be treated in a cruel, inhuman and degrading way,<sup>[8]</sup> by being left in a painful, degrading, unhygienic and psychologically disturbed state while waiting to be transferred to another healthcare institution, before receiving any medical attention.

The challenge with rape survivors is that healthcare practitioners have to balance 'the sometimes competing demands of appropriate medical care and management of the survivor with the need to collect proper forensic evidence', and it has been suggested that '[in] such cases the healthcare of the patient takes precedence.'<sup>[9]</sup>

## Can sexual assault evidence collection kits only be used at public hospitals?

### Where the rape survivor lays a criminal charge

The Criminal Law (Sexual Offences and Related Matters) Amendment Act<sup>[10]</sup> requires the National Commissioner of Police to issue a national instruction with guidelines for the police to follow when providing assistance to survivors of sexual offences. Where a rape survivor reports the matter to the police, the latter must take the person for a medical examination by a district surgeon or a person appointed by the Department of Health (DoH) to conduct such medical examinations.<sup>[11]</sup> In such cases healthcare practitioners will refuse to conduct a medical examination before a docket has been opened and a South African Police Service (SAPS) 308 form has been completed. The SAPS 308 form contains a request by the police for the rape survivor to be examined by a health practitioner. The results of the examination will be recorded by the health practitioner on a J88 form.<sup>[11]</sup>

When a rape survivor lays a charge with the police, the investigating officer must inform the rape survivor:

- of the need for HIV testing and post-exposure prophylaxis (PEP)
- of the purpose of obtaining samples
- of the reasons why SAPS 308 and J 88 forms must be completed
- that he or she may request the return of articles seized as evidence after the conclusion of the criminal case, with a warning that the articles may be damaged during the forensic process
- that he or she will be allowed to wash or have a bath once the medical examination is complete
- that the healthcare professional will answer questions relating to the medical treatment or services available if further treatment is needed
- that the healthcare professional may refer the survivor to a public health establishment.<sup>[11]</sup>

Where the time limit of 72 hours after the rape is about to expire, and a rape survivor who reports directly to a private healthcare facility wishes to lay a criminal charge, the facility should immediately contact the police.<sup>[12]</sup> At the same time the facility should provide counselling and deal with the medical examination as required in annexure C of the national instruction. The facility should also conduct HIV testing, and where necessary, provide the initial PEP treatment to prevent

HIV infection.<sup>[12]</sup> The police should then be requested to collect and transport the rape survivor to a public health facility for further care. Rape survivors should not be turned away by private healthcare facilities, nor should they be kept waiting for unreasonable periods of time until the police arrive or before they are transported to a state hospital.<sup>[12]</sup> If there are likely to be unreasonable delays the private institution should arrange for the necessary transport to a state hospital.<sup>[5]</sup> Where, however, the survivor wishes to continue treatment at a private institution, and can afford it, the request cannot be refused on unconstitutional grounds,<sup>[5]</sup> for instance, because the doctors do not want to give evidence in court.

Where a rape survivor is kept waiting at a private facility, and not provided with PEP to prevent HIV infection when the 72-hour PEP deadline is about to expire, she may have an action against the facility for negligence if she contracts the virus because it is no longer possible for her to receive PEP treatment. If she can prove such negligence she may claim for pain and suffering, loss of expectation of life, loss of earnings and future medical expenses.<sup>[5]</sup>

### Where the rape survivor does not wish to lay a criminal charge

Where a rape survivor does not wish to lay a criminal charge, the restrictions regarding the use of the SAPS 308 and J 88 forms do not apply and she may be examined by a private or state-employed doctor.<sup>[12]</sup> However, if the victim later changes her mind and wants to report the incident, it is recommended that the medical practitioner should record the examination in accordance with annexure C of the national instruction.<sup>[12]</sup> The doctor should collect and preserve any evidence using a sexual assault evidence collection kit as if the victim had been examined at the request of the police.<sup>[12]</sup>

Given the high incidence of sexual violence in SA, all public and private health establishments and private sector medical practitioners who are likely to be consulted by the victims of sexual offences (whether or not they are likely to be reported to the police) should ensure that they have a stock of sexual assault evidence collection kits<sup>[12]</sup> as well as copies of the national instruction and its annexures, which include:

- a list of the public health establishments in each province providing PEP treatment
- a list of the sexual offences under the Sexual Offences Amendment Act
- possible samples to be taken from the victim
- possible samples to be taken from the suspect
- a sexual offence statement checklist
- guidelines to taking a statement from a child victim.<sup>[12]</sup>

## Can a district surgeon who is 'on call' refuse to examine a patient until the morning after she was raped the evening before?

District surgeons, usually general medical practitioners, are full-time or part-time paid officials of the DoH. Part-time district surgeons simultaneously run their private medical practices. Although district surgeons are required to examine complainants in cases of alleged rape who have been referred to them by the police, complainants may insist that their private medical practitioner also be present. District surgeons are bound by all the rules of the medical profession,<sup>[13]</sup>

including the duty to assist in emergencies and not to violate the constitutional rights of patients.

District surgeons are bound by the terms of their contracts with the DoH, which may require them to be 'on call' on certain occasions to treat rape survivors and other victims of sexual assault. The DoH's National Policy Guidelines for Victims of Sexual Offences<sup>[14]</sup> require public health facilities to ensure that services for victims of sexual offences are available on a 24-hour basis, and that:

- rape victims are moved to the front of health queues
- for forensic reasons medical evidence must be captured as quickly as possible
- the victim should be allowed to wash after the examination
- medical and psychological problems should be dealt with quickly
- the intervention by the health professional should be sensitive to the experience of the victim
- the attending health practitioner must ensure that secondary victimisation does not take place.<sup>[14]</sup>

It is submitted that these policy guidelines must be observed by full-time and part-time district surgeons who are paid a salary by the DoH to render forensic services in addition to their other health work.

In the scenario mentioned in the introduction almost every one of the DoH's policy guidelines regarding rape survivors was violated by the district surgeon 'on call' who refused to examine the patient until the following day. These include the district surgeon's:

- failure to capture the medical evidence as quickly as possible
- refusal to see her until the next morning, which resulted in the victim not being able to wash until then
- not ensuring that the victim's medical and psychological problems were dealt with quickly
- allowing her to remain in cruel, inhuman and degrading circumstances until the next morning, which resulted in secondary victimisation.

## Conclusion

Private doctors and hospitals must treat patients in emergency situations. They may refuse to treat certain patients, provided such refusal is not unconstitutional. Rape survivors require emergency medical treatment. They may not be refused treatment by private

doctors and hospitals because practitioners do not wish to give evidence in court. Such refusal is unconstitutional as it amounts to 'unfair discrimination'. Sexual assault evidence kits may be used by private doctors and hospitals. Given the high rate of sexual violence in SA it is recommended that both private and state doctors should have stocks of sexual assault kits on hand, and the National Police Commissioner's national instruction for providing assistance to survivors of sexual offences. District surgeons 'on call' must treat rape survivors as requiring emergency medical treatment. They may not defer seeing them until the next day as this violates their constitutional right to dignity and exposes them to secondary victimisation.

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