The Omotoso Trial Lays Bare Questions of Patriarchy and the Law

Bathabile Dlamini, MP

The proceedings at the trial against Timothy Omotoso bring to the fore critical questions for public deliberation about the theory of law in contemporary democratic South Africa. More specifically, the conduct of the Defence Attorney, Adv Peter Daubemann, calls on us to revisit the interpretation and practice of law as it pertains to the historical antagonisms of the justice systems against women.

The general rule of jurisprudence in South Africa is that lawyers possess the obligation to act in their client's best interests. However, such burden is subject to the supreme duty of all legal practitioners to the criminal justice system and the court. They are expected to be fair and courteous towards every person during the exercise of their professional conduct. This requires taking into account the perspectives of witnesses.

Importantly, while Section 166 of the Criminal Procedures Act gives rights to the accused to cross examine witnesses, such rights are limited. Section 166 instructs that should it find any cross-examination to be "protracted unreasonably and thereby causing the proceedings to be delayed unreasonably, the court may request the cross-examiner to disclose the relevancy of any particular line of examination and may impose reasonable limits on the examination regarding the length thereof or regarding any particular line of examination."

In light of this framework, and Daubemann's apparent disrespect of the presiding officer, Judge Mandela Makaula's repeated cautions against his unnecessary and unreasonably protracted cross-examination of Cheryl Zondi, we have to collectively reconsider and redefine how women and their experiences with violence are articulated and treated in the law. This requires a historical examination of law in our society.

Historically, in South African Society law was used by the colonial and apartheid governments to structure our nation in binaries between customary and common law – effectively creating two states in one. More saliently, the historically patriarchal structure of the legal system established binaries of justices and injustices to men and women concurrently. Because of the historical exclusion of women from the justice system, our society has developed a culture of trivializing crimes against women. The normalization of emotional, physical and psychological forms of sexual

violence in turn have had consequences for how sexual violence crimes are persecuted.

To redress these historical imbalances, our democratic-era developmental agenda requires that due consideration be taken on how the binaries manifest themselves in the theory and practice of law. Central to this is the relation between policy making processes at national government level and their interpretation and implementation at local levels.

Our main concern as political, government, judicial and social leaders must be to consider the extent to which women have access to both the material and discursive resources to claim and enforce their Constitutional rights.

Furthermore, we have to ask ourselves whether we have created the necessary policy and environmental contexts that will further assist victims of sexual violence to lay claim to their rights. Daubemann's deliberate use of explicit repetitions of unnecessary questions under the guise of doing his job are a case in point.

The answer to this question must be found beyond the ambits of the law in its theoretical context. Rather, a contextual approach that considers the nuances of the social, economic, political and psychological factors we have inherited from the colonial and apartheid past must be central to our deliberations. This requires a transformational approach to the way we consider and apply law. It also calls to question the interpretative duty of adjudicators of legal texts.

This duty is not limited to lawyers. It extends to law-makers and implementators, including public service policy-makers whose responsibility it is to redress the imbalances of the past guided by the Constitutional framework. All of us who make interpretative decisions regarding the Constitution are fundamentally responsible for the social and distributive consequences that result from these choices.

For national policies, legislation and court decisions, there are choices and consequences – about which we will all be judged accordingly by the future. It is these choices and their relation to cultural and socio-psychological factors that are of most concern to the Department of Women regarding the Omotoso Trial, particularly the conduct of the Defense attorney.

To what extent does our own internalized socialization have an impact on the current gap between Constitutional aspirations and lived realities? In the same way that we cannot divorce the law from the law-makers, neither can we separate who we are from how we implement and adjudicate the law.

A black female lawyer, for example, who herself has experienced sexual violence, would not ask a survivor of sexual violence how many centremeters she had been penetrated. Neither would she imply that the witness was “willing to be raped”, as Daubermann has insinuated. This confirms that our own actions in relation to the Constitution are stamped onto us from early childhood, through socialisation. Daubermann’s own line of cross examination adheres to a practical logic that is shaped by the routine requirements and perceptions he has learnt from childhood.

The main question to consider as we collectively make sense of the order of our society as revealed in the Omotoso trial, is: how do we facilitate and manage meaningful social transformation in light of our inherited colonial and apartheid inherited precedence? Furthermore, to what extent do the legal norms we have inherited inform the decisions we make in the democratic era? Our main task, if the problem is inherited, is to rethink the institutional make-up of our social and judicial structures.

From a legal and policy perspective, our government is submissive to the supremacy of the Constitution, which formally recognises all citizens as equal under its law. Section 9 of the Constitution guarantees us all, regardless of race, gender, and the many subjective positions we occupy, the right to equal protection and benefit of the law. Section 12 guarantees our freedom and security. This includes the freedom from all forms of violence - from either public or private sources. We also enjoy the right to not be tortured, punished cruelly, or degraded in any way. But at which points are Defence Council’s right to cross examine witnesses trumped by the witnesses’ own rights as guaranteed by Sections 9 and 12 of the Constitution?

It is common cause that sexual offending has always been a crime that is difficult to prosecute. Traumatizing experiences such as faced by Cheryl Zondi in front of the whole nation are the main reasons that dissuade complainants from going to court.

It has become too common for cross-examination during sexual offences trials to be an opportunity for Defence council, who are often men, and likely perpetrators of unreported sexual crimes themselves, to re-traumitise witnesses by questioning their credibility.

The task ahead for the women’s movement of South Africa is clear. If we are to transform the manner in which justice is served to survivors of sexual violence, more studies are required to understand how trauma unfolds in courtrooms, and how this can be prevented towards society free of gendered oppressions.

We have to put an end to the age-old strategies used by Defence counsel of asking questions that request confirmation and using that information to construct inconsistencies in the testimony of the witness.

It cannot be just that women who have had to overcome the trauma of sexual violence have to relive such experiences through mounting Defence accusations. It is an old tactic used by weak Defence council to solicit emotion from witnesses by repeatedly telling them that their answers are inadequate and by reissuing questions repeatedly.

When survivors of sexual violence are made to feel as though they are persecuted during the trial process, the common feelings that resurface are intense guilt, self-blame, anxiety, powerlessness and embarrassment. Some witnesses have previously described cross-examination as worse than the actual sexual assault.

It is for such reasons, and the secondary-victimisation that accompanies such experiences, that survivors of rape delay reporting.

In line with our country's democratic model, our role as the Department of Women is to work with all social partners to address these social phenomena. We are well aware that we cannot fulfil the mammoth task of transforming gendered relations in our society alone. It is only when we form alliances between state institutions and women's movement actors that the outcomes are likely to lead to success.

The task for all of us, in all our different sectors and spheres of life, is to use the resources at our disposal to address the spread of violence on women.