



“If it is a tear let it be a tear, not a laceration”: Form J88 as evidence in prosecution of violence against women in South Africa

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ABSTRACT

The availability of the J88 form in court is believed to convey the precise clinical description of the woman's injuries as it is seen as prima facie evidence. This article reports how the J88 form is used in prosecution of violence against women (VAW). A four-phased sensory ethnographic design that used courtscapes, participants' observation, document analysis and conversations with prosecutors and court personnel to generate data was employed. In this paper the focus will be on findings from conversations and reviews of relevant documents. The findings indicate that, regardless of J88 being legally endorsed as prima facie and standalone evidence, some trials of VAW cases continue without it. Most importantly, J88 forms presented for evidence are usually 'silent' as they don't have any impact on prosecution of VAW. In some VAW cases, the J88 forms are viewed as recall for a victim's condition. We recommend a synergistic approach that is trans-disciplinary in nature in documentation of J88 forms. Such documentation will advance the legal and health practices.

Keywords: South Africa, medico-legal document, prosecution of VAW, prima facie.

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INTRODUCTION

Prosecution of violence against women (VAW) cases relies profoundly on oral evidence, hence testimony is the main form of evidence (Artz & Pithey, 2010; Hendry, 2010) required in South Africa. In addition, other forms of evidence that are required from the health sector in prosecuting a VAW case include: testimony by expert witnesses who might be a physician or forensic nurse (Jewkes et al., 2009), DNA findings and medical evidence in the form of documented findings from forensic examination reported on the J88 medical record.

Legally, in all reported incidents of VAW, the police are obligated to assist victims to open a case and to access medical care in terms of Section 2 'Duty to assist and inform complainants of rights' of the Domestic Violence Act, 1998 (Act 116 of 1998) (South Africa). During the health assessment, the healthcare providers are obliged to take a history, to complete an examination and to document what they see, smell, hear and touch (Duma & Ogunbanjo, 2004; Artz & Pithey, 2010) related to the victim, or in this case the patient. The history taking is followed by a comprehensive physical examination and health intervention and documented in the official legal medical record, the J88 form.

The J88 form is the official document from the Department of Justice (Rowe, Botha, Mahomed, & Schlemmer, 2013), used exclusively for criminal proceedings, for the purpose of recording injuries sustained by victims of crime, including violence against women. The structure of the form provides for observations on the physical and emotional state of the victim during her presentation to the health facility, observation of bodily injuries and, most importantly, injuries to the ano-genital region, and reporting on the various DNA samples taken in all cases and forms of sexual violence (Duma & Ogunbanjo, 2004; Jewkes et al., 2009). The structure of the form provides for written words, photographs or drawings of the sustained wounds or crime scene, seized weapons and clothing, narratives, excited utterances from the victim (quotes), and odours from the victim (Duma & Ogunbanjo, 2004; Artz & Pithey, 2010).

The J88 form is an incident reporting form that gives evidence for a single event of violence. It is submitted to the court at the beginning of a VAW trial in terms of Section 212 of the Criminal Procedure Amendment Act, 2008 (Act 65 of 2008) as prima-facie evidence, together with the affidavit from the health professional. The affidavit attests to and corroborates the fact that the victim has been seen and medically examined. The J88 form, in the prosecution process, is believed to be helpful to the victim of VAW. Its purpose is to convey a precise clinical description of the injuries, provided that the medico-legal record (J88) is documented appropriately, impartially, objectively, and with integrity and honesty (Kramer, 2002) by the healthcare providers (physicians, nurses and emergency

care providers). However, the forensic role of both nurses and emergency care providers in South Africa is still controversial as it is undermined. The presentation of hospital health records, as a stand-alone document, for legal practices has been used against women in VAW cases in court (Cory, Ruebsaat, Hankivsky, & Dechief, 2003).

Alternatively, in a Canadian study, Cory et al. (2003) report that a complete hospital file of the victim is taken to court during trial. The main aim of taking the entire hospital record is to have a bigger picture of the entire relationship and the incident in which abuse or violence occurred (Cory et al. 2003). The benefit of accessing the entire hospital record has value, as the subjective and objective health description of the individual client is shared to indicate acute, chronic consequences and long-term effects of VAW. In both South African and Canadian criminal cases on VAW where health records are part of the cases, advantages and disadvantages of the use have been described. For example, in the South African criminal justice system, a paper-based system is still in use when managing VAW cases. A case file is physically moved from one desk to another with the various forms of evidence before it reaches the prosecutor's desk. This can likely cause the loss of the contents of the file between the different departments. Regardless of these differences and challenges (single incident form or full hospital file), Holmstrom and Burgess (1983) and Cory et al. (2003) advocate that the health record submission continues to be used as a second voice in prosecution of VAW.

A key challenge is that health professionals, as the people who document the J88 forms, are not trained in legal issues. This deficiency places the health professionals and the VAW case in a detrimental position as collection of evidence is a specialised task that requires advanced training (Walker & Louw, 2003). The legal sector requires documentation with legal specificity while nurses are only taught generic skills in documentation and record-keeping (Duma & Ogunbanjo, 2004).

This paper examines how the J88 forms documented by health professionals (nurses and doctors) are used in prosecution of VAW. The paper is part of a larger study designed to explore the culture of prosecution of VAW cases. We report the J88 forms as evidentiary artefacts used in prosecution of VAW.

METHODOLOGY

We used a four-phased sensory ethnographic design including courtscapes, participants' observations, conversations with prosecutors and court personnel, and the review of relevant site documents to generate data. Our decision to use sensory ethnography as the methodology of choice emerged through a progression of experiences and deliberations.

As nurse researchers, our nursing training provided us with a background on how to pay special attention to sights, smells and sounds (Edvardsson & Street, (2007). Additionally, the first author was trained as an embodied qualitative researcher (Edvardsson & Street, 2007) who has to use sensate knowledge (Edvardsson & Street, 2007) together with emotions and bodily ways of knowing (Sharma, Reimer-Kirkham, & Cochrane, 2009) in order to understand the phenomena under study. This made it possible for her to interconnect and interrelate the senses with other forms of data in order to gain a deeper, richer understanding of what prosecution of VAW entails. Through the reflexive and experiential processes that sensory ethnography permits, she could not have understood certain happenings, for example the sound of a knock at a specific door in the court and the call “all rise up and silence” that required all people in the court room to act in a specific manner as the magistrate approached. Furthermore, attending to the possible meanings of the sounds through the sense of hearing, she was able to notice an atmosphere of anxiety (Edvardsson & Street, 2007) on the faces of the victims and their families when hearing the sounds of restraining chains on the feet of the perpetrators clicking on the floor as they (perpetrators) were led to the courtroom. Ethnographic studies always have the intent of observational questioning (i.e. what is happening in the situation). In our case, we opted for an ethnographic design that embraces both the lived experiences of participants and the researchers’ senses.

Sensory ethnography considers the senses as means of knowing and learning, thereby merging reflexive and experiential processes as significant underpinnings (Pink, 2009). Sensory ethnography allowed us to observe, understand and know the culture of prosecution of VAW in South African courts. Additionally, the senses such as vision and hearing were used to construct academic knowledge (Pink, 2009).

The whole research process was underpinned by Afrocentric feminism, a critical feminist perspective of African origin. This perspective emphasises the role of positive aspects of African culture in the lives of African women. Afrocentric feminism challenges ‘kyriarchy’, a construct first coined by Fiorenza (1984) as a system of ‘ruling and oppression’ in which many people interact and act as oppressors or the oppressed in a given time and moment. As a socio-political system, kyriarchy perpetuates hierarchical social relations that mark all women as inferior based on distinctions such as race/ethnicity, class, ability and locality (Masenya, 2004; Sprague, 2005). Unlike patriarchy as the main oppressive social order that privileges men and oppresses women, kyriarchy is theorised as a complex pyramidal system of intersecting multiplicative social structures of super-ordination and subordination, of ruling and oppression (Fiorenza, 2001). By definition, kyriarchy is the social system that keeps all forms of oppression in place. Further, kyriarchy is a social system that validates collage(s) of gender, race, ethnicity, sexuality, class, age, dis/ability hierarchies, and many more.

ETHICAL ACCESS

Ethical approval was obtained from the University of Alberta Health Research Ethics Board – Panel B in Canada. Recognising that ethical regulations are positioned in the national, international and cultural context (Clark & Sharf, 2007), the study was initiated after the key informant in the justice system in South Africa indicated that there was no need to obtain ethical approval from any local research ethical review body in South Africa. Operationally, appropriate research site approval was sought from the relevant chief magistrate, regional court president and chief prosecutors. Please refer to Annexure A for the permission letter. This approval was sought and received by the first author for each court in which observations took place. All participants signed an informed consent prior to the conversations.

SAMPLING AND RECRUITMENT

The participants were purposively sampled; prosecutors who were prosecuting VAW cases that have the J88 forms were eligible to participate. The regional court president and control regional court prosecutor were the key informants who assisted with the initial recruitment of participants. Subsequently, both theoretical and contextual sampling techniques were initiated in order to capture the emerging constructs and contextual aspects of prosecuting VAW. Hence other court personnel (court intermediaries, regional court magistrates) were recruited as cultural actors from the cultural scene.

DATA GENERATION

This paper reports data generated from the participants' observations, conversations and the review of documents to generate data. Multiple senses were interwoven within the data generation process. Prosecutors were observed while prosecuting VAW cases with J88 forms. Sense of vision was the most dominant sense, although other senses were used in relation to hearing different sounds in the courtrooms, smelling different odours, and feeling a sense of being awed by the proceedings and environment. These personal researcher experiences were documented in field notes and incorporated throughout this phase as a means to understand and learn about the culture of prosecuting VAW. More than 50 criminal cases with twenty six cases of VAW were observed in different regional courts.

Secondly, the first author engaged participating prosecutors and other court personnel in conversations about what had been observed and the meanings attached to observed events. In this phase, both etic (outsider) and emic (insider) stances from an Afrocentric feminist perspective were of great benefit. An outsider perspective about the criminal justice system enhanced an 'unknowing stance', wherein a researcher adopts a complete childlike persona (Ngunjiri, 2007). As such, conversational engagements were embraced and received with wonderment or awe. An insider stance was reflected in the first author's

position as a South African who had lived all her life in South Africa. This stance emphasises the importance of understanding the pre-colonial historical impact on African women of South African society. Both auditory and visual senses were dominant in this phase. Seven face-to-face intensive conversations and one virtual (e-mail) conversation were conducted with prosecutors and other court personnel. The conversations were digitally recorded and transcribed verbatim with one exception; one participant consented to a conversation but declined to be recorded and this conversation was documented by detailed field notes. The conversations were informed by the observations and with regard to the J88 form, this specific question was asked: “What is the role of J88 in prosecution of VAW cases?”

Additionally, relevant site documents were reviewed in order to enhance prior theoretical, observational and conversational claims on prosecution of VAW. Such site documents included the Criminal Procedure Act, 1977 (Act 51 of 1977) as amended, the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007), the Domestic Violence Act, 1998 (Act 116 of 1998) and the Department of Health’s National Sexual Assault Policy, as well as the J88 forms which were presented for evidence.

DATA ANALYSIS

Data generation and analyses occurred concurrently, inductively and iteratively from the initial phase of the study until the interpretation and sharing of the findings. An Afrocentric critical, feminist perspective guided both data generation and analysis by focusing on social interactions, power relations and experiences (Kushner, 2005) of a continentally based African woman as a victim of VAW. Feminist strategies to ensure rigour were applied and demonstrated throughout the research study. These strategies included a number of conversations held, taping and verbatim transcription of conversations, memoing and field notes, reviews of researcher interpretations, and reflections (Kushner, 2005).

RESULTS

The results presented in Table 1 are on data generated during conversations with participants (n=8). The findings also include data from the reviewed site documents.

Table 1: Participants' demographics*

| | |
|------------------------------|---|
| Gender | |
| Male | 4 |
| Female | 4 |
| Race | |
| Black | 5 |
| White | 3 |
| Ethnicity | |
| Venda | 1 |
| Pedi | 2 |
| Tswana | 1 |
| Tsonga | 1 |
| Afrikaner | 3 |
| Prosecutor Experience | |
| <10 | 4 |
| 11-25 | 1 |
| >40 | 2 |
| Qualifications | |
| B Juris and Honours | 7 |
| Diploma | 1 |
| Locality | |
| Urban | 3 |
| Rural | 1 |
| Urban and Rural | 3 |
| Metrocity | 1 |
| Court Type | |
| Mainstream | 4 |
| Specialised | 1 |
| Mainstream and Specialised | 3 |

*Presents selected demographic characteristics of the participants.

Relevant to the use of the J88 form during prosecution of VAW, the following subthemes emerged: *J88 as stand-alone evidence* and *the silent J88*.

J88 AS STAND-ALONE EVIDENCE

The significance of the J88 in prosecution of VAW was noticeable; it was submitted in all the cases that were observed. The importance of J88 was shared by all the participants in their conversations. One participant affirmed that:

J88 is real and conclusive evidence because it is presented under Section 212 of Criminal Procedure Act as amended. As the State, we [prosecutors] don't even ask permission from the Defense Counsel to use it [in trials].

Other participants similarly viewed the importance of the J88 in cases of VAW. A participant said:

J88 is to corroborate evidence in case of physical assault or forceful sexual penetration. It is very important because if we have medical record it gives the State's case strength...

During conversations, the prosecutors reported that health professionals were not documenting the J88 forms accurately. Inaccurate J88 forms cannot serve as admissible evidence in courts (Norfolk & White, 2006; Walker & Louw, 2003). The participants' perspective, however, contrasted with our review of relevant documents: most J88 forms were correctly documented from a health perspective. It became apparent that the discourse was on the interpretation of what was documented on the J88 forms. Not only was the interpretation of the recorded findings challenging; but there were individual differences on how health professionals record their findings. One participant expounded on how health professionals differed in their decisions about recording and reporting by saying:

One doctor will reflect on a medical report that the victim's eyes were swollen. The next doctor will take the matter further by taking a photo of the eyes. It goes without saying that what one has in mind is the 'best evidence rule' [that] can convey the message to the court and to emphasise the fact observed by those involved.

Inasmuch as the Criminal Procedure Amendment Act, 2008 (Act 65 of 2008) and participants declare the role of J88 in prosecution of VAW, prosecutors held health professionals at fault in relation to how they completed the J88.

THE SILENT J88

Participants who were using J88 in the courtroom were critical of the condition of J88 forms presented as prima facie evidence. During conversations, the participants indicated that the J88 forms were not providing the evidence as anticipated, hence, the court personnel referred to it as the 'silent J88'. According to the participants, for a J88 to be used as evidence in court, it should adhere to the standard of objectivity and impartiality. For example, one participant commented:

The injuries must be properly noted [in a J88 form]. If it is a [labia] tear let it be a tear, not a laceration. Medical findings must be medical findings. They [health professionals] must just give their findings of what was detected when examining the victim [mental, physical and gynaecological].

From the perspective of this participant, the credibility of the J88 form was compromised as evidence if it was not clearly and objectively completed, and if terms used did not convey

meanings they could interpret in the court proceedings. Another participant who was also critical of inaccuracy in recording on the J88 form, linked this to inadequate preparation by health professionals to complete the J88 in a way that is useful from their perspective as prosecutors:

Doctors [health professionals] must be given proper workshops especially on new Sexual Offences Act of 2007 as it demarcates between sexual assault and sexual penetration. What I have realised is all doctors [health professionals] make their conclusive remarks pertinent to sexual assault, even if there has been penetration.

Contrary to the abovementioned comments, the review of the Department of Health's National Sexual Assault Policy indicated that health professionals (nurses and doctors) were trained during the enactment and implementation of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007) (South Africa). In its foreword, the policy states that "The Department of Health has committed itself to ensure that various measures, including intensive training ..." (National Sexual Assault Policy, 2003). In the second paragraph of the foreword, the policy continues to state that countless workshops and consultations were held ever since 1998 when the first policy guidelines for sexual assaults were compiled.

A sense of minimising or dismissing the value of J88 emerged during the conversations. A participant commented,

"A J88 is just an [pause] official document which is submitted to the court at least to explain the injuries noticed by the doctor at the earliest possible time after the commission of the crime."

This comment suggests that the value of the J88 as evidence is limited to documenting injuries. Moreover, the court personnel indicated that in some instances cases were tried without J88 forms. For example, one participant said:

Whether [a J88] is there or not [pause]..... in most of the cases it does not make much of an impact in a VAW case. Its availability does not influence the court. Sometime back, I had a case of rape where it was only the complainant and the first report. The victim didn't go to the doctor but the accused perpetrator got 15 years. It really depends on how you as the prosecutor tackle your case.

These participant perspectives suggest an apparent disconnect between prosecutor experience with using the J88 and the court requirement that the J88 be used in proceedings.

DISCUSSION

The J88 form, which is a medico-legal form in South Africa, is endorsed as prima facie evidence in cases of violence against women. This is endorsed by the Criminal Procedure Amendment Act, 2008 (Act 65 of 2008) (South Africa). For this official form to be stand-alone evidence, it needs to be documented accurately and objectively (Cory et al., 2003). According to Rowe et al. (2013), in South Africa, the J88 form is essential as medical evidence in cases of VAW provided it is clearly and accurately completed. The same sentiment was alluded to by Cory et al. (2003) in their Canadian study, which recommended accuracy and objectivity when documenting health records as it can assist in court cases on VAW. Accurately and objectively completed health records are able to convey a precise clinical description of the injuries sustained by the victims during acts of violence (Artz & Pithey, 2010; Joyner & Mash, 2012; Duma & Ogunbanjo, 2004).

Documentation of the J88 is a specialised task (Purdue, 2001; Norfolk & White, 2006; Rees, 2010) that needs to be completed by nurses and doctors as the front-line health providers in the care of victims of violence. The Department of Health's National Sexual Assault Policy (South Africa, 2003) and a study by Jewkes et al. (2009) support the contention that health professionals in South Africa need to be trained on how to manage cases of sexual violence against women within the health facilities. This training was done before the implementation of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007). Documentation of the J88 was one of the aspects on which training was provided.

Despite this training, however, from the perspective of court personnel, the J88 forms which were presented in court for prosecuting cases of VAW were 'silent'. The court personnel were adamant that the forms were inaccurately completed and they served a limited or no purpose during the trials relating to violence against women. This concern has been identified in a previous study by Walker and Louw (2007) related to the dedicated sexual offences courts in South Africa. These authors (Walker & Louw, 2007) reported that inaccurately completed J88 forms were unable to serve as convincing prima facie evidence. The issue of (in) accuracy has been ascribed to the fact that these forms were not documented from a legal perspective but from a health professional's point of view. Different perspectives on documentation of the J88 result in misinterpretation, wherein the stakeholders judge each other with 'unease and even overt hostility' (Purdue, 2001). This has been a longstanding problem, which compromises the contribution of the J88 in court proceedings (Purdue, 2001). In practice, health professionals (nurses and doctors) have been trained on how to manage VAW clinically, but not on how to use legal language. Hence they submit J88 forms that are inaccurate in the eyes of court personnel as these forms 'neither confirm nor deny

the complainant's allegation' (Rees, 2010). Such reports limit the significance of the J88 in the prosecution of a case as the health professionals prefer 'not to draw conclusions of what happened' (Rees, 2010).

Rees (2010) suggested that health professionals document such forms in medical terminology in order to defend their knowledge territories while maintaining an independent status in prosecution. Similarly, court personnel in South Africa are not trained on the interpretation of medical terminology as evidence in court but on the legal issues concerning VAW cases (Human Rights Watch Report, 1997). The distinct perspectives seem to result in a discourse of misinterpretation, rather than supporting the court personnel's allegation of inaccurate completion of the J88. What is concerning, however, is that the importance of the J88 as outlined by the Criminal Procedure Amendment Act, 2008 (Act 65 of 2008) is de-emphasised in some cases as it was seen mainly as documenting the condition of the victim in her initial presentation at the health facility.

IMPLICATIONS AND RECOMMENDATIONS

Activities that are documented and recorded on the J88 are of worth in prosecution of violence against women, provided all stakeholders are in consensus on what and how to document on the J88 form (Purdue, 2001). Globally, the most important narrative is that healthcare professionals play a vital role in ensuring that 'justice is served' (Rowe et al., 2013, p. 437) as they are the initial ears and eyes in the management of VAW cases (Cory et al., 2003). However, it is apparent that problems persist globally with regard to medical evidence forms, which either underreport the violence which the victim endured (Cory et al., 2003, Norfolk & White, 2006, Walker & Louw, 2003) or are not completed adequately or appropriately to serve as admissible and credible evidence in courts (Walker & Louw, 2003). Consensus is possible, provided the criminal justice personnel are prepared to work with health professionals by communicating how the J88 needs to be completed to present the best evidence possible. For example, criminal justice personnel could assist health professionals to understand the system of codifying and clarifying legal practices (Purdue, 2001) to guide accurate documentation of information on the J88 form from the legal perspective (and not only the medical perspective). We suggest that there is a need for synergistic documentation (Kerfoot, 1996) that will allow the documentation of specific synergies resulting from the consensus of legal and medical personnel involved in prosecution of VAW.

Directed by the codified prosecutorial practices, such synergies would involve the integration of objective and subjective descriptions and interpretation of injuries in the written words on the J88 form. This would include accurate identification, measurement, and differentiation

of the wounds, lacerations, lesions and bruises and their anatomical landmarks on the body (Purdue 2001; Duma & Ogunbanjo, 2004; Artz & Pithey, 2010). Such synergies also imply the recording of injuries with other devices such as video/colposcopy or sketches before cleaning or suturing the injuries. Most importantly, the use of simple and widely recognised words with proper clinical jargons must be recommended in order to provide a concise description that is acceptable and meaningful in both legal and medical context.

Synergistic approaches in documenting on the J88 form are of importance to the nurses as they can revisit the existing health screening, identification, care, and reporting protocols on VAW. Appropriate reporting improves the quality of care and establishes connections on health issues that are related to violence (Kramer, 2002; Duma & Ogunbanjo, 2004). Furthermore, this type of approach will optimise accurate and lucid interpretation of the J88 form that contributes to evidence-based verdicts. We contend that findings from this study contribute to nursing knowledge by optimising and enhancing the current methods of collecting forensic evidence such as documenting, recording and sketching of the sustained wounds in order to provide hard evidence in courts. Moreover, the findings have the potential to improve screening, identification, care and reporting of VAW by showing how violence relates to other health issues (Kramer, 2002).

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