



# EQUALITY NOW

26 June 2002

Ambassador Santiago Canton  
Executive Secretary  
Inter-American Commission on Human Rights  
1889 F St., N.W.  
Washington, D.C. 20008

Ref. Amicus Curiae Brief  
Caso 12.350  
MZ  
Bolivia

Your Excellency:

Equality Now submits this brief *Amicus Curiae* in support of la Oficina Jurídica de la Mujer, el Comité Latinoamericano y del Caribe para la Defensa de los Derechos de la Mujer (CLADEM) and el Centro por la Justicia y el Derecho Internacional (CEJIL), co-petitioners on behalf of MZ, in their claim that the government of Bolivia, in the case of MZ, has discriminated on the basis of sex, thereby denying her internationally protected rights under the American Convention on Human Rights and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém Do Pará).

Equality Now is an international human rights organization working to protect and promote women's rights around the world. Equality Now draws on international law in its efforts to end violence and other forms of discrimination against women. Sexual violence and the failure of criminal justice systems to provide effective recourse for victims of sexual violence, forms of sex-based discrimination, are issues of central concern to the organization.

## RESTATEMENT OF FACTS

On October 2, 1994, at approximately 2:30 a.m., by her account, MZ, a Dutch citizen temporarily working for the United Nations in Bolivia, was asleep in her apartment when she was awakened by a man catapulting backwards through her bedroom window. As she screamed, the man jumped on top of her, threatened to kill her, tried to suffocate her, appeared to pull out a

gun, and overpowered her physically. He demanded that she satisfy him sexually, tore her sleeping clothes off, verbally threatened her life, and raped her over the next four hours. The terror and threats he inflicted on her overcame her resistance (including trying to get out of his grip desperately, trying to hit him with a lamp, and hitting him with a perfume bottle on the eyebrow, as the trial court found) and kept her from screaming for help.

Dawning light revealed the perpetrator to be Jorge Carlos Aguilar Orellana, whom she recognized then because she had met him briefly previously as the son of her landlords. When his attention lapsed momentarily, MZ finally managed to escape -- the trial court found she was barely dressed and bloody -- and sought refuge with neighbors, to whom she reported the crime. The trial record reveals that she immediately notified the authorities, filed a police report, pressed charges, and underwent gynecological and other medical examinations. MZ, distraught following the severe trauma of the assault and its aftermath, soon thereafter left Bolivia to return to Holland in order to recuperate mentally and physically with the support of her family, doctors, and community.

Two years after the attack, following trial, Mr. Aguilar Orellana was convicted of rape, and of breaking and entering, on substantial and compelling testimonial and physical evidence, and sentenced to five years in prison. However, the Court of Appeals, citing no legal defect in the trial, overturned his conviction. The Supreme Court of Bolivia, also without grounds in law cited, upheld the reversal. Following notification of the Supreme Court decision, attorneys for MZ filed a complaint against Bolivia with the Inter-American Commission on Human Rights under the American Convention on Human Rights and the Convention of Belém do Pará. In their reply of February 1, 2001, the Government of Bolivia stated that MZ received a full and fair trial, was able to and did take full advantage of all of her rights to appeal, and that the reviewing courts acted legally and within their jurisdiction.

Amicable settlement discussions were concluded unsuccessfully in March 2002, and the Commission decided to proceed to consider the merits of the case.

## **SUMMARY OF ARGUMENT**

A competent and unbiased trier of fact found that MZ was raped in a proceeding that fully complied with the rights of the accused. Reviewing courts, rather than identifying legal

defects, employed rape myths -- a form of sex inequality through gender bias -- to reverse that finding. On the basis of sex, procedural rights to due process of law and substantive rights to equal protection of the law were thus denied to a woman who was raped, violating the international obligations Bolivia has undertaken under the American Convention on Human Rights and the Convention of Belém do Pará.<sup>1</sup>

## ARGUMENT

### I. APPLICABLE INTERNATIONAL STANDARDS REQUIRE ABSENCE OF GENDER BIAS IN ADJUDICATIONS OF VIOLENCE AGAINST WOMEN

The American Convention on Human Rights and the Convention of Belém do Pará together provide an impressive panoply of sex equality rights, procedural and substantive, for women victims of sex-based violence.

Article 24 of the American Convention on Human Rights guarantees all persons the right to equal protection of the law without discrimination, including on the basis of sex.<sup>2</sup> Articles 1 through 6 of the Convention of Belém do Pará make patently clear, should further clarification be needed, that rape with official impunity violates the human rights of women, in particular the right to equality on the basis of sex.<sup>3</sup> Article 6 specifically guarantees women the right to be free from all forms of discrimination and to be valued "free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination;"<sup>4</sup> Article 7 requires that states adopt means to "prevent, punish and eradicate" all forms of violence against women, and requires, at 7(f), "fair and effective legal procedures for women who have been subjected to violence."<sup>5</sup> Article 9 requires States Parties to "take special account of the vulnerability of women to violence by reason of...their race or ethnic background."<sup>6</sup> Article 4 mandates respect for physical, moral and mental integrity, personal liberty and security, respect

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<sup>1</sup> American Convention on Human Rights (Pact of San José, Costa Rica) [hereinafter American Convention], Nov. 22, 1969, 1144 U.N.T.S. 123 (accession by Bolivia June 20, 1979); Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women [hereinafter Convention of Belém do Pará], June 9, 1994, 33 I.L.M. 1534 (signed by Bolivia Sept. 14, 1994, ratified Oct. 26, 1994).

<sup>2</sup> American Convention, *supra* art. 24, 1144 U.N.T.S. 123, 151.

<sup>3</sup> Convention of Belém do Pará, *supra* arts. 1-6, 33 I.L.M. 1534, 1535-36.

<sup>4</sup> *Id.* art. 6, 33 I.L.M. at 1536.

<sup>5</sup> *Id.* art. 7.

<sup>6</sup> *Id.* art. 9, 33 I.L.M. at 1537.

for dignity of the person, and recourse for violations of rights.<sup>7</sup> It further guarantees the right to equal protection of the law. Many of these rights are doubly entrenched by Articles 5(1) (respect for physical, mental and moral integrity) and 7(1) (personal liberty and security) of the American Convention on Human Rights.<sup>8</sup>

Further underlining these principles, the Special Rapporteurs on Women's Rights, including the Special Rapporteur on Women's Rights of the Inter-American Commission on Human Rights, stated in a Joint Declaration issued on 8 March 2002: "Violence against women is a manifestation of discrimination based on gender. We reaffirm that the right of every woman to be free from violence includes the right to be free from such discrimination and to enjoy equal protection under the law."<sup>9</sup>

The American Convention and the Convention of Belém do Pará have been interpreted and applied in a number of decisions by the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights in cases that provide guidance for MZ's case. The *Velásquez Rodríguez* case established that member states are responsible for failure to address human rights violations after they have occurred, requiring states to "prevent, investigate and punish any violation of the rights recognized by the Convention."<sup>10</sup> A State can accordingly be held responsible for its failure to remedy human rights violations when it effectively condones them by failing to hold human rights violators, including private violators, accountable.

Specifically, a State can be held internationally responsible when a violation of fundamental human rights is committed by a private person, but the State fails to respond as the Convention requires.<sup>11</sup> In the *Mejía* case, for example, Peru was held to violate the Convention for its failure to prosecute a rapist who may or may not have been a state actor.<sup>12</sup> There, the Inter-American Commission observed that the State is obligated "to make effective judicial

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<sup>7</sup> *Id.* art. 4, 33 I.L.M. at 1535-36.

<sup>8</sup> *Id.* arts. 5,7, 33 I.L.M. at 1536.

<sup>9</sup> Joint Statement of the Special Rapporteurs on Women's Rights, Mar. 8, 2002, [available at](http://www.iachr.org/declaration.women.htm) <http://www.iachr.org/declaration.women.htm> (last visited Mar. 31, 2002)

<sup>10</sup> *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Inter-Am. Ct.H.R. (Ser. C) No. 4 at para. 166 (1988) [available at](http://www.corteidh.or.cr/seriecing/index.html) <http://www.corteidh.or.cr/seriecing/index.html> (last visited June 19, 2002).

<sup>11</sup> *Id.* at para. 172. This language is quoted with approval in the *Godínez Cruz Case*, Judgment of Jan. 20, 1989, Inter-Am. Ct.H.R. (Ser. C) No. 5 at paras. 181-82 (1989) and in the *Caballero Delgado and Santana Case*, Judgment of Dec. 8, 1995, Inter-Am. Ct.H.R. (Ser. C) No. 22 at para. 56 (1996).

<sup>12</sup> Case 10.970, *Raquel Martín de Mejía v. Perú*, Report No. 5/96, Inter-Am. C.H.R.157, OEA/Ser.L/V/II.91 doc.7 (1996).

recourse available to victims of human rights violations (Article 25), recourse that must be substantiated in accordance with the rules of due process."<sup>13</sup>

Most recently, in the case of *María da Penha Maia Fernández*, the Commission, citing the holding of the Court in *Velásquez Rodríguez*, noted in its discussion of equality rights under Article 24 of the American Convention that "Compared to men, women are victims of domestic violence in disproportionate numbers."<sup>14</sup> There, the Commission recalled its findings in a special report on Brazil in 1997 that "there was clear discrimination against women who were attacked, resulting from the inefficiency of the Brazilian judicial system and inadequate application of national and international rules."<sup>15</sup> It recognized that "many courts remain reluctant to prosecute and punish the perpetrators of domestic violence,"<sup>16</sup> and articulated the fundamental sex discrimination in the judicial process, for which Brazil was held accountable, as follows:

Rather than focusing on the existence of the legal elements of the crime in question, the practices of some defense lawyers -- sustained in turn by some courts -- have the effect of requiring the victim to demonstrate the sanctity of her reputation and her moral blamelessness in order to exercise the remedies legally required to be available to her. The initiatives taken by the public and private sector to confront violence against women have begun to combat the silence which customarily has concealed it, but have yet to surmount the social, legal, and other barriers which contribute to the impunity in which these crimes too often languish.<sup>17</sup>

In a factually distinct but conceptually related setting, the Commission in the *Gustavo Carranza* case found a violation of Articles 8 and 25 when the Argentine judicial system chose not to address, on political question grounds, the unconstitutional firing of magistrates that occurred under the military dictatorship.<sup>18</sup> The case importantly holds that "the right to effective judicial protection provided for in Article 25 is not exhausted by free access to judicial recourse. The intervening body must reach a reasoned conclusion on the claim's merits, establishing the appropriateness or inappropriateness of the legal claim that, precisely, gives rise to the judicial

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<sup>13</sup> *Id.* (quoting *Velásquez Rodríguez*, Report No. 28/92, Argentina). Also cited approvingly in Case 10.087, *Gustavo Carranza v. Argentina*, Report No. 30/97, Inter-Am. C.H.R.254, OEA/Ser.L/V/II.95 doc.7, (1997).

<sup>14</sup> Case 12.051, *María da Penha Maia Fernández v. Brasil*, Report No. 54/01, Apr. 16, 2001. Inter-Am. C.H.R., at para. 47 [available at](http://www.cladem.org/Ingles/cas2.doc) <http://www.cladem.org/Ingles/cas2.doc> (last visited Mar. 31, 2002).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

recourse."<sup>19</sup> In other words, due process is not just going through the motions. It requires fairness in substance. The case goes on to hold that the absence of an effective remedy for violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking.<sup>20</sup> In the sense of that holding, an adequate remedy is not simply one formally recognized and provided for, but one that is truly effective in finding violations of human rights when they have occurred and in providing redress for them. Under *Gustavo Carrazana*, a remedy that proves illusory and futile because of the general conditions prevailing in the country, or even in the particular circumstances in a given case, cannot be considered legally effective.<sup>21</sup> Sex bias provides no more excuse for failure to provide effective judicial remedies than does other political bias.

Article 8(1) of the American Convention specifically guarantees every person the right to an "impartial tribunal," for determining her rights.<sup>22</sup> In addition, Article 25 guarantees everyone the right to "effective recourse" to a "competent court...for protection against acts that violate his fundamental rights" under the Convention.<sup>23</sup> The Inter-American Court of Human Rights has ruled that States Parties to the American Convention are obligated under Article 25 in relation to Article 1(1) to provide victims of human rights violations remedies that conform with the due process rules of Article 8(1).<sup>24</sup> Thus the Convention requires that states prevent, investigate, identify and punish perpetrators of human rights violations,<sup>25</sup> rights, as recently reiterated by the Commission, that have in certain circumstances been interpreted to impute acts of non-state actors to a state party.<sup>26</sup>

In sum, the substantive guarantees of equality ensure that judges trying or reviewing cases are unbiased by sex-based prejudices, that the law's application is free of sex-based

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<sup>18</sup> Case 10.087, *Gustavo Carranza v. Argentina*, Report No. 30/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 doc.7, 254 (1997).

<sup>19</sup> *Id.* at para. 71 (citations omitted).

<sup>20</sup> *Id.* at para. 74.

<sup>21</sup> *Id.*

<sup>22</sup> American Convention, *supra* art. 8(1), 1144 U.N.T.S. at 147.

<sup>23</sup> *Id.* art. 25, 1144 U.N.T.S. at 151.

<sup>24</sup> *Velásquez Rodríguez Case*, Preliminary Objections, Judgment of June 26, 1987, Inter-Am. Ct. H.R. (Ser. C) No. 1 at para. 91 (1987).

<sup>25</sup> See *Loayza Tomaya Case*, Reparations, Judgment of Nov. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 42 at para. 169 (1998).

<sup>26</sup> Case 11.654, *Corporación Colectivo de Abogados "José Alvear Restrepo" v. Columbia* [hereinafter *Riofrío Massacre Case*], Report No. 62/01, Apr. 6, 2001, Inter-Am. C.H.R. at para 52 (2001).

preconceptions, and that decisions are not predicated on mistaken notions derived from an individual's group membership. The procedural guarantees of due process converge in requiring that judicial determinations be based on facts in evidence and be free of partiality. Taken together, these rights go to the core of human rights and to the integrity of the legal system in enforcing them. They guarantee that domestic judicial outcomes are predicated not on preconceptions and prejudices or mythic stereotypes but on evidenced realities. The question raised by the instant case is whether these rights will be effective for women who are raped in Bolivia, or whether legal impunity, which promotes rape, will continue.

## **II. BASED ON THE EVIDENCE, THE TRIAL COURT FOUND THAT THE COMPLAINANT WAS RAPED.**

The Bolivian trial court found that sexual violence against a woman, MZ, was committed by a man, Jorge Carlos Aguilar Orellana. He was sentenced to five years in prison. In its decision, that court recounted evidence confirming violence and physical and circumstantial evidence supporting MZ's lack of consent to the sexual activity that was proven to have taken place that night.

The trial court explained that the evidence showed that MZ made a desperate call to her friends in the early morning of the day of the rape, telling them that she had been raped by the son of her landlords. Her friends found her, crying and bloody, hiding behind a door of her neighbors' house, wearing only a bathrobe and slippers she had been loaned.<sup>27</sup> In documenting the violence found to have been committed against MZ, the court referred to police photographs showing the disorder of the bedroom (the report notes that there were clear signs of a fight having taken place), her torn underwear, and the defendant's underwear.<sup>28</sup> The court recorded that the photos reveal that the mattress and sheets were stained with blood and covered with hair that showed signs of having being violently torn out.<sup>29</sup> The court noted that even according to his

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<sup>27</sup> Trial Court Sentence (Sentencia de Primera Instancia), Nov. 19, 1996 at 2, 6.

<sup>28</sup> *Id.* at 7. The police report states that there were clear signs of a fight in the bedroom including the state of disarray of the room, the blood on the sheets, the men's and women's underwear, and a bloodied blouse in the room. *Informe Circunstancial de Inspección Técnica Ocular*, Oct. 4, 1994. The captions on the police photographs note the disarray of the room and the torn pair of women's underwear found at the scene. *Id.*

<sup>29</sup> Trial Court Sentence, *supra* at 7.

own statement, the accused had not had time to put his underwear back on before fleeing the house.<sup>30</sup>

The court further observed that on the same day of the rape, MZ gave a statement of the events, filed charges with the police, and went to see a gynecologist.<sup>31</sup> The gynecologist, Dr. Jorge Aranibar, described her as highly agitated, and said that she had blood on her face and scratches on her body.<sup>32</sup> He found semen and genital lacerations that he said were the result of recent sexual contact.<sup>33</sup> A microscopic examination showed seminal fluid and sperm.<sup>34</sup> The trial court recounted the medical reports that revealed the lesions on her body and genital area to have been caused not by voluntary sex, but by a violent and traumatic penetration,<sup>35</sup> finding that this assault led her to aggressively attack her attacker with a blunt object, and then to hide nearly naked in her neighbors' house.<sup>36</sup>

The trial court noted that the accused changed his story -- first having said the victim desired and consented to sex with him, later that they did not have sex at all -- and that his story did not coincide with the one his friends provided or the physical evidence supported.<sup>37</sup> That court also noted that MZ's original story was complicated and somewhat incoherent at points, but later concluded that it was far more consistent than the accused's, and that, unlike his, her account was corroborated by the physical and other circumstantial evidence.<sup>38</sup> MZ said in her statement that the accused surprised her by entering her room through the window, and that he first tried to talk her into sex.<sup>39</sup> When she refused, he became aggressive, stripped off her clothes, and raped her.<sup>40</sup> She managed to hit him with a perfume bottle, which caused him to bleed

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<sup>30</sup> Id. at 5.

<sup>31</sup> Id. at 2-3.

<sup>32</sup> Id. at 3.

<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> The court says "reports" in the plural, here obviously referring to other unnamed reports as well. They probably refer to the reports by Dr. José Walter Mercado and Dr. Luis F. Hartmann.

<sup>36</sup> "[T]odo eso fruto de una cópula no voluntaria, al contrario producto de una penetración violenta y traumática [sic] que epilogó en una actitud agresiva de la mujer de atacar al varón con un objeto contundente para luego guarecerse casi desnuda en la casa vecina." Trial Court Sentence, supra at 7.

<sup>37</sup> Id.

<sup>38</sup> Id. at 9.

<sup>39</sup> [MZ]: Statement to the Police (Declaración Informativa Policial Prestada por la Señorita [MZ] (Denunciante)), Oct. 4, 1994.

<sup>40</sup> Id. The Court does not mention that in her statements MZ states that her attacker threatened to kill her if she made any noise or if she did not give in to his sexual demands, and he told her he was carrying a gun. She also says

profusely.<sup>41</sup> She later managed to flee the apartment and seek refuge in her neighbors' house.<sup>42</sup> She expressly denied any previous or ongoing sexual relationship with the accused.<sup>43</sup>

The trial court stated that in the accused's most recent version of events, he claimed that he had been drinking the night of the rape, and that he did not remember how he had been hurt.<sup>44</sup> He claimed that he and MZ had had an ongoing sexual relationship despite the fact that he was married.<sup>45</sup> He claimed that he entered her apartment through the door (not the window), and the two of them engaged in a discussion of whether or not to continue their love affair and whether or not to have sexual relations that evening.<sup>46</sup> He said she consented and they both undressed.<sup>47</sup> According to him, at this point MZ emerged from the bathroom and attacked him violently, causing the wound to his forehead.<sup>48</sup> After being hit, by his account, he decided to partially dress himself and leave quickly, without having sexual relations.<sup>49</sup> He could not explain the gynecologist's findings of semen and sperm.<sup>50</sup> In assessing this account of events, the court pointed out that in his first statement to the police, the defendant claimed that he and MZ had consensual sex that evening.<sup>51</sup>

The defendant's friends, in their statements to the police, stated that the accused told them that he had gone to the home of a foreign woman and had had sexual relations with her, including oral sex, which he said was a sign of her consent.<sup>52</sup> Following the sex, they said he

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that when she tried to yell, he pressed his arm against her throat, attempting to choke her. See [MZ] Statement to the Fiscal de Instrucción de Turno, Oct. 5, 1994.

<sup>41</sup> See Id.

<sup>42</sup> Trial Court Sentence, supra at 2, 6.

<sup>43</sup> MZ denied any on-going sexual relationship with the accused in her statement of October 5, 1994. This denial is also noted in her statement to the police, Declaración Informativa Policial Prestada por la Señorita [MZ] (Denunciante), Oct. 4, 1994.

<sup>44</sup> Trial Court Sentence, supra at 4.

<sup>45</sup> Id. at 4-5.

<sup>46</sup> Id. at 4.

<sup>47</sup> Id. at 4-5.

<sup>48</sup> Id. at 5.

<sup>49</sup> Id.

<sup>50</sup> Id. at 4-5.

<sup>51</sup> Id. at 4, 7.

<sup>52</sup> The police report states that a friend of the accused, Juan Norberto Meneses, reported that the accused had told him he had sexual intercourse with a foreign woman that night, that it was not the first time, and that he was surprised at her attitude that night. He reportedly further explained that the foreign woman had caused the wound on his forehead. See Continuación del informe complementario sobre diligencias de policia judicial, Oct. 28, 1994, at 5.

said she had caused the wound to his forehead.<sup>53</sup> The trial court observed that this version of events contradicted the accused's statement in which he claimed not to have had sex with MZ that night.<sup>54</sup> The court also observed that the medical reports contradicted his story and pointed to the wound on his forehead as evidence against him.<sup>55</sup>

The trial court also addressed the relative sizes of the victim and the accused, stating that the victim may have been tall, but that the accused was a very robust man, a former cadet at the Military College where he was subject to a rigorous physical and athletic regimen.<sup>56</sup> The court found that this physical training would have been more than enough to overcome any height advantage the victim may have otherwise enjoyed.<sup>57</sup>

On these grounds, the trial court found "solid evidence" that the accused was guilty of raping MZ, and sentenced him to five years in prison.<sup>58</sup>

### **III. IN RELYING ON SEX STEREOTYPES TO OVERTURN THE FINDINGS OF THE TRIAL COURT, THE REVIEWING COURTS VIOLATED INTERNATIONAL STANDARDS PROHIBITING GENDER DISCRIMINATION**

In the submission of Equality Now, rape violates women as women, depriving them of social equality on the basis of their sex. When the legal system collaborates in and compounds this social inequality by engaging in sex discrimination in rape adjudications, it denies rape victims procedural and substantive rights, depriving them of equality under law and in social life because they are women.

#### **A. JUDICIAL DEPENDENCE ON SEX STEREOTYPES ABOUT RAPE IS A FORM OF GENDER BIAS**

Rape myths are an expression of sex role stereotyping that derive from adversarial sexual beliefs and acceptance of interpersonal violence, among other sources.<sup>59</sup> Rape myths, well documented to be pervasive globally in a variety of cultural forms, include views that only

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<sup>53</sup> Id.

<sup>54</sup> Trial Court Sentence, *supra* at 6-7.

<sup>55</sup> Id. at 7.

<sup>56</sup> Id. at 8.

<sup>57</sup> Id. at 8-9.

<sup>58</sup> Id. at 10.

<sup>59</sup> See Martha R. Burt, Cultural Myths and Supports for Rape, 38 J. Pers. Soc. Psychology 217 (1980).

certain sorts of women are raped, that women who wish to resist rape can, that rape by a stranger is worse than rape by an acquaintance or intimate, that women resist sex that they actually want, that when women do not successfully or forcefully resist sexual attacks they want to have sex, that women want to have sex regardless of what they say, and that women routinely invent allegations of rape.<sup>60</sup> The acceptance of rape myths promotes a culture that encourages rape and effectively permits it.

The use of rape myths by courts as a substitute for evidence and legal analysis has been repudiated as inconsistent with sex equality guarantees, notably by justices of the Supreme Court of Canada on a number of occasions.<sup>61</sup> Justice Cory observed that:

A number of rape myths have in the past improperly formed the background for considering evidentiary issues in sexual assault trials. These include the false concepts that: women cannot be raped against their will; only "bad girls" are raped; anyone not clearly of "good character" is more likely to have consented."<sup>62</sup>

Madame Justice (now Chief Justice) McLachlin has recognized that rape myths could not be relied upon to give the requisite "air of reality" to a defense of honest belief in consent, in a case in which a verdict of guilty for sexual assault was returned, stating that:

Care must be taken to avoid the false assumptions or "myths" that may mislead us in determining whether the conduct of the complainant affords a sufficient basis for putting the defence of honest mistake on consent to the jury. One of these is the stereotypical notion that women who resist or say no may in fact be consenting.<sup>63</sup>

Madame Justice Claire L'Heureux-Dube, in applying the principles of the Convention on the Elimination of All Forms of Discrimination Against Women, concurring in a ruling that reversed an acquittal for rape on grounds of implied consent to sex, observed of rape myths that

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<sup>60</sup> See e.g. David Archard, Sexual Consent 131 (1998); Peggy Reeves Sanday, The Socio-cultural Context of Rape: A Cross Cultural Study, 37 J. Soc. Issues 5 (1981); Martha Burt, Rape Myths and Acquaintance Rape, in A. Parrot and L. Beckhofer, eds., Acquaintance Rape: The Hidden Crime (1991).

<sup>61</sup> E.g. R. v. Osolin, [1993] 4 S.C.R. 595; R. v. Esau, [1997] 2 S.C.R. 777; R. v. Ewanchuk, [1999] 1 S.C.R. 330.

<sup>62</sup> R. v. Osolin, [1993] 4 S.C.R. at 670.

<sup>63</sup> R. v. Esau, [1997] 2 S.C.R. at 814.

"[c]omplainants should be able to rely on a system free from such myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions."<sup>64</sup>

## **B. RAPE MYTHS DECISIVELY PERVADE THE OPINIONS OF BOLIVIA'S REVIEWING COURTS IN MZ'S CASE**

The Court of Appeals' accounts of MZ's and the accused's version of events bear little resemblance to the lower court findings of fact. The marked failure of the Court to consider the extensive evidence of actual violence detailed by the trial court, and the substitution of its finding that there was no violence, together with the inaccurate citation of a witness' testimony as the basis for its finding that MZ could not possibly have been raped because of her size, clearly shows judicial bias against women victims of sexual violence.

### ***1. Myth: Women want forced sex.***

The Court of Appeals reports, as the trial court found, that MZ called her friends to say she had been raped, and that her friends found her at the neighbors' house.<sup>65</sup> However, that Court fails to mention that she was found hiding behind the door barely dressed, or that she was upset, or crying, or bleeding.<sup>66</sup> Disregarding the lower court opinion and the evidence of record on which it was based, the Court of Appeals found that there were no signs of violence on the face or body of the accused.<sup>67</sup> In so doing, it ignored the cut on the forehead of the accused, the blood on MZ, the medical and police reports, and the content of the pictures from the scene of the rape, all of which testified to a violent confrontation.

Similarly, the Court mentioned that photographs were taken of the scene of the rape.<sup>68</sup> However, it only states that men's and women's underwear can be seen in them, failing to mention the fact that the woman's underwear was torn, blood and hair were visibly present, and the room was in a general state of disarray.<sup>69</sup> The Court entirely elided the evidence provided by

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<sup>64</sup> R. v. Ewanchuk, [1999] 1 S.C.R. at 336.

<sup>65</sup> Court of Appeals Opinion (Sentencia de la Sala Penal Segunda), Oct. 13, 1997 at 1.

<sup>66</sup> Id. In their statements, both José Guillermo Bazoberry Chali and Kathia Elvira Ferrufino Quiroga testified to having encountered MZ in this state following the rape. See Statements of José Guillermo Bazoberry Chali and Kathia Elvira Ferrufino Quiroga, Acta de Audiencia Pública de Declaración Confesoria, Aug. 8, 1996.

<sup>67</sup> Court of Appeals Opinion, supra at 3-4.

<sup>68</sup> Id. at 1.

<sup>69</sup> Id. Compare Trial Court Sentence, supra at 7.

the doctors on violence and trauma, including the blood and scratches on MZ's body. Through these omissions, the Court of Appeals reconfigured the events as not violent and left open the possibility that MZ wished them to have occurred. As so distorted in classic mythic terms, the Court's presentation of the facts substitute an image of sex for the reality of the rape that was found by the trial judge.

The Court of Appeals also came to the conclusion, highly problematic given the facts as found, that the victim did not make any attempt to fight the rape, despite her size and strength. The accounts of her height and weight in the record varied, indeed contained six different descriptions, although none is from official sources, such as medical records.<sup>70</sup> Nonetheless, the Court of Appeals determined that MZ was tall and robust, while the accused was thin and of medium height.<sup>71</sup> Amidst this confusion, the Court of Appeals misquotes a witness, citing as his testimony that MZ was tall, and in a hand to hand fight, it "would have been impossible for him [the accused] to overpower her."<sup>72</sup> In fact, the witness Rene Mauricio Guzman said that in his opinion, in a hand to hand struggle, MZ "would not be easily overpowered": "estimo que en una lucha de cuerpo a cuerpo no es susceptible de ser vencida facilmente."<sup>73</sup>

Whatever weight should be given Mr. Guzman's opinion on this subject, **not easy** is not the same as **impossible**. The implication that since, given her strength, the victim could have fought off the attacker if she had wanted to, serves to insinuate that, since she failed to fight him off, she must have wanted the events to occur. This, under the circumstances, is in turn an expression of the rape myth that women want forced sex. The Court's misrepresentation of the witness' statement is evidence of, and can be explained by, judicial disregard for fact in favor of myth.

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<sup>70</sup> Varying reports of MZ's height and weight were provided by the accused and other witnesses. The accused estimated her height at 1.80 meters and her weight at 90 kilos. Jorge Carlos Aguilar Orrelana, Acta de Audiencia Pública de Apertura, Prosecución de Debates, Ratificación de Diligencias de Policía Judicial, Lectura de Pruebas Literales, 17 de septiembre 1996. José Guillermo Bazoberri Chali estimated her height at 1.75 meters and her weight at "maybe 60 kilos." *Id.* Statement of José Guillermo Bazzoberri. René Mauricio Guzman testified that MZ was between 1.83-1.85 meters tall and weighed around 70 kilos. *Id.* Statement of René Mauricio Guzman. Her neighbor Jong Kwon Yun Yang did not estimate her height or weight, but did mention that she was "tall and thin." *Id.* Statement of Jong Kwon Yun Yang. Each of these reports represents at best an "estimate" of MZ's height and weight. None of the reports was confirmed by medical testimony.

<sup>71</sup> "[MZ] es robusta y 1.87 m. de altura, frente a la constitución delgada y estatura mediana del procesado." Court of Appeals Opinion, *supra* at 3.

<sup>72</sup> *Id.*

## ***2. Myth: Women can effectively resist rape if they want to.***

Further to the question of resistance, the Court of Appeals was suspicious that neighbors did not hear any sounds of conflict.<sup>74</sup> At the same time, that Court chose to ignore reports by MZ that her life was threatened and that when she tried to scream, her attacker attempted to choke her, and her credible explanation that this was the reason she did not make more noise. In a clear double standard, the Court of Appeals, while marking MZ's physique, also failed to note the accused's former military and athletic training, as the lower court did, which provided him a highly relevant physical advantage.<sup>75</sup> The Court in these respects relied upon standards for assessment of the credibility of a rape victim that bear no relation to the well-known terror and silencing of the victim that are typical in rape cases, and were amply recounted by MZ from the moment she came into contact with the authorities, and were in evidence at trial. Instead, they subliminally rely on the rape myth that women who really want to resist a rape, can and do.

In failing to consider evidence of intimidation, the Court once again ignored the law on rape in Bolivia, which provides that rape is a crime "if physical violence or intimidation has been employed..."<sup>76</sup> The Court's rationale that, as there was no violence and no resistance, there was no rape is unfounded in the evidence -- there was violence and there was resistance, as the trial court found. Moreover, coming immediately after the Court's own fairly extensive citation of the law on rape, it also represents a striking mis-statement of the law as requiring violence and/or resistance to establish a case of rape. The Court's failure to acknowledge the evidence of intimidation in this case, including the victim's perception of the presence of a weapon, and its erroneous finding that there was no violence so the act could not have been rape are best explained as, and constitute further evidence of, disregard for law and factual evidence in favor of myth.

The Court of Appeals also discusses at length the fact that MZ did not physically attend the trial, so the judges were not able to judge her personally.<sup>77</sup> This, they claimed, prejudiced the

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<sup>73</sup> Statement by René Mauricio Guzman, Acta de Audiencia Pública de Apertura, Prosecución de Debates, Ratificación de Diligencias de Policía Judicial, Lectura de Pruebas Literales, 17 de septiembre 1996.

<sup>74</sup> Court of Appeals Opinion, *supra* at 3.

<sup>75</sup> Trial Court Sentence, *supra* at 8.

<sup>76</sup> Bolivian Penal Code, tit. XI, cap. I, art. 308 § 1.

<sup>77</sup> Court of Appeals Opinion, *supra* at 5-6.

outcome of the trial and the court's ability to judge the evidence objectively,<sup>78</sup> maintaining that her failure to appear before the court further proved a lack of violence and intimidation.<sup>79</sup> There is no mention of the fact that she was not at trial because she had left the country. There is likewise no mention of the fact that she was found to have done so on the basis of a medical recommendation due to trauma from having been raped. Perhaps most strikingly, there is no mention of the fact that her absence from the trial is expressly permitted under Bolivian law.<sup>80</sup> Her absence at trial testified to the presence of intimidation, not its lack. Holding her absence against her under these circumstances in reversing her rapist's conviction betrays a sex biased animus.

In a further attack on the victim's credibility, the Court of Appeals found it impossible to believe that an attacker would undress before committing a rape, stay in the victim's room for four hours, and then flee leaving his underwear behind.<sup>81</sup> The Court appeared to be comparing the facts as found with a different image or stereotype of a rape that would be credible to it. However, in the literature on rape and cases of rape with which Equality Now is familiar, facts such as these are far from unusual. The Court's reasoning, departing from facts the trial court found credible, appears to evince an underlying assumption that a woman who claims to have been raped is not to be believed.

### ***3. Myth: If the woman was not a virgin, she cannot have been raped.***

The Court of Appeals treated the case as if they believed that if MZ had ever previously had sex, she could not have been raped -- another common rape myth. The Court of Appeals reiterated that MZ went to a gynecologist, and that the doctor found semen,<sup>82</sup> but it also noted that the old signs of tearing showed non-recent sexual contact,<sup>83</sup> as if this information was relevant. Similarly, in its discussion of the medical reports, the Court of Appeals focused on

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<sup>78</sup> *Id.*

<sup>79</sup> "Que la ausencia de la querellante durante la fase del plenario y su reiterada negativa para presentarse ante este tribunal, unida a todas las pruebas que cursan en el proceso, llevan al convencimiento de que no hubo violencia ni intimidación en las relaciones que ella sostuvo con el procesado." *Id.* at 6.

<sup>80</sup> Ley No. 2033, Ley de protección a las víctimas de delitos contra la libertad sexual, art. 15 § 4 grants a victim of sexual offenses the right not to appear as a witness if the evidence is considered otherwise sufficient to prove the elements of the crime.

<sup>81</sup> Court of Appeals Opinion, *supra* at 3.

<sup>82</sup> *Id.* at 1.

signs of previous tearing in the genital area noted in one of the medical reports that clearly referred to the hymen, signifying that MZ was not a virgin at the time. Citation of these otherwise irrelevant details suggests that, in the mind of the Court, rape is a violation of virginity, an attitude that injects into the case the rape myth that women who have previously had sex are not violated when raped, or cannot be raped. Such a notion judicially disregards the law on rape in Bolivia, which nowhere provides that virginity is a prerequisite to a finding of rape. Such an assumption also clearly constitutes internationally prohibited sex bias.

In further demonstration of its determination to reconfigure the events as sex, not rape, by ignoring MZ's testimony and the trial court's finding to the contrary, the Court of Appeals determined that she and the accused had an ongoing, voluntary sexual relationship that deteriorated following his marriage to another woman.<sup>84</sup> The existence of this relationship is supported, by the Court's account, only by the fact that the two were adults, ages 34 and 32.<sup>85</sup> The assumption that this determination clearly indicates -- that adult women cannot be raped -- derives from the rape myth that only young girls can be raped. It also sexualizes MZ and ignores the law on rape in Bolivia, which nowhere implies that adult women cannot be raped.

#### ***4. Myth: Northern European women are "loose" and cannot be raped.***

Particular rape myths often attach to women of specific demographic groups. Although not mentioned by the Court of Appeals, the fact that MZ is a foreigner -- a Northern European in particular -- may conceivably have contributed to the particular sex stereotype evident in the decision. In some Latin American cultures, North American and Northern European women are sometimes imagined as sexually promiscuous, largely due to media portrayals and pornography. According to this stereotype of the foreign woman of loose morals, for example, MZ would have pursued her attacker rather than the reverse, and his status as a married man would not have dissuaded her. It is not inconceivable that this sexist and ethnic stereotype of certain foreign women as particularly "loose women" could have contributed to the reviewing judges' determination that MZ was in a consensual relationship with her attacker. Of course, the trial court found no such fact, but rather found that she was raped by him. In the stereotyped view -- a

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<sup>83</sup> *Id.* at 4.

<sup>84</sup> *Id.* at 3.

view explicitly traceable in many other forms in the Court of Appeals judgment -- such a woman cannot truly be raped, regardless of the force used.

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The Supreme Court of Bolivia, upholding the Court of Appeals' reversal of the trial court decision, gave the sex-stereotypical errors of the Court of Appeals' decision the imprimatur of the highest court in the land and further entrenched the sex-stereotypical rape myths it relied upon.<sup>86</sup> The Supreme Court held that there was no violence by the accused or resistance by MZ because they had an ongoing and voluntary sexual relationship that had been deteriorating as a consequence of his marriage to another woman.<sup>87</sup> Further affirming the decision of the Court of Appeals, the Supreme Court found it unlikely that the accused entered MZ's residence using force, remained in her bedroom for four hours, and none of the neighbors heard shouts or noises.<sup>88</sup> In so ruling, the highest Bolivian court not only permitted the gender bias of the Court of Appeals; it actively engaged in sex discrimination itself. Inconsistent with the judicial findings of fact at trial and inconsistent with its own domestic law, but consistent with the rape mythology relied on by the Court of Appeals, the Supreme Court both affirmed the decision of the Court of Appeals and weighed in on the issues in finding that there was no violence and no intimidation. Its complete disregard for the facts as found by the trial court, and absence of identification of any legal defect in the trial court proceedings, compounded by its failure to note that certain findings of the Court of Appeals identified above were inconsistent with Bolivian law, manifests gender bias on behalf of the State.

In sum, the reviewing courts of Bolivia disregarded critical evidence that the trial court found, misrepresented documentary and testimonial evidence, and instead allowed their judicial review to be guided by rape myths and sexual stereotyping, rather than the rape law of Bolivia. The judicial treatment of MZ's case in these respects illustrates the 1997 Concluding Observations on Bolivia of the United Nations Human Rights Committee when it expressed

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<sup>85</sup> Id.

<sup>86</sup> Supreme Court Opinion (Sala Penal Segunda de la Corte Suprema de Bolivia), Apr. 25, 2000.

<sup>87</sup> Id. at 2.

<sup>88</sup> Id.

concern that "despite constitutional guarantees of the rights of women and laws attempting to put an end to discrimination, women continue to receive unequal treatment in Bolivia owing in part to the continuation of traditional attitudes..."<sup>89</sup> that violate international standards.

#### **IV. RULINGS SUCH AS THE ONE AT BAR DENY WOMEN RIGHTS TO EQUAL PROTECTION OF THE LAW AND DUE PROCESS OF LAW, IN VIOLATION OF THEIR HUMAN RIGHTS AS GUARANTEED IN THE INTER-AMERICAN LEGAL SYSTEM**

The official condonation by the Court of Appeals and Supreme Court of Bolivia of the sex-based violence against MZ violates international standards of equal protection and due process.

On sex-stereotyped and rape-mythic rather than valid legal and factual grounds, the Court of Appeals reversed the trial court ruling that MZ was raped and the Supreme Court confirmed this reversal. The Bolivian Court of Appeals and the Supreme Court subordinated legal reasoning and evidence to gender bias. Their sex-discriminatory decision-making rendered the promise and guarantee of an effective remedy for violence against women illusory. The Court of Appeals did not even cite and then refute or discredit much of the evidence that supported MZ that the trial court accepted. It simply ignored that evidence, relying instead on rape myths as the basis for the outcome. The Supreme Court of Bolivia did the same.

The perpetrator in this case was thus granted official impunity for acts of violence against a woman that the trial court found had occurred in a proceeding neither reviewing court faulted under Bolivian law. Such a reversal, as much as the delays in *María da Penha's* case, "is at odds with the international commitment voluntarily assumed by the State when it ratified the Convention of Belém do Pará."<sup>90</sup> It is further "an indication that the State condones the violence"<sup>91</sup> that MZ was found, in fact, to have suffered. As in that case, here the express tolerance by the State organs of this violence "exacerbate[s] the direct consequences of the aggression" against the victim,<sup>92</sup> creating a climate that promotes sexual violence by effectively condoning it by law.

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<sup>89</sup> Concluding Observations of the Human Rights Committee: Bolivia, CCPR/C/79/Add.74 par.21 (1997).

<sup>90</sup> Case 12.051, *María de Penha Maia Fernández v. Brasil*, *supra* at para. 55.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

The state of Bolivia in the present case is in clear derogation of its duties under Article 7 (b) (d) (e) (f) and (g) of the Convention of Belém do Pará, as recently applied by this Commission in the case of *María da Penha*, to prevent, punish and eradicate violence against women.<sup>93</sup> The rape of MZ is a clear instance of violence against women under Article 2. The failure to provide fair and effective legal procedures in this case further violates Article 8(a)'s requirement that States Parties undertake measures to promote "observance of the right of women to be free from violence, and the right of women to have their human rights respected and protected."<sup>94</sup> Denial of sex equality rights on a sex discriminatory basis denies women equal protection of the law twice over.

Moreover, Equality Now submits that judicial rulings such as the one at bar, determined on the basis of sex-biased rape myths, cannot be impartial, and in substituting myth for evidence, cannot be competent in the due process sense. As this Commission recently concluded in another case in which non-state actors inflicted violence for which a state provided inadequate redress, so here "the State has not fulfilled its obligation to offer proper judicial protection in accordance with Articles 8 and 25 of the American Convention to the victim..."<sup>95</sup> The result is that, in violation of due process guarantees, the rape of MZ has gone unpunished, the kind of outcome that, according to the Inter-American Court, "fosters chronic recidivism of human rights violations, and total defenselessness of victims"<sup>96</sup> -- a further deprivation, in this case, of women's international sex equality rights.

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<sup>93</sup> *Id.* at para 58.

<sup>94</sup> Convention of Belém do Pará, *supra* art. 8, 33 I.L.M. at 1536-37.

<sup>95</sup> Riofrío Massacre Case, *supra* at para. 76.

<sup>96</sup> *Paniagua Morales Case*, Judgment of Mar. 8, 1998, Inter-Am. Ct.H.R. (Ser. C) No. 37 at para. 173 (1998)

**V. JUDICIAL GENDER BIAS AS EVIDENCED BY THIS CASE PRODUCES IMPUNITY FOR PERPETRATORS AND DETERS WOMEN FROM REPORTING GENDER-BASED VIOLENCE AGAINST THEM, THEREBY SYSTEMATICALLY DENYING BOLIVIAN WOMEN EQUAL PROTECTION OF THE LAW AND SEX EQUALITY IN SOCIAL LIFE**

The sex-based violence to which MZ was subjected is not uncommon in Bolivia. Indeed, as in most countries in the world, it is a pervasive problem. A study of women conducted in 1997-98 by the Pan-American Health Organization and the Ministry of Health in three municipalities that represent the country's three major cultural and geographic zones found that 62% of women reported at least one incident of gender-based violence in their lifetimes.<sup>97</sup> As is also often the case elsewhere, ineffective legal response in Bolivia discourages women from asserting their rights. These studies estimated that only one out of every five incidents of violence against women is reported.<sup>98</sup> An earlier study by the National Institute of Statistics similarly found that 40% of all reported violent attacks in La Paz in 1992-93 were perpetrated against women.<sup>99</sup> In La Paz during this period, a total of 11,069 complaints of violence against women were registered.<sup>100</sup> The government estimated that there were as many as 100,000 such incidents annually nationwide and that as many as 95% of them go unpunished.<sup>101</sup> Specifically, the Congressional Committee on Women stated that an average of 3.5 cases of rape or statutory rape were reported each day during the first half of 1995, but twice that many cases were unreported, hence were committed with total legal impunity.<sup>102</sup> Just as the failure to prosecute and convict perpetrators "is an indication that the state condones the violence," as the *María da Penha* case held, overturning a valid conviction for rape, as here, is integral to the "condoning" of such acts "by the entire system" that "only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women."<sup>103</sup>

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<sup>97</sup> United States, Department of State, Bolivia Country Report on Human Rights Practices for 2001 (Mar. 4, 2002) available at <http://www.state.gov/g/drl/rls/hrrpt/2001/wha/8299pf.htm> (last visited Mar. 31, 2002).

<sup>98</sup> Id.

<sup>99</sup> United States, Department of State, Bolivia Country Report on Human Rights Practices for 1998, (Feb. 26, 1999) available at [http://www.state.gov/www/global/human\\_rights/1998\\_hrp\\_report/Bolivia.html](http://www.state.gov/www/global/human_rights/1998_hrp_report/Bolivia.html) (last visited Mar. 31, 2002).

<sup>100</sup> Id.

<sup>101</sup> Id.

<sup>102</sup> Id.

<sup>103</sup> Case 12.051, *María de Penha Maia Fernández v. Brasil*, supra at para. 55.

## CONCLUSION

Jorge Carlos Aguilar Orellana was convicted for the rape of MZ in a fair trial. Reviewing courts, including the Supreme Court of Bolivia, improperly overturned this result for sex-biased reasons, substituting rape myths for the facts as found and the law as properly interpreted, depriving the victim of internationally protected rights as recognized by this Commission. The Bolivian courts' reversal of the trial court's valid conviction for rape on the basis of bias rather than evidence denied a raped woman her rights to due process of law and equal protection of the law for her human rights violation on sex discriminatory grounds.

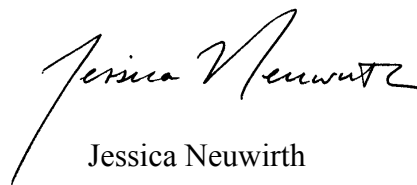
For the foregoing reasons, Equality Now urges the Commission to find that the government of Bolivia violated the sex equality guarantees set forth in, *inter alia*, Article 24 of the American Convention on Human Rights and Article 4 of the Convention of Belém do Pará in this case.

Respectfully submitted,

THE LAWYERS' ALLIANCE FOR WOMEN (LAW) PROJECT  
EQUALITY NOW



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