



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 248/2022

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS

EASTERN CAPE, MAKHANDA

APPELLANT

and

LOYISO COKO

RESPONDENT

and

WOMEN'S LEGAL CENTRE TRUST

FIRST AMICUS CURIAE

INITIATIVE FOR STRATEGIC

LITIGATION IN AFRICA

SECOND AMICUS CURIAE

COMMISSION FOR GENDER EQUALITY

THIRD AMICUS CURIAE

Neutral citation: *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko (Women's Legal Centre Trust, Initiative for Strategic Litigation in Africa and Commission for Gender Equality*

intervening as Amici Curiae) (case no 248/2022) [2024]
ZASCA 59 (24 April 2024)

Coram: PETSE DP and ZONDI, MOCUMIE, MBATHA and
MABINDLA-BOQWANA JJA

Heard: 14 November 2023

Delivered: 24 April 2024

Corrected: This judgment was corrected electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date and time for correction is deemed to be 11h00 on 05 July 2024.

Summary: Criminal law and procedure – rape – consent to an act of sexual penetration – nature of consent – appeal by Director of Public Prosecutions against decision of high court upholding appeal against conviction for rape – whether invocation of s 311 of the Criminal Procedure Act 51 of 1977 by the State is, on the facts, competent – whether State had proved its case against respondent beyond reasonable doubt that complainant had not consented to act of sexual penetration – whether high court's interference with factual findings of regional court warranted.

ORDER

On appeal from: Eastern Cape Division of the High Court, Makhanda (Ngcukaitobi AJ, Gqamana J concurring, sitting as court of appeal):

- 1 Paragraphs 5 and 6 of the order of this Court made on 24 April 2024 are deleted.
- 2 Paragraph 7 of the said order is varied and substituted as follows:
‘2.1 The respondent is directed to present himself to the Makhanda Correctional Centre, Makhanda within 7 days of the date of this order to serve his sentence.’
- 3 The order of this Court will henceforth read thus:
‘1 The appeal by the State against the acquittal of the respondent is upheld.
2 The acquittal of the respondent by the high court is set aside.
3 The conviction of the respondent by the regional court is reinstated.
4 The order of the high court is set aside and in its place the following order is made:
“The appeal against conviction is dismissed.”
- 5 The respondent is directed to present himself to the Makhanda Correctional Centre, Makhanda within 7 days of the date of this order to serve his sentence.’

SUPPLEMENTARY JUDGMENT

Petse DP and Mabindla-Boqwana JA (Zondi, Mocumie and Mbatha JJA concurring):

[1] On 24 April 2024 this Court delivered judgment in this matter incorporating an order in the following terms:

- ‘1 The appeal by the State against the acquittal of the respondent is upheld.
- 2 The acquittal of the respondent by the high court is set aside.
- 3 The conviction of the respondent by the regional court is reinstated.
- 4 The order of the high court is set aside and in its place the following order is made:
‘The appeal against conviction is dismissed.’
- 5 The question of sentence is remitted to the high court for it to determine whether the sentence imposed by the regional court was appropriate.
- 6 The Director of Public Prosecutions, Eastern Cape, Makhandha is requested to prioritise the placement of the appeal against sentence on the roll as soon as all relevant regulatory requirements have been met.
- 7 Should the respondent fail to prosecute the appeal against sentence within 20 days of the date of this order he shall forthwith report to the Makhandha Correctional Centre, Makhandha in order to serve his sentence.’

[2] Some few days after the judgment had been delivered, we were provided with correspondence by the Registrar of this Court emanating from the Director of Public Prosecutions, Makhandha. The upshot of this correspondence was that paragraphs 5, 6 and 7 of this Court’s order were incapable of implementation. We were further told that this was so because there was no appeal against sentence pending before the high court since the respondent had previously been refused leave to appeal by the high court on petition to it.

[3] Consequently, what was before the high court on appeal to it from the regional court was the appeal against conviction only. Therefore, the statement in paragraph 1 of the high court judgment that the appeal which served before it against both the conviction and sentence was erroneous. In this regard it bears mentioning that the foregoing error, as it turned out, was common to all the interested parties who participated in the appeal before this Court as it appeared in the documents presented before us, including the judgment of the high court.

[4] Accordingly, the order made by this Court on 24 April 2024 falls to be rectified. In our view, this can be achieved by deleting paragraphs 5 and 6 of such order and varying paragraph 7 to reflect the true state of affairs and in addition renumbering, to the extent necessary the operative paragraphs of the amended order.

[5] In the result, the following order is made:

- 1 Paragraphs 5 and 6 of the order of this Court made on 24 April 2024 are deleted.
- 2 Paragraph 7 of the said order is varied and substituted as follows:
‘2.1 The respondent is directed to present himself to the Makhanda Correctional Centre, Makhanda within 7 days of the date of this order to serve his sentence.’
- 3 The order of this Court will henceforth read thus:
‘1 The appeal by the State against the acquittal of the respondent is upheld.
2 The acquittal of the respondent by the high court is set aside.
3 The conviction of the respondent by the regional court is reinstated.
4 The order of the high court is set aside and in its place the following order is made:
“The appeal against conviction is dismissed.”
- 5 The respondent is directed to present himself to the Makhanda Correctional Centre, Makhanda within 7 days of the date of this order to serve his sentence.’

X M PETSE
DEPUTY PRESIDENT
SUPREME COURT OF APPEAL

N P MABINDLA-BOQWANA
JUDGE OF APPEAL

Appearances

For the appellant:	J Mnisi (with P Pillay)
Instructed by:	The State Attorney, Port Elizabeth The State Attorney, Bloemfontein
For the respondent:	KF Pieterse
Instructed by:	EDJ Attorneys, Bloemfontein
For the first amicus curiae:	A Christians
Instructed by:	The Women's Legal Centre, Cape Town Maduba Attorneys, Bloemfontein
For the second amicus curiae:	L Makapela
Instructed by:	Centre for Applied Legal Studies, Johannesburg McIntyre Van der Post Attorneys, Bloemfontein
For the third amicus curiae:	G Marcus SC (with E Webber)
Instructed by:	Norton Rose Fulbright South Africa Inc., Cape Town Lovius Block Inc., Bloemfontein