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

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 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, Makhanda 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 Makhanda Correctional Centre, Makhanda in order to serve his sentence.

JUDGMENT

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

Introduction

[1] This case adds to the distressing long list of innumerable cases of rape with which our courts have been inundated for a couple of decades now.

[2] Rape is an utterly despicable, selfish and horrendous crime. It gains nothing for the perpetrator, save for fleeting gratification, and yet inflicts lasting emotional trauma and, often, physical scars on the victim. More than two decades ago, Mohamed CJ, writing for a unanimous court, aptly remarked that:

'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.

The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization.

Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.'[1]

[3] In similar vein Nugent JA, writing for a unanimous court, in equal measure described rape in these terms:

'Rape is a repulsive crime, it was rightly described by counsel in this case as an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity.'[2]

[4] In *Director of Public Prosecutions, North Gauteng v Thabethe* [3] this Court rightly noted that 'rape has become a scourge or cancer that threatens to destroy both the moral and social fabric of our society.'[4]

[5] In *Tshabalala v S (Commissioner for Gender Equality and Centre for Applied Legal Studies as Amici Curiae); Ntuli v S* [5] the Constitutional Court once again underscored the gravity of the crime of rape and its attendant repulsive

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[1] *S v Chapman* [1997] ZASCA 45; 1997 (3) SA 341 (SCA) (*Chapman*) paras 3-4.
[2] *S v Vilakazi* [2008] ZASCA 87; 2009 (1) SACR 552 (SCA) para 1.
[3] *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA).
[4] Ibid para 16.
[5] *Tshabalala v S (Commissioner for Gender Equality and Centre for Applied Legal Studies as Amici Curiae); Ntuli v S* [2019] ZACC 48; 2020 (2) SACR 38 (CC).

consequences. In the same case, Khampepe J, writing separately, said that 'rape is not rare, unusual and deviant. It is structural and systemic.'[6]

[6] In *Masiya v Director of Public Prosecutions Pretoria and Another (Centre for Applied Legal Studies and another as Amici Curiae)*[7] the Constitutional Court said the following of rape:

'Today rape is recognised as being less about sex and more about the expression of power through degradation and concurrent violation of the victim's dignity, bodily integrity and privacy.'[8]

Regrettably, 26 years since the decision of this Court in *Chapman*, the scourge of rape has shown no signs of abating. On the contrary, rape is not only rife but has also reached pandemic proportions. And, sadly, it is women and children, being the most vulnerable in society, who bear the brunt of this scourge. In this regard, the learned author Professor C R Snyman rightly opines in his book that non-consensual penile penetration of a woman's vagina violates the most personal of all the parts of a woman's body. And that it 'infringes' her whole being and identity as a woman.[9] It is therefore little wonder that incidents of rape always evoke outrage and revulsion from the citizenry.

[7] For most women and children, in particular, the rights guaranteed everyone in the Bill of Rights, such as the right to be free from all forms of violence from either public or private sources; bodily and psychological integrity, including the right to make decisions concerning reproduction and security in and control of their bodies,[10] ring hollow. Thus, it brooks no argument to the contrary that rape gratuitously violates the fundamental value of human dignity and related rights.

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[6] Ibid para 76.
[7] *Masiya v Director of Public Prosecution Pretoria and Another (Centre for Applied Legal Studies and another as Amici Curiae)* [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (CC); 2007 (2) SACR 435 (CC) (*Masiya*).
[8] Ibid para 51.
[9] C R Snyman *Criminal Law* 5ed at 357.
[10] See s 12 of the Constitution of the Republic of South Africa, 1996.

[8] Against the foregoing backdrop, it is hardly surprising therefore that having rightly noted the prevalence of sexual offences engulfing the country, the legislature saw it fit to take decisive action and introduced legislation such as s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[11] (the Sexual Offences Act) to curb the scourge of rape. The Sexual Offences Act abolished the common law offence of rape and instead opted for an expansive definition of the statutory crime of rape going far beyond what had hitherto constituted the common law offence of rape.[12]

[9] This matter comes before us on appeal against a decision of the Eastern Cape Division of the High Court, Makhanda (the high court) in terms of which the appeal by the respondent, Mr Loyiso Coko, against his conviction for contravening s 3 of the Sexual Offences Act read with s 51(2)*(b)*, (3) and (6) of the Criminal Law Amendment Act,[13] (the 1997 Act) read further with Part III of Schedule 2 thereto and the resultant sentence of seven years imprisonment, was upheld. At the time material to the charge, s 51(3)*(a)* of the 1997 Act prescribed that in the absence of 'substantial and compelling circumstances' justifying a lesser sentence than that ordained in Part III of Schedule 2, a first offender convicted of such offence is liable to imprisonment for a minimum period of 10 years' imprisonment.

[10] In *S v Malgas*[14] this Court rightly noted that the provision of s 51(1) of the 1997 Act read with Part I of Schedule 2 thereto and, by parity of reasoning, s 51(2) read with Part II and Part III of Schedule 2 'must be read in light of the

[11] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[12] In his book *South African Criminal Law and Procedure, Volume II (Common Law Crimes)* 3ed, the learned author Professor J R L Milton defines rape thus: 'Rape consists in unlawful intentional sexual intercourse with a woman without her consent.' On the other hand in his book *Criminal Law* 4ed Professor C R Snyman defines the common law crime of rape as follows: 'Rape consists in the male having unlawful and intentional sexual intercourse with a female without her consent.' See also: *S v Gaseb* 2001 (1) SACR 438 (NmS) at 451g-h.
[13] Criminal Law Amendment Act 105 of 1997.
[14] *S v Malgas* [2001] ZASCA 30; [2001] 3 All SA 220 (A); 2001 (2) SA 1222 (A) (*Malgas*).

values enshrined in the Constitution and, *unless it does not prove possible to do so, interpreted in a manner that respects those rights*.' (Emphasis added.)

[11] The appeal to the high court had arisen out of the incident that occurred on the night of 1 July 2018 in the respondent's room at Fingo Village, Makhanda. The charge against the respondent was that on the night in question he unlawfully and intentionally committed an act of sexual penetration on the complainant, TS, then 21 years of age, by inserting his penis into her vagina without TS's consent. The respondent pleaded not guilty to the charge. In his terse explanation in substantiation of his plea of not guilty, the respondent, who was legally represented, asserted that the sexual intercourse was consensual.

[12] At the conclusion of the trial, the respondent was convicted as charged and thereafter sentenced to seven years' imprisonment. The cardinal question in this appeal is therefore whether the State succeeded in proving its case against the respondent and, in particular, whether the admitted sexual intercourse had occurred without TS's consent. We pause here to observe that this appeal raises important questions of law to which this Court must provide answers.

[13] It bears mentioning that this case falls within the category of sexual violence committed in the context of an intimate relationship. Consequently, this can be particularly difficult to navigate given the intimate nature of such relationship, familiarity coupled with the fact that the parties would in most cases have previously been involved in some form of sexual contact prior to an allegation of rape by one of the parties against the other. This point was studiously emphasised by counsel for the second amicus curiae, Initiative for Strategic Litigation in Africa. However, it must be stressed that this in no way means that consent by one party to a specific form of sexual act should be taken to be a licence to every other sexual act. It is, *inter alia*, those types of situations that the Sexual Offences Act was designed to address.

Factual background

[14] The events leading up to the prosecution of the respondent are largely common cause. Therefore, we shall summarise them as briefly as the exigencies of the case require.

[15] The respondent and TS commenced a love relationship in mid-June 2018. At the time, the respondent was employed as a driver with Gardmed Ambulance Service. TS was still a student at a local university and in her early twenties. As it emerged from the record, the parties had on a couple of occasions engaged in discussions during which TS informed the respondent that she was a virgin. TS had, more than once, reiterated that she was not ready to engage in penetrative penile/vaginal sexual intercourse as she wished to preserve her virginity.

[16] On 1 July 2018, and by sheer coincidence, their paths crossed at one of the local stores. During this brief encounter, they agreed that TS would visit the respondent at his apartment in the evening and spend the night with him. Even during this encounter, TS made plain that her acceptance of the invitation to visit the respondent at his apartment was no signification that they would engage in sexual intercourse. For his part, the respondent unequivocally assured TS that he had no qualms with her standpoint.

[17] Indeed, during the early evening, TS made good on her undertaking and repaired to the respondent's apartment. Once there, the two of them sat on the respondent's bed and watched a movie on television. TS was all along wearing pyjamas, without underwear (as it was customary for her whenever she went to bed). They kissed each other for some considerable time. The respondent began to take off TS's pyjama pants. The respondent's attempt at this was thwarted by TS who, instead, closed her legs.

[18] In order to put her at ease, the respondent assured TS that he had no intention to have sexual intercourse with her. Having been given such assurance, TS then allowed the respondent to take off her pyjama pants. They continued kissing. The respondent then began to perform oral sex on TS. Although, TS testified that she was taken aback and felt uncomfortable when the respondent performed oral sex on her, she did not object to this. For his part, the respondent testified that whilst he was performing oral sex on TS, he also took off his pants. What happened next, according to TS' testimony, was that the respondent stopped performing oral sex and, instead, climbed on top of her as she laid on her back on the bed and started kissing her. She then dropped her guard and relaxed. The next thing, she felt a sharp pain in her vagina and realised that the respondent was penetrating her, vaginally, with his penis.

[19] When the respondent inserted his penis into her vagina, TS froze and started crying. She immediately attempted to push him off her whilst at the same time saying that 'he must stop', he 'was hurting [her].' It is common cause that the respondent did not heed TS' plea and groans. Rather, what he did, on his own version, was to pause momentarily, and thereafter, according to TS' testimony, he 'just carried on shoving it in and out and saying sorry in my ear.' We pause here to observe that there was common understanding amongst those involved in the trial that the phrase 'shoving it in and out' was meant to convey to the trial court that instead of stopping the sexual act, the respondent in fact continued to thrust his penis in and out of TS' vagina.

[20] As already indicated, the respondent also testified at the trial. With respect to the crucial aspects of TS' evidence, he testified that when he penetrated TS, the latter 'did not say anything at the time.' It is fair to infer that in saying this, the respondent presumably sought to convey to the trial court that TS did not verbalise her objection to his penetrative penile act. This is in fact apparent from what the respondent himself later confirmed when he testified that 'all she said

was that it was hurting.' Indeed, this is borne out and made clear by what the respondent later stated that TS did not resist or try to push him off her after he had mounted her following oral sex with her.

[21] The respondent sought to reinforce this notion when he testified to the effect that TS was relaxed after the oral sex and that this was the stage at which he took off his pants and mounted on top of her. Further, the respondent suggested that he understood the prolonged oral sex in which they had engaged as some form of foreplay to the penetrative sexual intercourse. Most tellingly, the respondent nevertheless accepted that penetrative sexual intercourse was not in their plans on TS' visit on the fateful night. But he went on to state that penetrative sexual intercourse flowed from the 'foreplay' in the form of oral sex that they had engaged in preceding the penetrative sexual intercourse, including TS' body language. The cumulative effect of these factors, so the respondent asserted, formed the basis for his assumption that TS was a willing participant even to penetrative sexual intercourse, engendered by the latter's failure to object when he climbed on top of her.

[22] After the respondent had finished having sexual intercourse, TS became emotionally withdrawn and from then on there was no meaningful communication between them, let alone an affectionate one, as would have been expected. But what emerges from the record and strikes one is that TS immediately expressed her disdain at what the respondent did to her. TS felt betrayed by the respondent who had, before he took off TS' pyjama pants, reassured her that her wish that she was not ready to engage in penile vaginal penetrative sexual intercourse would be respected.

[23] The next morning TS, whose disgust at what had befallen her was palpable throughout the previous night, left and returned to her University residence. What followed next was a series of WhatsApp text messages exchanged between them

that spanned a period of over 48 days. We interpose here to emphasise that all of them, without exception, were about nothing else other than what befell TS on the fateful night. We refer to these messages later in this judgment, albeit briefly. The sum total of the messages exchanged reveal that TS' sudden change in her mood and disposition towards the respondent could not have been feigned.

Trial court

[24] At the end of the presentation of the evidence, the regional magistrate was satisfied that the State had proved the respondent's guilt beyond a reasonable doubt. More particularly, the regional magistrate held that it had been established that the respondent unlawfully and intentionally sexually penetrated TS without the latter's consent. He was not impressed by the respondent as a witness and, as a result, rejected his evidence as false beyond a reasonable doubt.

[25] In reaching this conclusion, the regional magistrate, *inter alia*, found that the respondent's assertion that TS had, during the kissing and oral sex, given him mixed signals leading him to believe that she was consenting to penetrative penile/vaginal sex was a vain attempt aimed at tailoring his evidence to fit his version which could not reasonably possibly be true. And that having regard to the fact that TS had more than once made it abundantly clear to the respondent that she was still a virgin and wished to preserve her virginity, these considerations detracted from the truthfulness of his version. Therefore, concluded the regional magistrate, it was proven beyond reasonable doubt that the respondent in truth failed to restrain himself during the so-called heat of his passion and penetrated TS well aware that she had not consented to his penetrative sexual act. We interpose here to mention that at the trial it was common cause, in addition to her undisputed steadfast stance that she wished to preserve her virginity coupled with the respondent's assurances to her that penetrative sexual intercourse would not take place, that at no stage had TS explicitly consented to penile/vaginal penetrative sex. In the circumstances, the

regional magistrate convicted the respondent of rape in contravention of s 3 of the Sexual Offences Act as charged.

[26] The trial court's underlying reasoning lay emphasis on the existence of the prior agreement between the respondent and TS before the night of the incident, that they would not have sex. The agreement arose from the fact that the complainant was a virgin and was not ready to engage in penetrative sex. She had made it clear that the position had not changed when she initially resisted the respondent's attempts to remove her pyjama pants. The respondent reassured her that no sex would take place. As a result, TS allowed the respondent to take off her pyjama pants. Thus, having regard to the express agreement and a seriously held desire and value she held dearly, to remain a virgin, the trial court reasoned that something more than body language was required to communicate that TS had actually changed her mind.

[27] We pause here to observe that significantly, the respondent agreed with the prosecutor that 'something more' was required to establish consent. This is borne out by what emerged during his cross-examination by the prosecutor that went as follows:

'PROSECUTOR: But you would agree with me that if she was not a virgin then it is understandable, meaning the fact that she is no longer a virgin would mean that she is sexually active and you would not need an expressive answer from her, but this girl is a virgin. Do you not think that you needed something more from her?

ACCUSED: Yes, I think I needed more from her.

COURT: Especially also in view of your earlier discussions surrounding her virginity.

ACCUSED: that is correct your Worship.'

High Court

[28] Dissatisfied with his conviction and resultant sentence, the respondent unsuccessfully applied, to the regional court, for leave to appeal his conviction and sentence. In the view of the regional magistrate, the envisaged appeal had no

reasonable prospects of success, hence its refusal. Undaunted by this setback, the respondent turned to the high court. The high court took a different view of the matter to that of the regional magistrate and granted leave.

[29] In due course, the appeal was heard by Gqamana J sitting together with Ngcukaitobi AJ. In a judgment penned by Ngcukaitobi AJ, in which Gqamana J concurred, the high court came to the conclusion that on the evidence, the respondent's conviction was unsustainable. It went on to find that the regional court had fundamentally misdirected itself in several material respects. In particular, the high court held that the regional court failed to take cognisance of the fact that consent to an act of sexual penetration can be granted either by explicitly communicating the consent to the other person or tacitly by conduct.

[30] In this regard the high court, *inter alia*, reasoned as follows:

'It was the evidence of the Appellant that throughout the encounter, the Complainant was an equally active participant, she was not merely passive – she kissed the Appellant back, she held him, she had no problem with the removal of her clothes, she watched him take off his clothes without raising an objection, she knew he was erect, she did not object to the oral sex. The only area where there was a dispute was *after* the penetration. It is in this area where the Complainant says she objected and said the penetration was hurting. The Appellant's evidence was that when the Complainant said the penetration was hurting, he "would stop and then continue". This aspect was not taken up in cross examination, nor was it weighed in the assessment of the probabilities by the Magistrate. It was not the evidence that the Appellant simply continued with the intercourse in disregard of the wishes of the Complainant, as held by the Magistrate. In these circumstances, I cannot uphold the findings of fact of the Magistrate which are unjustified when one has regard to the record. I cannot hold that the state proved that the version of the Appellant that he genuinely believed there was at least tacit consent was false beyond reasonable doubt.'

[31] It further found that TS did not object to any of the respondent's actions after taking off her pyjama pants. On this score the high court said:

'After she was being undressed, they continued kissing. Then the Appellant took off his clothes. *No force or threats were used to coerce the Complainant* (who is the same age as the Appellant). After he had taken his clothes off, he returned to place his head in between her thighs, again with no force. He then performed oral sex on her, *which she testified she had no objection. On the complainant's version, there was no manifestation of any refusal of consent between the kissing, oral sex and penetration.* The evidence was that it was only after the penetration that the Complainant experienced pain and told the Appellant to stop as he was hurting her. *The Appellant accepted this but said he would stop and then continue*.' (Emphasis added.)

[32] The high court nevertheless recognised that absence of resistance does not necessarily constitute consent to a sexual act. However, it went on to find that TS was an active participant because she did not object to a number of activities performed by the respondent before he penetrated her. It further found that neither force nor coercion was used.

Discussion

[33] Before delving into what is at the core of this appeal, it might be helpful to make certain observations in regard to two issues. The first relates to the proper test to be applied to the evaluation of evidence adduced in a criminal trial. The second has more to do with the enduring principles that constrain the powers of an appellate court when it comes to factual findings of the trial court and, in particular, circumscribe the circumstances in which interference with such factual findings may be justified. We proceed to deal with these issues in turn.

[34] Insofar as the proper approach to evaluation of evidence in a criminal matter is concerned, bearing in mind that the onus is on the prosecution to prove its case against the accused beyond reasonable doubt, the current state of the law

is settled. What Nugent J said in *S v Van der Meyden*[15] on this score is instructive. The learned Judge said:

'The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, *R v Difford* 1937 AD 370 especially at 373, 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.
In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.'[16]

[35] *Van der Meyden* was cited with approval in *S v Chabalala*[17] in which Heher JA said:

'The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.'[18]

[36] Whilst it is permissible for a trial court to have regard to the inherent probabilities in the accused's version, such version 'can only be rejected on the basis of inherent improbabilities if it can be said to be so improbable that it cannot be reasonably true.'[19]

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[15] *S v Van der Meyden* 1997 (2) SA 79 (WLD); 2001 (2) SACR 97 (*Van der Meyden*).
[16] Ibid at 80H-81B.
[17] *S v Chabalala* 2003 (1) SACR 134 (SCA).
[18] Ibid para 15.
[19] See *S v Shackell* 2001 (2) SACR 185 (SCA) para 30.

[37] The concept of 'proof beyond reasonable doubt' has been a subject of judicial discussion in countless decisions of our courts. Therefore, it is not necessary to rehash the principles appertaining thereto in this judgment. It suffices to reiterate that proof beyond reasonable doubt does not equate to proof 'beyond all shadow of doubt' or 'absolute certainty' as to the guilt of the accused.[20]

[38] As to the second issue, it is now trite, as has repeatedly been emphasised in innumerable decisions of our courts, that in every appeal against conviction where the factual findings of the trial court are impugned, an appellate court should be guided by the well-settled principle that its powers to interfere with such findings are circumscribed. Thus, it is not at large to interfere unless it is satisfied that the trial court committed material misdirections or a demonstrable blunder in evaluating the evidence. Almost eight decades ago in *Rex v Dhlumayo and Another*,[21] this Court quoted a passage from one of its previous judgments delivered on 28 March 1948 in *Rex v Apter and Apter* in which the following was stated:

'Where the judicial officer in the trial court has taken every point into consideration and has not misdirected himself or been guilty of any error of law, an appeal court, in a case in which the ground of appeal is that the trial court ought to have had a doubt, will not be entitled to interfere with the verdict unless it is satisfied that the trial court ought to have had a doubt; but I am prepared to assume that in this appeal, because of the criticism to which I have referred, we should re-try the case in the sense of inquiring whether on the record of the evidence, taken in conjunction with the impression made on the trial court by the witnesses, we ourselves are satisfied beyond reasonable doubt of the guilt of the appellants.'[22]

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[20] See, in this regard, *S v Ntsele* 1998 (2) SACR 178 (SCA); *S v Mashiane en Andere* 1998 (2) SACR 664 (NC) and the cases therein cited.

[21] *Rex v Dhlumayo and Another* 1948 (2) SA 677 (A) (*Dhlumayo*).

[22] Ibid at 687. *Dhlumayo* has been consistently followed ever since. See, for example *S v Cornick and Another* [2007] ZASCA 14; [2007] 2 All SA 447 (SCA); 2007 (2) SACR 115 (SCA); *S v Egglestone* [2008] ZASCA 77; [2008] 4 All SA 207 (SCA); 2009 (1) SACR 244 (SCA); *S v Monyane and Others* [2006] ZASCA 113; [2006] SCA 141 (RSA); 2008 (1) SACR 543 (SCA); *S v Mnisi* [2009] ZASCA 17; 2009 (2) SACR 227 (SCA); [2009] 3 All SA 159; *Mazibuko and Another v National Director Of Public Prosecutions* 2009 (2) SACR 368 (SCA); *S v Abader* 2008 (1) SACR 347 (W); *S v Naicker* 2008 (2) SACR 54 (N); *Lotter v S* [2007] ZAWCHC 70; 2008 (2) SACR 595 (C); *S v Robiyana and Others* [2008] ZAECHC 107; 2009 (1) SACR 104 (Ck); *Bakos v S* [2009] ZAGPJHC 69; 2010 (1) SACR 523 (GSJ).

[39] Therefore, in the ordinary course, an appellate court should proceed on the basis that the factual findings of the trial court are correct. This entails that the appellate court must defer to the trial court as the latter court was steeped in the atmosphere of the trial and had the opportunity of observing the witnesses testify, and drawing inferences from their demeanour. In *Powel and Wife v Streatham Nursing Home*[23] Lord Wright was forthright when he put it thus:

'Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judges, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.'[24]

[40] However, care should be taken not to overstate the indubitable duty of an appellate court to show deference to the factual findings of the trial court and, as a result, render the rights of appellants on appeal illusory. In this regard, the remarks of the Constitutional Court in *Bernert v Absa Bank Ltd*[25] are instructive. The Court said the following:

'What must be stressed here, is the point that has been repeatedly made. The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is recognition of the advantages that the trial court enjoys which the appellate court does not. These advantages flow from observing and hearing witnesses as opposed to reading "the cold printed word". The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to "tie the hands of the appellate courts". It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it.'[26]

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[23] *Powel and Wife v Streatham Nursing Home* 1935 AC 243.
[24] Ibid at 265.
[25] *Bernert v Absa Bank Ltd* [2010] ZACC 28; 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 (CC).
[26] Ibid para 106.

This Court

[41] At the outset it soon became clear during the hearing that this case primarily concerns the interpretation and approach adopted by the high court to two crucial elements of the statutory crime of rape, namely the nature of consent to a sexual penetrative act and the form of intention required for conviction.

[42] As previously indicated, the common law crime of rape was abolished by the Sexual Offences Act that took effect on 16 December 2007. And, in its wisdom, the legislature settled for an extensive definition of rape. It will be helpful at this juncture to quote s 3 of the Sexual Offences Act. It provides:

'Any person ("A") who *unlawfully* and *intentionally* commits *an act of sexual penetration* with a complainant ("B"), *without the consent of B,* is guilty of the offence of rape.' (Emphasis added.)

[43] It bears mentioning that for purposes of s 3, 'consent' is defined in s 1(2) of the Sexual Offences Act as 'voluntary or uncoerced agreement'. Section 1(3), in turn, lists instances where a complainant would be taken not to have voluntarily or without coercion agreed to an act of sexual penetration.[27]

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[27] See s 1(3) which reads:
'(3) Circumstances in subsection (2) in respect of which a person ('B') (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration, as contemplated in sections 3 and 4, or an act of sexual violation as contemplated in sections 5 (1), 6 and 7 or any other act as contemplated in sections 8 (1), 8 (2), 8 (3), 9, 10, 12, 17 (1), 17 (2), 17 (3) (a), 19, 20 (1), 21 (1), 21 (2), 21 (3) and 22 include, but are not limited to, the following:
(a) Where B (the complainant) submits or is subjected to such a sexual act as a result of-
(i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or
(ii) a threat of harm by A against B, C or D or against the property of B, C or D;
(b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;
(c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that-
(i) B is committing such a sexual act with a particular person who is in fact a different person; or
(ii) such a sexual act is something other than that act; or
(d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act-
(i) asleep;
(ii) unconscious;
(iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgement is adversely affected;
(iv) a child below the age of 12 years; or
(v) a person who is mentally disabled.'

[44] The expression 'sexual penetration' is defined in s 1(1) of the Sexual Offences Act as follows:

'"sexual penetration" includes any act which causes penetration to any extent whatsoever by-

(a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;

(b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or

(c) the genital organs of an animal, into or beyond the mouth of another person, and "sexually penetrates" has a corresponding meaning.'

The Sexual Offences Act also defines 'genital organs' as including 'the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs.'

[45] In essence, s 3 of the Sexual Offences Act, as foreshadowed in its Preamble, seeks to 'deal adequately, effectively and in a non-discriminatory manner with many aspects relating to . . . the commission of sexual offences.' Further, it seeks to accord proper recognition to the right to equality enshrined in the Bill of Rights.[28] The concepts of 'sexual penetration' and 'consent' are likewise now extensively statutorily defined. Self-evidently, this was the legislature's response to the criticism expressed by the Constitutional Court in *Masiya* that the common law crime of rape was 'archaic, illogical, discriminatory, irrational, unjust and thus unconstitutional.'[29]

[46] We pause here to observe – borrowing from the eloquence of Marais JA – that in the light of the most extensive definitions of the expression 'act of sexual penetration' and the concept of 'consent' employed in the Sexual Offences Act and 'an alarming burgeoning' of rape incidents, the legislature was not 'content with' the pervasive prevalence of rape and the fact that this scourge diminished the quality of life of women and children in particular, that it would remain

[28] See in this regard the 4th and 6th object under 'whereas' in the Preamble to the Sexual Offences Act.
[29] See *Masiya* fn 7 above paras 10 and 70.

'business as usual'[30], that had hitherto allowed perpetrators avenues of escape for the consequences of their heinous deeds. The legislature therefore considered the enactment of the Sexual Offences Act as an appropriate response to the scourge of sexual violence cases.

[47] From what is set out in paras 42 to 45 above, there are therefore two crucial elements of the statutory crime of rape that the State must establish to secure a conviction on a rape charge, namely (a) an act of sexual penetration without consent, in the sense defined in the Sexual Offences Act; and (b) intent, historically known as *mens rea*.

Statutory interpretation

[48] As previously indicated, the respondent was charged with a contravention of s 3 of the Sexual Offences Act. Thus, we are in this appeal enjoined to keep uppermost in our minds the abiding principles of statutory interpretation. In this regard, the logical and helpful point of departure is the decision of this Court in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.[31]

[49] *Endumeni* tells us that the prevailing state of the law on the subject is as follows:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads

[30] *S v Malgas* [2001] ZASCA 30; [2001] 3 All SA 220 (A) para 7.
[31] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*).

to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'[32]

[50] Accordingly, the inevitable point of departure is the language used in the provision under consideration in the light of the overarching scheme of the legislation and, in particular, the context.[33] *Endumeni* has been consistently followed in this Court[34] and subsequently referred to with approval in several judgments of the Constitutional Court.[35]

[51] In *Chisuse and Others v Director-General, Department of Home Affairs and Another*[36] the Constitutional Court reiterated that the process of interpretation is a unitary exercise, not a mechanical consideration of the text, context and purpose of the instrument under consideration. Most recently, the essence of what the interpretative exercise entails was neatly captured by Unterhalter AJA in

[32] *Endumeni* para 18.
[33] See, in this regard, the separate concurring judgment of Schreiner JA in *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662G-663A whose approach was endorsed by the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) paras 77 and 89-91.
[34] See, for example, *Shoprite Checkers (Pty) Ltd v Mafate* [2023] ZASCA 14; [2023] 2 All SA 332 (SCA) para 18; *Transnet National Ports Authority v Reit Investments (Pty) Ltd and Another* [2020] ZASCA 129 para 56.
[35] See, for example, *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC); *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* [2018] ZACC 33; 2019 (5) SA 1 (CC) para 29; *Road Traffic Management Corporation v Waymark Infotech (Pty) Limited* [2019] ZACC 12; 2019 (5) SA 29 (CC) paras 29-30 (*Road Traffic Management*).
[36] *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20; 2020 (10) BCLR 1173 (CC); 2020 (6) SA 14 (CC) para 52. See also, *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) para 65; *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (10) BCLR 1027 (CC); 2007 (6) SA 199 (CC) in which the Constitutional Court stressed that statutory provisions must always be interpreted purposively.

Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others[37] thus:

'It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined.'[38]

[52] To conclude on this topic, it is necessary to emphasise that since the coming into effect of the Constitution on 4 February 1997, the courts of the land are now enjoined to interpret legislation through the prism of the Constitution. This constitutional injunction was explained by the Constitutional Court, with reference to its previous decision,[39] thus:

'When interpreting legislation, a court must promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) of the Constitution. This Court has made clear that section 39(2) fashions a mandatory constitutional canon of statutory interpretation.'[40]

[53] In *Makate v Vodacom (Pty) Ltd*[41] the Constitutional Court reiterated that s 39(2) 'introduced...a new rule in terms of which statutes must be construed' stating that 'this new aid of interpretation is mandatory'. It explained:

'[T]his means that courts must at all times bear in mind the provisions of section 39(2) when interpreting legislation. If the provision under construction implicates or affects rights in the Bill of Rights, then the obligation in section 39(2) is activated. The court is duty-bound to promote the purport, spirit and objects of the Bill of Rights in the process of interpreting the provision in question.'[42]

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[37] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA) 2022 (1) SA 100 (SCA).
[38] Ibid para 25.
[39] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2000 (10) BCLR 1079; 2001 (1) SA 545 (CC) para 21.
[40] *Fraser v Absa Bank Limited* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) para 43.
[41] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC).
[42] Ibid para 88.

[54] The Court continued:

'The objects of the Bill of Rights are promoted by, where the provision is capable of more than one meaning, adopting a meaning that does not limit a right in the Bill of Rights. If the provision is not only capable of a construction that avoids limiting rights in the Bill of Rights but also bears a meaning that promotes those rights, the court is obliged to prefer the latter meaning.'[43]

Analysis

[55] Bearing the basic principles of statutory interpretation discussed above in mind, we now proceed to a consideration of what is at the heart of this appeal. Turning to s 3 of the Sexual Offences Act, we first deal with the concept of 'consent' as defined in s 1(2) with special reference to the word 'agreement'. To our mind, such a word entails the meeting of the minds of the willing participants to engage in penetrative sexual intercourse. The Sexual Offences Act explicitly requires that consent must be 'given *consciously and voluntarily, either expressly or tacitly* by persons who have the mental capacity to appreciate the nature of the act consented to. Moreover, for the consent to avail a person who commits a penetrative sexual act, such consent must be based on true knowledge of the material facts relating to the act in question.'[44]

[56] As this Court made plain in *Mugridge v S*,[45] mere submission, or acquiescence, or lack of resistance does not convey a willingness to engage in a penetrative sexual act. Thus, none of these would constitute consent. The court had this to say:

'The law requires further that consent be active, and therefore mere submission is not sufficient. In *Rex v Swiggelaar*, Murray AJA commented as follows:

"The authorities are clear upon the point that though the consent of a woman may be gathered from her conduct, apart from her words, it is fallacious to take the absence of resistance as *per se* proof of consent. Submission by itself is no grant of consent, and if a man so intimidates a

[43] Ibid para 89. See also in this regard: *Road Traffic Management* fn 35 above paras 29-30.
[44] See in this regard, *Snyman* op cit at 364. See also: *S v Nitito* [2011] ZASCA 198 para 8.
[45] *Mugridge v S* [2013] ZASCA 43; 2013 (2) SACR 111 (SCA) (*Mugridge*).

woman as to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape. All the circumstances must be taken into account to determine whether passivity is proof of implied consent or whether it is merely the abandonment of outward resistance which the woman, while persisting in her objection to intercourse, is afraid to display or realises is useless.'" (Emphasis added.)[46]

[57] Turning to the expression 'act of sexual penetration', what immediately strikes one is that such an expression tellingly signifies that the one party must agree to engage in a particular act of sexual penetration with another. The self-evident implication of this is that B (as illustrated in the definition) must therefore consent to the specific act of penetrative act about to take place, for 'consent' as contemplated in s 3, to avail A. Thus, for example, consent to foreplay or oral sex will not suffice for purposes of a vaginal penetrative sexual act because foreplay and oral sex do not constitute an ‘act of penetration’ as defined in the Sexual Offences Act.

[58] In addition, the reference to 'an act' equally assumes great significance. In our view, it axiomatically signifies a specific act to which B consents. In this regard, counsel for the third amicus, the Commission for Gender Equality, invited us to have regard to foreign judicial precedent which dealt with a comparable situation presently confronting us in this case. Before we consider these foreign cases to which we have been referred by counsel, it is necessary to sound a word of caution as doctrines and the contextual settings between jurisdictions may well differ.

[59] That resort to foreign jurisdictions for guidance is permissible and has received endorsement from the Constitutional Court is beyond question. In *H v Fetal Assessment Centre*[47] the Court set out the circumstances in which foreign

[46] Ibid para 40.
[47] *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) BCLR 127 (CC); 2015 (2) SA 193 (CC) paras 31-32. See also, *Nelson Mandela Foundation Trust and Another v Afriforum NPC and Others* [2019] ZAEQC 2; [2019] 4 All SA 237 (EqC); 2019 (6) SA 327 (GJ) at 115-117.

law may be invoked as a useful aid in interpreting legislation and developing common law. The Court there said the following:

'Foreign law has been used by this Court both in the interpretation of legislation and in the development of the common law. Without attempting to be comprehensive, its use may be summarised thus:

(a) Foreign law is a useful aid in approaching constitutional problems in South African jurisprudence. South African courts may, but are under no obligation to, have regard to it.

(b) In having regard to foreign law, courts must be cognisant both of the historical context out of which our Constitution was born and our present social, political and economic context.

(c) The similarities and differences between the constitutional dispensation in other jurisdictions and our Constitution must be evaluated. Jurisprudence from countries not under a system of constitutional supremacy and jurisdictions with very different constitutions will not be as valuable as the jurisprudence of countries founded on a system of constitutional supremacy and with a constitution similar to ours.

(d) Any doctrines, precedents and arguments in the foreign jurisprudence must be viewed through the prism of the Bill of Rights and our constitutional values.

The relevant question then is what role foreign law can fulfil in considering this case. Where a case potentially has both moral and legal implications in line with the importance and nature of those in this case, it would be prudent to determine whether similar legal questions have arisen in other jurisdictions. In making this determination, it is necessary for this Court to consider the context in which these problems have arisen and their similarities and differences to the South African context. Of importance is the reasoning used to justify the conclusion reached in each of the foreign jurisdictions considered, and whether such reasoning is possible in light of the Constitution's normative framework and our social context.'[48]

[60] Almost a decade ago, in *R v Hutchinson*[49] the Canadian Court was called upon to interpret s 273.1 of the Canadian Criminal Code which defined 'consent' in the context of sexual assault as 'the voluntary agreement of the complainant to engage in the sexual activity in question.' The Court there said:

[48] Ibid paras 21-32.
[49] *R v Hutchinson* 2014 SCC 19 (*Hutchinson*).

'We conclude that Farrar J.A. was correct to interpret the "sexual activity in question" in s. 273.1(1) to refer simply to the physical sex act itself (for example, kissing, petting, oral sex, intercourse, or the use of sex toys). The complainant must agree to the *specific* physical sex act. For example, as our colleagues correctly note, agreement to one form of penetration is not agreement to any or all forms of penetration and agreement to sexual touching on one part of the body is not agreement to all sexual touching.'[50] (Emphasis added.)

[61] Our comments pertaining to the passage from *Hutchinson* quoted in the preceding paragraph in the context of the Sexual Offences Act are these. True, the words employed in the statutory provision considered in *Hutchinson* are materially different to our own legislation. Nevertheless, *Hutchinson* provides useful insights into what the words 'an act' referred to in our own legislation should be understood to mean. In our judgement, reference to 'an act' found in s 3 can, on a rational basis, only be interpreted to mean and be understood as a reference to 'a specific physical act.' The section does not refer to 'acts' that B may consent to. Rather, it seems to be inherent in the very choice made by the legislature in using a singular, ie 'an act' that B may consent only to a specific act of sexual activity. And it seems plausible and clear enough that it would be a far cry to contend that whilst the legislation speaks of 'an act' that should be understood to be a reference to more than one act. Such an interpretation would lead 'to insensible or unbusinesslike results' or fundamentally 'undermines the apparent purpose' of the legislation. Accordingly, in our view, it would be incongruent with the Sexual Offences Act to construe the agreement to one form of sexual act to encompass all kinds of sexual acts. Therefore, this means B's willingness to engage in other acts should clearly be communicated to A, either explicitly or tacitly.

Mens rea

[50] Ibid para 54.

[62] As to the element of *mens rea*, it is beyond question that intention is a prerequisite for a conviction as it is an integral part of the definition of the statutory crime of rape. A must know that B had not consented to a penetrative sexual act.[51] Therefore, the accused may 'escape [criminal] liability on the ground of absence of knowledge of unlawfulness of his conduct if he [or she] believed the complainant . . . was infact consenting.'[52] Even *dolus eventualis* suffices, which means that it is sufficient to prove that A foresaw the possibility that B's free and conscious consent might be lacking, 'but nevertheless continues to act [recklessly] appreciating that [he/she may be acting without her/his consent], therefore "gambling" as it were [with the security, bodily integrity and dignity] of the person against whom the act is directed.'[53]

[63] Counsel for the State and the first *amicus curiae*, Women's Legal Centre Trust (WLCT), submitted that in this case there were, at the very least, unquestionable factors that were indicative of the presence of intent in the form of *dolus eventualis*. For her part, counsel for WLCT enumerated the following: (a) the respondent knew that TS was a virgin and while this is not in itself a factor that raises the bar as to the test of consent, it is relevant when considering whether the respondent was alive to the possibility that TS did not consent to sexual intercourse in the form of penile-vaginal penetration; (b) the respondent conceded that sexual intercourse in the form of penile-vaginal penetration was not part of the plan for that evening; (c) when the respondent tried to remove TS's pants, she physically resisted and expressly indicated that she did not want to have sex with him. The respondent in turn assured her that he was not trying to have sex with her; (d) following this reassurance, TS allowed the respondent to remove her pants and perform oral sex on her; and (e) when asked by the prosecutor 'what made you think at that moment that she would allow you to take her virginity?',

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[51] See, in this regard: *R v K* 1958 (3) SA 420 (A) at 421; *R v Z* 1960 (1) SA 739 (A) at 743A-745D.
[52] Burchell *Principles of Law* 5ed at 414 paras 235-236.
[53] *Director of Public Prosecutions, Gauteng v Pistorius* [2015] ZASCA 204; [2016] 1 All SA 346 (SCA); 2016 (2) SA 317 (SCA); 2016 (1) SACR 431 (SCA) para 26. See also, *S v Humphreys* 2015 (1) SA 491 (SCA) para 15.

the respondent answered 'since there was no resistance from when I was doing oral sex, I went with the motion'; (f) that TS put a high premium of her virginity to the knowledge of the respondent and that she wished to preserve until, as she put it, 'she was ready to engage in penetrative sex'; and (g) the fact that when he testified, the respondent could only provide an incoherent and nebulous explanation as to how it came about that he ended up sexually penetrating TS vaginally, being content to suggest that he was overcome with the passion of the moment.

[64] These factors, considered cumulatively, impel the conclusion that the respondent, in breach of his assurances to TS, intentionally had penetrative sexual intercourse with her, well knowing that she had not consented thereto. Counsel further argued that there could hardly be a clearer example of 'proceeded recklessly' than this. The high court's acceptance of this evidence, so it was argued, clearly played into the myth that a man can take consent to one sexual act as an invitation to perform all other sexual acts; and that 'going with the moment' is an acceptable defence – which it is not. It was further submitted that '[t]he fact that the complainant gives no outward indication that she is consenting would be strong evidence that the accused[’s] belief is not honestly entertained.'[54]

[65] It will be recalled that TS testified that she was uncomfortable with oral sex and that she only relaxed after the respondent went up and started kissing her again. Immediately thereafter, the next thing she felt was a sharp pain in her vagina, when the respondent penetrated her vagina without her consent. She asked him to stop, pushing him away and telling him that he was hurting her. The respondent denied that she asked him to stop and pushed him but conceded that she did say he was hurting her. But whenever TS told the respondent that the

[54] Burchell fn 45 above at 415.

penetration was hurting her, the respondent would momentarily stop and then continue.

[66] However, in the face of all this, the high court found, on insubstantial grounds, that TS was an active participant. As earlier indicated, it stated:

'It was the evidence of the Appellant that throughout the encounter, the Complainant was an equally active participant, she was not merely passive – she kissed the Appellant back, she held him, she had no problem with the removal of her clothes, she watched him take off his clothes without raising an objection, she knew he was erect, she did not object to the oral sex. The only area where there was a dispute was *after* the penetration. It is in this area where the Complainant says she objected and said the penetration was hurting. The Appellant's evidence was that when the Complainant said the penetration was hurting, he "would stop and then continue". This aspect was not taken up in cross examination, nor was it weighed in the assessment of the probabilities by the Magistrate. It was not the evidence that the Appellant simply continued with the intercourse in disregard of the wishes of the Complainant, as held by the Magistrate. In these circumstances, I cannot uphold the findings of the fact of the Magistrate which are unjustified when one has regard to the record. I cannot hold that the state proved that the version of the Appellant that he genuinely believed there was at least tacit consent was false beyond reasonable doubt.'

[67] It further found that TS did not object to any of the actions by the respondent after he took off her pyjama pants. It then said:

'After she was being undressed, they continued kissing. Then the Appellant took off his clothes. *No force or threats were used to coerce the Complainant* (who is the same age as the Appellant). After he had taken his clothes off, he returned to place his head in between her thighs, again with no force. He then performed oral sex on her, *which she testified she had no objection. On the complainant's version, there was no manifestation of any refusal of consent between the kissing, oral sex and penetration.* The evidence was that it was only after the penetration that the Complainant experienced pain and told the Appellant to stop as he was hurting her. *The Appellant accepted this but said he would stop and then continue*.' (Emphasis added.)

[68] In our view, the high court erred in making these findings. The respondent testified that he could tell from her body language that TS was ready to be penetrated. And he further stated that as he took off his pants, TS calmly lay on the bed, doing nothing. He was not sure whether she saw that he had an erection but she could have felt it. Then the following exchange ensued between the prosecutor and the respondent:

'PROSECUTOR: You never asked her for permission to penetrate her?

ACCUSED: Not with words, no.

PROSECUTOR: What made you think at that moment she would allow you to take her virginity?

ACCUSED: Since there was no resistance from when I was doing the oral sex, *I went with the motion.*' (Emphasis added.)

[69] But the high court recognised that lack of resistance does not constitute consent to sexual act. This notwithstanding, it went on to find that TS was an active participant because she did not object to a number of activities performed by the respondent before he penetrated her. It further found that no force was used nor was she coerced although the evidence supports TS's version that she was just lying there in shock of what was happening.

[70] As already mentioned, consent to penetrative sex must be communicated by the complainant to the accused. Consent to 'foreplay' does not constitute consent to '*an act of penetration*'. The respondent squarely relied on and equated the complainant's consent to 'foreplay' and oral sex as constituting consent to sexual penetration. This, notwithstanding his firm assurance that no penetrative sex would take place when TS visited him at his apartment.

[71] The high court further found that the trial court had applied a stringent standard for consent on the basis that TS was a virgin. In this regard, it held that the trial court had required express consent even though on the facts tacit consent was established. We disagree with these findings. The trial court did not lay down

a general rule that when a complainant is a virgin, a higher standard of consent is required. Rather, it found that in the peculiar circumstances of this case, there was no basis for the respondent's assertion that TS had, through her body language, tacitly consented to penetrative sex.

[72] True, the trial court's underlying reasoning lay emphasis on the existence of the agreement between the respondent and TS before the night of the incident, that they would not engage in sexual intercourse. As already mentioned, the agreement arose from the fact that TS was a virgin and had unequivocally indicated that she was not ready to engage in penetrative sex. She subsequently made it clear on the night of the incident that the position had not changed by, *inter alia*, initially resisting the respondent's attempts to remove her pyjama pants. The respondent reassured her that no sexual intercourse would take place. Thus, having regard to the express agreement and uncompromising desire and value she held dearly, namely to preserve her virginity, the trial court reasoned that something more than body language was required to communicate that the complainant had changed her mind. Whilst this could have been expressed better, we are nevertheless unable to find fault with the essence of what the trial court said.

[73] Significantly, the respondent also agreed with the prosecutor that 'something more' was required to establish consent. This is borne out by what emerged during the cross-examination of the respondent by the prosecutor, as earlier indicated, thus:

'PROSECUTOR: But you would agree with me that if she was not a virgin then it is understandable, meaning the fact that she is no longer a virgin would mean that she is sexually active and you would not need an expressive answer from her, but this girl is a virgin. Do you not think that you needed something more from her?[55]

[55] The choice of words by the prosecutor is regrettable as the implication is that for someone who is sexually active express consent is not required, which is not the case.

ACCUSED: Yes, I think I needed more from her.
COURT: Especially also in view of your earlier discussions surrounding her virginity.
ACCUSED: That is correct Your Worship.'

[74] That TS had the inalienable right to choose whether or not to participate in penetrative sex goes without saying. This goes to the heart of her constitutional right to dignity, bodily integrity and security of person.

[75] It is noteworthy that after the penetration for the first time, and whilst the respondent was still on top of her, TS persistently demonstrated her unmistaken objection to continued penetrative sex by pushing the respondent away, telling him to stop and saying he was hurting her. Even on his own version the respondent accepted that TS told him that it was painful. Instead, the respondent would as he testified, however, merely pause and then continue. There is no evidence that he first established from TS whether he could continue, or that she communicated her consent to him to continue, even by her conduct, despite her unequivocal indication that it was painful.

[76] At this juncture a pertinent observation of considerable weight may be mentioned. Logic dictates that even in circumstances where consent has been given to a specific sexual act, it may also be withdrawn during the sexual act to which the consent relates. This then means that if B changes her mind and withdraws her consent and communicates her change of mind to A, there would be no consent to speak of beyond the withdrawal of the consent previously granted.

[77] Thus, subsequent to the withdrawal of consent previously granted, any continued engagement in an act of penetrative sexual act in relation to which consent has subsequently been withdrawn would constitute a contravention of

s 3. In this regard, a reference to the Canadian Supreme Court case of *R v Ewanchunk*, is merited. The court said:

'Common sense should dictate that, once the complainant has expressed her unwillingness to engage in sexual contact, *the accused should make certain that she has fully changed her mind before proceeding with further intimacies. The accused cannot rely on the mere lapse of time or the complainant's silence or equivocal conduct to indicate that there has been a change of heart and that consent now exists,* nor can he engage in further sexual touching to "test the waters". Continuing sexual contact after someone has said "No" is, at minimum, reckless conduct, which is not excusable.' (Emphasis added.)[56]

[78] Even on this basis, we conclude that the crime of rape was established. In other words, even if TS had initially consented to an act of sexual penetration – which was not the case here – her cries and groans, indicated above, served as an unequivocal indication that she disapproved of the respondent's conduct. Despite this, the respondent was unfazed and continued penetrating her. Consequently, the high court erred in disregarding this crucial aspect of the trial court's judgment.

[79] We accept that the trial court went overboard in some of its findings. One example is when it found that the respondent had lured TS to his apartment with the intention of having sex with her, in the belief that he could get away with it. This is a misdirection because such a finding is not borne out by the evidence. However, this does not detract from the weight of the evidence as the facts demonstrate beyond reasonable doubt that the respondent sexually penetrated TS without her consent. Accordingly, having regard to the totality of the evidence, his defence of tacit consent was correctly rejected by the trial court as not reasonably possibly true.

[56] *R v Ewanchunk* 1999 SCC 711 para 52.

[80] Considered in that context, the version of the respondent, in our view, casts a shadow of unreality over the thrust of this evidence. Such version amounts to no more than a pregnable veil of incongruity when the contrasting versions are analysed in the context of each other. And, seen in this light, there can be no cogent reason to call into question the trial court's adverse credibility findings against the respondent. We say this because of the crucial factors already mentioned in para 63 above.

[81] At this juncture we revert to the WhatsApp messages to which we alluded in paragraph 23 above. Whilst the text messages exchanged between the respondent and TS in the aftermath of the incident could not in themselves be relied upon as evidence establishing the crime of rape, they are nevertheless consistent with the substance of the evidence and, in some way, reinforce the State's case. To illustrate the point, the following excerpt from the record will suffice.

'[TS]: So, you don't think anything wrong happened on Sunday other than the fact that there was no condom.

[Respondent]: Alot was wrong, I thought you wanted it to happen so technically consent did pop. Could infected you by not using protection. You could be pregnant right now.

[TS]: For the record, I didn't want to. I wasn't ready nor prepared to have sex that night. And I thought we were on the same page about that because you assured me we weren't having sex before you took of my pyjamas. But you said one thing and did the opposite. And I've been going insane ever since.

[Respondent]: As worthless as my apology is I'll still apologize. I am really sorry.

. . .

[TS]: Why are you apologising to me Loyiso? Do you get what you apologising for? What exactly is it you want me to forgive?

[Respondent]: Going back on my word. And having unprotected sex with you?

[TS]: Going back on your word. That's what you call inserting your penis in my [vagina] without my permission. And continuing even when I told you you hurting me.

[Respondent]: Then maybe I don't deserve your forgiveness.'

[82] TS testified that following the rape, she could not believe what had just happened to her. For his part, the respondent accepted that TS was visibly 'shocked, more than angry, very distant and quiet', after the sexual act. He further confirmed that she had also said that she could 'not believe what just happened, happened.'

[83] TS's distant behaviour was clearly not just due to loss of her virginity. Whilst that was in the reckoning, the issue for her was more about the manner in which she lost it. She was surreptitiously robbed of her right to choose when and with whom and how she would lose her virginity. Instead, she found herself to have lost something she valued through being sexually violated by her boyfriend. She felt betrayed that the respondent's assurances turned out to have been a ruse to violate her. The effect on her of such traumatising encounter was corroborated by Ms Yendall, a counselling psychologist, who testified that, among other things, TS struggled with anxiety and panic attacks. According to her, TS also presented depressive symptomology which included a struggle to sleep at night. The aftermath of the ordeal also had an adverse impact on her academic, social and emotional well-being.

[84] Taking into account the conspectus of the evidence, there can be no doubt that rape was proved beyond a reasonable doubt in this case. Therefore, the high court's interference with the findings of the trial court was not warranted. The inevitable consequence of our conclusion is that the respondent's conviction by the trial court falls to be reinstated. Insofar as the sentence imposed by the trial court is concerned, different considerations apply. This is because the high court, having overturned the respondent's conviction, rightly considered that such outcome rendered it unnecessary for it to deal with the appeal against the sentence which automatically fell away. We return to the consequences of this later.

Court's jurisdiction

[85] It is apposite at this stage to refer to s 311 of the Criminal Procedure Act (the CPA).[57] This provision reads:

'(1) Where the provincial or local division on appeal, whether brought by the attorney-general or other prosecutor or the person convicted, gives a decision in favour of the person convicted on a question of law, the attorney-general or other prosecutor against whom the decision is given may appeal to the Appellate Division of the Supreme Court, which shall, if it decides the matter in issue in favour of the appellant, set aside or vary the decision appealed from and, if the matter was brought before the provincial or local division in terms of–

(a) section 309 (1), re-instate the conviction, sentence or order of the lower court appealed from, either in its original form or in such a modified form as the said [Supreme Court of Appeal] may consider desirable.'

[86] It is trite that the State does not have a right to appeal on questions of fact such as where a court has erred in evaluating the evidence or drawing inferences, even if such an error is grave. This was reiterated by this Court in *Director of Public Prosecutions, Transvaal v Mtshweni*[58] relying on *Magmoed v Janse van Rensburg*.[59] In *Magmoed* Corbett CJ made plain, with reference to previous decisions[60] of this Court, that s 319 there under consideration did 'not permit of the reservation of a question which in reality is a question of fact'.[61] By parity of reasoning it goes without saying that s 311 of the CPA too does not accord the State a right of appeal in relation to a question of fact even if dressed up as a question of law, like for example, whether a reasonable court would have acquitted the accused.

[87] It is evident in this case that the high court committed an error of law in its approach to what was central in the matter before it. In terms of s 311(1)*(a)* of the CPA, this Court may 're-instate the conviction, sentence, or order of the lower

[57] The Criminal Procedure Act 51 of 1977.
[58] *Director of Public Prosecutions, Transvaal v Mtshweni* [2006] ZASCA 165; [2007] 1 All SA 531 (SCA); 2007 (2) SACR 217 (SCA) para 19.
[59] *Magmoed v Janse van Rensburg* [1992] ZASCA 208; 1993 (1) SA 777 (A) (*Magmoed*).
[60] See *S v Khoza en Andere* 1991 (1) SA 793 (A) at 797B; cf *Attorney-General, Transvaal v Kader* 1991 (4) 727 (A) at 739D-740J.
[61] *Magmoed* fn 54 above at 806H-I.

court appealed from either in its original form or in such a modified form' as this Court may consider desirable.

[88] Understandably, in this case the high court did not enter into the merits of the appeal in relation to the sentence. And, this being a case that emanated from the magistrates' court, this Court is by law precluded from entertaining the appeal against sentence in circumstances where the high court did not adjudicate the appeal once the conviction was overturned. As this Court held in *S v N* [62] more than three decades ago, this is because its power to hear criminal appeals derives from statute and not from its inherent jurisdiction.[63] Hence, in *S v Khoasasa* [64] this Court reiterated that in circumstances where an appeal from a lower court has not been heard and determined first by the high court, it had no jurisdiction itself to hear such an appeal directly from the lower court. *Khoasasa* has been consistently followed ever since.[65]

[89] In these circumstances, we consider that the interests of justice dictate that the respondent ought to be afforded an opportunity to pursue his appeal against sentence in the high court, if so advised. Therefore, whatever order we make in this appeal should conduce to a speedy hearing of such appeal to prevent any potential prejudice that the respondent may suffer if the appeal against sentence is not dealt with expeditiously. Our order should, in these circumstances, incorporate a paragraph requesting the Director of Public Prosecutions, Makhanda to place the matter on the roll as soon as possible, once all the relevant regulatory requirements have been satisfied.

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[62] *S v N* 1991 (2) SACR 10(A).
[63] See s 309(1) of the Criminal Procedure Act 51 of 1977 that provides that appeals from lower courts (including regional courts) lie to the High Court; *Abraham de Sousa v S* [2011] ZASCA 215 para 5.
[64] *S v Khoasasa* 2003 (11) SACR 123 (SCA) (*Khoasasa*).
[65] See, for example: *S v Smith* 2012 (1) SACR 567 (SCA) paras 2-3; *S v Matshona* 2013 (2) SACR 126 (SCA) para 5; *S v Kriel* 2014 (1) SACR 586 (SCA) paras 11-12.

[90] However, lest the respondent elects not to pursue his appeal against the sentence imposed by the regional court – thereby accepting his fate – the order of the high court setting aside the sentence will, in line with the conclusion reached in this judgment, be set aside. And the sentence imposed by the regional court will therefore be reinstated in order to cater for such eventuality.

Condonation

[91] There is also an application for condonation of the late filing by the State of its notice of appeal to address. Although this application was initially opposed by the respondent, the opposition was withdrawn at the hearing. The principles in regard to applications for condonation are now well settled. A court considering an application for condonation is required to have regard, *inter alia*, to: (a) the degree of non-compliance; (b) the explanation therefor; (c) the importance of the case; (d) the respondent's interest in the finality of the decision appealed against; and (e) the avoidance of unnecessary delay in the administration of justice.

[92] In the context of the facts of this case and the fact that the matter raises an arguable point of law of general public importance, we are satisfied, having regard to the degree of non-compliance, the explanation proffered for the delay and the prospects of success, that condonation should be granted.

[93] To recapitulate, in relation to the conviction, it is our considered view that upon a realistic appraisal of the evidence holistically, the State had, as correctly found by the regional magistrate, proved its case against the respondent beyond reasonable doubt. Accordingly, for all the foregoing reasons and in particular, the cumulative effect of the weighty factors mentioned in para 63 above, the foundation for the conclusion of the high court that TS had tacitly consented to the penetrative sexual act, is negated. It is therefore, with respect, a matter for adverse comment that the high court, ironically, misdirected itself in holding that

the regional magistrate had committed material misdirections in reaching his conclusion to convict the respondent of rape.

[94] A postscript will be the appropriate point to end this judgment. It is this: were the conclusion reached by the high court to prevail, leading to the dismissal of this appeal, this would not only be a perverse incentive to unscrupulous persons taking advantage of their victims, but also have the effect of frustrating the speedy realisation of the constitutional objective of gender equality which is one of the foundational values of our constitutional order. In addition, this would also entrench patriarchal attitudes, stereotypes and mindsets that the rights of women and children, in particular, to their dignity and physical integrity count for little and can therefore be gratuitously violated with impunity.

[95] On this score the remarks of Langa CJ in *Masiya*[66] are particularly apposite and warrant repetition. The learned Chief Justice said:

'As expressed in the judgment of Nkabinde J, the historical reason why rape was criminalised was to protect the proprietary rights of men in women. However, over the years the courts have gradually focused less on the proprietary interests and more on the sexual nature of the crime. Today rape is recognised as being less about sex and more about the expression of power through degradation and the concurrent violation of the victim's dignity, bodily integrity and privacy. In the words of the International Criminal Tribunal for Rwanda the "essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion."'[67]

[96] Further, in his insightful article, Hall pertinently remarks that rape is: 'an act of violence and oppression against women. It is a sexual attack which expresses male dominance and contempt for women . . . The origins of rape are anchored in the structured imbalance of power between men and women as social groups, that is, in their political relationship.'[68]

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[66] *Masiya* fn 7 above.
[67] Ibid para 78.
[68] Hall *Rape: The Politics of Definition* (1988) 1-5 SALJ 76 at 73.

State of appeal record

[97] Before making the order, it is regrettably necessary to comment adversely on the state of the record. It comprises three volumes running into 398 pages. Incorporated into the record are also irrelevant documents that have no bearing on what is at stake in this appeal. For example, the following documents were included: (i) transcript of the address of the legal representatives during the application for leave to appeal; and (ii) the transcript of the argument when the appeal was heard in the high court. Altogether, this irrelevant material accounts for 105 pages of the record. This is a flagrant disregard of what rule 8(6)*(j)*(i) of this Court requires relative to preparation of appeal records.

[98] This Court has, in a number of cases, bemoaned the fact that despite many admonitions practitioners continue to pay scant regard to its rules that are designed to promote efficiency in the disposition of the court's business. One of the objectives of the rule in question is to assist Judges of this Court in preparing for the appeal so that they can focus only on relevant matter without wasting their valuable time and energy trawling through irrelevant material. Practitioners should henceforth take this as a warning that should this sort of wanton disregard for its rules persist, this Court might well seriously consider sanctioning those responsible for such transgressions as a mark of its displeasure.[69]

Order

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

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:

[69] See rule 11A of the Supreme Court of Appeal Rules.

'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, Makhanda 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 Makhanda Correctional Centre, Makhanda in 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:	B Pithey
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