IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, GRAHAMSTOWN)

CASE NO: CA&R 219/2020

In the matter between:

LOYISO COKO Appellant

And

THE STATE Respondent

JUDGMENT

NGCUKAITOBI AJ:

INTRODUCTION

1. On 8 September 2020, the Appellant was convicted on one count of rape at the Regional Court of Grahamstown. He was sentenced to 7 years imprisonment. The Regional Court refused him leave to appeal, but this Court granted leave to appeal on both conviction and sentence. He is presently out on bail, pending the outcome of this appeal.

2. The Appellant has appealed against the conviction and sentence. He submits that the State failed to prove beyond reasonable doubt the elements of the crime of rape and in any event the sentence of 7 years is unduly harsh, ignores

interests of society, and induces a sense of shock. The State disputes this and counters that the Appellant was correctly convicted and the sentence is appropriate.

3. Before addressing the grounds of appeal, the material facts must be recounted.

MATERIAL FACTS

The charge

4. According to the charge sheet the Appellant was charged with 1 count of rape:

> *"In that on or about the 01st July 2018 and at or near 01 D Street, Fingo, Grahamstown in the Regional Division of the Eastern Cape the said accused did unlawfully and intentionally commit an act of sexual penetration with the Complainant to wit [TS], by inserting his penis into the vagina of the said Complainant without the consent of the said Complainant."*

5. The Appellant was charged in terms of Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act). That section defines the offence of rape as follows:

> *"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."*.

6. The State had the onus to prove beyond reasonable doubt that the Appellant *"unlawfully"* and with *"intention"* sexually penetrated the Complainant without her *"consent"*. The question before this Court is whether the Regional Court was correct in finding that the state had discharged the onus of proof in this regard.

The complaint

7. The offence is said to have occurred on 1 July 2018 at Fingo Village Grahamstown. The Complainant underwent a medical examination on 2 September 2018, after lodging a criminal complaint with the police on the same date.

8. The medico-legal examination report was produced on the same day by Dr Luvuyo Bayeni.

9. Dr Bayeni recorded:

- *"Patient reports that on 1 July 2018 her (then) boyfriend had sexual intercourse with her despite their agreement that they would just cuddle for the night. She also states that she did attempt to push hm away and did say no."*.
- In the section of Clinical Findings Dr Bayeni noted *"no physical signs of assault."*
- Under "gynaecological examination" Dr Bayeni stated *"hymen not present. No fresh tears elicited."*

- The conclusion states *"clinical examination suggestive of previous per vaginal penetration as hymen is torn."*

10. It was common cause that the Appellant and the Complainant were in a love relationship, which was terminated by the Complainant shortly after the rape allegation.

11. Notwithstanding the end of the relationship, they remained in contact as demonstrated by their communication by WhatsApp between 7 July 2018 until 23 August 2018.

The communication after 1 July 2018

12. The Complainant and the Appellant remained in contact for more than a month after the incident. On 7 July 2018 at approximately 9.00am the Complainant and the Appellant exchanged several text messages. The Complainant asked whether or not *"anything wrong happened on Sunday other than the fact that there was no condom."* The reference to "Sunday" is a reference to 1 July 2018. The Appellant answered *"a lot was wrong, I thought you wanted it to happen so technically consent did pop. Could have infected you by not using protection. You could be pregnant right now."* The Complainant responded *"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 were not having sex before you took off my pyjamas. But you said one thing and did the opposite. And I have been going insane ever since."*

13. Between 7 July 2018 to 10 July 2018 both the Complainant and the Appellant were concerned about the possibility of pregnancy. But on 10 July 2018 the Complainant informed the Appellant that she was not pregnant as her *"period had arrived"*.

14. Between 14 and 15 July 2018 the Complainant and the Appellant were engaged in cordial conversations, with the Appellant repeatedly affirming his love for the Complainant. The Appellant visited the Complainant on 15 July 2018 socially. This is clear from the text messages exchanged between the two of them before and after the visit.

15. In further exchanges on 16 July 2018 the Appellant apologised to the Complainant for *"going back on his word. And having unprotected sex with you."* But the Complainant rejected this telling him *"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."* The Appellant's response was *"maybe I don't deserve your forgiveness."*

16. Between 19 July 2018 to 27 July 2018 the Complainant and the Appellant continued to exchange cordial messages to each other. The same seems to have been the case for the period 2 August 2018 until 23 August 2018, including occasions where the Complainant and the Appellant agreed to meet on a social basis.

17. I have recounted the above exchanges because they were relied upon by the Magistrate to establish the guilt of the Appellant. I shall return to their significance later.

Evidence for the state

18. The trial commenced on 14 July 2020. The Complainant gave evidence. In July 2018 she was a postgraduate student, residing at the post graduate village at Rhodes University in Grahamstown.

19. She was 23 years of age. The Appellant is her former boyfriend. Their relationship began in the middle of June 2018. She also confirmed that their relationship ended at the beginning of July 2018, although she could not recall the specific date. The reason for terminating the relationship was because of the rape incident.

20. The Complainant's description of the rape incident was as follows.

    23.1 On 1 July 2018 at about 3.30pm the Complainant left her residence to visit the Appellant. They met at Victoria Girls Sports Ground.

    23.2 The Complainant had brought a pie and some water for the Appellant. There they stood and spoke for approximately an hour or two next to an ambulance, which the Appellant was employed to drive as a paramedic.

23.3 Thereafter, the Complainant returned to her friends and the APPELLANT left for Port Alfred for work.

23.4 The Complainant and the Appellant continued the conversation by text. They made plans that upon the Appellant's return from Port Alfred during the evening of 1 July 2018 they would meet up. It was the Complainant who suggested *"that we should meet up and I would sleep over at his place that night."*. Her plans, however, were *"to hang out, cuddle and sleep"* for the night at the Appellant's residence.

23.5 After 9.00pm the Appellant and the Complainant met again at the Pick 'n Pay by chance. There, they made arrangements for the Appellant to fetch the Complainant from her residence.

23.6 Indeed as planned at about 10.30pm, the Appellant arrived at the Student Village to fetch the Complainant. They drove together to Fingo Village where the Appellant stayed. Upon their arrival a movie was playing on the Appellant's laptop, which was on the Appellant's bed.

23.7 The Complainant was wearing *"a track suit, a big camouflage coat and shoes"* and pyjamas underneath. She and the Appellant got under the blankets of the Appellant's bed and watched the movie together. They were in a jovial mood, *"making jokes until the movie finished."*

23.8 When the movie ended the laptop was closed and put on the side table. They *"continued chatting and started kissing and so on."* The Complainant could not remember who started the kissing but was clear that she *"didn't have a problem with the kissing."*

23.9 The Appellant *"started taking off [the Complainant's] pyjama pants."* As the Appellant was taking off the Complainant's pyjama pants the Complainant closed her legs. The Appellant then said *"no, I don't want to have sex with you."* The Complainant thereafter did not resist the Appellant from taking off her pyjama pants. The evidence was that she was not wearing underwear.

23.10 The Complainant testified further that the Appellant was *"kissing down on my vagina as well and then it was a bit uncomfortable and he stopped and then he continued climbing on top of me and penetrating his penis into my vagina."*.

23.11 The Complainant was asked whether or not she had been a virgin before the sexual penetration by the Appellant, to which she replied in the affirmative. She confirmed that she did not object to the oral sex performed by the Appellant on her prior to the penetration.

23.12 The Prosecutor asked *"so he penetrated you and then what happened?"* The Complainant responded *"I was crying,*

trying to push him off of me and I kept saying he must stop, he is hurting me. I had like my hands on his shoulders trying to push him off. He wouldn't stop and he just carried on shoving it in and out and kept saying sorry in my ear."

23.13 The Complainant further stated that the Appellant was shoving his penis in and out and she was telling him "*you are hurting me."* When the Appellant *"was done he lay next to me and just laid there. And then the first thing I said, I sat up and I was like "did that just happen? I didn't imagine that did I?"*.

23.14 The Complainant testified that the Appellant laid next to her. Since there was no condom, the Complainant was panicking and went quiet for some time. The Appellant had ejaculated since there was a lot of wetness and a wet spot.

23.15 There was then *"a bit of an uncomfortable silence"* and the Appellant was trying to make conversation. He asked why she was silent and told her that she was scaring him. The Complainant asked the Appellant why he promised one thing but did the opposite. He had promised there would be no sex and did not keep his promise. The Appellant's response was that he got caught up *"in the heat of the moment."*

23.16 When asked by the Prosecutor if she believed that the Appellant had planned the sexual intercourse, the Complainant replied that she did not know what the Appellant may or not have

planned. She went home the following morning, having spent the night with the Appellant.

23.17 The Prosecutor asked the Complainant to explain what she thought would happen after the pants had been removed and she was naked. She responded that she was not sure but thought that they *"could touch and cuddle and maybe even myself at some point I would get a chance to take off his top and touch his arms and cuddle."*

24 On 2 July 2018, the day immediately after the incident, the Complainant got into an argument with the Appellant about the unprotected sex of the previous night. This was resolved and the Complainant sent a text message to the Appellant to apologise for her unkind messages.

25 The Appellant accepted the apology noting that he understood and probably had something to do with it. They saw each other two or three days later where the Complainant informed that Appellant that she wanted to end the relationship.

26 The Complainant explained that she reported the incident at the beginning of September 2018 as she initially tried to carry on and do nothing about it. But the incident was weighing on her and she eventually decided to go to the Police station when she had nervous breakdowns which would not stop.

27 In cross examination it was established that the Appellant and the Complainant first met in 2017.

28 Shortly after their relationship began, the Appellant had told the Complainant that he would not pressure her to having sex if she was not ready. In the days leading to 1 July 2018, the Appellant and the Complainant regularly met at the Complainant's house where they would kiss, cuddle and touch each other intimately.

29 It was put to the Complainant that she admitted to consensual oral sex in court, but her statement to the police made no reference to this fact. She suggested that the police told her that her statement had do be in summary form and any facts not included could be supplemented at a later stage.

30 The Complainant was asked to describe how the pants were pulled down by the Appellant. She explained:

> *"So at the time when he then proceeded to take off my pants, or try and take off my pyjama pants I was there on my back I was lying on my back. And he was on, sort of on top of me in that way, he was supporting himself. His elbows were that way, he was supporting himself with his elbows so to speak so he wasn't lying flat on top of me but he was on top of me and I was lying on my back and then when he then tried to take off my pyjama pants, he was on top of my, in between my knees so to speak. He was on top of me and sort of looking at me through my legs I guess like this. So I was facing him like this and he was like this*

and then his arms he pulled from the sides, he started pulling from the sides pulling my pants down from the side.".

31 After the Complainant pulled off her pants, she felt naked and vulnerable. She was then asked about what happened after the oral sex. She testified that it felt uncomfortable but it did not last long. The Appellant stopped the oral sex and proceeded to kiss her on her lips *"and then I felt a bit more at peace."*

32 The Complainant confirmed that the Appellant did not use any form of threat or violence against her. She was also asked why she did not leave or call the Police, to which she replied that she did not think anything wrong was happening or about to happen as she had been given an assurance that he would not attempt to have sex with her. It was then put to her that on her version by the time of the oral sex, it was clear that any *"trust"* had been broken. She had a chance to leave if she did not approve what was happening. She, however, did not leave.

33 The Complainant accepted that during and after the oral sex she did not tell the Appellant to stop or attempt to put an end to it. The following exchange took place:

"Mr Mqeke: Did you tell him to stop what he was doing?.

Ms [S]: When?

Mr Mqeke: After the oral sex when he was on top of you.

Ms [S]: No, he was kissing me after that and I was fine with kissing."

34 The Appellant's Attorney asked a further question *"you are saying that when he was on top of you after he had performed oral sex on you, when he was on top of you, you were fine with that, you were fine with him being on top of you?*. The Complainant responded *"no"*.

35 She was then asked why she did not stop the appellant. Her answer was that she did not feel like she was in a position to stop anything. She stated that she felt like almost powerless and vulnerable and not in a position to change the situation.

36 Responding to a question from the Magistrate, the Complainant confirmed that her pyjama pants were off the whole time when the Appellant was performing oral sex on her and subsequently continued to kiss her.

37 The Complainant was confronted about why she did not say in her statement that the Appellant told her he was sorry as he was penetrating her. She again responded by saying that the Police informed her that any further details could be added later. (It is necessary to record at this stage that the police who took the statement were not called by the state to explain these discrepancies.)

38 It was put to her that the Appellant's version was that there was consensual sexual intercourse, which she denied.

39 The Complainant was asked if she believed that what had happened to her was unlawful why she did not report the matter immediately to the Police. She stated that she was scared and confused and she went through phases of not knowing how to deal with the situation. The Complainant was asked whether she

believed that the Appellant acted intentionally. She responded *"he may not have done it intentionally but the explanation of the heat of the moment, its not acceptable to me."*

40 The Appellant's Attorney put to the Complainant that when all of the circumstances are taken together namely the fact that they were in a relationship, that she spent the night at his house and generally her body language she tacitly gave consent to the sexual intercourse. He added further that she let him touch her, perform oral sex and kiss her and suggested that all of those were indications of tacit consent. She disputed this.

41 The second witness called by the State was Ms Kaitlin Amy Yendall. Ms Yendall is a Counselling Psychologist who was employed at the Rhodes University Counselling Centre in July 2018. She testified that the Complainant had come to see her for therapy on 1 August 2018 and reported that she had been raped by her boyfriend.

42 Ms Yendall testified that when the Complainant came to see her, she was distressed resulting in their session overrunning.

43 According to Ms Yendall the Complainant presented with certain symptoms such as anxiety and panic attacks, struggling to sleep at night, struggling to wake up or to fall asleep. She withdrew from her friends socially and displayed symptoms of post-traumatic stress disorder and had flashbacks. She was also struggling academically with her work although she found that her time was not productive. Her attitude about reporting the matter was that she did not want people to know because they might look at her with pity or shame.

44 In cross-examination Ms Yendall was asked about her experience. She accepted that she qualified and wrote her board exams in 2017. But this was her first job. When she started seeing the Complainant she was still an intern. Ms Yendall could not point to specific experiences where she dealt with rape cases in her line of work.

Evidence for the defence

45 The Appellant testified that he was 23 at the time of the incident, and employed as a paramedic, having been employed as such for 3 years. He had, however, quit her job shortly after being charged with rape.

46 He confirmed that the Complainant was his girlfriend whom he began dating in June 2018. He testified that they met through a mutual friend but had seen her before at church. He explained that on 1 July 2018 at about 10.30pm he fetched the Complainant to his apartment as they had agreed. Upon their arrival, his laptop was on top of his bed and a movie was playing. They continued watching the movie, cuddling and kissing.

47 After the movie ended they continued kissing. The Complainant was wearing her pyjama pants. He took them off while they were kissing and had oral sex with her. He was asked whether or not the Complainant resisted when he took her pants off. His response was that he could not remember whether she did or not. He was asked what the Complainant was doing during the oral sex, to which he answered that she said nothing and did not signal discomfort.

48 The Appellant testified that after the oral sex he moved up her body and kissed her on the mouth again. It was at this point that he inserted his penis in her vagina. The Complainant did not stop him from penetrating her. She mentioned that the penetration was hurting, when he would stop and continue again. After he finished the sexual penetration he laid next to her.

49 The Appellant was asked by the Court whether he *"just continued"* to have intercourse with her after she said it was hurtful. The Appellant stated that *"we just carried on"*. He was asked whether or not the Complainant ever told him to stop what he was doing to which he denied. The Court enquired from the Appellant *"if the Complainant never stopped saying, she never said you must stop, or resist in any way."* The Appellant responded that the Complainant did not resist in any way. After the sex, they cuddled and spent the night in the Appellant's bed.

50 The Appellant testified that after the oral sex the Complainant's body language *"seemed relaxed"* which led him to take his pants off and he kissed her on the mouth, and she kissed him back. The Court enquired whether or not he viewed the oral sex as a means of foreplay, to which the Appellant agreed.

51 After the *"foreplay"*, the Court asked if both of them *"enjoined into one to have sexual intercourse"*. The Appellant agreed to the proposition, and added that he would stop when she cried that it was hurting and continue thereafter with no resistance from the Complainant. The Appellant ejaculated inside the vagina of the Complainant.

52 It was put to the Appellant that the sexual intercourse was not part of the plans for that evening. He accepted the proposition and responded that as part of the foreplay and the body language of the Complainant, he believed that she was a willing participant. He accepted that they had previously discussed sex and she told him that she was not ready for sexual intercourse. He also accepted that he had been told that the Complainant was a virgin.

53 Subsequent to the sexual intercourse the Appellant confirmed that the Complainant appeared distant and quiet. The Appellant understood this change in attitude to have resulted from losing her virginity.

54 The Appellant was again asked about whether or not the Complainant attempted to stop him when he was having sexual intercourse with her. His response was that she never said that he should stop. *"The only thing that she said to me was that it was painful and when she said it was painful I would stop and then I would continue."* The Court enquired why he continued. His answer was that the Complainant did not resist which he took as agreement. During the sexual intercourse she was also holding him and *"seemed fine with everything."* He denied that she tried to push him away or whispered to her ear that he was sorry.

55 The Appellant apologised in Court for having unprotected sex and taking away the virginity of the Complainant in the manner in which it happened. He testified that had it had been made clear to him that the kissing, the oral sex and the penetrative sex were not welcome he would have stopped immediately. He testified that he loved the Complainant and they were in a good relationship.

56 In cross-examination the Appellant was asked how he sexually satisfied himself before 1 July 2018 given the parameters that were set by the Complainant. His response was that when he visited her house, they would engage in foreplay and *"fingering"*. During those instances they would hold and kiss each other. He denied that he had a plan to have sex with the Complainant on 1 July 2018. From his perspective the sex took place as a consequence of their intimacy. He testified that he did not specifically ask for permission for the oral sex but the Complainant had objection to it.

57 The Appellant was asked whether he could tell after the oral sex if she was ready to be penetrated. According to him from the body language and how they were the Complainant was ready for penetration. The Appellant testified that the Complainant must have seen him take off his pants as he got off her in order to take them off. He was asked whether or not he had an erection, which he confirmed that he did.

58 He was asked further whether or not the Complainant saw that his penis was erect. Although he could not confirm this aspect, he was certain that she would have felt his erect penis on her body. He confirmed that he did not ask for permission to penetrate. Then the Prosecutor asked *"what made you think at that moment that she would allow you to take her virginity?"*. The answer was *"since there was no resistance from when I was doing the oral sex, I went with the motion."*

59 The Prosecutor then asked whether or not bearing in mind that the Complainant was a virgin, it would have been necessary to obtain *"an expressive answer"* from the Complainant. The Appellant responded that he thinks that he *"needed more from her."*

60 It was put to the Appellant that by not obtaining an expressive response in the light of the previous agreement with the Complainant and that the Complainant was a virgin the Appellant *"broke the law"*. There was no immediate response from the Appellant. An exchange then took place between the Prosecutor and the Court. Ultimately the Appellant was invited to speak by the Court and he stated that he understood but *"on literally getting a yes from her that would be my fault."*

61 The Prosecutor stated:

> *"That you need to understand that rape is not always this big monster where injuries must flow, violence must be applied, rape can also happen in cases like this where consent is given and it is withdrawn. It is cruel, I agree, because I am a man, but that is how it is. And to aggravate the situation and I am going to emphasize it, that she is a virgin. Because you need to go and reflect what has happened, why all of us have told you that you have raped, she is a virgin, you were obliged to ask her, can I take it?"*

62 There was no response to the comment. It also does not appear that the Court invited the Appellant to comment. The Magistrate enquired from the appellant

whether or not he admits that during the oral sex the Complainant did ask the appellant for an assurance that there would be no penetrative sex. The Appellant in fact gave the assurance and then did the opposite.

63 The Court asked whether or not the evidence of the Complainant in that regard was true. The Appellant answered *"yes your Worship"*. The Court asked whether in the light of that it was still disputed that there was no consent. The Appellant's response was about the *"body language"* of the Complainant and the fact that he went *"with the motions"*.

THE JUDGMENT OF THE COURT BELOW

64 The Magistrate accepted the evidence of the Complainant, in full. It then also commented that the Appellant is an honest witness in many respects. However the Court took the view that on a holistic reading the Appellant's version that the Complainant gave mixed signals which led him to believe that there was consent cannot reasonably possibly be true. As such it should be rejected as false beyond reasonable doubt.

65 The Court held that the Appellant must have known that there was no consent from the onset. Therefore there could be no argument that he was deceived by the body language of the Complainant in allowing him to perform oral sex.

66 Although she admitted to acceding to oral sex she did not consent *"to actual sexual penetration in the natural way."* The Court also held that at the specific

time of the oral sex she again made it clear that there should be no penetration. During the trial, the Appellant had accepted this and including the assurance given to the Complainant that there would be no penetration, but acted contrary to that assurance.

67 The Court held that *"the accused ought to have controlled himself as he had fallen for a principled young girl who made it clear that despite apparent consent to oral sex, I am not giving you consent to sexually penetrate my vagina with your penis."*

68 The Court also concluded that the evidence justifies:

> *"An inference that the accused in all probability … lured the Complainant to his place, knowing she is a virgin, defied her wishes, taking her advantage of the situation in the hope that no one will believe the Complainant should she cry rape under the circumstances he thought he could get away with it, but this thinking of his, or whatever thinking he possessed has now boomeranged."*

69 The Magistrate thereafter turned to the issue of sentence. Although it accepted that the Legislature has prescribed a sentence of 10 years imprisonment for an offence such as the present, there were substantial and compelling circumstances justifying a departure from that sentence. On a consideration of the circumstances of this case a sentence of 7 years imprisonment was considered appropriate.

THE APPEAL

The legal principles

70 It is necessary to restate some basic principles.

71 The first is that the State bears the onus to prove the guilt of the accused beyond reasonable doubt. In the matter of S v T 2005 (2) SACR 318 (E) at paragraph 37 this Court, per Plasket J held the following, at paragraph 37

> *"The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond a reasonable doubt. The high standard of proof – universally required in civilised systems of criminal justice – is a core component of the fundamental right that every person enjoys under the Constitution, and under the common law prior to 1994 to a fair trial. It is not part of a Charter for criminals and neither is it a mere technicality. When a Court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal, even if there may be suspicions that he/she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which the freedom and the dignity of the individual are properly protected and are respected. The inverse – convictions based on suspicion or speculation – is the hallmark of tyrannical systems of law. South Africans have a bitter experience of such a system and where it leads to."*

72 Since the onus of proof rests on the State to prove the guilt of an accused beyond reasonable doubt, there is no onus on the accused to prove their innocence. In Sithole v S (868/2011) [2012] ZASCA 85 (31 May 2012) it was held:

> *"[8] The State bears the onus of establishing the guilt of an accused beyond reasonable doubt and he is entitled to be acquitted if there is a reasonable doubt that he might be innocent. The onus has to be discharged upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt nor does it look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. The correct approach is set out in the following passage from Mosephi and others v R LAC (1980 – 1984) 57 at 59 F-H:*
>
> > *'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful guide to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees'.*

In weighing the evidence of a single State witness a court is required to consider its merits and demerits, decide whether it is trustworthy and whether, despite any shortcomings in the evidence, it is satisfied that the truth had been told. It must state its reasons for preferring the evidence of the State witness to that of the accused so that they can be considered in the light of the record. In applying the onus the court must also, where the accused's version is said to be improbable, only convict where it can pertinently find that the accused's version is so improbable that it cannot be reasonably possibly true."

73 In order to be acquitted, the version of an accused need only be reasonably possible true. Nugent J explained the position as follows in S v van de Meyden 1999 (1) SACR 447 (W) at 448 F - G:

"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 … 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."

74 In S v V 2000 (1) SACR 453 (SCA) the Court stated as follows at paragraph 3

"It is trite that there is no obligation upon an accused person, where the State bears the onus, "the convince the Court". If his version is reasonably possible true, he is entitled to an acquittal even though his explanation is improbable. A Court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is impermissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other Courts the test is whether there is a reasonable possibility that the accused's version may be true."

75 As pointed out above, rape is a statutory offence.

- Section 3 of the Act punishes the unlawful, intentional sexual penetration without consent.
- In turn, *"sexual penetration"* means *"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."*. (Section 1(1)).
- Section 1(2) deals with consent and provides inter alia that for the purposes of the offence in Section 3 (rape) consent means *"voluntary or uncoerced agreement"*.

- Section 1(3) provides for the circumstances in which a complainant does not voluntarily or without coercion give consent to sexual penetration.

76 In Otto v S [2017] ZASCA 114 the Supreme Court of Appeal held:

> *"The onus rests on the State to prove all of the elements of the offence of rape, including the absence of consent and intention. That is so even where, as in this case, the version put to the complainant by the appellant's legal representative was a denial of any sexual contact with her."*

77 Since this is a court of appeal I may interfere with the factual findings of the trial Court if on examination of the record I can find material misdirections. In the absence of a misdirection I am not entitled to interfere.

78 In S v Hadebe & Others 1997 (2) SACR 641 (SCA) at 645 E – F it was held:

> *"In short, in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct, and will only be disregarded if the recorded evidence shows them to be wrong."*

Intention and consent

79 In this matter the issue of consent and intention are interrelated. The sexual penetration is common cause. The defence of the Appellant was that he had no intention of having sex with the Complainant without her consent. He

admitted that the consent was not explicitly given. His defence is that he genuinely believed that the consent had been given by the conduct of the Complainant.

80 Much was been made by the Magistrate and the Prosecutor of the fact that the Complainant was a virgin at the time and wished to preserve her virginity. It was suggested to the Appellant that bearing in mind that the Complainant was a virgin *"something more"* was required to demonstrate her consent, and that it was not sufficient for the Appellant to rely solely on her conduct as illustrative of consent.

81 There are aspects of the Judgment which also appear to endorse this line of reasoning. For instance, the Magistrate says that *"the Complainant explicitly barred the accused from penetrating her vagina with his penis so as to prevent him from deflowering her."* Furthermore, the Magistrate describes the Complainant as *"a principled young girl"* on account of her stated wish to remain a virgin. Finally the Magistrate criticises the Appellant for *"luring the Complainant to his place, knowing that she is a virgin."*

82 This is a misdirection of law. There are no different standards applicable to women (or men) who are virgins and those who are not. Consent means the same thing regardless of whether the victim is a virgin or not. It would set an unfortunate precedent if the law applied a different threshold to consent in respect of persons who are not virgins.

83 The main defence of the Appellant was that he genuinely believed that consent had been given. If he knew that consent had been withheld, he would not have proceeded with the intercourse. I cannot approach the matter through an *ex post facto* assessment, however. I should consider the facts as they unfolded at the time to decide if the state discharged the onus to prove that the Appellant acted with intention to commit an offence beyond reasonable doubt.

The factual misdirections

84 The main finding of the Magistrate in regard to the issue of consent and intention is that the Appellant *"conceded"* that the Complainant did not give consent for penetration by way of a penis into the vagina of the Complainant, but he nevertheless decided to proceed anyway.

85 The Magistrate held *"as they became engulfed in smooching and the oral sex, she made it plain once more that you cannot penetrate her vagina with your penis."* The Magistrate then concluded that the Appellant conceded this part of the evidence. However, this is a factual misdirection, which manifestly played a crucial role in the overall assessment of the evidence and influence the findings of the Magistrate in finding the Appellant guilty.

86 These findings including the *"concession"* by the Magistrate rely on the answers given by the Appellant in an exchange with the Appellant. It is necessary to consider the actual exchange which forms the substratum of the findings. The record shows that the Magistrate said:

"Yes, whilst we are on that I just wanted to get clarity from you sir, it was her evidence and I do not recall it being disputed that around about the point where there was this oral sex, she did make it plain to you that there would not be any penetration and then you assured her that you will not penetrate her and all of a sudden you did exactly that."

87 The Magistrate then asked whether the evidence is true, which the Appellant accepted. Thereafter, the Appellant referred to the Complainant's *"body language"* which he claimed suggested the opposite. In argument, the matter was approached from the perspective of *"tacit consent".*

88 An accused cannot solely rely on the *"body language"* of a rape victim to override his or her express words. But the record does not suggest that this is what happened here.

89 How should consent be established? The SCA has endorsed the views of the author CR Snyman, in the following manner in relation to the issue of consent:

"[8] The author Snyman, states:

> *'For consent to succeed as a defence, it must have been given consciously and voluntarily, either expressly or tacitly, by a person who has the mental ability to understand what he or she is consenting to, and the consent must be based on a true knowledge of the material facts relating to the intercourse.'"*
>
> **(**S v Nitito (123/11) [2011] ZASCA 198 (23 November 2011))

90 The state bears the onus to prove absence of consent. Where there was no express rejection of the sexual act, in Mugridge v S (657/12) [2013] ZASCA 43; 2013 (2) SACR 111 (SCA) the SCA commented as follows:

> *"[37] In law, consent has the following requirements:*
>
> *(a) the consent itself must be recognised by law;*
>
> *(b) it must be real consent; and*
>
> *(c) it must be given by a person capable of consent.*
>
> *[38] The question of whether consent in the context of sexual offences will be 'recognised in law' is determined with reference to considerations of public policy, with the following factors relevant in the making of such a determination:*
>
> *'[T]he nature and extent of the harm, both physical and psychological; and the age and relationship of the parties, especially if the conduct involves the exploitation or abuse of children.'*
>
> *[39] The first and last of the aforementioned requirements need no further discussion for the purposes of the instant matter. Rather, as noted earlier, it must be assessed whether, on the facts of this matter, the apparent submission and acquiescence of the complainant amounted to consent in the legal sense.*
>
> *[40] 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 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.'"*

91 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.

92 The Magistrate considered it decisive that the Appellant conceded that he agreed with the Complainant that there would be no sexual intercourse, but went against his word, holding *"the accused even conceded to this material aspect".* Further, the Magistrate held *"the accused acknowledged all of this and assured her that he will resist the temptation of not doing so, only to do just that".*

93 I consider this finding to be erroneous. It is necessary to consider the evidence upon which the *"concession"* is based. The first part is the evidence of the Complainant. She explained that the assurance of the Appellant was given when the Appellant first tried to undress her. But her version was *"then we carried on kissing and then he proceeded to take them off"*.

94 The finding by the Magistrate that the Complainant made it clear to the Appellant that she did not consent during the kissing and the oral sex is not correct and not borne out by the record. The correct sequence of the evidence, as given by the Complainant, is that she mentioned that she closed her legs and mentioned that she not want to have sex with the Appellant as he was undressing her. What happened next was that there was no indication expressly or otherwise of any lack of consent to being undressed. 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 to. On the complainant's version, there was no manifestation of any refusal of consent between the kissing, the oral sex and the 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.

95 The state had the duty to prove that the Appellant was aware that there was lack of consent. On this aspect, the Magistrate erroneously held that after the oral sex the Complainant told the Appellant that she did not consent to the sexual penetration, which was not the evidence. This was a misdirection and in conflict with evidence given.

96 The misdirection seems to have emanated from the manner in which the question was posed by the Magistrate namely that *"about the point where there was this oral sex, she did make it plain to you that there would not be any penetration and then you assured her that you will not penetrate and all of a sudden you did exactly that."*

97 This was not the evidence of the Complainant. The Complainant did not say that an assurance was given *"at about the point of oral sex".* Her testimony was that when the Appellant was undressing her he told her that he was not going to have sex with her. But just as he. Was saying that, they were kissing. Three further things happened, with the clear consent of the Appellant – the kissing, the Appellant's taking off his clothes, the oral sex. The manner in which the evidence has been evaluated by the Magistrate, which glosses over and overlooks crucial details has resulted in a misdirection.

Further erroneous findings

98 The Magistrate found that the rape was planned beforehand. He concluded that the Appellant *"lured"* the Complainant to his apartment thinking that he could get away with the rape. There is no evidence to support this conclusion. It seems on a fair reading of the record that the intention to sexual intercourse was formulated during the night in question, when the Appellant and the Complainant were already at the Appellant's house. The testimony of the Appellant, which the Magistrate did not address at all was that he did not plan the intercourse, and genuinely believed that the Complainant had consented, and got carried away with their intimacy, resulting in him having unprotected sex with the Complainant. There was no evidence on the record that the appellant devised an entire scheme to trap the Complainant to his house for the purposes of raping her.

99 The Magistrate concluded that the Appellant "deliberately ignored this wish of the complainant and did this by deceptive means crushed that wish of her". These are hyperbolic findings, which have no basis from the record. It was not the case of the state that the Appellant was engaged in any deception. The case was that the sexual penetration occurred without the consent of the Complainant. The Magistrate did not bother to explain how he came to the conclusion of a planned, deliberate, deceptive scheme, calculated to deflower the Complainant.

100 The Magistrate also relied on the text messages between the Complainant and the Appellant to *"accept the complainant's evidence that he did express regret for violating her wish not to be sexually penetrated immediately after having done so."* However, the text messages show that the Appellant apologised for *"going back on his word. And having unprotected sex"* with the Complainant.

101 In these circumstances, I should ask whether the state has succeeded in proving the guilt of the Appellant beyond reasonable doubt. I am not satisfied that they did. I do not think the evidence proved beyond reasonable doubt that that the Appellant acted intentionally knowing that there was no consent.

102 Several of the main findings of the Court below have no basis from the record, and constitute speculative conjecture. I have addressed its salient aspects and central conclusions above.

Fair trial rights affected

103 I must also express some disquiet at some aspects of the trial, which adversely affected the rights of the Appellant to a fair trial, guaranteed in section 35 of the Constitution. They created an adverse atmosphere in the trial, resulting in the Appellant making *"concessions"* made when the questions themselves were based on an incorrect rendition of the evidence.

103.1 The Prosecutor was allowed to make lengthy moralising statements about the conduct of the Appellant, which have no place in a criminal trial.

103.2 There were portions where the Magistrate and the Prosecutor appeared to be making argumentative statements, and the Appellant did not appear to understand what was expected of him, whether to provide an answer or not, with no explanation from the Court.

103.3 The *"concession"* extracted from the Appellant, which was then used as one of the key findings against him, was extracted wrongly as the Magistrate did not put the correct sequence of the facts, as per the testimony of the Complainant.

103.4 During the trial some time was taken up with the notion that because the Complainant was a virgin, the Appellant could not rely on her tacit consent to the sexual intercourse. This line of enquiry at the instance of the Prosecutor was allowed to continue, despite having no foundation in law. It seems to have found apparent endorsement in the judgment. We are concerned about this element of the trial as it risks engaging the courts in matters of sexual morality. The fact of the matter is that there are no special rules for male or female virgins – everyone is equal before the law and is entitled to equal protection and benefit of the law.

104 In the result the following Order shall be made.

1. The Appeal against the conviction and sentence succeeds.

2. The Appellant is found not guilty and is acquitted of the charge of rape against him.

3. The sentence of the Appellant of seven years imprisonment is set aside.

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T NGCUKAITOBI

ACTING JUDGE OF THE HIGH COURT

GQAMANA J

I agree.

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N GQAMANA

JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Appellant	:	*M Stanley*
Instructed by	:	Mqeke Attorneys Grahamstown
Counsel for the Respondent	:	*H Obemeyer*
Instructed by	:	The Office of the DPP Grahamstown
Date heard	:	19 May 2021
Date judgment delivered	:	8 October 2021