



## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

### MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**From:** The Registrar, Supreme Court of Appeal

**Date:** 24 April 2024

**Status:** Immediate

*The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal*

*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)*

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Today, the Supreme Court of Appeal upheld an appeal by the State against the acquittal of the respondent, Mr Coko. It set aside his acquittal by the Eastern Cape Division of the High Court, Makhanda (the high court), and reinstated his conviction by the regional court.

The respondent was charged with the rape of the complainant, TS who was then 21 years of age. He pleaded not guilty to the charge, asserting that the sexual intercourse was consensual. At the conclusion of the trial, the respondent was convicted as charged and thereafter sentenced to seven years' imprisonment.

The events leading to the prosecution of the respondent were largely common cause. 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.

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.

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.

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.

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, carry on thrusting his penis in and out of her vagina.

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

Dissatisfied with his conviction and resultant sentence, the respondent unsuccessfully applied, to the regional court, for leave to appeal his conviction and sentence. 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 magistrate and granted leave.

The judges seized with the matter in the high court came to the conclusion that on the evidence, the respondent's conviction was unsustainable. They found 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. 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, including the kissing, removal of her clothes and oral sex. It further found that neither force nor coercion was used.

The appeal concerned 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.

The SCA, firstly, reiterated principles applicable in evaluating evidence and circumstances upon which an appellate court may interfere with the factual findings of the trial court. It then embarked on an interpretation of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (Sexual Offences Act), which provides that '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.'

The SCA held that 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.

Turning to the expression 'act of sexual penetration', the SCA held that the 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. In addition, the SCA held that the reference to 'an act' equally assumes great significance. It axiomatically signifies a specific act to which B consents. 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.

The SCA found that logic also dictated that even in circumstances where consent had been given to a specific sexual act, it may also be withdrawn during the sexual act to which the consent related. 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 of the Sexual Offences Act. Even if TS had initially consented to an act of sexual penetration – which was not the case here – her cries and groans served as an unequivocal indication that she disapproved of the respondent's conduct. Despite this, the respondent was unfazed and continued penetrating her.

As to *mens rea*, the SCA found that factors, considered cumulatively, impelled 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: (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?', 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 on 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.

The SCA held that considering the conspectus of the evidence, there could be no doubt that rape was proved beyond a reasonable doubt in this case. The SCA also held that the high court's interference with the findings of the trial court was not warranted. The inevitable consequence of the conclusion of the SCA was that the respondent's conviction by the trial court fell to be reinstated. As to jurisdiction the SCA found that the high court committed an error of law, which permitted the State to appeal in terms of s 311 of the Criminal Procedure Act 51 of 1977.

Insofar as the sentence imposed by the trial court was concerned, different considerations applied. This is because the high court, having overturned the respondent's conviction, that outcome rendered it unnecessary for it to deal with the appeal against the sentence which automatically fell away. The matter was remitted to the high court to determine the appeal on sentence.

