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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

NOT REPORTABLE

Case no: 47/2022

In the matter between:

THE STATE

and

SANDILE ELVIS TSHOBA

Accused

JUDGMENT

Govindjee J

[1] Mr Tshoba was charged with rape in that he unlawfully and intentionally committed acts of sexual penetration with the complainant, E, a 19-year-old mentally and physically disabled woman, by causing penetration to her genital organs without her consent and against her will. He pleaded not guilty, averring that he was not aware that the complainant was a person with a mental disability and claiming that they were in a so-called 'love relationship'.

[2] Any person who unlawfully and intentionally commits an act of sexual penetration with a complainant, without that person's consent, is guilty of the offence

of rape.¹ ‘Consent’ means voluntary or uncoerced agreement.² The Sexual Offences Act provides examples of circumstances in which the complainant does not voluntarily or without coercion agree to an act of sexual penetration. This includes where the complainant ‘is incapable in law of appreciating the nature of the sexual act’, including where the complainant is at the time of the commission of such sexual act ‘a person with a mental disability’.³ This notion is defined in the Sexual Offences Act as follows:

“‘person with a mental disability’ means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was

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- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act.’⁴

[3] Before convicting, a court must always be satisfied that every element of the offence has been established by evidence that is truthful and reliable beyond reasonable doubt. In cases of rape, those elements include both absence of consent and knowledge by the accused of the absence of consent (or at least knowledge of that possibility).⁵ If the prosecution proves that the circumstances set out in s 1(3) of the Sexual Offences Act exist an accused cannot successfully raise a defence of

¹ S 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007) (‘the Sexual Offences Act’).

² S 1(2) of the Sexual Offences Act.

³ S 1(3)(d)(v) of the Sexual Offences Act. The previous wording of this provision made reference to ‘a person who is mentally disabled’.

⁴ S 1 of the Sexual Offences Act.

⁵ S v *Vilakazi* 2012 (6) SA 353 (SCA) para 47.

consent.⁶ A court can reject an accused person's claim of belief in consent by drawing inferences from objective facts which indicate the contrary.⁷

[4] An accused person who genuinely believes that a defence excluding unlawfulness exists, even though it does not, lacks fault (*mens rea*) in the form of intention.⁸ Unlawfulness is established in cases where, objectively, a reasonable person in the position of the accused person would not have acted in the same way. What is at issue in cases of a putative defence is culpability.⁹ As Burchell indicates, if a complainant lacked legal capacity to consent, the accused's conduct in persisting in sexual penetration of the complainant would be unlawful.¹⁰ But an erroneous belief that the complainant has consented to sexual intercourse may, depending upon the circumstances, exclude *dolus*.¹¹ The accused person may escape liability on the ground of absence of knowledge of the unlawfulness of their conduct if they believed that the complainant had the necessary capacity and was in fact consenting validly.¹² An honest belief would suffice.¹³ In *S v Vilakazi*, Nugent JA offered the following translation of the dictum in *S v S*¹⁴ in explaining the position:¹⁵

‘Although the appellant had sexual intercourse with the complainant without her consent and against her will he is not guilty of rape if he *bona fide*

⁶ *S v Prins* 2017 (1) SACR 20 (WCC) as cited in PJ Schwikkard ‘Rape: An unreasonable belief in consent should not be a defence’ (2021) SACJ vol 34(1) 76 at 80.

⁷ J Burchell *Principles of Criminal Law* (5th Ed) (Juta) (2016) at 626. Also see *R v K* 1958 (3) SA 420 (A) at 422D – E.

⁸ See J Burchell *South African Criminal Law and Procedure: Vol I: General Principles of Criminal Law* (4th Ed) (2011) ch28-p416. See Burchell n 7 at 361 on the need for a court to be reluctant to label an accused's belief as not ‘rational’ when the central issue is whether the accused's belief was in fact ‘genuinely’ held.

⁹ *S v De Oliveira* 1993 (2) SACR 59 (A) at 63.

¹⁰ Burchell n 8 ch28-421.

¹¹ *S v De Oliveira* n 9 at 64.

¹² Burchell n 8 ch28-421.

¹³ See Burchell n 8 ch28-422 and the cases cited at fn 115.

¹⁴ *S v S* 1971 (2) SA 591 (A) at 597B – F.

¹⁵ *S v Vilakazi* n 5 para 47. The learned judge added the following: ‘Where an accused person advances a false defence, as the appellant did in this case, a court might ordinarily infer that the reason for doing so is that he or she has no other defence. But on the ordinary logic of inferential reasoning that inference could not properly be drawn if another reason presents itself. The most that could then be said is that he or she might have advanced a false defence for either of those reasons. Needless to say an accused person in that position takes a considerable risk. For if there is unchallenged evidence of all the elements of the offence a court would be perfectly justified in accepting the evidence. It is if there is no evidence on the issue that the onus that rests on the state will accrue to the benefit of the accused for the gap in the evidence could not be filled by an inference drawn against the accused. That is not a matter of law but only a consequence of ordinary inferential reasoning: para 48.’

believed that she consented ... In the present case the appellant does not allege that he believed that the complainant consented to intercourse and he could not allege that, given his denial that he had intercourse with her. That does not relieve the State however of the obligation to prove *mens rea*, although the appellant's false denial that intercourse occurred makes the State's task in that regard considerably easier.'

[5] Schwikkard has summarised the position, most usefully, as follows:¹⁶

'In terms of the current definition of rape, the prosecution must prove the perpetrator's intention to sexually penetrate the complainant without the complainant's consent. *Dolus eventualis* will suffice and the burden of proof in relation to the absence of consent will be discharged even if the accused did not intend to have non-consensual intercourse if the prosecution can prove beyond a reasonable doubt that the accused foresaw the possibility that the complainant was not consenting and nevertheless proceeded. Foresight is tested subjectively: if the perpetrator did not foresee the possibility of the absence of consent, no matter how unreasonable the lack of foresight, they must be acquitted.'

[6] The question is whether the state has proved beyond reasonable doubt that Mr Tshoba subjectively had the necessary intent to commit the crime. In other words, that he did not entertain an honest belief that the complainant could consent and had consented.

[7] According to Burchell, 'If intention is the fault element for the offence, the mistake will not be a defence if the prosecution proves beyond reasonable doubt that the accused at least foresaw the possibility of the unlawfulness of their conduct.'¹⁷

¹⁶ Schwikkard n 6 at 82. The learned author, in arguing for legislative reform, goes on to elucidate the current position. Before an accused person can be convicted on the basis of absence of consent due to one or more of the factors listed in s 1(3) of the Sexual Offences Act being present, they must have been aware that those factors existed and that they negated consent. The reasonableness of the accused's ignorance or mistaken belief in consent will be irrelevant. The court must make a finding on the accused's subjective belief notwithstanding that the honesty of that belief will be assessed in the context of all the proven facts before the court: at 83, 84. Also see Burchell n ... at 236.

¹⁷ Burchell n 8 ch 28-p416.

Put differently, actual knowledge of lack of capacity is not required for a conviction: it is sufficient if the accused foresaw the possibility that the complainant lacked the capacity to consent or was not consenting, or that, in the circumstances consent was not recognised by law, and nevertheless proceeded with the commission of the offence.¹⁸

[8] Ramsbottom JA held as follows in *R v Z*:¹⁹

‘Rape is a crime in which intention is an element ... That intention must be proved as an essential element in the Crown case. If the accused believed that the woman had consented, the guilty intent or *mens rea* is lacking. The *onus* is on the Crown to prove that the accused had the necessary *mens rea*, and therefore the Crown must prove that the accused knew that the woman had not consented ... That the accused had that knowledge may be proved in many ways, and proof that the accused was aware of the possibility of non-consent and was reckless whether the woman consented or not will suffice, but the necessary *mens rea*, like the other elements in the crime must be proved beyond all reasonable doubt.’

The evidence

[9] Dr Lee, a general medical practitioner, testified that he had seen the complainant on 8 November 2020 at Aliwal North Hospital and completed a J88 report. His examination suggested recent sexual activity and that the complainant had been a virgin prior to this. He observed a perforated hymen and could observe a whitish substance, which he assumed was semen, suggesting that sexual intercourse had taken place. No overt signs of forceful penetration or sexual trauma were visible to him.

[10] Dr Lee testified that he had noticed physical and mental ‘retardation’ when examining the complainant. Much of the interview had occurred via the

¹⁸ Burchell n 8 ch 28-422.

¹⁹ *R v Z* 1960 (1) SA 739 (A) at 745D – H.

complainant's guardian and with the assistance of the police. It was the first time he had performed an examination of a person with mental challenges, and he confirmed that mental assessment was not his strength. Her responses were not normal but he conceded that it was difficult to gauge her mental capacity from a single consultation, particularly when his focus had been on gathering physical evidence. He nevertheless would have doubted her ability to consent had she presented for a medical procedure. His impression was that she lacked intelligence, although this had not been reflected on his report. In fact, the J88 made no reference to the fact that the complainant had been assisted by her guardian during the examination or that she was a person with a mental disability. In the space provided for comment on 'Mental health and emotional status' the doctor had merely indicated 'Good'. By contrast, the form reflected a physical issue with the complainant's arm. Dr Lee testified that 'consensual intercourse was possible', given the findings of his examination.

[11] Dr Andrews, a clinical psychologist, testified that she has performed numerous psychological assessments and appeared in court as an expert witness on various occasions since 2007. The complainant had been referred to her for an assessment of the extent of her mental incapacity, her ability to testify in court and ability to consent to sexual intercourse. She had interviewed the complainant and her guardian and conducted 'mental state examination' and psychometric testing. Dr Andrews reported as follows regarding the mental state examination:

'E ... presented as a 20-year-old female who was normally physically mature, but obviously physically impaired. Her left arm was crippled and maintained at her side. Her left leg was crippled, giving her a notable limp when she walked. Her speech was obviously impaired, with poor word pronunciation. She was able to use language to communicate, but her verbal skills were immature and impaired. E's cognitive functioning was consistent with moderate to severe cognitive impairment upon Head Injury. Fluid cognitive functions of attention, concentration, immediate memory and information processing were notably slow. This had a negative impact on her executive mental functioning. These were consistent with a Moderate to Severe Neurocognitive Disorder, and a Mental Age of 7. E was able to

provide concrete information about herself and her experience in this case. However, this information was provided in an impaired response style. She was unable to demonstrate an understanding of what it means to tell the truth and what it means to tell lies. Her mental state was characterised by a significant cognitive impairment due to Head Injury, and a mental capacity consistent with a Mental Age of 7.'

[12] Dr Andrews concluded that E did not have the ability to understand sexual behaviour and opined that her condition was such that she fell within the definition of 'mentally disabled' in the Sexual Offences Act. It was reported that E was able to say "yes" or "no" but would not know what these meant in relation to a sexual act, so that she was unable to consent to sexual intercourse because of her mental disability. Dr Andrews' final conclusion was that 'It is obvious to any lay person that she is physically and mentally disabled'.

[13] Under cross-examination, Dr Andrews testified that her findings cohered with the history she had obtained from E's guardian. She explained, with reference to her comment that 'concrete information' had been provided, that E would take a word and use that word to say something that she associated in her mind with that word, but that she could not describe matters logically or chronologically. Dr Andrews testified that it was possible to hear that E had an impairment when she spoke. Her cross-examination proceeded as follows:

'Mr Sojada: "Speech can be impaired even if it is normal."

Dr Andrews: "This is usually associated with some neurological damage. Most people would be on guard [thinking] let me go further and see if they understand me when I talk to them. The physical is the start, then you hear the speech impediment, then speak to them and realise that they don't make sense and then you know that this is a disabled person."

[14] Part of Dr Andrews' responses to cross-examination was drawn directly from her recollection of the history she had been provided. For example, she testified that E could not wash the dishes herself and never went anywhere on her own. She

amplified this point by stating that regardless of where E went, she would have to be accompanied by somebody else. She also stated that it was possible that E had been in a relationship with the accused, but that this would be greater reason for him to have known about her injuries.

[15] LM, 13 years of age and the daughter of E's guardian, testified through an intermediary and via closed circuit cameras, following admonishment. She and N, who I gather was a very young companion, had seen Mr Tshoba and E sleeping in the kitchen on the night in question. Her grandfather was asleep at the time in the bedroom, which was the only other room in the house. She had also been in the bedroom and heard E's 'cries', which drew her to the kitchen where she observed Mr Tshoba making up and down movements on top of E. She heard E telling Mr Tshoba to leave her alone. As she was afraid, she did nothing further and returned to the bedroom with N. When N's mother, Ms S [...], knocked at the kitchen door, she and N had opened it. Mr Tshoba and E were still sleeping in the kitchen and spent the night there together. Ms S [...], who had not been drinking, was crying as she couldn't make contact with her husband. The child did not make any report to Ms S [...], who had not said anything when she had seen Mr Tshoba and E sleeping on the floor.

[16] The witness also recalled that Mr Tshoba had asked E to accompany him to buy beers the previous evening before the alleged sexual intercourse took place. LM testified that E had quietly accompanied Mr Tshoba, who by that stage was drunk and could not walk properly, when he requested her to buy alcohol with him. The witness denied that E had been drinking. They were away for a long period of time. E had proceeded to the kitchen upon their return and slept in the place that Ms S [...] and her husband were meant to occupy. It was the first time that Mr Tshoba had slept at their home. The witness said that there was no reason why Mr Tshoba could not be E's boyfriend.

[17] LM also said that E had fallen asleep in the kitchen, even though she usually slept in the bedroom. Mr Tshoba, having consumed the beer he had bought, had said, when asked, that he was not going to go to his home. He had switched off the light and proceeded to sleep where E was sleeping.

[18] Mr Tshoba had come to the bedroom the following morning and advised her not to speak to anyone or make any disclosure. In return he would give her an undisclosed sum of money. She had told Ms S [...] about the offer of money, causing her to make an exclamation. Neither she nor Ms S [...] had asked E what she had been doing with Mr Tshoba. Ms S [...] had called LM's grandmother, who had arrived on the morning after the incident. Only after her grandmother returned had E asked LM to accompany her. When they were near Greenhuis, E indicated that she wanted to go to the police station. E said that she wished to lay charges against Mr Tshoba, and told the police that he had raped her.

[19] Ms D [...] S [...] testified that her husband, N [...], had been drinking alcohol with Mr Tshoba, who had offered alcohol to E. She refused twice, he poured the liquor into a glass for her and she drank. The drinking continued until late at night. Mr Tshoba had left with E at approximately 22h00 to buy more alcohol and they had returned at 23h30. They drank again. By this point E was very drunk and looked as though she may fall.

[20] Ms S [...] had left the house in pursuit of N [...] at some point. At that stage both Mr Tshoba and E had been seated on buckets in the kitchen. Upon her return she noticed that the light had been switched off. Whilst knocking at the door she heard E 'crying', saying "Leave me alone" repeatedly to Mr Tshoba. Upon entry, Ms S [...] saw Mr Tshoba lying beside E and said she was shocked to see them sleeping together. She called Mrs M [...], the grandmother / mother of the house, to inform her. She had not asked E why she had been crying or had cried out, and said this was due to her shock. She knew that they had had sexual intercourse. When she was first asked what she had reported to Mrs M [...] she made reference only to the fact that Mr Tshoba and E had been sleeping together. Mrs M [...] advised that she would return early the next morning. In response to a leading question about the cries she said she had heard, she indicated that she had also told Mrs M [...] about that. She also testified that she had tried to wake the grandfather of the house, who had been sleeping. He had not acted in any way other than to tell her to report to Mrs M [...], indicating that he would do the same. She had asked the children what had happened and they said they had noticed Mr Tshoba laying on top of E.

[21] Ms S [...] said that Ms Tshoba had frequented that home, and that she had known him for four years. He did not reside there. E was 'not well upstairs' and seemed disabled. This was because she was not always audible and comprehensible and needed reminding to bath herself. She would become upset and angry when spoken to. Her opinion was that E would not be in a position to have a boyfriend but she was uncertain whether Mr Tshoba would have known this or not.

[22] According to Ms S [...], she had heard from E that Mr Tshoba had said they should 'only make themselves happy'. She had threatened to tell Mrs M [...] that E had been drinking and was 'managing herself now'. E had 'controlled herself' and did not stop drinking despite being asked to do so by Ms S [...]. E had not listened to her and insisted on drinking. When asked why she had not asked Mr Tshoba what he was doing, given what she had heard E say while at the door, she said that she was not in a position to do so because of her shock. She then said she was frightened to do so, even though there were other adults close by, renting space on the property. She later testified that she had gone to the owner of the property and knocked, but was not heard. It had not crossed her mind to seek help from one of Mrs M [...]’s friends, who lived nearby.

[23] E had not made any report to Ms S [...] about Mr Tshoba’s conduct when Ms S [...] had entered the house. There was no noise when she entered and when she went to sleep. E and Mr Tshoba remained quiet and sleeping on the floor until the following day. When Ms S [...] discussed the matter with E the following day, she replied that she was dizzy and that Ms S [...] should let go of her. The witness opined that E knew what she had done. E then decided to go to the police station when she was told that Mrs M [...] was close to returning home.

[24] According to the witness, E mainly needed assistance because of the problem with her arm. She would leave the home on her own and go to the shop. She would only be given a few rand as she might lose the money. Mrs M [...] left E in the care of others when she travelled to Venterstad at the end of each month.

[25] Mrs M [...] testified that she had cared for E from January 2020. E had a problem with her arm and spoke using short sentences, also requiring assistance to bath. People in the neighbourhood knew of her condition, and mental state. This was because she had visited her neighbours to advise them that E had arrived to stay with her, and that she was short-tempered and would sometimes swear at them. They should be aware that she was this type of person. She was forgetful and had a speech problem. She would occasionally return from the shop without any change and might forget the reason she had been sent.

[26] Mr Tshoba had been visiting her home since 2018 as they were distantly related. When E had arrived, Mr Tshoba had been warned that she was 'not okay' and that she would sometimes speak rudely to him. She swore at him on occasions when he sent the children to buy cigarettes for him and he would complain to Mrs M [...] that they were rude. Mr Tshoba and E had not had any conversations or drank together previously. When Mrs M [...] left the home to visit her brother, she would leave E in one of her children's care. On this occasion she had asked Ms S [...], her brother's wife, to look after E.

[27] Mrs M [...] testified that she had not asked Ms S [...] whether Mr Tshoba was still in the home when she heard about the incident telephonically. She was shocked to hear that E and Mr Tshoba had slept together. This was because he was related to her and she knew he was HIV positive. He had never slept at her home before and she was upset that he had made E drink liquor and had sex with her, when they did not normally speak to one another.

[28] Mrs M [...] returned home the following afternoon. She followed E and LM to the police station and spoke to E, who did not answer her question as to why she had left the home without her. E told her that Mr Tshoba had made her drink alcohol and she did not know what happened thereafter, although she had woken up naked. Mrs M [...] had made the report to the police because of E's condition. She said that E could not tell the police the entire story, only bits and pieces of what had happened. This included that Mr Tshoba had taken E to his home when they went to buy beer, pulled up her dress and placed her on his bed, before they returned to Mrs M [...] home, where E had passed out.

[29] Mrs M [...] said that E could not be in a relationship with Mr Tshoba as she did not go out at night and only left home for minor errands. She was a quiet person who did not speak to anyone. She would not know about sexual intercourse but had the capacity to understand that she had needed injections to prevent menstruation.

[30] During cross-examination, Mrs M [...] explained that she had reminded Mr Tshoba about E's condition on various occasions. He tended to be forgetful when under the influence of alcohol, and would also forget about E's challenges when he wanted to smoke. This is when Mrs M [...] would intervene. Investigating officers had visited the home subsequent to the matter being reported and asked E about what had occurred. At some point the investigating officer noticed that there was something amiss with E, resulting in the referral to the psychologist. According to Mrs M [...], E recalled details of what had occurred during the evening of the incident, including when Mr Tshoba had lifted her skirt at his home, but could not recall what had been happening when the children had been alerted.

[31] Mrs M [...] could not explain why the statement made to the police made no reference of E being assisted by her. She first indicated that E was not okay and could not recall 'anything' that happened to her. After she had made the statement to the police, she was 'not alright'. Mrs M [...] eventually conceded that E had not been assisted when she made the statement to the police, and had told the police what happened. Her own statement to the police made no reference about any mental disability, only indicating that 'E is physically disabled as she was in an accident at the age of five years. She is aggressive and short minded.'

[32] Mr Tshoba testified that he had had sexual intercourse with E. She was healthy and could speak for herself, despite being physically disabled. A relationship had developed between them. They would have conversations about relationships in general and had kissed at some point. E did not want Mrs M [...] to know about this in case she was chased away from the home.

[33] E had asked him for a drink and he could see she was tipsy. He asked her if she now drank alcohol, but later testified that she had consumed alcohol previously.

This had been hidden from Mrs M [....]. E had forcefully wanted to accompany Mr Tshoba when he left the home to purchase alcohol. Ms S [...] had been informed and had no difficulty with this. They had fetched money from his home before proceeding to purchase more alcohol. On the way they had been seen by some neighbours holding hands. Having consumed the alcohol at Mrs M [....]'s home upon their return, Mr Tshoba noticed that he was becoming drunk. He went under the blankets in the kitchen and fell asleep. He noticed E getting underneath the blankets. She was pointing a finger at her mouth and saying he should keep quiet and that they should 'sleep'. She had kissed him and he reminded her about his HIV status as he did not have a condom. She asked him to make an arrangement, and he told her that he would only insert his penis between her thighs. They had then had sexual intercourse while they lay on their sides and he had ejaculated in his underpants, not between her thighs. They had slept and everything had been normal the next day, when he had been arrested.

[34] Mr Tshoba said that E was not a person who could not speak, but she did speak on a 'stop and go' basis, but audibly and understandably. Her words would occasionally be cut off. She did have anger issues and would use swear words. He expressed incredulity at the notion that he had never had a conversation with E, considering that they had been in each other's company for an eight-month period. He could not comprehend the case against him. Mrs M [....] had only visited the neighbours to discuss E's condition after the incident.

[35] Mr Tshoba could not explain why he had not disputed the evidence that Mrs M [....] had explained E's condition to her neighbours upon E's arrival, that E had been rude to him on occasion, that LM had heard her scream, called out his name and asked him to let go of her or that E had fallen asleep first. He suggested that it was their words of affection for one another that may have woken the children. He also said that Mrs M [....] had asked him to stay over when she was away.

[36] Mr Tshoba denied having made up and down movements on top of E. They had been laying on their sides and he had 'penetrated' between her thighs. They had made love and may have been heard while they expressed those feelings. E had never said that he should leave her alone or let go of her. This was confirmed by the

fact that E had not left her spot sleeping in the kitchen until the next morning. Had Ms S [...] heard this, it was implausible that she would not have reported a rape to someone. They had woken the next morning without any indication that a visit to the police station was necessary.

[37] Mr Tshoba, in response to questions from the court, said he had been in a secret relationship with E since September. She had visited his home frequently and wished to take the affair further. They had behaved as a couple in public. He had been shocked when she had joined him in bed on the night in question and believed that the complaint to the police had been motivated by Mrs M [....].

Analysis

[38] The vulnerability to and prevalence of rape and other forms of violence against women and girls with disabilities has been the subject of a number of studies, and remains an issue of great concern.²⁰ One study has indicated that individuals with intellectual disabilities are four to ten times more likely to be sexually abused than non-disabled persons.²¹

[39] It must be accepted that Mr Tshoba and E had sexual intercourse. Dr Lee's evidence, although not unequivocal, coupled with the observations of LM, who testified credibly, convince me of that. Given the testimony of Dr Andrews, I accept that E is a person with a mental disability, as defined in the Sexual Offences Act, so that she was unable to consent to sexual intercourse, given the definition of that notion in the legislation. Mr Tshoba is accordingly unable to rely on consent as a defence to the charge. It may also be accepted, based on the evidence adduced by Dr Lee and Dr Andrews, that his conduct was unlawful, on the basis that a reasonable person in his position would, objectively, not have acted in the same way.

²⁰ D Msipa 'How assessments of testimonial competence perpetuate inequality and discrimination for persons with intellectual disabilities: An analysis of the approach taken in South Africa and Zimbabwe' (2015) 3 *African Disability Rights Yearbook* 63-90 at 63,64.

²¹ *Id.*

[40] But that is not the end of the matter. Mr Tshoba may escape liability on the basis of an absence of knowledge of the unlawfulness of his conduct. He would then lack the requisite fault in the form of intention for a conviction. To do so, he must have honestly believed that E had the necessary capacity and was in fact consenting, even though he may have been mistaken as to that belief. Such a defence may, however, be negated by drawing inferences from objective facts which indicate the contrary.

[41] LM was a single child witness to the sexual intercourse. Typically for a child aged only 13, she appeared to be innocent of precisely what she was observing in the kitchen. For example, she described what she had seen as 'up and down movements' rather than drawing the conclusion that she had been observing sexual intercourse. She demonstrated a clear recollection of the events she had observed, testifying honestly, clearly and in a forthright manner, albeit with minimal detail. E had cried out. The kitchen was close to the bedroom and LM and N heard the cry, left the bedroom and observed what was occurring. She had observed Mr Tshoba on top of E, making up and down movements.

[42] As to the nature of the cries and her testimony about what she had heard E say, this evidence must be treated with the necessary caution.²² The reasons for this are well known, including the imaginativeness and suggestibility of children, which requires an appropriate measure of caution.²³ While she provided a useful account of events, her evidence was not without blemish, as may be expected of a child her age testifying about events which occurred some months previously. At one point she testified in a manner which suggested that the up and down movements had continued even when Ms S [...] entered after knocking, which is improbable considering all the evidence. She conceded that this was not the case during cross-examination. Mr Tshoba and E were sleeping quietly when Ms S [...] entered.

[43] In addition, LM had fallen asleep and been woken by the sound of E's cries. Applying the necessary level of caution, it appears as if LM may have conflated

²² *S v Manda* 1951 (3) SA 158 (A) at 162E-163F.

²³ *Id.* Also see *S v Webber* 1971 (3) SA 754 (A) at 758.

aspects of what she observed when testifying. Her major recollection was of observing the up and down movements, having been woken up and drawn to the kitchen by the 'cries'. The nature and extent of those 'cries' is uncertain, as is whether she in fact observed any up and down movements accompanied by these 'cries'.

[44] Whether because she sensed the children's presence or otherwise, I accept that E communicated to Mr Tshoba that he should cease, but not repeatedly so or in a manner that caused LM to be concerned about her safety. This partly explains why she failed to make any report about what she had seen or heard to Ms S [...], when she returned to the dwelling. I accept that she would have experienced some level of discomfort based on what she had seen and heard.

[45] I also accept LM's testimony that Mr Tshoba, who was under the influence of alcohol, had asked E to accompany him to purchase more beer, that E had fallen asleep in the kitchen before him when they returned after some time, so that he joined her in bed, and that he had offered LM money for her silence the following morning. She was, however, mistaken in believing that E had not consumed any alcohol that evening.

[46] By contrast, Ms S [...] did not impress me with her recollection of events. She appeared over-eager to testify in a manner that would secure a conviction, implausibly seeking to explain away her own inaction at the time. I am particularly unconvinced that she had heard E crying or telling Mr Tshoba to leave her alone. This is because I accept LM's version that, having heard E cry out and seen them having sex, she and N had returned to the bedroom. Ms S [...]’s knocks, which drew them out of the bedroom again to answer the door, occurred later, and the probabilities favour that Ms S [...] had not heard anything outside the door or upon entry into the home. She accepted that it was quiet when she entered and that she had heard no noise from Mr Tshoba or E until she went to bed.

[47] This would explain her subsequent inaction. While she may have been surprised to see Mr Tshoba sleeping with E, so that she contacted Mrs M [...] telephonically to report this, her belated suggestion that she had reported to Mrs M

[....] hearing E cry or indicate that she wished to be left alone was contrived. The probabilities do not support this version, particularly when considering Mrs M [....]'s recollection of what Ms S [....] had communicated to her telephonically, which made no mention of this aspect.

[48] Ms S [....] knew that Mr Tshoba and E had sexual intercourse upon entering the house and before going to sleep, despite LM not making any report to her about this upon her re-entry into the home. Mrs M [....] recalled Ms S [....] telling her this telephonically during the early hours of the morning. Ms S [....]'s evidence that she had tried to wake the grandfather, was fearful or paralysed with shock or had attempted to wake the owner of the property before going to bed, cannot be accepted and appears to be a fabrication.

[49] As for Mrs M [....], despite various opportunities to provide a clear answer for the reason she was shocked to hear that E and Mr Tshoba had had intercourse, her discomfort was clearly not based on E's mental condition but on various other considerations:

'Mr Mgenge: Was it strange that he slept over?

Mrs M [....]: I was shocked and not okay after hearing that.

Mr Mgenge: Why did this shock you?

Mrs M [....]: He knows the complainant is my blood. I know that he is HIV positive. Like me, when I use my medication he would ask for a tablet to use.

Mr Mgenge: You were shocked?

Mrs M [....]: [Yes], because he never slept over at my place – that never happened.

Mr Mgenge: You were shocked about him having sex with the complainant?

Mrs M [...]: I was shocked when I heard that he made her to drink liquor.

Mr Mgenge: Listen to the question ...

Mrs M [...]: I was shocked because he made her to drink liquor and had sex with her and he [has] nothing to do with the complainant because they never spoke to one another ...'

[50] Mrs M [...]'s testimony about what occurred at the police station vacillated. Her initial version, that much of what had been said to the police was spoken by LM, was gainsaid by LM's own testimony, which made it clear that E had been the one to tell the police what had occurred. She later testified that E could not recall anything that had happened to her that evening, which is inconsistent with the testimony of LM and Ms S [...]. She eventually conceded that E had told the police what had occurred when the matter was reported. On that day she had remembered a great deal of what had occurred, but subsequently, according to Mrs M [...], lost that recollection. Even though uncontradicted, these shortcomings and the manner in which she testified affect the assessment of Mrs M [...]'s testimony about what precisely she had communicated to Mr Tshoba about E's condition prior to the incident, and what it was that he would 'forget' when engaging with her in Mrs M [...]'s presence.²⁴ Her evidence was too vague and contradictory to serve as sufficient proof, on its own, that Mr Tshoba foresaw the possibility that E could not consent to sexual intercourse.²⁵

[51] Considering the totality of evidence, it may be accepted that it was Mr Tshoba who offered E alcohol to drink, and that she eventually accepted and drank with him. It may also be accepted that they left the home together for a period of time in excess of an hour, after he requested her to accompany him, continuing to drink upon their return. E was consequently under the influence of alcohol by the time she went to sleep. Ms S [...], who was sober, was aware that E was drinking and may have expressed some concern at some point during the evening. It may be accepted

²⁴ See *Katz v Bloomfield and Keith* 1914 (TPD) 379 at 381.

²⁵ See *Shenker Bros v Bester* [1952] 4 All SA 64 (A); 1952 (3) SA 664 (A) at 670F-G. Also see *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 558H; *Pullen v S* 2019 (2) SACR 605 (ECG) para 14.

that she had been left in charge of the household during Mrs M [...]’s absence, prompting her call to Mrs M [...] when she observed Mr Tshoba sleeping with E in the kitchen later that night. Nevertheless, she ultimately did not stop E drinking or accompanying Mr Tshoba when he had left the home to buy more alcohol. Their lengthy absence would have also been noted by Ms S [...], who observed their continued drinking upon their return.

[52] As indicated, the state must prove beyond reasonable doubt that Mr Tshoba had the necessary *mens rea*, in that he did not honestly believe that E could consent and had consented. It would suffice to show that Mr Tshoba foresaw the possibility that E lacked the capacity to consent or was not consenting and nevertheless proceeded to have intercourse with her. It must be noted that the subjective test for intention may be satisfied by inferential reasoning:²⁶

‘In attempting to decide by inferential reasoning the state of mind of a particular accused at a particular time, it seems to me that a trier of fact should try mentally to project himself into the position of that accused at that time. He must of course also be on his guard against the insidious and subconscious influence of *ex post facto* knowledge.’

[53] Courts must, however, exercise caution against drawing the inference of subjective foresight too easily:²⁷

‘The court should guard against proceeding too readily from “ought to have foreseen” to “must have foreseen” and thence to “by necessary inference in fact foresaw” the possible consequences of the conduct being inquired into. The several thought processes attributed to an accused must be established beyond reasonable doubt, having due regard to the particular circumstances which attended the conduct being inquired into.”

[54] Holmes JA expressed the degree of proof in the following terms in *Sigwahla*:²⁸

²⁶ *S v Mini* 1963 (3) SA 188 (A).

²⁷ *S v Bradshaw* 1977 (1) PH H60 (A).

²⁸ *S v Sigwahla* 1967 (4) SA 566 (A) at 570.

‘Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did do so.’

[55] Courts have consistently emphasised that any inference of guilt that is drawn can only be drawn if it is the *only* inference that can reasonably be drawn from the proved facts or evidence. The evidence must be examined as a whole by the trial court and if there is credible evidence sufficient to create a reasonable doubt in favour of the accused, he must be given this benefit.²⁹ There is no onus on Mr Tshoba to convince the court of the truth of his explanation and he should be acquitted if there exists a reasonable possibility that his evidence may be true.

[56] It is immediately apparent, when considering the evidence as a whole, that E’s mental disability is of a more subtle kind that might be assumed given the stark conclusions emanating from the report containing the psychological assessments. The related evidence highlighted the low mental age of the complainant and conveyed the impression that she required constant assistance in order to function. While E did not testify, various pieces of evidence emanating from other witnesses who did so convey a more nuanced sense of her level of functioning.³⁰ This is relevant in considering whether there were objective facts from which an inference that Mr Tshoba possessed subjective foresight may be drawn, and whether the state has proved its case. The court must also be careful of inferring, *ex post facto*, knowledge on the part of Mr Tshoba on the basis of Dr Andrews’ testimony, particularly when considering that the lay witnesses who testified on behalf of the state were far less unequivocal about the nature of E’s condition.

²⁹ See Burchell n 7 at 360.

³⁰ See *S v N* 1979 (4) SA 632 (O) at 634.

[57] It must be accepted that E was able to make a statement to the police about what had transpired unassisted, and that she had told the police a version of events. Leaving aside the statement itself, this is apparent from the evidence of LM and Mrs M [...]. The police accepted E's statement based on what she told them. Only later was it suggested that she be referred to a psychologist for assessment, seemingly after various interactions with the police, suggesting that at least her initial interaction with them, which involved using words to describe what had occurred to her, did not immediately alert them to the fact that she was a person with a mental disability.

[58] Dr Lee could not recall whether and to what extent Mrs M [...] had assisted E when she had been examined by him. Given the extent of his recollection of his examination of E, including difficulties experienced due to language, it must be accepted that he would have been able to recall had the information he obtained, including the relevant medical history, emanated from Mrs M [...].

[59] The impression conveyed by Ms S [...] and Mrs M [...] focused on her rudeness and anger, her forgetfulness and unusual speech. As already indicated, I accept that, based on these factors taken in combination with her physical disability, a reasonable person would have realised that E was a person with a mental disability. Yet the two adults who know Mr Tshoba and who testified made statements that suggest that his level of understanding about her mental condition was less certain and was inconsistent.

[60] Ms S [...], while of the view that E could not have a boyfriend because of her condition, stated that Mr Tshoba might not have known this. She had known him for a period of four years. She added that E had known what had transpired when she spoke to her the next day, when E had experienced a dizzy head. This is consistent with E's ability to have recalled what had occurred, even though she may have been under the influence of alcohol, and to talk about this to the police and Dr Lee.

[61] Mrs M [...] had considered it necessary to tell her neighbours about E's condition, suggesting that her mental disability was not automatically apparent to all who would come across her. She had warned Mr Tshoba, but seemingly with an emphasis on E's rudeness, and conceded that he 'would sometimes forget' what she

had warned him, particularly when drinking or when he sent the children for cigarettes. E would then swear at him. As far as LM was concerned, there was no reason why Mr Tshoba could not be E's boyfriend.

[62] The circumstances surrounding E's visit to the police station must also be taken into consideration. On Mrs M [...]’s version, which I accept on the point, this only occurred during the afternoon of the day after the incident. E had not immediately woken up and reported that she had been raped.³¹ It is so that in criminal proceedings involving the alleged commission of a sexual offence, a court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.³² It must, however, be accepted that, despite being a person with a mental disability, she was mentally able to do so and in fact did so sometime later, also recalling at least aspects of what had occurred when being examined by Dr Lee. The report occurred only when Mrs M [...] returned from her trip that afternoon. This is similar to Ms S [...]’s version that E decided to go to the police station only when she was told that Mrs M [...] had almost reached home. This accords with Mr Tshoba's version that the complaint was motivated by her fear of Mrs M [...]’s reaction to what had occurred.

[63] It is also necessary to consider Mr Tshoba's evidence as part of determining the key issue. At times he provided an unreliable account of what occurred, ultimately suggesting a fanciful longer-term, semi-public love relationship with E which cannot be accepted. He vacillated from accepting that he had had sexual intercourse with E, and repeatedly referring to their love-making, to suggesting that he had placed his penis between her thighs. He then claimed to have ejaculated in his underpants, a claim which must be rejected.

[64] Other parts of his testimony were, however, believable. I accept that Mr Tshoba would have conversed with E on occasion prior to the incident, given that he frequented Mrs M [...]’s home, where she resided. His incredulity at the suggestion that they never conversed was, in my view, genuine. Given that I accept that E,

³¹ Cf *S v McLaggan* [2012] ZAECHGHC 63 para 133.

³² S 59 of the Sexual Offences Act.

based on Mrs M [...]’s testimony, was able to have a conversation about menstruation, and seemingly able to make her own decision to take medication to prevent this, and was able to provide an account of an alleged rape to the police, and, in more truncated fashion, to Dr Lee, I also accept that their conversation may, at some point, have turned to Mr Tshoba’s relationships, as he suggested. He also testified openly about E’s anger issues and the shortcomings he had observed with her speech, also during cross-examination, adding that what she said was nevertheless understandable. This is consistent with E being able to make a statement to the police unassisted.

[65] Mr Tshoba ultimately acknowledged that he had gone to sleep when he was feeling drunk and that E had also been under the influence of alcohol. The probabilities favour that he offered E alcohol, that she drank for the first time, that he asked her to accompany him to purchase additional alcohol, and that she fell asleep first after they had returned and consumed more alcohol. I accept that sexual intercourse subsequently took place, and, based on the medical report, that E had been a virgin. As is so often the case in sexual offence-related matters, events in question were seemingly driven by alcohol.

[66] An accused person is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt. He must be acquitted if it is reasonably possible that he might be innocent. In analysing the evidence and reaching a conclusion, this court is obliged to account for all the evidence.³³ The SCA has favoured an approach which involves a detailed and critical examination of each and every component in a body of evidence. But once that is done, it is necessary to step back and consider the picture as a whole.³⁴

[67] Importantly, it is well established that a court does not have to be convinced that every detail of an accused’s version is true. The court is also obliged to make due allowance for reasons why Mr Tshoba may have dishonestly denied certain

³³ *S v Van Aswegen* [2001] JOL 8267 (SCA); 2001 (2) SACR (SCA).

³⁴ *S v Mbuli* 2003 (1) SACR 97 (SCA) para 57.

facts.³⁵ In particular, I am alive to the possible reasons for his dishonesty in respect of actual sexual penetration, when considering his admitted HIV-positive status. It has been held that mendacious evidence cannot supplement gaps in the state case and, on its own, justify a finding of guilt.³⁶ If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version.³⁷ An accused's version may only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.³⁸

[68] Considering the evidence as a whole, I am unconvinced that the state has proved beyond reasonable doubt that Mr Tshoba subjectively foresaw the possibility that E lacked the capacity to consent or was not consenting during the time that sexual intercourse took place. In the circumstances, he ought reasonably to have done so. Even if, on the probabilities, he probably did foresee that possibility, that is not the test to be applied and there is a reasonable possibility that subjectively he did not foresee that possibility at the relevant time. Put differently, there is sufficient doubt in my mind, based on the evidence presented, that he did not foresee the possibility that E lacked capacity to consent. The nature of his evidence, suspicious as it is, does not change that.³⁹ In coming to this conclusion, the evidence of E's level of functioning in general, the events of the night in question, E drinking alcohol and accompanying him for an extended period out of the house, their return and resumption of drinking, the evidence of what transpired during the time of intercourse and immediately thereafter, including the limited evidence as to the nature and extent of the sounds heard by LM, the quality of the testimony of Ms S [...] and Mrs M [...], as well as the context of E's reporting of the incident to the police, have all

³⁵ *S v Mtsweni* [1985] 3 All SA 344 (A) at 345 - 346; 1985 (1) SA 590 (A) at 593D – 594G. Mendacious evidence or a false statement does not always justify the most extreme inference, and the following factors must be taken into account: a) the nature, extent and materiality of the lies, and whether they necessarily indicate a realization of guilt; b) the accused's age, level of development, cultural and social background and status insofar as they can explain his lies; c) possible reasons why people resort to lies, for example, that in certain circumstances a lie may sound more acceptable than the truth; d) the tendency in some cases for a person to deny the truth because of a fear that he may become involved in an incident or crime or because of a fear that an admission of his involvement in an incident or crime, however slight, carries the danger of an inference of guilt out of all proportion to the truth.

³⁶ *S v Mtsweni* id.

³⁷ *S v Shackell* 2001 (2) SACR (SCA) at 194g – i.

³⁸ Id.

³⁹ *R v Churchill* 1959 (2) SA 575 (A) at 578E – I.

been considered and weighed, together with the strengths and weaknesses of Mr Tshoba's evidence. I have also considered Dr Lee's report that, although this is not decisive given the nature of the human body, there were no overt signs of rape or of forceful penetration.

[69] It may be accepted that Mr Tshoba became concerned, in the cold light of day, as to how the events of the previous evening would be perceived, prompting him to suggest a bribe to LM, and to fabricate aspects of his relationship with E during his testimony. But that conduct, when considered together with the other available evidence, is insufficient to result in the conclusion that he did not honestly believe that she had the capacity to consent and was consenting the previous night. It follows that I am of the view that the inference of his subjective foresight that the state seeks to draw is not the only inference that can be drawn from the proved facts. There is sufficient credible evidence that has emerged to create a reasonable doubt, which must, in terms of our system of justice, operate in favour of Mr Tshoba, and which justifies an acquittal.

[70] A final issue may be noted. Msipa has noted that the testimonial competence of witnesses with intellectual disabilities is frequently challenged because of a misconception that their disability makes them incompetent and unreliable witnesses, adding the following:⁴⁰

‘A finding of incompetence means that the complainant does not get to testify or that the court does not accept her testimony, without which the chances of a successful prosecution may be seriously compromised.’

[71] Msipa concludes that the provision of accommodations is the best method of addressing the problems associated with the traditional approach to testimonial competence that is taken in South Africa. The learned author proposes that assessments to do with testimonial competence should be concerned with asking what supports an individual may require in order to participate effectively and on an equal basis with others, as opposed to merely assessing whether or not that

⁴⁰ Msipa n 20 at 64.

individual is competent to testify.⁴¹ This argument is premised on the Convention on the Rights of Persons with Disabilities (CRPD) and its extension of the definition of discrimination to include the denial of reasonable accommodations.⁴² The author proposes an approach designed to ensure that the witness is properly accommodated to enable them to tell their story in court.⁴³ Perhaps more controversially, she also questions whether there is still a place for assessments of competence.⁴⁴

[72] In *S v Katoo*,⁴⁵ the SCA considered the capacity of a person with the mental age of a four-year-old child to testify, in the context of s 194 of the Criminal Procedure Act, 1977 ('the Act').⁴⁶ The court concluded that the person did not fall within the ambit of s 194 and had been competent to testify, and noted that it was the duty of the trial court to conduct an inquiry in order to decide on the issue of competence when this is raised.⁴⁷

[73] More recently, the SCA, with reference to *Katoo*, held as follows in *Haarhoff*:⁴⁸

"In the past courts in this country have permitted persons suffering from mental disorders as well as imbeciles to testify subject to their being competent to do so ... That approach is in harmony with the presumption contained in s 192 to the effect that every person is a competent witness."

[21] It is therefore clear from that dictum and the cases cited therein that the law applicable in this country before 30 May 1961 did not equate a person's infirmity of mind with incompetence to testify in court.'

[74] While expert evidence about a witness's competence to testify may be decisive, it is the court that must ultimately decide that issue, and not the parties.

⁴¹ Id at 65, 66.

⁴² CRPD, art 2.

⁴³ Msipa n 20 at 74.

⁴⁴ Msiba n 20 at 90.

⁴⁵ *S v Katoo* 2005 (1) SACR 522 (SCA).

⁴⁶ Act 51 of 1977.

⁴⁷ *Katoo* n 45 para 12. *Haarhoff & Another v Director of Public Prosecutions, Eastern Cape* [2018] ZASCA 184 para 17.

⁴⁸ *Haarhoff & Another v Director of Public Prosecutions, Eastern Cape* [2018] ZASCA 184 para 17.

This is self-evident when considering s 193 of the Act, read with s 194A(1). As the SCA explained in *Katoo*, the court may do so by way of an enquiry whereby medical evidence on the mental state of the witness is led or by allowing the witness to testify so that the court can observe him or her and form its own opinion on the witness's ability to testify.⁴⁹ Parties to criminal proceedings should be careful to proceed as if the nature of an expert report is automatically determinative of the point. There also appears to be merit in the suggestion, drawn from the CRPD, that expert competence assessments should at least consider, as part of the report presented to court, whether any reasonable accommodations might assist a person with a mental disability to the extent that they would be able to tell their story personally in court. Their participation in court proceedings, in appropriate cases, should be facilitated in the interests of justice.

Order

[75] The accused is found not guilty of the charge of rape.

A GOVINDJEE

JUDGE OF THE HIGH COURT

Heard:10-11&19-20 October 2022

Delivered:12 December 2022

Appearances:

For the State: Adv S Mgenge
 Director of Public Prosecutions
 Makhanda
 046 602 3000

For the defence: Mr V Sojada

⁴⁹ *Katoo* n 45 para 12.

Legal Aid South Africa

Makhanda

046 636 9350