



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

CASE NO: CC19/2025

In the matter between:

THE STATE

and

SIBUSISO MBALI

JUDGMENT

Krüger AJ

The charges

[1] The accused was charged with raping¹ Y.... R, aged 17, on 27 December 2023 at the house of Athenkosi Tshete in the East Bank, on the outskirts of East London. The accused pleaded not guilty to the charge and maintained that he had sexual intercourse with the complainant with her consent.

¹ As prohibited in terms of section 3, read with section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

[2] The accused also faced a second related charge of trafficking in persons as prohibited in the Prevention and Combatting of Trafficking in Persons Act 7 of 2013. The prosecution set out to prove that the accused paid money to Tshete to have sex with the complainant, then Tshete's girlfriend. He pleaded not guilty to this charge.

[3] The defence and the prosecution were in agreement that an acquittal on the rape charge would necessarily mean that the accused should be acquitted on the trafficking charge.

[4] The Prevention and Combatting of Trafficking in Persons Act prohibits trafficking in persons in broad terms. Section 4(1) reads:

'4 Trafficking in persons

(1) Any person who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic, by means of-

(a) a threat of harm;

(b) the threat or use of force or other forms of coercion;

(c) the abuse of vulnerability;

(d) fraud;

(e) deception;

(f) abduction;

(g) kidnapping;

(h) the abuse of power;

(i) the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or

(j) the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage,

aimed at either the person or an immediate family member of that person or any other person in close relationship to that person, for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons.'

It defines 'exploitation' to include 'sexual exploitation' and defines the latter to mean:

'the commission of-

(a) any sexual offence referred to in the Criminal Law (Sexual Offences and Related Matters) Amendment Act; or

(b) any offence of a sexual nature in any other law.'

(Emphasis added)

[5] It thus follows, as counsel submitted, that a finding that no sexual offence took place necessarily means that no sexual exploitation took place, thus not meeting the definitional standard. Accordingly, where an accused facing both charges is acquitted on the rape charge, an acquittal on the trafficking charge must follow. I thus consider the rape charge in the first instance.

The legal framework

[6] Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act confirms the common law position, namely that the absence of consent is a material element of the offence of rape. Section 1(2) clarifies that 'consent' as used in section 3, means 'voluntary or uncoerced agreement'. Section 1(3) further elaborates thereon by providing examples of circumstances under which consent is absent, incorporating aspects which reflect the power dynamics often relevant in rape cases:²

'(a) Where B (the complainant) submits or is subjected to such a sexual act as a result of-

(i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or

(ii) a threat of harm by A against B, C or D or against the property of B, C or D;

² DK Phelps, D Smythe and J Omar 'Section 3: Rape' in D Smythe and B Pithey *Sexual Offences Commentary* (RS 2 – 2019) Ch2-p9.

- (b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;
- (c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that-
 - (i) B is committing such a sexual act with a particular person who is in fact a different person; or
 - (ii) such a sexual act is something other than that act; or
- (d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act-
 - (i) asleep;
 - (ii) unconscious;
 - (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgement is adversely affected;
 - (iv) a child below the age of 12 years; or
 - (v) a person with a mental disability.'

[7] The presence or absence of consent is a question of fact that must be determined on the evidence presented. It is the evidence that must be weighed to determine whether the complainant simply submitted to the accused or whether she actively consented. In *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko*,³ the Supreme Court of Appeal confirmed that mere submission⁴ or the lack of active resistance⁵ does not mean that a complainant consented to sexual intercourse. Whether the complainant's acquiescence was the result of force, intimidation, threats of harm or abuse of power is similarly a matter of evidence.⁶

[8] Rape is a crime that can only be committed with intention i.e. *mens rea*.⁷ The State is required to prove both a form of intention⁸ and knowledge of unlawfulness

³ 2024 (2) SACR 113 (SCA) paras 55-56.

⁴ *R v McCoy* 1958 (2) SA 4 (SR) 9H-10H.

⁵ *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko* para 69; *S v S* 1971 (2) SA 591 (A) 596E-H.

⁶ See Phelps, Smythe and Omar *Sexual Offences Commentary* Ch2-p8 – p13.

⁷ *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko* para 62.

on the part of the accused.⁹ Where an accused person *bona fide* (i.e. honestly and sincerely) but mistakenly believed that the complainant consented to sexual intercourse, that may vitiate *mens rea* and justify the acquittal of the accused.¹⁰

[9] It is not necessary for the State to prove that the accused had the direct intention to have sexual intercourse with the complainant without her consent. Where the state proves intention in the form of *dolus eventualis* beyond a reasonable doubt, the accused must be convicted. This requires the prosecution to prove that the accused subjectively foresaw the possibility that the complainant did not consent to the sexual intercourse, yet proceeded despite his foresight. His lack of foresight will not result in an acquittal where a reasonable person, in the circumstances, would have realised the possibility of non-consent.¹¹

[10] The State must prove its case beyond a reasonable doubt. Nugent J in *S v Van der Meyden*¹² explained:

‘The *onus* of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, *R v Difford* 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will

⁸ I.e. *dolus directus* or *dolus eventualis*.

⁹ *R v K* 1958 (3) SA 420 (A) 421F. See also *Bridgman NO v Witzenberg Municipality (JL and Another Intervening)* 2017 (3) SA 435 (WCC) para 14.

¹⁰ Wessels CJ in *R v Mosago* 1935 AD 32 at 35 held: This is our law, for we do not punish a man for a crime where he has no *mens rea*, and if a woman by her actions induces a man to believe that she is willing to have carnal connection with him and he acts on such inducements, he cannot be said to have had a *mens rea* or an intention to ravish her. English judges have expressed a similar view in regard to English law. I need only refer to the following cases *R v Young* (38 L.T. 540), *R. v Flattery* (13 Cox C.C.). It merely comes to this that the consent of a woman can be inferred from her acts, and if her acts induce the accused honestly to believe that she consents then he has no *mens rea*, and if he has connection with her he is not guilty of rape. See also J Burchell *South African Criminal Law and Procedure: Vol I: General Principles of Criminal Law* 5th ed (2016) 414-415.

¹¹ *Director of Public Prosecutions, Eastern Cape, Makhandu v Coko* para 62. See also PJ Schwikkard 'Rape: An unreasonable belief in consent should not be a defence' (2021) SACJ vol 34(1) 76 at 82 quoted with approval in *S v Thsoba* 2023 JDR 0045 (ECMA) para 5. See also Burchell *South African Criminal Law and Procedure* Chapters 26 and 28.

¹² 1999 (1) SACR 447 (W) 448F-G.

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.'

[11] Brand AJA in *S v Shackell*¹³ summarised the standard thus

'It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can 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.'

[12] The standard must be applied in relation to holistic assessment of all the evidence presented. In *S v Chabalala*¹⁴ the Supreme Court of Appeal explained:

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

It is against this standard that the evidence must be considered.

The evidence

¹³ 2001 (2) SACR 185 (SCA) para 30.

¹⁴ 2003 (1) SACR 134 (SCA) para 15.

The complainant's testimony

[13] The complainant testified that she was assaulted and raped earlier on 27 December 2023 by her boyfriend, Atenkosi Tshete, who also forced Asipe Zathu to rape her. Tshete told her that he was going to sell her to all his friends who came to his house. At the time this took place, the accused was not present.

[14] The complainant was in bed at Tshete's home when the accused knocked on the door. Tshete opened the door for him, and the two of them had a conversation in the lounge, which she did not overhear.

[15] The accused then came into the room and asked her what was wrong. She told him that Tshete assaulted her.

[16] The accused then told her that he gave Tshete money. He came up to the bed. He forced himself on her, penetrating her vagina with his penis. He told her that he was getting what he paid for.

[17] The complainant testified that she told the accused to stop and physically resisted, but that he held her by her arms as he raped her.

[18] However, in cross-examination, the complainant said that it was possible that the accused thought she consented to having sex with him. She added that he was not aware that she did not like it, as he did not know she was injured. She agreed that he only saw her injuries at his house, as there was no light at Tshete's house.

[19] Mr *Mgenge*, in re-examination, questioned the complainant about her concession that the accused could possibly have thought that she consented. In response, she recanted and insisted that she verbally told the accused that she did not want to have sex with him and that she physically pushed him away. Therefore, she stated, he knew that she did not consent.

[20] The complainant explained that the accused stopped having intercourse with her when he noted that she was bleeding from a wound on her head. It was at that point that she told him that Tshete assaulted her. The accused then asked her whether she wanted to get away from Tshete's house, and she agreed.

[21] The complainant also testified that Tshete smoked the drugs he purchased when he came home. He then instructed the complainant to go with the accused to charge his phone at the latter's home.

[22] The complainant and the accused left Tshete's home. In cross-examination, the complainant conceded that the accused told her to go home after they left Tshete's house, but that she told him that she was scared that Tshete would follow her and that she wanted to go to his house.

[23] At the accused's home, he prepared food for her, boiled water for her to wash, and gave her painkillers, thus taking care of her.

[24] The complainant told the accused that she was tired, and he told her to sleep in the bed. He went to sleep on the couch.

[25] The complainant further testified that she was sleeping when the accused came into the room and forced her to have sexual intercourse with him. Since he was not charged with raping the complainant at his home, I do not elaborate on her evidence in this regard.

[26] The complainant testified that the accused then heard someone at the gate of his house and left her in the room to investigate. Tshete was outside the accused's house and shouted for the complainant to come out. Tshete threw something at a window. In cross-examination, the complainant agreed that the accused chased Tshete from his home with a spade, thus protecting her.

[27] The next morning, the accused told the complainant that she should go to the clinic, and he accompanied her to the clinic. In cross-examination, the complainant conceded that she asked the accused what she should say at the clinic as they

made their way to the clinic. He told her to tell the truth. In re-examination, she explained that she asked him what to say because she was still confused.

[28] At the clinic, the complainant told the nurse what happened to her and the police came to the clinic. The complainant then told the police that Tshete, Asipe Zathu and the accused raped her. The complainant and the accused were taken to the police station, where the accused was arrested.

Tshete's testimony

[29] Athenkosi Tshete was the second witness for the prosecution. He admitted to raping the complainant twice on the day, to forcing Asiphe Zathu to rape her, to assaulting her with balled fists, to suffocating and to drowning her. He explained that he was infuriated by what he was told about the complainant, his girlfriend. He conceded that he told the complainant that he was going to sell her to all his friends.

[30] Tshete testified that the accused arrived at his house while he and the complainant were in the dark bedroom in bed. He asked the accused what he was doing, walking around so late, and then suggested to him that he *knew* what the accused wanted, i.e. someone to sleep with and something to smoke. In cross-examination, he agreed that the accused told him that he was looking for Tshete's brother.

[31] Tshete testified that he told the accused in the presence of the complainant that he could have what he wanted (i.e. sex) if he gave Tshete R 20. He told the accused that he was making the complainant available. Tshete stated that the complainant tapped him on the arm and said 'no, no, I do not want to have sex with anyone'. In Tshete's view, the accused must have heard the complainant as he was in the room when she said this.

[32] Tshete's evidence was that the accused gave him R 12, and Tshete got up, dressed and left the house. As he left, he said that he was getting something for them to smoke.

[33] Tshete did not hear the accused asking the complainant whether he could have sex with her and added that it could have happened later. He testified that he reassured the accused that he was going to get what he wanted. He explained in court that he knew that the complainant would comply, as she was scared of him.

[34] When Tshete returned to his house, the complainant was finishing getting dressed. He asked the accused whether everything was fine, i.e. whether he had intercourse with the complainant, to which the accused responded in the affirmative.

[35] In cross-examination, he agreed that he and the complainant smoked the Mandrax that he bought together. They offered to share this with the accused, who rejected the offer.

[36] Tshete agreed that the accused convinced him to let the complainant go with him to have his phone charged, the promise of food, and the undertaking that the accused would pay him R 50 in order for the latter to take the complainant to his house to have sex with her. He was of the view that the accused and the complainant would come back to his house.

[37] The witness further testified that he went to the accused's home to look for the complainant when a long time had passed without them returning. He went to the house to fetch the complainant, but was unable to do so since the accused chased him away.

The accused's testimony

[38] The accused testified in his defence. He went to Tshete's home, looking to find his friend Tshete's older brother, his friend.

[39] He arrived at the house and knocked. He was invited inside and found no one in the lounge. He was called to come to the bedroom where he found Tshete and the complainant in the bed. The room was dark.

[40] Tshete asked him what he was doing walking around so late and then asked him if he wanted 'some vagina'.

[41] The accused indicated that he was interested. Tshete then told him that he had to give him R20 in exchange for sex with a woman. The accused asked him a second time to check whether that was indeed the case.

[42] The accused then went home, searched around for money and found R 12. He went back to Tshete's house and entered without knocking, going back into the bedroom.

[43] The accused said that he only had R 12. He testified that he heard Tshete and the complainant mumbling softly together. Tshete got out of bed and told the accused that it was 'all right'.

[44] The accused asked whether the complainant was consenting. Tshete assured him that she was willing. The accused then asked again and addressed the complainant directly, asking her if she consented. She responded in the affirmative.

[45] The accused then handed the money to Tshete after he had her consent. Tshete left the house.

[46] Thereafter, the accused opened the curtain and a window and turned to the bed where the complainant was lying on her right side, facing the wall.

[47] The accused then pushed his trousers down and got onto the bed behind the complainant. Before he touched her, he said to her that he was ready. She then turned on her back, drew her knees up and opened her legs. The accused got on top of her and had sexual intercourse with her. She did not tell the accused to stop or physically try to stop him. The accused explained that the complainant actively assisted and participated in the sexual intercourse, and that she moaned pleasantly before he ejaculated. This further indicated to him that she consented.

[48] The accused conceded that he did not have the presence of mind to think that she only agreed because she was forced by Tshete to agree or that his intercourse with her was in any way exploitative of her as a vulnerable person. The accused explained that transactional sex, such as what he and the complainant engaged in, is commonplace in his neighbourhood. People would sell their bodies to get money for drugs, such as the complainant did or for other benefits, such as accommodation.

[49] After they had sex, the accused lay next to the complainant on the bed and asked her whether she was okay. He did so to find out whether the sex was okay for her, or whether she wanted to have sex again. After first saying she was fine, she said that she was not fine and that Tshete had assaulted her earlier and abused her to the point where she thought he wanted to kill her.

[50] The accused wanted to help her escape Tshete's house and thought of plan to get her out of the house. The complainant was scared, but she dressed herself and prepared to leave.

[51] Tshete arrived back and asked the accused whether everything was fine (in reference to having had intercourse with the complainant) and the accused said that everything was fine.

[52] The complainant and Tshete then smoked the Mandrax tablets, which Tshete bought while he was out.

[53] The accused then offered Tshete R 50 to take the complainant to his home and explained that it was to have sex with her at his place. The accused explained that he did not intend to have intercourse with the complainant but that he wanted to convince Tshete to let her go with this offer. Tshete agreed, and they left the house.

[54] The accused told the complainant to go home, but she indicated that she was scared of Tshete and wanted to go to the accused's home. He took her to his house.

[55] In the light at his home, the accused saw the injuries to the complainant's face, arms and back. He prepared food for the complainant, prepared water for her to wash and assisted her when she could not wring the washcloth by washing her. He gave her painkillers and offered his bed for her to sleep. He slept on the couch.

[56] Tshete came to the accused's home, looking for the complainant. Tshete shouted, knocked persistently and threw something at a window, breaking it. The accused chased him away with a spade.

[57] The accused slept on the couch while the complainant slept in the bed. He denied that he went to the bed or had intercourse with the complainant at his home.

[58] The next day, the accused accompanied the complainant to the clinic. On the way to the clinic, the complainant asked him what she should say to the nurses, he told her to tell the truth.

[59] The accused's evidence was that he was arrested on a charge of rape at the clinic. At the police station, the complainant told him that she was not laying charges against him. The accused could not explain why the complainant said that he had raped her but speculated that her drug abuse over the years or the Mandrax she smoked with Tshete might still have been in her system when she said that he had raped her.

Arguments

[60] Mr *Mgence* emphasised the need for explicit consent as held in the *Coko* matter by the SCA.

[61] The complainant, he argued, was an honest, credible and reliable witness whose version must be accepted. She did not agree to intercourse with the accused and communicated this to him in word and deed. Her version was corroborated by that of Tshete, who accepted his guilt in this matter.

[62] In turn, the accused's testimony on consent must be rejected as the complainant merely submitted to him given her vulnerability. The accused knew that it was wrong to have sex with the complainant without her consent, and he knew that she was vulnerable. He thus foresaw that she did not consent, but proceeded to have intercourse with her, despite his insight.

[63] It was further submitted that the accused acknowledged that he paid money to Tshete to have sex with the complainant against her will. Therefore, he should not only be convicted of rape but also on the charge of human trafficking.

[64] Mr *Geldenhuys*, for the accused, advanced two arguments in the alternative in support of the accused's acquittal. First, he argued that the version of the accused was reasonably possibly true. In the alternative, he submitted that the accused lacked the required *mens rea*.

[65] I was urged to consider the fact that the complainant was a single witness and that her evidence contained several contradictions and inconsistencies, or stood uncorroborated. For example, Tshete and the accused testified that their exchange about the money for sex took place in her presence, while she denied this.

[66] Furthermore, Mr *Geldenhuys* highlighted the improbability of the accused having raped the complainant. He noted that the evidence clearly demonstrates that the accused rescued the complainant from Tshete's house. Thereafter, the accused told the complainant to go home but she wanted to go to his house. At his house, he fed her, bathed her and gave her medication. He chased Tshete away when he came looking for the complainant. She trusted the accused. He told her to tell the truth when she asked him what she should say at the clinic. Had he raped her, it was argued, it was improbable that he would have told her to tell the truth.

[67] It was submitted that the room at Tshete's house was dark and that the accused could not have seen that the complainant was injured or in a vulnerable state. She admitted that he did not know she was injured and only saw that at his house. In cross-examination, the complainant furthermore conceded that it was

possible that the accused could not have known that she did not consent. While she recanted that in re-examination, it must be considered.

The evidence considered

[68] On the issue of consent, there are two mutually destructive versions before the court. The complainant's version was that she explicitly refused consent in word and action, while the version of the accused was that she consented explicitly in word and in action to engage in sexual intercourse with him. In such an instance, the court has to consider the credibility of the witnesses, their reliability and the overall probabilities, before, as a final step, determining whether the State has discharged the onus of proving the guilt of the accused beyond a reasonable doubt.¹⁵

[69] The complainant was tentative in giving her testimony, and her version was provided piecemeal in response to statements regarding the accused's version. In examination-in-chief, she omitted to mention that the accused told her to go home after they left Tshete's house, but that she chose to go with him as she was scared of Tshete. She testified that only Tshete smoked the Mandrax on his return to the house, while both the accused and Tshete testified that she also smoked the drugs. She only added that the accused chased Tshete away from his home in cross-examination. Similarly, she omitted to mention that she asked the accused what to say to the nurses at the clinic and that he told her to tell the truth. The complainant further contradicted earlier statements under cross-examination and/ or in re-examination, leaving uncertainty as to her version. For example, she testified that she asked the accused to get her out of Tshete's house, confirmed that in cross-examination and contradicted that in re-examination. She conceded in cross-examination that the accused did not see her injuries until they came to his house, that he did not know she was injured and that he could possibly not have known that she did not consent. The latter statement was retracted in re-examination, after careful questioning by the State. In examination-in-chief, the complainant stated that she told the accused, as he walked into the room, that Tshete had assaulted her

¹⁵ *Stellenbosch Farmers' Winery Group Ltd v Martell et cie* 2003 (1) SA 11 (SCA) para 5.

earlier. But she also testified that she told him after they had intercourse. All of these statements cannot be true.

[70] The accused was candid. He explained that transactional sex was normal in his frame of reference. This was not contradicted. He agreed with a middleman, Tshete, to secure someone for him to have sex in exchange for money. The complainant was present throughout this discussion, corroborated by Tshete. When he realised that the person he was to have sex with was the complainant, a person known to him, he checked with Tshete, who was her boyfriend whether that was in order with him, and whether the complainant consented. His version is that he asked the complainant explicitly whether she agreed to this and that she responded in the affirmative. When it came to them having intercourse, the complainant turned on her back and opened her legs, communicating consent to the accused. On his version, the complainant participated and held on to him as they had intercourse.

[71] The complainant was not a good witness. She was selective in what she presented to the court, and her evidence was not always clear and consistent. While she remained steadfast in her version that the accused had raped her from the day of the report until she testified in court, that alone is not sufficient. As a single witness, her evidence must be clear and satisfactory in all respects.¹⁶ From the omissions, contradictions and inconsistencies highlighted above, it is evident that her evidence did not meet that standard. The accused was a more credible and reliable witness, even though he may have overstated some aspects, to which I return shortly.

[72] Tshete's evidence on the aspect of consent was of limited value. However, his testimony, which must be considered, was that he overpowered and subjected the complainant on the day, physically and emotionally. There is no doubt that the complainant was injured as a result of the earlier rape and assault by Tshete.

[73] All three witnesses testified that the room in Tshete's house was dark. I accept the evidence of the complainant and the accused that he could not see her

¹⁶ *S v Adbullah* [2022] ZASCA 33 (31 March 2022) para 7 and the authorities cited there.

injuries in the dark and that he was not aware of the abuse she had suffered earlier at Tshete's hands. Her evidence that she immediately told the accused that Tshete assaulted her does not accord with this finding and it is rejected.

[74] In my view, the probabilities further support the following factual findings: the accused accepted Tshete's proposition to have sex for R 20 with someone and that the accused offered R 12 instead. Tshete, mumbling, informed the complainant of the lower offer and indicated to the accused that they agreed to accept his offer. Having overpowered the complainant earlier on the day, Tshete assured the accused that the complainant consented to having sexual intercourse with him in exchange for money to buy drugs. The accused, unaware of the complainant's physical and emotional state, accepted that she consented after her exchange with Tshete, and Tshete's repeated assurances, and the latter's departure from the house. When the accused told the complainant that he was ready, she turned to lie on her back, making intercourse possible. He interpreted this as further indicative of consent. The probabilities support a conclusion that the complainant did not communicate her lack of consent verbally or physically, but tolerated the transactional sex for what it was. She submitted to the accused in fear of Tshete. It was only after the accused had intercourse with the complainant that he asked about her well-being and realised that she was the victim of abuse. On Tshete's return, he and the complainant smoked the Mandrax he purchased with R 12 the accused gave to him in exchange for having sex with the complainant. She thus shared in the money she earned. At her request, the accused convinced Tshete to let her leave with him since she trusted him. As they left Tshete's house, the accused urged the complainant to go home, but she feared that Tshete would find her. She chose to stay with the accused. At his home, the accused cared for the complainant and ward off Tshete's attempt to take her back to his home. The next day, the accused took the complainant to the clinic. On her own version, the complainant was confused and, therefore, asked the accused what she should say to the nurses. He told her to tell the truth. In my view, the probabilities support the conclusion that he told her to tell the truth in the honest belief that it would include that she had consensual sexual intercourse with him in exchange for money to buy drugs.

[75] The complainant's submission to the accused followed from her fear of Tshete. In these circumstances, should the accused reasonably have foreseen that the complainant did not consent to sexual intercourse? I accepted the evidence that the accused did not see the complainant's injuries or know about the abuse she had suffered until after they had intercourse. The accused interpreted the mumbled discussion between Tshete and the complainant as a discussion and acceptance of his offer, and thus consent. This was communicated to him by Tshete who assured him again when he asked. Significantly, the complainant turned to the accused when he told her that he was ready, signalling to him that she was a willing participant. She also smoked the Mandrax tablets with Tshete which he had bought with R 12 the accused paid for intercourse with the complainant. In my view, a holistic consideration of all the evidence supports a conclusion that the accused had a *bona fide*, but mistaken belief that the complainant consented to the transactional sex with him that was reasonable in the circumstances.

[76] I am of the view that the State failed to discharge the onus to prove the requisite *mens rea* on the part of the accused beyond a reasonable doubt. It thus follows that the accused must be acquitted on both charges.

[77] I made a point of not casting other than a legal judgment in the course of assessing the evidence. The evidence did not support a conclusion that the accused stood in a position of power relative to the complainant, but it supported a finding that Tshete instilled fear in her. This only came to the accused's attention after he had intercourse with the complainant. I am not in a position, given the evidence, to find that persons, such as the accused, who engage in transactional sex necessarily engage in exploitative behaviour. Women choose to sell sex for different reasons, whether their choices are constrained or not. It is beyond the evidence presented to make a finding thereon in this matter.

Order

[78] The accused is found not guilty on the charge of rape and not guilty on the charge of human trafficking.

R KRÜGER AJ
ACTING JUDGE OF THE HIGH COURT

Date heard: 4-7 August 2025

Date delivered: 11 August 2025

[Revised for typographical errors]

APPEARANCES:

For the State: *Adv Mgenge*
Director of Public Prosecutions Eastern Cape, Makhanda

For the accused: *Adv Geldenhuys*
Legal Aid SA