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THE REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: A 201 / 2025

In the matter between:

ZATHULELE WILLIAM COLA

Appellant

and

THE STATE

Respondent

Coram: Wille J *et* Mgengwana AJ

Heard: 31 October 2025

Delivered: 7 November 2025

Summary: Appeal from the Regional Court – Conviction – Rape – Consent – Complainant Intoxicated – How drunk is too Drunk to Consent? – Consent free and Informed - Consent not possible – May Consent be Implied? - Conviction confirmed.

JUDGMENT

THE COURT:

INTRODUCTION

[1] This is an appeal essentially about the 'evidential' criterion, including, *inter alia*, the factual evaluation of the probabilities, credibility, bias, appearance and circumstantial evidence. Stratford CJ, defines the law of evidence as that part of the law that influences the way facts are proved.¹

[2] Put in another way, the primary role of the law of evidence is the determination of which evidence may be put to a court to prove a fact, as well as to determine how and by whom the evidence may be presented. The appellant was convicted in the lower court on a single count of rape. The crime of rape has now been more broadly defined in the Act.²

[3] Leave to appeal on conviction was applied for and was refused. An application was piloted through a petition to the High Court. Subsequently, leave was granted against the appellant's conviction on the charge of rape. We take the view that this appeal may be primarily dealt with on a legal basis because of the legislative developments in our law. Most of the essential facts are, in our view, common cause; alternatively, not materially disputed.³

¹ Tregea v Godart 1939 (AD) 16, 30 -1.

² Section 1(3) (d) of Act, 32 of 2007 (the 'Act').

³ It is only the issue of "consent" that is the subject of dispute.

[4] Furthermore, this appeal is to be dealt with solely on the issues and facts presented before us. As mentioned, this is an important matter (for several reasons), and accordingly, we have discussed in this judgment what we believe are the most important issues.⁴

[5] It must not be inferred that from our failure to refer specifically to any argument or contention that we were unaware of it, or that we ignored it. The victim of the alleged rape is 41 years younger than the appellant. She testified that she was under the influence of intoxicating liquor when the appellant raped her. The appellant admits that he had sexual intercourse with the complainant but alleges that this was consensual. This raises (even if the version of the appellant is accepted) whether the complainant could legally consent to sexual intercourse, considering her inebriated state of intoxication.⁵

THE GROUNDS OF APPEAL

[6] The grounds of appeal are these: (a) that the court of first instance incorrectly interpreted the evidence presented by the prosecution; (b) that the court of first instance incorrectly accepted the evidence presented by the prosecution; (c) that the court of first instance incorrectly relied on the evidence of a single witness without applying the necessary cautionary rules; (d) that the court of first instance incorrectly accepted the evidence of the complainant despite her previous inconsistent reporting of the alleged

⁴ The issue of consent while under the influence of intoxicating liquor is the primary issue.

⁵ The question arises as to how drunk is drunk enough not to be able to consent to sexual intercourse?

rape, and (e) that the court of first instance incorrectly interpreted the evidence presented by the prosecution to be sufficient to meet the threshold of beyond reasonable doubt.⁶

[7] In summary, the argument is that it was 'reasonably possibly true' that the complainant consented to having sexual intercourse with the appellant and that the evidence pointed away from non-consensual sex with the appellant.⁷

THE CASE FOR THE RESPONDENT

THE COMMON CAUSE FACTS

[8] The victim was 17 years old when she was allegedly raped. The appellant knew the victim. Both the appellant and the victim had consumed alcohol. The appellant had sexual intercourse with the victim in his house. The victim was found by her mother and others at the home of the appellant. She was unconscious (semi-conscious) when she was found.⁸

MS M[...] (THE COMPLAINANT)

[9] She is the complainant. The appellant and her father are acquainted. On the day in question, she was drinking at a local tavern. She became intoxicated. She decided to go home. The appellant was also drinking at the tavern. The appellant was keeping an eye on her while they were at the tavern. On her way home, she noticed that the appellant

⁶ It seems that it is argued that the victim must prove that she did not consent to sexual intercourse.

⁷ We find no evidence to suggest that the sexual intercourse was consensual.

⁸ The appellant was 41 years older than the victim.

was following her. She asked the appellant why he was following her. The appellant forcibly took her to his house, locked the door to his house and then raped her.⁹

MS M[...] (THE COMPLAINANT'S MOTHER)

[10] She was asleep and woke up when she received information that the complainant had been raped. She went to the appellant's home. The complainant was unconscious on the appellant's bed. She was unable to revive the complainant. With assistance, the complainant was placed in a police vehicle and transported to a hospital.¹⁰

[11] The following day, the complainant informed her that she could not precisely recall what had happened the day before (when she was raped), and she had no clear memory of the incident. The complainant, however, did tell her brother what had happened to her.¹¹

MR RASEMENTE

[12] Both the complainant and the appellant are known to him. He had suspected that the appellant had confined the complainant to his house. When he arrived at the appellant's house, the ambulance was on the scene, and they were trying to revive the complainant.¹²

THE CASE FOR THE APPELLANT

⁹ It is unexplained why the appellant elected to follow her from the tavern.

¹⁰ She noticed that the underwear of the complainant had been disturbed and was not worn correctly.

¹¹ She told her brother at her house what had transpired the day before.

¹² To him it seemed as if the complainant had "passed away".

[13] The appellant testified and called no witnesses. He confirmed that he was at the tavern, and he testified that he was intoxicated when he left the tavern. He did not say why he left the tavern shortly after the complainant. He led no evidence to counter the evidence that he was ‘keeping an eye’ on the complainant while she was drinking alcohol at the tavern. Also, in his evidence, he did not confirm or deny that the complainant’s boyfriend was also at the tavern when they were drinking alcohol. He also did not dispute the evidence that the complainant had consumed copious amounts of alcohol at the tavern. He met up with the complainant while he was walking home. According to him, the complainant held his hand, and she voluntarily went with him to his house. He confirmed that the complainant was intoxicated but opined that she was still able to walk. They went into his room, and the complainant initiated sexual intercourse with him in his room.¹³

CONSIDERATION

THE EVIDENCE POINTED AWAY FROM CONSENSUAL SEX?

[14] One of the core issues advanced by the appellant at the hearing of this appeal was that the respondent failed to prove beyond a reasonable doubt the lack of consent to the alleged rape of the complainant. This is because of the reasoning that the ‘lack of consent’ is an element of the crime of rape as formulated, and the respondent bears some onus of proof (beyond a reasonable doubt) to sustain a conviction against the appellant. This must be carefully considered in view of the evidence to the effect that the complainant was heavily under the influence of intoxicating liquor at the time. Additionally, in our view,

¹³ He testified that he had consensual sexual intercourse with the victim.

this is an outdated and regrettable traditional approach to cases of this nature. Following this (what we call an outdated approach), the prosecutor asked the complainant the following question:

*'...did you consent to sex. No, I did not. Did you do anything to convey the fact that you were not consenting to this act...'*¹⁴

[15] It is precisely this issue that warrants further scrutiny. Consent arises in various forms in our law. Consent in criminal law matters more so because to locate consent in connection with sexual intercourse is to discover the normative boundary between criminal rape and consensual sexual intercourse. Consent is not a generic concept. Generally, to have consented to sexual intercourse in law is to completely acquiesce to the sexual intercourse in some way, whether by virtue of doing so subjectively, objectively, or as a matter of law.¹⁵

[16] We say this also because 'intention' is specifically indicated in the definition as a requirement for a conviction. However, it suffices to prove '*dolus eventualis*' in that it is sufficient to prove that the appellant, in these circumstances, foresaw the possibility that the deceased's free, complete and conscious consent might be lacking, but notwithstanding, continued to have sexual intercourse with her. In this connection, there have been recent legal developments in France, including legislation to define the concept of consent in cases such as these. Consent has now been defined as:

¹⁴ Record page 47 at lines 6-8.

¹⁵ The facts and surrounding circumstances surrounding the issue of consent become very relevant.

*‘...consent must be free and informed, specific, prior and revocable...’*¹⁶

[17] The count of unlawful sexual penetration in the indictment against the appellant alleges that the appellant did so without the consent of the complainant or under circumstances when the complainant was unable to give such consent. This concept of consent in relation to the offence is defined in section 1(2) of the Act as *‘voluntary or uncoerced agreement’*.¹⁷

[18] The relevant section contains a provision dealing specifically with the interpretation of the words ‘voluntary or uncoerced’. It indicates, *inter alia*, as follows:

‘...Circumstances ... in respect of which a person (‘B’) (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration...include, but are not limited to, the following:

(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

*(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...’*¹⁸

[19] In our view, considering the circumstances of this case, for the complainant to have consented to sexual intercourse with the appellant, her acquiescence must have been sufficiently free, informed and complete to have enabled her to take responsibility in the

¹⁶ Similar consent-based laws exist in Sweden, Germany and Spain.

¹⁷ Section 1 (2) of Act, 32 of 2007.

¹⁸ Section 1 (3) (d) of Act, 32 of 2007.

eyes of the law for her choice. We hold the view that the facts (even on the appellant's version) point away from consensual sex. Even after the alleged rape, the complainant was in a state of unconsciousness (semi-consciousness).¹⁹

[20] The credibility of the respondents' witnesses was not the subject of any dissent during cross examination on the following issues, namely: (a) that the complainant had been drinking heavily at the tavern; (b) that she left the tavern because she had consumed too much alcohol; (c) that the appellant followed her out of the tavern, and (d) that the complainant was in a state of semi-consciousness (even unconscious) when the police transported her to the hospital. This evidence was not the subject of any dispute, nor was it materially challenged; accordingly, it falls to be accepted as a matter of law concerning the issue of consent.²⁰

THE TWO CARDINAL RULES OF LOGIC IN REASONING BY INFERENCE

[21] The two cardinal rules of logic in reasoning by inference have been eloquently described as follows:

'...In reasoning by inference, there are two cardinal rules of logic which cannot be ignored:

- (1) the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.*
- (2) the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not*

¹⁹ This remained unchallenged.

²⁰ There was no material challenge to this evidence.

*exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct...*²¹

[22] Thus, by way of application, all the circumstantial evidence in this matter indirectly supplied proof of the heavily intoxicated state of the complainant at the time of sexual intercourse. The true test to be applied in this case is the following:

*'...In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged...'*²²

[23] The enquiry, however, does not end here. We say this because there has been severe criticism of the written police statements (the 'statements') made at the complainant's instance. When judging these statements, the question arises whether it should be done 'objectively' (in other words, whether one should assess what the words intended to convey), or whether the declarant meant something, but did not say it expressly, in other words, 'subjectively'. We believe that the solution lies in an objective approach that provides for subjective factors in certain instances. The complainant's fragmented recollection of the events in turn points to her level of intoxication. The best approach to evaluate her recollection (in these circumstances), in our view, has been formulated as follows:

²¹ R v Blom 1939 (AD) 188 page 202-203.

²² R v Mlambo 1957 (4) SA 727 (A) at 738 B.

‘...Surrounding circumstances may be looked at, but only those circumstances which help to ascertain the true meaning of the words used...’²³

[24] In our view, the alleged inconsistencies in these statements were not and are not material. We say this because the victim of the alleged rape testified that she had not yet totally recovered at the time when her first statement had been noted. Furthermore, regrettably, police statements obtained from witnesses are notoriously lacking in detail, often inaccurate, and incomplete.²⁴

[25] Self-evidently, consent should be informed, revocable and given willingly and clearly. Both the complainant and the appellant may be intoxicated and nevertheless be able to consent. However, the complainant’s capacity to consent is the issue to be determined.²⁵

[26] In our view, the appellant failed to demonstrate that he took objectively reasonable steps to ascertain that the complainant consented to sexual conduct. In our view, there is no other crime in which the victim’s response plays such a significant role in defining the crime. Impermissibly, it somewhat unfairly shifts the focus to the conduct of the victim who must prove that she did not consent, rather than the other way round.²⁶

[27] This is even more problematic as the consent definition lends support to the misconception that sexual offences are primarily about sexual activity rather than violence, coercion and power. Further problems may arise as it may become impossible for a victim to prove that there was no consent for the act, and it imposes an unfair burden on the victim by imposing expectations on how victims should respond to being sexually

²³ S v Motara 1963 (2) SA 579 at 585 A.

²⁴ S v Xaba 1983 (3) SA 717 (A) at 730 B-C.

²⁵ The appellant’s state of intoxication in this case is irrelevant.

²⁶ This perpetuated patriarchal assumptions about sexuality which undermines dignity and equality.

molested. This is even more so when intoxication bears down on the issue of consent or lack thereof.²⁷

THE FAILURE TO CALL THE WITNESS ASEMAHLE

[28] The appellant submits that the prosecution's failure to call a witness is a ground of appeal. This witness was a friend of the complainant who had been drinking with her at the tavern. She is also the daughter of the appellant. We say no adverse inference should be drawn from this alleged failure. We say this because the prosecution made numerous attempts to locate her and present her evidence. Also, it would mean that this witness would have to testify against her father. This evidence was not crucial as most of the factual evidence is, in any event, common cause and circumstantial.²⁸

CONCLUSION

[29] In our view, it is clear from the mosaic of circumstantial evidence presented by the respondent that the complainant could not and did not consent to sexual intercourse as indicated in Section 1(3) (d) (iii) of the Act, 32 of 2007. It is trite that in the absence of demonstrable and material misdirection, a trial court's findings of fact are presumed to be correct and that they will only be disregarded on appeal if the recorded evidence shows them to be clearly wrong. It is against this principle that the credibility and factual findings made by the trial court, and decried by the appellant, must be considered. In our view, the inferences drawn by the presiding officer in the lower court were correct. This is based on the factual and circumstantial evidence. Also, the appellant did not materially challenge

²⁷ The factual circumstances surrounding the offence become very relevant.

²⁸ This evidence would not have assisted on this issue of consent.

the evidence that the complainant was inebriated when she left the tavern to go home. We find that the appellant had sexual intercourse with the complainant at a time when she was legally unable to consent thereto.²⁹

[30] Thus, the following order is granted, namely:

1. The appeal against the appellant's conviction is dismissed.
2. The conviction and sentence imposed upon the appellant are hereby confirmed.

WILLE, J

I agree:

MGENGWANA, AJ

²⁹ Section 1(3) (d) (ii) and (iii) of the Act, 32 of 2007