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REVISITING MENTAL DISABILITY IN THE CONTEXT OF SEXUAL OFFENCES – SOME THOUGHTS

OPSOMMING

Herbesoek van geestesgestremdheid in die konteks van seksuele misdrywe – enkele gedagtes

In hierdie bydrae word geestesgestremdheid in die konteks van seksuele misdrywe oorweeg. Die Wysigingswet op die Strafreg (Seksuele Misdrywe en Verwante Aangeleenthede) 32 van 2007 ("SMW") het op 16 Desember 2007 in werking getree. Die SMW maak vir 'n uitgebreide omskrywing van "geestesgestremdheid" voorsiening en bevat ook bepalings rakende die afwesigheid van toestemming. Artikel 57(2) van die SMW bepaal dat, sodra dit vasstaan dat 'n klaer of klaagster ten tyde van die pleeg van 'n seksuele handeling 'n persoon met 'n geestesgestremdheid was, geen toestemming regsgeldig erken sal word nie. In hierdie bydrae word oorweging geskenk aan geestesgestremdheid binne die raamwerk van die SMW, saamgelees met die bepalings rakende afwesigheid van toestemming. Dit word aangedui dat artikel 57(2) oorbodig is en dat afwesigheid van toestemming een van die omskrywingselemente van die misdrywe beslaan. Dit moet dus steeds deur die staat bo redelike twyfel bewys word. Alternatiewe benaderings word ook toegelig. Die feit dat deskundige getuienis van onskatbare waarde vir die staat en die verdediging is, ten einde geestesgestremdheid te bewys of te weerlê, word laastens aangedui.

1 Introduction

Sexual offences against persons with mental disabilities have undergone radical reform since the advent of the Constitution of the Republic of South Africa, 1996 ("Constitution"). Prior to the constitutional dispensation, sexual offences partly were catered for statutorily in terms of the previous Sexual Offences Act 23 of 1957 ("SOA"). Rape and indecent assault were common law offences. The SOA provided for sexual offences against children and persons with mental disabilities, albeit within a limited scope. Undoubtedly, the advent of the Constitution played a pivotal role in the far-reaching transformation of the criminal law pertaining to sexual offences. On 16 December 2007, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("SORMA") came into effect (see Smythe and Pithey *Sexual offences commentary – Act 32 of 2007* (2011) v and Snyman *Criminal law* (2014) 341). Initially, the premise behind SORMA was to create a new framework for sexual offences against children. However, it was later decided to extend the project to cover all sexual offences, including sexual offences against children and adults (Smythe and Pithey v).

SORMA repealed various common law crimes, including the common law crime of rape. SORMA includes rape as an offence and expands its definition, which are gender-neutral, and its scope (Snyman 27). In addition, the common law offence of indecent assault was repealed and replaced with the statutory

crime of sexual assault (Smythe and Pithey 3-4–3-7). SORMA introduced a unique feature involving the chapters dealing with comprehensive new offences regarding sexual acts against persons with mental disabilities. The latter advancement is to be welcomed, because persons with mental disabilities constitute a particularly vulnerable group in society (Smythe and Pithey vi). Accordingly, SORMA contains general sexual offences relating to adults and, in addition, contains chapters specifically focused on addressing sexual offences against children and persons with mental disabilities (Smythe and Pithey 14-1).

The preamble to SORMA enshrines the need to protect persons with mental disabilities as a vulnerable group by providing as follows:

> "Enacting comprehensive provisions dealing with the creation of certain new, expanded or amended sexual offences against children and persons who are mentally disabled, including offences relating to sexual exploitation or grooming, exposure to or display of pornography and the creation of child pornography, despite some of the offences being similar to offences created in respect of adults as the creation of these offences aims to address the particular vulnerability of children and persons who are mentally disabled in respect of sexual abuse or exploitation."

The preamble to SORMA endorses the rights included in the Bill of Rights of the Constitution, including the rights of all persons to equality, privacy, dignity, and freedom and security of the person, the latter of which incorporates the right to be free from all forms of violence and the rights of vulnerable persons whose best interests should be of paramount importance (Smythe and Pithey 14-1).

From a constitutional perspective, SORMA has made enormous strides towards setting a solid foundation for sexual offences against persons with mental disabilities, affording adequate protection from sexual abuse and exploitation. SORMA defines a sexual act as any act of sexual penetration or violation (see the definition clause in SORMA Chapter 1).

SORMA provides a definition of "mental disability" and further contains a specific section, in the definition clause to SORMA, as to when consent will be absent. In terms of SORMA, absence of consent is read with section 57(2). Upon an analysis of SORMA, it becomes clear that a person with a mental disability cannot validly consent to a sexual act. The latter becomes relevant where an accused performed a sexual act with a person with a mental disability, while subjectively believing that the complainant consented to the act and where the accused later finds out that the complainant had been incapable of consenting to such act by reason of mental disability.

Accordingly, the definition of "mental disability" becomes particularly contentious where consent is raised as a defence. SORMA does not provide an indication as to which mental disabilities will qualify for purposes of these sections. A further anomaly relates to proving consent. In cases of severe mental disability, it is easier for a court to draw an inference of mental disability negating consent. The problematic issue relates to milder forms of mental disability. The latter raises concerns for the State and the defence. The State will have to prove that the mental disability is of such a severe nature as to negate consent, whereas the defence will have to prove that, despite the mental or intellectual disability, the complainant was still capable of consenting.

In this contribution, mental disability is assessed within the framework of SORMA and against the backdrop of the definition of "mental disability" and absence of consent as provided for in SORMA. An analysis is conducted as to

the appropriate route to follow where, after a sexual act was committed with a person with a mental disability, an accused claim that such person consented to such and/or he subjectively believed that consent had been present. A further question is whether section 57(2) of SORMA serves any purpose. It could be argued that absence of consent remains one of the definitional elements that the State must prove beyond reasonable doubt. There may be cases where the accused's claim, that consent existed, could be reasonably possibly true or the only reasonable inference to be drawn from the facts. This contribution sheds light on these aspects, with reference to, among others, decided cases in which mental disability in the context of sexual offences was addressed.

2 "Mental disability" in SORMA

Before the enactment of SORMA, sexual offences against persons with mental disabilities were regulated in terms of section 15 of the SOA, which provided as follows:

> "Any person who –
> (a) has or attempts to have unlawful carnal intercourse with any male or female idiot or imbecile in circumstances which do not amount to rape; or
> (b) commits or attempts to commit with such male or female any immoral or indecent act; or
> (c) solicits or entices such a male or female to the commission of any immoral or indecent act;
> shall, if it be proved that such person knew that such male or female was an idiot or imbecile, be guilty of an offence."

This section was problematic, among others, in that it failed to provide a definition of mental disability (see Smythe and Pithey 14-9). Section 15's underlying intention was to criminalise sexual intercourse or indecent acts with persons with mental disabilities (Smythe and Pithey 14-10). Where the complainant lacked capacity to consent or where consent was absent, the conduct amounted to rape (Smythe and Pithey 14-10).

With the enactment of SORMA, the concept of mental disability underwent radical transformation. SORMA provides for an elaborate definition of "mental disability". Although the advancement of the definitional concept of mental disability is a welcoming feature of SORMA, it still proves problematic in terms of assessing whether a complainant had been mentally disabled to such a degree at the time of the commission of a sexual act, to render consent absent.

The term "mental disability" refers to both "intellectual disability" and "psychiatric disability" (Smythe and Pithey 14-2). As to psychiatric disability, it could be because of a mental illness as provided for in the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) (American Psychiatric Association *Diagnostic and statistical manual of mental disorders* (2013)). SORMA defines mental disability as follows:

> "'Person who is mentally disabled' 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 –
> (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."

It could be argued that the word "including" in the definition renders the definition broad enough to also cover neurological disorders, for example. Accordingly, each case will have to be assessed on the basis its unique circumstances to assess whether the complainant had a mental disability. In the recent judgment of *S v Mnguni* 2014 2 SACR 595 (GP), Louw J stated the following in respect of the onus of the State in proving mental disability (para 5):

> "The onus was therefore on the state to prove that the victim was mentally disabled as contemplated in one of the four categories mentioned in the definition. The nature of the mental disability required to be proved is therefore specific. It is not sufficient for the state to merely prove that the victim is mentally disabled or retarded or challenged."

It is notable that the wording of the definition of "mental disability", as contained in SORMA, is in accordance with the requirements for criminal capacity as provided for in section 78(1) of the Criminal Procedure Act 51 of 1977 ("CPA") (see Snyman 391, 164–172 and Burchell *Principles of criminal law* (2014) 271–302).

It can be deduced from the definition of "mental disability" that expert evidence from mental health professionals will become pivotal in assessing the alleged mental disability of a complainant in any given scenario. Expert evidence will become crucial for the State and the defence in proving or rebutting allegations of mental disability. Interestingly, SORMA does not contain any guidelines to assist in the assessment of mental disability. It could be argued that the procedure provided for in section 79 of the CPA could become useful in this context, with specific reference to the panel of mental health experts as well as the assessment process. Obviously, it will have to be adapted to the context of mental disability within the framework of sexual offences. However, expert evidence remains pivotal in establishing firstly, whether the complainant has a mental disability and secondly, whether such mental disability resulted in one or more of the consequences listed in the definition of mental disability as contained in SORMA.

3 Consent and the capacity of persons with mental disabilities to consent

SORMA contains a definition of consent, which reads as follows (see the definition clause to SORMA and Smythe and Pithey 14-6):

> "(2) For the purposes of sections 3, 4, 5(1), 6, 7, 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22, 'consent' means voluntary or uncoerced agreement;
>
> (3) Circumstances in subsection (2) in respect of which a person ('B') (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration, as contemplated in sections 3 and 4, or an act of sexual violation as contemplated in sections 5(1), 6 and 7 or any other act as contemplated in sections 8(1), 8(2), 9(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22 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 –
>
> (v) a person who is mentally disabled."

In addition, section 57(2) of SORMA provides as follows:

> "Notwithstanding anything to the contrary in any law contained, a person who is mentally disabled is incapable of consenting to a sexual act."

Chapter 4 of SORMA contains a cluster of offences against persons with mental disabilities without referring to the question of consent, for example, by requiring the absence of consent as an element of the offence (Smythe and Pithey 14-7). The reason for the latter is that when the definition of a "person who is mentally disabled" is read with section 57(2), consent will invariably be absent. Accordingly, once it has been established that a complainant falls within the scope of the definition of a person who was "mentally disabled", it will be accepted that the complainant was unable to consent to the sexual act in question (Smythe and Pithey 14-8).

Thus, it will firstly have to be established whether the complainant falls within the framework of the definition of "mental disability" as provided for in SORMA. Once that is established to be the case, according to the interpretation of the sections in SORMA, consent will be ruled out. This could have far-reaching implications for an accused who honestly but erroneously believed that the complainant consented to the commission of the sexual act. SORMA does not indicate which mental disabilities will qualify as mental disabilities and does not provide any guidelines as to the degree or severity of mental disability that will be sufficient to negate consent. It becomes clear that reliance will have to be placed on expert evidence to guide a court in such an instance.

4 Judicial response to mental disability and the defence of consent

The first reported decision dealing with the defence of consent within the framework of mental disability, was *S v Prins* 2017 1 SACR 20 (WCC). The facts of the decision appear from the judgment delivered by Gamble J. The appellant had been charged before the regional magistrate of Parow on three charges in terms of SORMA. He had been charged with two counts of rape in terms of section 3 of SORMA and one count of sexual assault in terms of section 5 of SORMA. The appellant was convicted of one charge of statutory rape and was acquitted on the other two charges. The appellant was sentenced to fifteen years imprisonment and it was directed that his name be included in the Register of Sexual Offenders. The appellant appealed against the conviction and the sentence. It transpired that the complainant had been the appellant's nineteen-year-old stepdaughter. The complainant's intelligence quotient ranged between 50 and 69, which had placed her in the range of mild intellectual disability (para 4). In terms of her scholastic aptitude, it was established that her "test age" was six years and that she functioned at the level of a Grade 1 child (para 4). A clinical psychologist in the employ of Cape Mental Health, Ms Hundermark, conducted an assessment to evaluate the complainant's level of intellectual functioning, her ability to consent to sexual intercourse and her competence to testify (para 3). Ms Hundermark concluded that the complainant was, in the circumstances, unable to consent to sexual intercourse with reference to the provisions of section 57(2) of SORMA (para 5). The appellant pleaded not guilty to the charges. The appellant's defence was one of consent. The appellant admitted to one incident of sexual intercourse with the victim at the family home one morning. The appellant contended that the complainant had pleaded with him to satisfy her sexually and that he had eventually, despite expressing reluctance, succumbed to her request (para 7).

In delivering judgment, Gamble J correctly noted that not all forms of mental disorder or disability will invalidate the victim's consent within the purport of section 57(2) and that the disability had to be of such a nature and extent that it prevented the complainant from being able to appreciate one or more of the listed consequences provided for in the definition of "consent" in terms of SORMA (para 10). The court relied heavily on Ms Hundermark's expert evidence (para 14). The court was satisfied, by virtue of Ms Hundermark's findings, that the complainant's mental disability fell within the ambit of the definition of "consent" as provided for in SORMA (para 15). Further, Gamble J noted that the defence did not provide any persuasive evidence in relation to the complainant's mental disability of functioning (para 20). It was held that the State had established beyond reasonable doubt that the victim was unable to understand the possibility of conception or the contraction of a sexually transmitted illness. Accordingly, she had been unable to appreciate the nature and reasonably foreseeable consequences of participating in an act of sexual intercourse (para 22). Having regard to the expert findings of Ms Hundermark, the court found that the appellant correctly had been convicted of rape and dismissed the appeal of the conviction and the sentence (para 23).

Mental disability in the context of SORMA was again revisited in the decision of *S v Pullen* 2019 2 SACR 605 (ECG). The facts of the decision appear from the judgment delivered by Rugunanan AJ (Griffiths J concurring). The appellant had been charged with two counts of rape in the regional court in Port Elizabeth. The offences were alleged to have had taken place during 2013, when the appellant committed acts of sexual penetration with the complainant NQ (para 1). The first count related to alleged penetration of the complainant anally, whereas the second count alleged vaginal penetration. The appellant pleaded not guilty to both counts. The appellant was acquitted on the second count. However, he was convicted on the first count for which he was sentenced to life imprisonment after the trial court found that the complainant had a mental disability at the time that the offence was commissioned, as enunciated in SORMA (para 1). Accordingly, the appellant appealed against both conviction and sentence.

It was common cause that the appellant had committed an act of sexual penetration by penetrating the complainant anally (para 2). However, the appellant's defence was that the complainant had consented to such intercourse and that, at the time of the commission of the act, he had been unaware of the fact that she had a mental disability. The trial court rejected the appellant's version and held that the sexual intercourse had not been consensual and that the appellant had known that the complainant had a mental disability (para 2).

In delivering judgment, Rugunanan AJ held as follows, in respect of the onus of proving mental disability (para 4):

> "The onus is on the state to prove that a victim is mentally disabled as contemplated in one of the categories mentioned in the definition. In each instance the nature of the mental disability required to be proved is fact specific. It is not sufficient for the state merely to prove that the victim is mentally disabled or retarded or challenged."

Doctor Mabusela, a clinical psychologist, had conducted a cognitive assessment of the complainant. At the time of the assessment, the complainant was twenty-two years of age. Doctor Mabusela had estimated the complainant's mental age as between the ages of six and seven (para 5). Doctor Mabusela concluded the assessment by stating that, at the time of the incident, the complainant had been

unable to appreciate the nature and foreseeable consequences of a sexual act (para 6). Upon cross-examination of Doctor Mabusela's expert testimony, it became evident that various sections of the general knowledge questionnaire, which had been used during the assessment of the complainant, were left incomplete (para 7). In addition, Doctor Mabusela conceded that she had "missed an opportunity" (para 7). In respect of Doctor Mabusela's testimony, Rugunanan AJ held as follows (para 8):

> "The conclusion, that the complainant fell into the specific definitional category of being unable to appreciate the nature and foreseeable consequences of a sexual act, is informed by the complainant's reluctance to discuss sexual issues. There was a duty on Dr Mabusela to have ensured that the questionnaire was complete and accurate. The failure to have done so was a failure to have put the complainant at ease, which meant that the conclusion regarding the definitional category of mental disability ascribed to the complainant was distorted. … Her testimony regarding proof of the fact specific category of mental disability in s 1(a) of the Sexual Offences Act is rendered unreliable."

Accordingly, it was held that there was no evidence that sufficiently proved mental disability, as set forth in SORMA, and that the trial court had erred in relying solely on the evidence of Doctor Mabusela as proof of mental disability (para 10). Further, the court had to establish whether the accused had known at the time of the incident that the complainant had a mental disability. It was held that the appellant's denial of knowledge of the complainant's mental disability had never been challenged during cross examination (para 14). Moreover, the court found that the complainant's evidence was unsatisfactory and that it was clouded in inconsistencies (paras 15–16). Rugunanan AJ concluded that the trial court had been incorrect in rejecting the appellant's evidence, and held, based on the totality of the evidence, that the appellant's version might have been reasonably possibly true (para 20). The appeal against the conviction and the sentence succeeded.

5 Assessment

To date, the decisions in which mental disability in the context of sexual offences, and more particularly the defence of consent, were addressed, have been few. This leaves such area of the substantive criminal law clouded with controversy. From the decisions discussed above, it is clear that the substantive proof of mental disability will fall squarely within the field of mental health experts called to provide expert evidence as to the mental state of the complainant and as to whether or not the complainant's mental disability was to such a degree as to negate consent in terms of SORMA. From the two judgments, one can discern two different outcomes. These, to a large extent, were brought about because of the expert evidence presented in each of the cases. The *Prince* decision is a classic example of where the court heavily relied on expert evidence to assess whether the complainant had been incapable of consenting to the sexual act. Further, it was noted by Gamble J that not all forms of mental disability will invalidate the complainant's consent and that the disability must be severe enough to prevent the complainant from being able to appreciate the consequences of the sexual act (see para 10). On the other hand, the *Pullen* decision is indicative of the outcome that could follow inadequate expert testimony. In such an instance, the court will be confronted with the uncontested version of the accused. In addition, it was held that the State must go further than merely proving that the complainant was a person with a mental disability. From a

procedural perspective, once it is alleged that a complainant was mentally disabled at the time of the commission of a sexual offence, it must firstly be established whether the complainant was mentally disabled as required in terms of SORMA. Secondly, it must be established that such mental disability resulted in one or more of the consequences provided for in the definition of "mental disability" in SORMA (Smythe and Pithey 14-5). The latter will heavily depend on expert evidence, because SORMA does not contain any guidelines in this regard and does not provide any indication as to the degree or severity of mental disability that could negate consent. Smythe and Pithey note that within this context a person's capacity is assessed at the time of the commission of the sexual offence. Accordingly, the test is contextual, because it is possible that the complainant at the time of the commission of the offence suffered for example from a psychiatric illness rendering him or her unable to appreciate the nature and foreseeable consequences of the act, but that the complainant later received treatment and recovered to such an extent as to no longer be "mentally disabled" at the time of the trial (Smythe and Pithey 14-5). Once it has been established that a complainant was "mentally disabled" at the time of the commission of the offence within the ambit of the definitional criteria set forth in SORMA, section 57(2) takes effect, which provides that a person who has a mental disability is incapable of consenting to such an act (see also Smythe and Pithey 14-6–14-7). Inevitably, the latter results in an accused not being able to rely on consent by the complainant as a defence. In the context of a complainant that suffered from a mental disability at the time of the commission of an offence, consent as a defence becomes problematic where an accused subjectively but mistakenly believed that the complainant was capable of consenting to the sexual act, and where it later transpires that the complainant had a mental disability. Absence of consent forms one of the definitional elements of both "rape" and "sexual assault" in terms of SORMA (see sections 3 and 5 of SORMA). Once it has been established that the complainant was mentally disabled at the time of the commission of the offence, the State is in effect relieved from proving this element of the offence by virtue of the wording of section 57(2). Within the latter context, section 57(2) becomes problematic. The question which inevitably arises is whether the State should still prove absence of consent beyond reasonable doubt. It remains an undeniable reality that in cases of severe mental disability, a court easily will be able to draw an inference of lack of consent. However, the milder categories of mental disability create a twilight zone. Does the fact that a complainant falls within the framework of the definition of "mental disability", as set forth in SORMA, automatically imply that he or she was totally incapable of consenting? Should the State not bear the onus of proving this together with all the other definitional elements of the offence? Further, it should be borne in mind that persons with mental disabilities would never be able to consent to any sexual acts. This is because, whenever it is established that a person has a mental disability, any consent by such person would be regarded as invalid. A further anomaly would arise when persons with mental disabilities commit sexual acts with other persons with mental disabilities. It is submitted that section 57(2) is superfluous. A possible alternative would be to, in the first instance, establish that a complainant was mentally disabled at the time of the commission of the offence. Once it has been established that the complainant had a mental disability, the State must establish that such mental disability rendered the complainant incapable of consenting. Inevitably, the latter will entail an analysis of whether the alleged mental disability resulted

in one or more of the consequences listed in the definition of "mental disability". A court will then have to establish the guilt of the accused based on the totality of the evidence of the case. In *Prince*, the court indicated that the disability had to have been of a sufficient degree to bring it within the purport of section 57(2), because not all forms of mental disability will invalidate consent. For example, it should be noted that the punishment prescribed for rape, where the complainant had a mental disability in terms of SORMA, is life imprisonment (see section 51(1) of the Criminal Law Amendment Act 51 of 1997 ("MA"); see also Snyman 357). The latter became evident in the *Punnel* case in which the trial court imposed the harshest penalty. In addition, an accused's particulars will be entered in the National Register of Sex Offenders as provided for in SORMA.

From the wording of all the sections contained in SORMA, it is clear that strict liability does not find application. Fault, as such, with specific reference to intention, remains an essential element that the State must prove beyond reasonable doubt. In addition, there is a general presumption against strict liability over and above the constitutional issues associated with it (see Burchell 388–389; *S v Coetzee* 1997 3 SA 527 (CC); *S v De Blom* 1977 3 SA 513 (A); and *S v Arenstein* 1964 1 SA 361 (A)). One of the essential elements of intention is knowledge of the unlawfulness of the act. Knowledge of unlawfulness presupposes that the accused was aware that his or her conduct was unlawful and as such not justified in terms of any ground of justification (Snyman 198). As far as sexual offences with persons with mental disabilities are concerned, if an accused subjectively believed that the complainant was not mentally disabled and the latter consented to the sexual act, but objectively it was not the case, an accused could still rely on lack of intention with specific reference to lack of knowledge of unlawfulness to escape criminal liability. In the latter instance, the accused's conduct remains unlawful. However, the accused could escape liability on the ground of absence of knowledge of unlawfulness of his or her conduct if he or she believed the complainant had the capacity to consent (see Burchell 404). As such, the defence would be one of putative consent. Having regard to the wording of SORMA and the definition of "mental disability" read with section 57(2), the defence of putative consent seems to be the more appropriate defence to raise, because absence of consent is almost invariably presumed in terms of section 57(2). Obviously, intention in the form of *dolus eventualis* would be sufficient to establish liability if it is proved that the accused foresaw the possibility that the complainant had a mental disability and is incapable of consenting, but nevertheless reconciled him- or herself with such possibility (see in general Snyman 178–183). However, it could be argued that putative consent within these contexts could prove to be a more viable defence to an accused who honestly but mistakenly believed that the complainant was consenting to the sexual act at the time of the commission of the offence, but where it later transpires that the complainant had a mental disability. Also, putative consent would amount to a more just and logical application of the general principles of criminal liability in terms of substantive criminal law. Fault, and more specifically intention, remains one of the essential definitional elements that the State must prove beyond reasonable doubt. The test for intention remains a purely subjective one (Snyman 184). A court will have to assess intention by means of

inferential reasoning, having regard to all the circumstances of the case, as well as individual characteristics of the accused, which could have impacted on his subjective state of mind, and by placing itself in the accused's position at the time of the commission of the act (Snyman 185; see also *S v Sigwahla* 1967 4 SA 566 (A)).

It is submitted that section 57(2) in its current form is redundant and superfluous. Absence of consent remains one of the core definitional elements that the State must prove. It could be argued that the wording of the section leads to a presumption of lack of consent, which raises constitutional concerns.

Alternatively, it is submitted that, where an accused is charged with a sexual offence where the complainant allegedly had a mental disability at the time of the offence it must be established in the first instance that the complainant indeed had a mental disability. Once it has been established that the complainant had a mental disability and section 57(2) takes effect, the appropriate defence for an accused who claims that the complainant indeed consented, or that he or she honestly believed that consent had been given, would be that of putative consent. Then, the totality of evidence can be assessed to establish whether intention was present or not.

6 Conclusion

This contribution highlights the problematic nature of mental disability within the framework of SORMA, and, more pertinently, where consent is raised as defence. The decisions discussed above further expose the anomaly surrounding sexual acts committed with persons with mental disabilities.

The fact that SORMA defines the concept of "mentally disability" is a welcome development. However, it gives rise to various procedural difficulties for the State and the defence. The State will need to prove that the complainant's disability was to such a degree as to fall within the ambit of the definition of "mental disability" to negate any defence of consent. This will only be possible with persuasive expert evidence pertaining to the complainant's level of intellectual functioning. Therefore, expert evidence becomes vital. The defence will be faced with the challenge of proving that the complainant's disability was not to such a degree as to render his or her consent invalid. This becomes problematic where the complainant suffers from a mild mental disability and where the accused mistakenly believed that the complainant was able to consent.

Section 57(2) remains problematic in terms of invariably presuming absence of consent once mental disability has been established. Further, section 57(2) of SORMA raises constitutional concerns and could potentially impact on an accused's right to a fair trial in terms of section 35(3) of the Constitution. It could be argued that section 57(2) of SORMA is superfluous, and that in any given scenario where a sexual act was committed with a person with a mental disability, the onus of proving absence of consent should remain on the State. In the absence of the latter, a person with a mental disability would never be able to validly consent to sexual conduct and any person engaging in consensual sexual acts with persons with mental disabilities would never be able to rely on consent as a defence.

A fact emphasised in both cases discussed above is that expert evidence plays a crucial role in the assessment of mental disability for purposes of SORMA. It is essential for the State and the defence to retain their own experts. Only with proper expert evidence, in conjunction with an assessment of all the facts and circumstances of a case, can it be said that a just and balanced approach was followed in cases of mental disability within the framework of sexual offences.

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