Loyiso Coko v S (CA&R 219/2020) [2021] ZAECGHC 91 (8 October 2021): * Oblique subscription to rape myths as an indication of the urgent need to reform the *mens rea* test in acquaintance rape cases in South Africa

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1. Introduction

The core legal question in the *Coko v S* judgment turned on whether the complainant tacitly consented to penetrative sex. The appellant was acquitted by the high court based on his defence that he genuinely believed that complainant's behaviour and body language indicated her consent. The judgment was penned by acting judge Tembeka Ngcukaitobi, with judge Nyameko Gqamana concurring. Appellant's version of events was accepted, namely that 'he got caught up "in the heat of the moment"' (at para 23.15), and that '[he] thought [she] wanted it to happen so technically consent did pop' (at para 12). The high court overturned the magistrates court's conviction of appellant (at para 91), instead finding that appellant's version was reasonably possibly true (at paras 72 – 74).

The judgment garnered significant controversy, and it was criticised for entrenching 'rape myths', as well as signifying that the defence of genuine belief in tacit consent in intimate relationships must be reformed or removed in totality (E Ferreira *'Coko vs S* ruling: The case against a subjective test on consent in rape trials' *Mail &*

Guardian, 20 October 2021, available at *https://mg.co.za/news/2021-10-20-coko-vs-s-ruling-the-case-against-a-subjective-test-on-consent-in-rape-trials/*, accessed on 9 August 2022; S Swemmer '"Foreplay" judgment shows how problematic judicial views around consent in rape cases persists' *Daily Maverick*, 14 October 2021, available at *https://www.dailymaverick.co.za/opinionista/2021-10-14-foreplay-judgment-shows-how-problematic-judicial-views-around-consent-in-rape-cases-persists/*, accessed on 9 August 2022; OS Sibanda 'Flawed Makhanda High Court judgment is an Achilles' heel in rape case law in South Africa' *Daily Maverick*, 17 October 2021, available at *https://www.dailymaverick.co.za/opinionista/2021-10-17-flawed-makhanda-high-court-judgment-is-an-achilles-heel-in-rape-case-law-in-south-africa/*, accessed on 9 August 2022; B Winks 'Recent rape acquittal shows why we need to revise our laws on sexual consent' *News24*, 16 October 2021, available at *https://www.news24.com/news24/analysis/ben-winks-recent-rape-acquittal-shows-why-we-need-to-revise-our-laws-on-sexual-consent-20211016*, accessed on 9 August 2022).

This case note will first provide brief context to certain issues that add to the complexity of acquaintance rape trials, namely consent, the *mens rea* test, the defence of a genuine belief in tacit consent to sex, as well as rape myths that are intricately enmeshed in these cases. Thereafter the high court judgment's description of events of the night in question and the reasoning that led to the acquittal of the appellant will be engaged with. It will then be argued that the court made two significant missteps: first, the court completely overlooked growing arguments that the South African subjective psychological *mens rea* test in establishing consent must be reformed, something which is also argued for or has already been implemented in several other jurisdictions. The second misstep flows from the first: the defence of a genuine belief in tacit consent in cases of acquaintance rape is strongly rooted in rape myths. By acquitting appellant and not engaging with the global movement to address the link between rape myths and consent, such myths implicitly emerged in the judgment. The case note will be concluded by recommending how the *mens rea* test should be reconceptualised in the South African criminal justice context, specifically to better protect victims. The purpose is to ensure that the unfair expectation placed on complainants to show non-consent is instead directed to the accused to show what they did to establish whether the complainant was indeed consenting to penetrative sex.

2. Contextualising acquaintance rape cases

Rape occurs in different forms and guises. The question of consent hinges on the type of context within which it is committed. For instance,

in terms of international criminal law it is undisputed that sexual and gender-based crimes amounting to genocide, crimes against humanity, torture or war crimes are clearly committed in contexts within which the prosecution does not have to prove the lack of consent at all (*The Prosecutor v Dragoljub Kunarac* IT-96-23-T and IT-96-23/1-T (Judgment) 22 February 2001 paras 457 – 458; *Prosecutor v Dragoljub Kunarac, Kovac & Vukovic* IT-96-23 & IT-96-23/1-A (Judgment) 12 June 2002 para 130; *Sylvestre Gacumbitsi v The Prosecutor* ICTR-2001-64-A (Judgment) 7 July 2006 para 155). In instances where extreme violence is used by the perpetrator, such as gang rape or rape during the commission of robbery or other serious crimes, the evidence is usually of such a nature that it is a clear indication that the victim did not consent to sex (*Tshabalala v S* 2020 (5) SA 1 (CC)).

When it comes to consent to sexual acts in intimate relationships or where the victim knows the perpetrator personally, proving the lack thereof becomes complicated. Instances of so-called 'date rape' or 'acquaintance rape' are extremely difficult to prove, if not the most difficult, as consent is both subjective and psychological. This applies to the beliefs of both the perpetrator and the victim: what the former (subjectively and psychologically) believes to be an indicator of the *existence* of consent, and what the latter (subjectively and psychologically) believes to *signify their* consent to sexual acts. The perception that this form of rape does not amount to 'real rape' still persists. Focus on the actions of the perpetrator shift to those of the victim. Historically the credibility of a rape complainant was established if she testified to chasing the perpetrator away, that she showed multiple signs of physical injury, cried out for help, and immediately reported the rape (Lord M Hale *The History of the Pleas of the Crown* (1847) 633). Further, her general reputation and sexual history (or lack thereof) was considered, together with the corroboration of her testimony by other people (Hale ibid).

With regards to marital rape, a husband could not be found guilty of raping his wife, as 'by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract' (Hale op cit at 628). The defence of the existence of a marriage was incorporated in South African law for many years, namely that rape could only be committed if a male had 'carnal connection with a woman (not his wife) without her consent' (*R v Mosago* 1935 AD 32 at para 34; *R v K* 1958 (3) SA 420 (A); s 1 of the Criminal Law and Criminal Procedure Act Amendment Act 39 of 1989; F Kaganas and C Murray 'Law reform and the family: the new South African rape-in-marriage legislation' (1991) 18 *J L & Soc'y* 287). It was only in 1993 that the defence of the existence of a marriage was abolished in s 5 of the Prevention of Family Violence Act 133 of 1993. Section 56(1)

of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('SORMA') also prohibited the defence of marriage, but importantly added that 'it is not a valid defence for that accused person to contend that a marital or *other relationship* exists or existed

between him or her and the complainant' (own emphasis).

The importance of preventing and prosecuting sexual and gender-based violence are strongly advocated globally as well as domestically, from a governmental level right through to grassroot movements. In South Africa the common law crime of rape was amended to become a statutory crime, and is currently defined as '[a]ny person (''A'') who unlawfully and intentionally commits an act of sexual penetration with a complainant (''B''), without the consent of B, is guilty of the offence of rape' (s 3 of SORMA). The definition in terms of SORMA is both gender-neutral and not limited to 'the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion' (*Masiya v Director of Public Prosecutions* 2007 (5) SA 30 (CC) at para [78], with reference to *The Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T (Judgment) 2 September 1996 paras 149, 597 and 731).

The question of what exactly would amount to consent to sexual acts is a topic of robust debate globally, specifically because this is the biggest sticking point in acquaintance rape cases. The accused must intend to commit rape, which is the *mens rea* or mental element of the crime. *Mens rea* is conceived as the psychological and subjective reflection of the state of mind of the accused, and in South Africa the required intention to prove rape may include *dolus eventualis* (JM Burchell *Principles of Criminal Law* 5ed (2016) at 348, and 380 – 385; S Hoctor 'The concept of *dolus eventualis* in South African law – an historical perspective' (2008) 14 *Fundamina* 14; S Hoctor 'The degree of foresight in *dolus eventualis*' (2013) 26 *SACJ* 131; SV Hoctor *Snyman's Criminal Law* 7ed (2020) at 128, 134 – 136, and 178 – 183). *Dolus eventualis* in rape cases means that the accused subjectively foresaw the possibility that the victim did not consent to sex, but nevertheless proceeded with sexual penetration (Burchell op cit at 625; Hoctor (2020) op cit at 356).

What complicates convictions of acquaintance rape is the defence that the accused genuinely believed that the complainant tacitly consented to sex, which is usually relied upon in such cases (K Phelps, D Smythe and J Omar 'Chapter 2 Section 3: Rape' in D Smythe & B Pithey *Sexual Offences Commentary* (2019 RS 2) ch 2, para 2.4.1; T Illsey 'The defence of mistaken belief in consent' (2008) 21 *SACJ* 63; PJ Schwikkard 'Rape: An unreasonable belief in consent should not be a defence' (2021) 34 *SACJ* 76). In South Africa, if an accused holds a genuine, subjective, even if mistaken, belief that consent was given,

they will lack the required *mens rea*: '[t]he element of intention is vital because rape can only be committed intentionally. A principle of our criminal justice system is expressed in the maxim *actus non facit reum nisi mens sit rea* – the act is not wrongful unless the mind is guilty' (*S v Zuma* 2006 (2) SACR 191 (W) at 205).

Section 1(2) of SORMA defines 'consent' as a 'voluntary or uncoerced agreement'. By including 'uncoerced' in the definition of consent in s 1(2) of SORMA, the legislature tried to shift the focus towards the accused so that the victim no longer has to prove that their behaviour and body language unequivocally communicated their refusal to have penetrative sex (Phelps, Smythe and Omar op cit para 2.3). Further, '[t]he enquiry into consent should begin by examining the conduct of the accused and the circumstances surrounding the event in question, in order to determine whether consent was vitiated' (Phelps, Smythe and Omar op cit para 2.3). Interrogating the perpetrator's conduct instead is a 'more [appropriate reflection of] the reality of power dynamics that surround criminal sexual conduct' (Phleps, Smythe and Omar op cit at para 2.3 at 9). This is also in conformity with the obligation to protect and respect the victim's fundamental rights to equality, human dignity, freedom and security of the person, and privacy (ss 9, 10, 12 and 14 respectively of the Constitution).

Despite the advances in the South African legal framework on sexual and gender-based violence, the behaviour and body language of acquaintance rape victims are still treated with mistrust. Not only do victims question and blame themselves, society and the criminal justice system as a whole do too. They are subjected to a plethora of 'myths' and 'victim blaming', all of which suggest that the archaic requirements to prove the lack of consent are still deeply entrenched in the general public, albeit overtly or more implicitly. Victims are expected to explain that their behaviour and body language as a whole very clearly indicated that they did not consent to penetrative sex whatsoever at the time of the rape. They had to have unambiguously verbally and physically resisted the penetrative sex; if they submitted to the act and their body lacked clear signs of physical violence, it indicated consent and enjoyment. If the victim did not raise any objection to various sexual acts during foreplay, it is viewed as an indicator of tacit consent to penetrative sex. Their 'no' in reality meant 'yes'. It is expected that they had to have immediately fled the scene to report the rape to the relevant authorities. They must explain why they wore the clothes they did or didn't wear, and what message either portrayed. Victims' sexual experience (or lack thereof) also comes under intense scrutiny. The versions of events by victims regarded as promiscuous by society are treated with distrust: they are portrayed as regularly consenting to sex; therefore, they must have consented again. It is also believed

that women in particular often 'change their minds' after having sex, and then make a false allegation of rape in an attempt to avoid being perceived a 'slut'. Great significance is also attached when an intimate, romantic, or marital relationship existed: the expectation is that sexual acts will continue to be welcomed. Consent, once given, cannot be withdrawn (See further: A Allen 'Rape messaging' (2018) 87 *Fordham L Rev* 1033; J Bucher and M Manasse 'When screams are not released: A study of communication and consent in acquaintance rape situations' (2011) 21 *Women & Crim Jus* 123; J Crowe and B Lee 'The mistake of fact excuse in Queensland rape law: Some problems and proposals for reform' (2020) 39 *U Queensland L J* 1 at 6 – 7 and 11 – 12; D Gurnham 'Victim-blame as a symptom of rape myth acceptance: Another look at how young people in England understand sexual consent' (2016) 36 *Legal Stud* 258; Illsey op cit at 74 – 75; D Jackson 'Six mistakes of law about consent' (2020) 4 *NZ Women's L J* 97; CA MacKinnon 'Rape redefined' (2016) 10 *Harv L & Policy Rev* 431 at 467–428; JM Modiri 'The rhetoric of rape: an extended note on apologism, depoliticisation and the male gaze in *Ndou v S*' (2014) 30 *SA J Hum Rights* 134; Schwikkard op cit at 77, 87–90, 94–97, 00; L Wolhuter 'Levelling the playing field: A feminist redefinition of the crime of rape' (1998) 61 *THRHR* 443 at 444, 453, 457; M Xiao Liu and AKC Benton 'Beyond belief: How the "corroboration rule" in Malawi obstructs justice for victims of sex crimes and discriminates against women and girls on the basis of sex – a call for legislative change' (2021) 40 *Columb J Gender L* 408 at 444).

The next part will briefly discuss the high court judgment, whereafter the argument will be made that the court made two significant missteps, namely that it failed to consider the growing global support to broaden and reconceptualise the meaning of consent, and that the snowball effect of this oversight led to the manifestation of rape myths in the court's reasoning. It must however be highlighted at the outset that the movement to reconceptualise consent and the *mens rea* test has not yet translated to criminal law reform in South Africa. The court therefore applied South African rape law *ius strictum*, without contemplating issues of more general societal impact and concern. South Africa is one of the countries with the highest rape incidents in the world, a dire situation in need of drastic change ('Rape statistics by country 2022', *World Population Review,* available at *https://worldpopulationreview.com/country-rankings/rape-statistics-by-country*, accessed on 9 August 2022). Judicial intervention in particular could play an instrumental role herein, particularly in bringing about legislative development and eventually, societal transformation.

3. The high court judgment

In 2020 the Grahamstown regional court convicted Loyiso Coko of raping the complainant in 2018, and sentenced him to seven years' imprisonment. Coko's initial application for leave to appeal the conviction and sentence was refused by the regional court, but he was eventually granted leave to appeal by the high court. In October 2021 the high court delivered judgment, finding that the state failed to prove beyond reasonable doubt that appellant intentionally and unlawfully sexually penetrated the complainant without her consent (at paras 91 and 101).

The core facts of the case were not disputed by the appellant and complainant. They started dating mid-June 2018, and on 1 July, she slept over at his house. They broke up not long thereafter. They continued communicating with one another for some time after breaking up, and saw one another socially on a number of occasions. It was also not disputed that, from the start of the relationship, complainant made it clear to appellant that she was still a virgin, and when they discussed sexual intercourse she stated that she was not yet ready to have penetrative sex (at paras 28 and 52).

The court referred to several text messages exchanged between appellant and complainant after the 1st of July 2018. On 7 July, complainant stated:

> 'for the record, I didn't want to. I wasn't ready nor prepared to have sex that night. And I thought we were on the same page about that because you assured me we were not having sex before you took off my pyjamas. But you said one thing and did the opposite. And I have been going insane ever since' (at para 12).

The court then referred to text messages that were exchanged on the 16th of July 2018:

> 'Appellant apologised to the complainant for "going back on [my] word. And having unprotected sex with you." But the complainant rejected this telling him "going back on your word. That's what you call inserting your penis in my vagina without my permission. And continuing even when I told you you hurting me." The Appellant's response was "maybe I don't deserve your forgiveness"' (at para 15).

Where appellant and complainant differ fundamentally is whether she consented to sex on the night in question. Sexual acts and foreplay to which there were 'no manifestation of any refusal of consent', included cuddling, kissing, allowing appellant to undress them both, and that she did not object to him performing oral sex on her. The court also accepted appellant's version that she did not ask him to stop after he penetrated her, but that they instead continued having sex after she told him he was hurting her.

The court found that various aspects of complainant's behaviour gave appellant the impression that she gave tacit consent to penetrative sex (at paras 40 and 91), such as not leaving appellant's house immediately (at para 32), not reporting the rape to the police immediately (at paras 7 and 39), not wearing underwear underneath her pyjama pants (at para 23.9), and that her pants were off during the foreplay and penetrative sex (at paras 12, 23.9, 30, 36, 47).

The high court accepted that appellant was aware that the complainant was still a virgin and that she would only lose her virginity when she was ready. The court however disagreed with the magistrate's court prosecutor's argument that, because of complainant's virginity, appellant was 'obliged to ask her' first before penetrating her (at para 61), and therefore that it was 'necessary to obtain "an expressive answer" from the Complainant' (at para 59). The court found that the magistrate made 'a misdirection of law' (at para 82) in concluding that '"something more" was required to demonstrate her consent, and that it was not sufficient for the appellant to rely solely on her conduct as illustrative of consent' (at para 80). The high court stated that

> 'the notion that because the Complainant was a virgin, the Appellant could not rely on her tacit consent to the sexual intercourse. This line of enquiry at the instance of the Prosecutor was allowed to continue, despite having no foundation in law. It seems to have found apparent endorsement in the judgment. We are concerned about this element of the trial as it risks engaging the courts in matters of sexual morality. The fact of the matter is that there are no special rules for male or female virgins – everyone is equal before the law and is entitled to equal protection and benefit of the law' (at para 103.4).

It was further found that the magistrate, in not addressing that appellant's defence that he 'genuinely believed that the Complainant had consented, and got carried away with their intimacy', amounted to making an 'erroneous finding' (at para 98). The conclusion of the court was that it could not 'uphold the findings of fact of the Magistrate which are unjustified when one has regard to the record. I cannot hold that the state proved that the version of the Appellant that he genuinely believed there was at least tacit consent was false beyond reasonable doubt' (at para 91).

4. Missteps of the high court: the *mens rea* test and rape myths

The high court made two significant missteps in reaching its conclusion. The first is that the court completely failed to consider arguments regarding reforming the South African subjective psychological test to prove *mens rea* to more accurately reflect the global movement to shift

the meaning of what would amount to consent to penetrative sex. This is particularly important when an accused's defence is a genuine belief that a complainant tacitly consented to sex. The second misstep is very closely related to the first: the defence relates to the facts considered to indicate that complainant tacitly consented to sex, and the court's interpretation hereof finds its roots in various rape myths.

In South African criminal law, the accused's genuine belief in consent is assessed subjectively from a psychological point of view, therefore it is a reflection of their mental state at the time of the rape (Burchell op cit at 625 – 626). However, the continued availability of this defence 'has especially serious ramifications in the context of sexual offences, as the required mental element is intention', and '[i]nappropriately construed it could lead to injustice and serve to undermine the values expressed in [SORMA]' (*Sexual Offences Commentary* op cit para 2.4.1 at 23 – 25).

In the criminal law of several other jurisdictions (*inter alia* Australia, Canada, India, Sweden, New Zealand, the United Kingdom, and the United States of America) the defence of an accused in acquaintance rape cases that consent existed are tested against various benchmarks, some of which overlap with the South African approach. Criteria include that the accused's belief had to have been a 'mistake of fact', 'reasonable', 'objective', or 'honest'. It is also argued that an obligation should be placed on the accused to prove that they took 'reasonable', 'positive' or 'affirmative' steps to ascertain whether the complainant indeed consented to penetrative sex (see further s 273.2(b) of the Canadian Criminal Code (RSC, 1985 c C-46; *R v Ewanchuk* [1999] 1 SCR 330; s 1(2) of the United Kingdom Sexual Offences Act 2003; R Cavallaro 'A big mistake: eroding the defence of mistake of fact about consent in rape' (1996) 86 *J Crim L Criminol* 815; J Crowe and B Lee 'The mistake of fact excuse in Queensland rape law: some problems and proposals for reform' (2020) 39 *U Queensland L J* 1; A Dhonchak 'Standard of consent in rape law in India: towards an affirmative standard' (2019) 34 *Berkeley J Gender L Jus* 29; DP Bryden 'Redefining rape' (2000) 3 *Buffalo Crim L Rev* 317; S Hussaini 'Rape is rape – or is it?' (2015) 24 *Nottingham L J* 182; HM Malm 'The ontological status of consent and its implications for the law on rape' (1996) 2 *Legal Theory* 147; ATH Smith 'Rethinking the defence of mistake' (1982) 2 *Ox J Legal Studs* 429; V Tadros 'Rape without consent' (2006) 26 *Ox J Legal Studs* 515; K Tong 'Date rape: real rape' (2002) *UCL Juris Rev* 130; L Wegerstad 'Sex must be voluntary: sexual communication and the new definition of rape in Sweden' (2021) 22 *German L J* 734).

In South Africa the subjective psychological nature of testing the veracity of the accused's defence of a genuine belief in consent has been

the subject of debate, specifically to ensure more effective protection of rape victims. Burchell argues that even when an accused's genuine belief in consent is 'mistaken' and 'unreasonably held, the accused lacks the subjective intention (or knowledge/foresight of unlawfulness) to commit rape' (Burchell op cit at 625). For Burchell a subjective or objective test 'may not actually be very significant in practice' as courts have the discretion 'to draw legitimate inferences from the objective facts' in establishing *mens rea* (Burchell op cit at 626). In turn, Snyman (in Hoctor (2020) op cit) criticises the subjective psychological theory, but holds that it is in conformity with the Constitution (Hoctor (2020) op cit at 134 – 136). Regarding the subjective/objective, psychological/reasonable test he states as follows:

> 'the presence of subjective aspects does not detract from what is in essence an objective inquiry. The presence (or not) of a particular subjective disposition remains an objective fact, after all. Ultimately even where subjective disposition does play a role in constituting unlawfulness, the focus is on whether an act can be regarded as *objectively reasonable* in the light of all the surrounding circumstances, including subjective disposition or intent. The consequences of mixing categories of liability such as unlawfulness and culpability does nothing to aid legal certainty' (at 135 – 136).

Schwikkard strongly argues in favour of broadening the current *mens rea* test to specifically include reasonableness, but that it is crucial for the legislature to very clearly give content and guidelines as to exactly what the belief in consent would mean (op cit at 99–101). This is particularly so as a 'reasonableness test' is complicated to establish in a diverse society such as South Africa (Schwikkard op cit at 89–90). What may be 'reasonable' for one person may be 'abhorrent' to another, and

> 'there is a very real possibility that placing the reasonable person in the position of the accused will result in rape myths being validated. This is where the metaphorical constitutional bridge as both an educative and normative instrument charts the way forward. The factors selected as indicators of reasonableness should be justifiable in terms of promoting constitutional values, in doing so they should serve an educative function

in negating myths and stereotypes that undermine autonomy and dignity, reflecting age-old patriarchal attitudes and beliefs. Conversely, beliefs that contradict constitutional values should not be regarded as reasonable' (at 96 – 97).

In Canada an obligation is placed on an accused to show that they took 'reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting' (s 273.2(b) of the Canadian Criminal Code). This also finds support in South Africa. Schwikkard holds that this would 'align with the educative and protective functions of the criminal justice system', as the duty to take reasonable steps would ensure that persons will not be able to rely

'on discriminatory myths and stereotypes' (Schwikkard op cit at 97). The reason for this is because the trauma to the victim 'far outweighs' the duty to establish whether a person consents to sex, and would align with their fundamental rights to equality, human dignity, and freedom and security of the person (Schwikkard op cit at 89). Illsey also argues in favour thereof that an accused must take 'reasonable steps' to ascertain consent, and highlights the Canadian *R v Ewanchuk* judgment where it was found that 'where a complainant expresses non-consent, the obligation on the accused to take additional steps to ascertain consent escalates' (Illsey op cit at 73).

One cannot examine the defence of a genuine belief in consent, especially tacit consent, without being confronted with several rape myths. This is where judges Ngcukaitobi and Gqamana made their second misstep: the consequence of not considering the global movement to develop the meaning of consent to sex, particularly relating to the *mens rea* test, is that rape myths obliquely emerged in their judgment.

The high court focused extensively on *complainant's* behaviour and body language: *she* failed to prove that *her* words, behaviour and body language indicated clearly enough that she did not consent to sex on the 1st of July. In contrast hereto, the magistrate's court interrogated *appellant's* words and behaviour at length. The magistrate correctly pointed out that it was 'not sufficient for the appellant to rely solely on her conduct as illustrative of consent' (at para 80). Appellant was required to explain and justify his actions. The high court did the opposite to this. The repercussion hereof is the defeat of SORMA's purpose of shifting the onus away from a complainant in the redefinition of consent towards the accused, specifically to more accurately reflect 'the reality of power dynamics that surround criminal sexual conduct' (*Sexual Offences Commentary* op cit at para 2.3 at 9).

Communication between complainant and appellant after the night in question was undisputed, yet its content was not accorded any worth by the court. Complainant was clear in her text messages that she 'wasn't ready nor prepared to have sex that night' (at para 12). The court acknowledged that complainant 'mentioned that she not want to (sic) have sex with the appellant as he was undressing her' (at para 94), and also accepted that appellant 'told her that he was not going to have sex with her' whilst kissing and undressing her (at para 97). During court proceedings appellant 'accepted that they had previously discussed sex and she told him that she was not ready for sexual intercourse. He also accepted that he had been told that the complainant was a virgin' (at para 52). Yet, the court fails to make the connection that complainant, by *saying* that she did not want to have sex, did not want to have sex. Not only that, it is also inconsistent

with the principle of inferential reasoning: appellant's inference that complainant consented to sex that night was not consistent with her words, and in turn her words were clear enough to exclude the inference that she wanted to have penetrative sex (*R v Blom* 1939 AD 188 at 202 – 203).

Further, the court stated that, '[o]n the complainant's version, there was no manifestation of any refusal of consent between the kissing, the oral sex and the penetration' (at para 94). Yet, when complainant was asked why she did not attempt to stop appellant when he penetrated her, she testified 'that she did not feel like she was in a position to stop anything. She stated that she felt like almost (sic) *powerless* and vulnerable and not in a position to change the situation' (at para 35, own emphasis). She also testified that she was crying, 'kept saying he must stop', tried to push him off with her 'hands on his shoulders', but that he 'just carried on shoving it in and out and kept saying sorry in my ear' (at para 23.12). However, in terms of long-established criminal law, if a victim does not resist but instead submits to penetration, it does not equate to their consent to the sexual act (*R v Day* 173 ER 1026 (1841); *R v Swiggelaar* 1950 (1) PH H61 (A)).

It was noted in the medical report that complainant's body showed 'no physical signs of assault' (at para 9), which she later confirmed in her testimony (at paras 32 and 94). The high court concluded that she tacitly consented to penetrative sex, based thereon that violence was not used, complainant did not refuse cuddling, kissing, or oral sex, and that she allowed appellant to undress them both. The court found that the magistrate made a 'factual misdirection' in distinguishing between the 'foreplay' and penetrative sex (at paras 84 – 97). Here the judgment reflects the rape myth that sexual desire equites consent, and that foreplay will inevitably lead to penetrative sex. However, '[d]esire is also an internal and subjective state that can exist, or be absent, without any external manifestation. This makes it very easy for defendants to claim that they thought the victim desired sex, whether or not they actually did believe this. These factors make this a particularly dangerous mistake of law' (Jackson op cit at 116–117).

What is of further importance of complainant's testimony is that, after the first act of vaginal penetration, she asked appellant to stop because he was hurting her, and that he continued regardless (apologising to her while doing so). However, the court attached no importance to complainant's protestations. In Burchell's *Principles of Criminal Law*, he describes the withdrawal of consent as follows: 'once a man has penetrated the woman, he may begin to inflict some form of violence or hurt on the woman which is unacceptable to her. She should be entitled to demand the cessation of the sexual intercourse and if the

male persists his conduct can only be construed as rape.' (JM Burchell *Principles of Criminal Law* 5ed (2016) at 624).

By failing to interrogate appellant's behaviour sufficiently, the high court also failed to consider the way in which power materialises in intimate relationships, which can take place on a broad spectrum (*Sexual Offences Commentary* op cit at para 2.3 at 8–9). The court did not attach any significance to complainant's testimony that she felt 'powerless and vulnerable' (at para 35) during the rape, yet it is apparent from the magistrate's court judgment that importance was attached to 'the reality of power dynamics that surround criminal sexual conduct' (Judgment, *Coko v State* Petition at 158, with reference to *Sexual Offences Commentary* op cit at para 2.3 at 9). In the Constitutional Court's *Masiya* judgment (*Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, amici curiae*) 2007 (5) SA 30 (CC)), it was held that power lies at the heart of rape: '[t]oday rape is recognised as being less about sex and more about the expression of power through degradation and the concurrent violation of the victim's dignity, bodily integrity and privacy' (*Masiya* supra at para [78]).

Then, because complainant repeatedly communicated to appellant that she did not want to have sex, he should have *foreseen* that this did not signify that her 'no' in reality meant 'yes'. These words should have been an indication that there is a possibility that complainant did not consent to penetrative sex, even if she did not resist any foreplay at all. Appellant blatantly ignored these words when he went ahead and penetrated her vagina. This is a clear reflection of the 'no means yes' rape myth, where an accused claims 'a reasonable belief in consent in the face of the victim saying no', in this case repeatedly by complainant before and on the night in question (Jackson op cit at 118). In this case appellant's genuine belief in consent was based on the 'relationship expectation': namely 'believing that the other person would probably, or might, agree to or welcome the sexual activity is a belief in consent (that is, believing that actual agreement is not required)' (Jackson op cit at 127). What makes the high court's subscription to this myth very strange, is that a 'relationship expectation' is usually based on behaviour and statements made on *previous* occasions. However, the court accorded no consequence to complainant's repeated refusals *before* the night in question.

Another major myth is that rape perpetrators are 'psychopaths', sex-starved 'degenerates' and 'perverts', immoral men or men with mental and psychological disorders. As we now know, most studies on this topic have indicated the contrary: that rape is committed by normal men, in the normal mode of a patriarchal society, within the routine conventions of male sexual expression; men in traditional masculine,

patriarchal roles (such as husbands, fathers, uncles, boyfriends, male co-workers and employers)' (Modiri op cit at 147).

The high court's construction of the appellant's profile is not done in extensive detail, yet it is nevertheless significant. The court drew attention to it that appellant 'had seen [complainant] before at church' before they met through a friend (at para 46), and that he had worked as a paramedic for three years (at para 45). The court mentions appellant's age twice (at paras 45 and 94). The second time is done rather strangely: it is pointed out that '[n]o force or threats were used to coerce the Complainant (who is the same age as the Appellant)' (at para 94). Immediately thereafter the court delves into the magistrate's 'misdirection' to distinguish between foreplay and penetrative sex (at paras 94 – 97). Then, before making its order, the court '[expresses] some disquiet at some aspects of the trial' which it finds to have infringed on the appellant's fair trial rights, particularly that 'an adverse atmosphere [was created] in the trial' (at para 103). This calls the court's description of the grounds of appeal right at the start of the judgment to mind, namely that the sentence of seven years 'is unduly harsh, ignores [the] interests of society, and induces a sense of shock' (at para 2). When making its order the court again returns to the way in which the magistrate's court approached complainant's virginity, making the peculiar statement that 'there are no special rules for male or female virgins – everyone is equal before the law and is entitled to equal protection and benefit of the law' (at para 103.4).

This is in contrast to the proceedings at the magistrate's court where the prosecutor stated that 'rape is not always this big monster where injuries must flow, violence must be applied, rape can also happen in cases like this where consent is given and it is withdrawn' (at para 61). This is in line with the sentiment expressed by the Constitutional Court in *Tshabalala* judgment that

> '[r]ape is often mischaracterised as being an act of sexual intercourse, absent of consent, committed by inhumane monsters. This is a dangerous mischaracterisation of rape. *Words matter*. Words give a construction of a certain viewpoint of the world, and this viewpoint tends to be gendered' (*S v Tshabalala* 2020 (5) SA 1 (CC) at para [70], own emphasis).

The implicit emergence of several rape myths in the *Coko* judgment is unfortunately not unique to acquaintance rape cases (Modiri op cit at 134–138, 153–158; Schwikkard op cit at 87–89). Modiri argues that acquaintance rape judgments are often a reflection of a 'judge's subscription to, and use of, 'rape myths' in reaching the final decision' (Modiri op cit at 135), and Schwikkard aptly calls South African judgments dealing with rape since the adoption of SORMA as a continuation of 'a judicial dance with such myths' (Schwikkard op cit at 88). Judges Ngcukaitobi and Gqamana sadly failed to steer away

from buying into rape myths, thereby damaging strides made globally and in South Africa in reconceptualising the meaning of consent and the *mens rea* test in acquaintance rape cases. This contrasts to the way in which the entire proceedings were run at the magistrate's court, which is firmly aligned with the global movement. The high court obliquely provided legal substantiation for adopting rape myths, and the judgment is particularly disconcerting in the South African context with its staggering rape statistics. This was an unfortunate missed opportunity to reject archaic requirements to prove the lack of consent in acquaintance rape cases.

5. Recommendations and conclusion

The *Coko* judgment evidences that urgent societal, legislative and judicial intervention in providing content to consent to sexual acts is needed in South Africa, especially in intimate relationships. The problem with the continued availability of the defence of a genuine belief in consent to penetrative sex is that this is where rape myths and victim blaming commonly materialise. The judiciary must be made well aware that they must be particularly cautious to identify myths when they arise, as their reaction thereto would best protect victims and complainants. A framework with clear guidelines and best practices must be established for the criminal justice system as a whole to implement when dealing with acquaintance rape cases. It is suggested that the legislature should without delay amend SORMA to make official provision for assessing the (limited) circumstances when the defence of a genuine belief in consent should be available (Schwikkard op cit at 100 – 101). Ideally the courts will then provide further content to the meaning of consent in its (binding) judgments, thus marking a clear shift away from continuing to be one of the contributors to the entrenchment of rape myths in society.

The extreme difficulty to prove instances of date or acquaintance rape cases lies therein that both complainant and accused hold subjective and psychological beliefs: for complainant what *constitutes* consent is subjective and psychological, for accused the belief in the *existence* of consent is subjective and psychological. This is precisely why it is strongly recommended that the test applied in other jurisdictions to establish the *mens rea* of an accused in acquaintance rape cases should be applied by our courts when adjudicating acquaintance rape cases. It is further recommended that prosecutors question accused persons as to which 'reasonable', 'positive', or 'affirmative' steps they took to establish whether the complainant consented to penetrative sex. These steps must be considered alongside the circumstances as a whole: judges do not consider 'an accused's version in a vacuum', they

are required to consider the 'strength and weaknesses' of both the state's and the defence's cases to reach its conclusion (*Zuma* supra at 210 with reference to *S v Radebe* 1991 (2) SACR 166 (T)).

The yardstick for courts adjudicating acquaintance rape cases must be the importance of the obligation to respect another person's fundamental rights to equality, human dignity, freedom and security of the person, as well as privacy. What reasonable, positive, and affirmative steps did the accused take to act in conformity with this obligation? This is of utmost importance in a constitutional democratic state such as ours, and courts are obliged to protect these rights in establishing consent in acquaintance rape cases. The trauma that may possibly be caused to a person when another fails to curb their sexual urges is serious enough to require that they must take conscious and concerted steps to establish the presence of consent: '[t]he cost to the non-consenting party far outweighs the cost of ensuring that ones' belief in consent is reasonable' (Schwikkard op cit at 89).

To conclude, the following analogy (own formulation based on the case) illustrates the danger of the message this judgment sends to society and the criminal justice system as a whole:

> 'I want you to have my kettle. I know you like my watch too, but it is very special to me. I have had it since I was born. I know that one day, when I am ready, I will give it to someone who will treasure it as much as I do. You invite me for tea, made in your new kettle, and I say that it would be lovely! When I arrive at your house, we are happy to see each other. We are in a jovial mood. We make jokes. I give you my kettle, and after you take it, you reach out to take my hand. I let you hold my hand. Because it feels nice to be held like that.
>
> But then you start looking at me, at my watch, in a different way. The expression in your eyes changes. Your body language changes. Your grip on my hand changes. I don't say that this is upsetting to me. You are still holding my hand, I am still letting you. You take my other hand. You tighten your grip on my hands, it hurts. I tell you it hurts, and I ask you to stop. You say that you're sorry it hurts, and soften your grip slightly around my two hands. With your free hand, you start undoing the clip on my watch. The watch I said I am not ready to give. The watch you said you wouldn't pressure me into giving away until I am ready. I remind you of this. Again, I say that you are hurting me, please stop. You are now trying even harder to take my watch off my wrist. I have started wriggling a bit, hoping to free myself. Then you won't be able to take my watch. I realise that my wriggling is pointless, I am powerless to stop you. I just stand there. You keep saying, whispering really, that you're sorry. But you don't stop. When you have taken it off, you let go of my hands. You put my watch on your wrist. I watch you do it, I don't say anything. My hands and wrists are hurting. Eventually I say: "Did that just happen? I didn't imagine that did I?" There is an uncomfortable silence. You say: stop staring at me, your silence is scaring me. I think: you are scaring me too. I ask you why you broke your promise. You say: I "got caught up in

> the heat of the moment," I went with the motion. But stay for tea, you said you would. I think: yes I did. I drink my tea, and then you take me home.
>
> The next couple of days are a bit of a blur. I am in shock too, I think. I trusted you. You even promised, but then you did the opposite. Why? I send you a message (I can show you, I saved it on my phone), asking if "anything wrong happened" that day I was at your house. I also say: "I wasn't ready nor prepared" to give you my watch. You apologise for "going back" on your word, that you "don't deserve" my "forgiveness".
>
> Two months later I report that you stole my watch at the police station. But I wonder, did I make a mistake in wearing my watch to your house?

Did my body language make you think I wanted to give you my watch? Why did I not just leave? Why did I not take my hand out of yours? Why did I stay to have tea with you? Did I not say clearly enough that night? Should I have said that I did not want to give you my watch more often that night you took it? Why did I wait two months to go to the police? Why did I continue chatting with you, even seeing you socially once or twice after you took my watch? Did it mean that, by going to your house, I gave you my kettle *and* my watch? Then it would mean that it was reasonably possibly true that you did not, as I thought, steal my watch. Everyone tells me, every day, that I did, in fact, give it to you. That my body language gave it to you. That wearing it to your house in the way I did that day, meant that I gave it to you. Everything I did, meant I gave it to you. It doesn't matter to anyone that I told you many times that I wasn't ready to give my watch away. But maybe I didn't say it enough? Maybe I didn't say it clearly enough? Maybe I didn't say that you're hurting me loud enough? Maybe I should have screamed theft! theft! People don't believe me when I say you took my watch. That you didn't take it. That it was actually me that gave it to you. *I* got it wrong. *I.* Am. Wrong.'

* Now reported at 2022 (1) SACR 24 (ECG).
