

# Does Mistaken Belief in Consent Constitute a Defence in South African Rape Cases?

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## Abstract

In the 2020 case of *Coko v S* 2022 1 SACR 24 (ECG), the Eastern Cape High Court held that a person's mistaken belief in consent to penetrative sex could constitute a valid defence in law. In statutory provisions and jurisprudence, the absence of the victim's consent is fundamental in establishing a case of rape. This paper evaluates the decision, where it was held that when an appellant reasonably believes that the complainant/victim had consented to sex, this alone could be enough to acquit the appellant of the charge of rape.

## Keywords

Consent; intention; mistaken belief; rape; reasonable belief in consent.

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## 1 Introduction

The High Court (HC) in *Coko v S*<sup>1</sup> delivered a judgment that overturned a lower court's decision and set aside a 7-year sentence of imprisonment.<sup>2</sup> The lower court had convicted a 23-year-old male paramedic of rape.<sup>3</sup> This judgment raised a hypothetical and significant issue that pertains to the prosecution of rape: can someone who mistakenly or reasonably believed that the victim/complainant consented to (penetrative) sex be acquitted when accused of the crime of rape?<sup>4</sup>

The jurisprudence of the local courts and the writings of South African legal scholars have built both the *actus reus* and *mens rea* elements of the crime of rape.<sup>5</sup> This paper looks at one of the material elements of the crime of rape: the lack of consent by the victim at the time of the sexual intercourse. In other words, in order to convict an accused of the offence of rape, the prosecution must prove beyond reasonable doubt that the victim did not voluntarily consent to the sexual intercourse. The issue of consent is of crucial importance, since the entire definition and prosecution of the offence depends on the absence of the victim's consent. Consequently, the question of consent in rape cases can be very complex, as several issues arise: the voluntariness of the consent given by the victim; the withdrawal of consent; and acting under a reasonable belief that the victim consented to the sexual intercourse. The focus of this paper is narrow in scope, and it aims to investigate whether having a mistaken or reasonable belief that someone consented to sex could be considered a defence in a rape case that could result in an acquittal. Furthermore, the paper will evaluate whether such an acquittal would be contrary to public policy or disregard justice, particularly considering the high incidence of gender-based violence in South African society.

The paper is structured as follows: it starts with the legal position of the offence of rape with reference to the relevant statutory provisions. It also

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<sup>1</sup> *Coko v S* 2022 1 SACR 24 (ECG) (hereafter *Coko v S*).

<sup>2</sup> *Coko v S* para 2.

<sup>3</sup> *Coko v S* para 2.

<sup>4</sup> Hoctor *Snyman's Criminal Law* 307; Tadros 2006 *OJLS* 521.

<sup>5</sup> In *DPP v Morgan* [1975] 2 WLR 913 [1975] 2 All ER 347 it was held that *mens rea* of rape is not knowledge of lack of consent, but intent to have intercourse with the knowledge of lack of consent or recklessness as to whether or not there is consent.

outlines the mental and material elements of the offence of rape in South African criminal law. The second part of the case then considers the judgement of the lower court and the judgment of the HC, the acquittal of the convict/appellant and the basis of the HC's judgment. The third part explores the element of consent in rape cases, and some difficulties in establishing the voluntariness of the consent, the continuation of consent, the withdrawal of consent and the accused's (mistaken) belief that the victim consented or continued to consent.

## 2 Rape: a general overview of the elements

In South Africa, the offence of rape is defined, prohibited, and penalised by the *Sexual Offences and Related Matters Amendment Act, 2007* (SORMA). The offence is defined in section 3 of SORMA as:

Any 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.<sup>6</sup>

The following elements must be present in the determination of rape: sexual penetration of another;<sup>7</sup> without the consent of the latter person;<sup>8</sup> unlawfulness;<sup>9</sup> and intention.<sup>10</sup>

With regard to sexual penetration, SORMA expanded the definition of rape to no longer include instrumentality as a requirement for a rape conviction,<sup>11</sup> requiring the accused to personally, with their own genitalia, penetrate a victim without the required consent.<sup>12</sup>

Furthermore, the definition of rape now includes more than just the insertion of male genitalia into female genitalia.<sup>13</sup> Before the amendment of the Act, rape could be committed only towards a female.<sup>14</sup> SORMA further expanded

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<sup>6</sup> *Molaza v S* 2020 4 All SA 167 (GJ) para 38.

<sup>7</sup> See *S v Willemse* 2011 2 SACR 531 (ECG).

<sup>8</sup> See *Maqhwara v S* (2019/A171) [2021] ZAGPJHC 619 (26 October 2021).

<sup>9</sup> See *Tshabalala v S; Ntuli v S* 2020 5 SA 1 (CC).

<sup>10</sup> See *S v Makayi* 2021 2 SACR 197 (ECB).

<sup>11</sup> *Tshabalala v S; Ntuli v S* 2020 5 SA 1 (CC) para 13.

<sup>12</sup> *Tshabalala v S; Ntuli v S* 2020 5 SA 1 (CC) para 2.

<sup>13</sup> Examples of acts of sexual penetration include acts committed by a male in respect of a female, acts committed by a female in respect of a male, acts committed by a male in respect of another male, and acts committed by a female in respect of another female.

<sup>14</sup> *R v K* 1958 3 SA 420 (A) 421F; Burchell and Milton *Principles of Criminal Law* 490; Hoctor *Snyman's Criminal Law* 307.

the definition to include, for example, the insertion of inanimate objects into a person's genitals or anus without the person's consent.<sup>15</sup>

It is sufficient in modern South African law that rape occurred without a person's consent.<sup>16</sup> Consent is not present if a person is asleep, intoxicated, mentally incapable of understanding the act, or below the age of consent.<sup>17</sup> In these instances the law deems such people incapable of consent. Consequently, consent is vitiated if it is given based on or as the result of fraudulent inducement by the perpetrator of a material mistake.<sup>18</sup> Duress, which results in a person's will being overborne, also vitiates consent. For example, the application or threatened application of physical force constitutes the clearest illustration of the vitiation of consent on account of duress.

It is crucial to note that the crime of rape can only be committed intentionally.<sup>19</sup> This is because the accused's attention must relate to all the elements of the crime, as the accused must have known or foreseen and discounted the possibility that the complainant had not consented to the sexual penetration. To this end, it is arguable that a subjectively mistaken belief that the person has consented to sex, however unreasonable, constitutes a valid defence since it excludes the element of intent.<sup>20</sup>

### 3 In the Regional Court

#### 3.1 Facts of *Coko v S*

The accused and his girlfriend (hereafter the complainant), both 23 years of age, were in a romantic relationship on the 1<sup>st</sup> of July 2018 when the alleged rape occurred.<sup>21</sup> Later, in September 2018, the complainant laid a charge of rape against the accused at the police station.<sup>22</sup> The accused was consequently charged with rape in terms of section 3 of SORMA.<sup>23</sup> The Regional Court convicted the accused on 8 September 2020 on one count

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<sup>15</sup> *Tshabalala v S; Ntuli v S* 2020 5 SA 1 (CC) paras 69 and 97; Mokone 2021 *Obiter* 416.

<sup>16</sup> Van der Bijl 2010 *SACJ* 232; Spies 2016 *SALJ* 402.

<sup>17</sup> Burchell *Principles of Criminal Law* 608; Flecha, Tomás and Vidu 2020 *Frontiers in Psychology* 6.

<sup>18</sup> Feinberg 1986 *Ethics* 334.

<sup>19</sup> *R v K* 1958 3 SA 420 (A) 421; *R v Z* 1960 1 SA 739 (A) 743A, 745D; (although these cases relate to the old common law crime of rape, they still apply to the new crime. It is nevertheless an indication that intent as an element of rape must be present for the crime of rape to be constituted); Van der Bijl 2010 *SACJ* 236; Hoor *Snyman's Criminal Law* 307.

<sup>20</sup> Amirthalingam 2002 *Sing JLS* 303.

<sup>21</sup> *Coko v S* para 20.

<sup>22</sup> *Coko v S* para 7.

<sup>23</sup> *Coko v S* para 5.

of rape.<sup>24</sup> He was sentenced to seven years' imprisonment. The Regional Court refused to grant the accused leave to appeal.<sup>25</sup>

The accused subsequently lodged an application directly to the HC against the conviction and sentence by the Regional Court.<sup>26</sup> The accused submitted that the State had failed to prove beyond a reasonable doubt that he was guilty of rape.<sup>27</sup> The accused was on bail, while waiting for the outcome of the appeal.<sup>28</sup>

### 3.1.1 *Complainant's version of events*

The complainant's version of events was that they went to a place to spend the evening together.<sup>29</sup> It had been common cause that they would usually kiss while watching a movie in bed.<sup>30</sup> On this day, the accused removed the complainant's pyjamas during kissing and performed oral sex on her,<sup>31</sup> which she stated was acceptable. An important issue was that she informed the accused that she did not want penetrative sex as she wanted to remain a virgin.<sup>32</sup> However, the accused allegedly disregarded her wish to refrain from penetrative sex, as he removed her pants and inserted his penis in and out of her vagina while whispering the word "sorry" in her ears.<sup>33</sup> She tried to close her legs as she told him that she did not want to have penetrative sex with him.<sup>34</sup> She added that she cried during the whole event and tried to push the accused off her, but all in vain.<sup>35</sup>

### 3.1.2 *Accused's version of events*

The accused's version of events differed from that of the complainant. He stated that after the movie they started kissing and he performed oral sex on the complainant.<sup>36</sup> The complainant did not show any signs of discomfort.<sup>37</sup> He then started kissing her again and inserted himself into her.<sup>38</sup> The complainant did not stop him from having penetrative sex with

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<sup>24</sup> *Coko v S* para 1.

<sup>25</sup> *Coko v S* para 1.

<sup>26</sup> *Coko v S* para 2.

<sup>27</sup> *Coko v S* para 2.

<sup>28</sup> *Coko v S* para 1.

<sup>29</sup> *Coko v S* para 23.4.

<sup>30</sup> *Coko v S* para 23.6.

<sup>31</sup> *Coko v S* paras 23.9-23.10.

<sup>32</sup> *Coko v S* para 23.11.

<sup>33</sup> *Coko v S* para 23.12.

<sup>34</sup> *Coko v S* para 23.9.

<sup>35</sup> *Coko v S* para 23.12.

<sup>36</sup> *Coko v S* para 46.

<sup>37</sup> *Coko v S* para 47.

<sup>38</sup> *Coko v S* para 48.

her.<sup>39</sup> The only objection from the complainant's side was that the penetration hurt her, after which he said he stopped and then continued to penetrate her sexually.<sup>40</sup> The complainant did not object; nor did she push him off of her. Most importantly, the accused added that the body language of the complainant was sufficiently relaxed for him to genuinely believe that she had consented to penetrative sex.<sup>41</sup>

Based on this factual setting, the Court had to determine whether someone who mistakenly or reasonably believed that another person consented to penetrative sex can be acquitted on a charge of rape.

### **3.2 Judgment**

The Court accepted both the complainant's and the accused's evidence in full.<sup>42</sup> However, according to the Court, the accused's claim that the complainant's mixed body language put him under the impression that consent had been given could not reasonably be true.<sup>43</sup> The Court added that the accused should have known from the outset that there was no consent from the complainant.<sup>44</sup> The Court based this conclusion on the fact that at the time of oral sex, the complainant had explicitly told the accused that she did not want penetrative sex.<sup>45</sup>

The Court added that the complainant's principle of not having penetrative sex and her wishes to remain a virgin should have been sufficient reason for the accused to control himself.<sup>46</sup> More specifically, the Court added that the accused most probably lured the complainant to his house knowing that she was a virgin, and that he had had the intention to penetrate her sexually that evening.<sup>47</sup> The Court also found that the accused deliberately disregarded the wishes of the complainant not to have penetrative sex with the thought that if he raped her, no one would believe her about the circumstances under which she was raped.<sup>48</sup> The Court was of the opinion that the accused thought he could get away with rape.<sup>49</sup>

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<sup>39</sup> *Coko v S* para 48.

<sup>40</sup> *Coko v S* para 48.

<sup>41</sup> *Coko v S* para 52.

<sup>42</sup> *Coko v S* para 64.

<sup>43</sup> *Coko v S* para 64.

<sup>44</sup> *Coko v S* para 65.

<sup>45</sup> *Coko v S* para 66.

<sup>46</sup> *Coko v S* para 67.

<sup>47</sup> *Coko v S* para 68.

<sup>48</sup> *Coko v S* para 68.

<sup>49</sup> *Coko v S* para 68.

From the above findings, the Court found the accused guilty of the crime of rape in terms of section 3 of the Act and sentenced the accused to 7 years' imprisonment.<sup>50</sup> However, Mr Coko appealed the judgment.

#### 4 In the High Court

In the high court Ngcukaitobi AJ and Gqamana J referred to *Otto v S*,<sup>51</sup> where the Supreme Court of Appeal held that the State bears the onus to prove all the elements of rape, including intention and lack of consent. Therefore, they held that the appellant did not need to prove his innocence. They added that the appellant must be acquitted if there was reasonable doubt that he may be innocent,<sup>52</sup> even if the appellant's version appeared unconvincing. In this regard, the Court referred to *S v Van der Meyden*,<sup>53</sup> where Nugent J held that:

The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent ... these are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.

Ngcukaitobi AJ and Gqamana J specifically looked at the two elements of rape, namely consent and intent.<sup>54</sup> They looked at consent in terms of section 1(2) of the SORMA, where it is described as "voluntary or uncoerced agreement". They referred to section 1(3) of the SORMA, which deals with the circumstances under which a complainant is considered not to be consenting to sexual penetration voluntarily or without coercion. Ngcukaitobi AJ and Gqamana J held that consent meant the same thing for all rape victims, regardless of whether they were male or female, a virgin or not a virgin.<sup>55</sup> They believed that if another approach were to be followed to consent in respect of persons who were not virgins, it would set an unfortunate precedent in our law.<sup>56</sup>

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<sup>50</sup> *Coko v S* para 69.

<sup>51</sup> *Otto v S* 2019 3 SA 189 (WCC).

<sup>52</sup> *Coko v S* para 73.

<sup>53</sup> *S v Van der Meyden* 1999 1 SACR 447 (W) 448F-G.

<sup>54</sup> *Coko v S* para 79.

<sup>55</sup> *Coko v S* para 82.

<sup>56</sup> *Coko v S* para 82.

#### 4.1 *Factual misdirections in the Regional Court*

The Court found that Regional Court findings contained some factual misdirections during the trial. The Magistrate in the Regional Court focussed only on the fact that the appellant referred to the body language of the complainant and assumed consent from that.<sup>57</sup>

The Court felt that the testimony of the appellant that he had stopped and then continued to insert his penis into the complainant's vagina was not taken up in cross-examination, nor was it weighed in the assessment of the probabilities by the Magistrate.<sup>58</sup> Therefore, it could not be said that the appellant simply continued with the intercourse in disregard of the wishes of the complainant, as held by the Magistrate.

Ngcukaitobi AJ and Gqamana J believed that the Regional Court should have considered the evidence on which the concession was based.<sup>59</sup> The concession viewed the fact that when the appellant took off the complainant's clothes, she stated that she did not want penetrative sex,<sup>60</sup> and the complainant's version supported this view. She stated that she closed her legs and as he was undressing her, she said that she did not want to have sex with the appellant.<sup>61</sup> As such, the finding by the Magistrate in the Regional Court that the complainant made it clear to the appellant during the kissing and oral sex that she did not consent was not correct and was not substantiated by the record.<sup>62</sup>

It had been established that there was initially no consent from the complainant. Nevertheless, the cumulation of the subsequent tacit acts automatically led the appellant to the belief that consent was present: the complainant's lack of objection to the kissing, combined with the act of allowing her clothes to be removed by the appellant, combined with the lack of objection to the oral sex (participating in the oral sex), combined with her failure to stop the appellant from removing his clothes. These acts together may have led the appellant to mistakenly believe that the complainant consented to penetrative sex the moment he sexually penetrated her.<sup>63</sup> Similar facts had occurred *in R v M*,<sup>64</sup> where the victim had claimed that the accused had raped her, but the court had acquitted the accused. The court

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<sup>57</sup> *Coko v S* para 86.

<sup>58</sup> *Coko v S* para 91.

<sup>59</sup> *Coko v S* para 93.

<sup>60</sup> *Coko v S* para 93.

<sup>61</sup> *Coko v S* para 94.

<sup>62</sup> *Coko v S* para 97.

<sup>63</sup> *Coko v S* para 23.12.

<sup>64</sup> *R v M* 1953 4 SA 393 (AD).

found that although consent had not been verbally expressed, the complainant had voluntarily engaged in sexual conduct with the accused. This led to her being overcome by the sexual stimulation and allowing full copulation, and only fully realising the extent of her actions after the fact. It was important to consider the *R v M* judgment/decision and the facts of the *Coko*-case, where the complainant took a few days to report the case. At their next meeting after the alleged rape, she did not say anything about rape to the appellant. Her only concern was pregnancy.<sup>65</sup> Nor did she say in her initial statement to the police that she had pushed the appellant away from her.<sup>66</sup> This could be used as evidence that the complainant had enough time before the complaint and before the trial to fully realise her actions (during the alleged rape incident). Major J in *R v Esau*<sup>67</sup> supports this line of argument. The judge ruled for the majority, namely that the complainant's cooperative behaviour earlier that evening had in fact given the required air of reality to the accused's defence of mistaken belief in consent.<sup>68</sup> From the above, when looking at rape, all constructive actions before and during the alleged rape must be considered as a whole before a definitive judgment regarding rape is passed down.

#### 4.1.1 *Mistaken belief in consent and intention*

Although it is clear from the above that the complainant may have consented to penetrative sex,<sup>69</sup> the court still failed her in the sense that they disregarded her withdrawal of consent to penetrative sex after the initial penetration took place.<sup>70</sup> It is still rape if consent is withdrawn after penetration and the accused continues with penetration, as is evident from the facts of this case.<sup>71</sup> This set of facts is also closely related to *dolus eventualis*.<sup>72</sup>

Since mistaken belief in consent is not easy to dispute,<sup>73</sup> the state could have applied the principle of *dolus eventualis*.<sup>74</sup> Subjectively according to

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<sup>65</sup> *Coko v S* paras 12-13.

<sup>66</sup> *Coko v S* para 29.

<sup>67</sup> *R v Esau* [1997] 2 SCR 777.

<sup>68</sup> *R v Esau* [1997] 2 SCR 777 para 9.

<sup>69</sup> *Coko v S* para 93.

<sup>70</sup> *Coko v S* para 23.10.

<sup>71</sup> Lyon 2004 *J Crim L & Criminology* 277.

<sup>72</sup> *Dolus eventualis* can be described as follows. "The commission of the unlawful act or the causing of the unlawful result is not the main aim of a person, but he subjectively foresees the possibility that in striving towards his main aim, the unlawful act may be committed, or the unlawful result may be caused, and he reconciles himself to this possibility." See Hoctor *Snyman's Criminal Law* 161.

<sup>73</sup> Illsley 2008 *SACJ* 79; Vandervort 1987 *CJWL* 233.

<sup>74</sup> See *S v Makayi* 2021 2 *SACR* 197 (ECB); Mangale and O'Brien 2021 *Without Prejudice* 61.

the accused he could not have foreseen the possibility that the complainant might withhold consent, since he mistakenly believed that she had given consent, which was his defence. Mistaken belief in consent, automatically results in the absence of intention. And since *dolus eventualis* is a form of intention, the state made the right decision not to use *dolus eventualis* as part of its argument.

As indicated above, the chances are slim that the *Coko*-case will reach the Supreme Court of Appeal (SCA). If the case does reach the SCA, the SCA can consider only the following: whether there was a misdirection in law or a mistake in a sentence that raises a reasonable possibility that the Court could reach a different finding. There was no misdirection in law nor a mistake in sentence arising from the HC judgment, as is illustrated throughout the paper. The SCA would be constrained in setting aside the order of the HC as its jurisdiction to hear the appeal could be contested, particularly in view of section 316B of the *Criminal Procedure Act*. This section provides that: "(1) Subject to subsection (2), the attorney-general may appeal to the Appellate Division against a sentence imposed on an accused in a criminal case in a higher court." In this case, section 316B will apply to appeals only where the HC sat as a court of first instance and not a court of appeal. The SCA would, in terms of section 316B, delete the appeal from the roll and the judgment of the HC would stand.<sup>75</sup> Thus, despite all the considerations to appeal the HC judgment, it all boils down to the fact that the defence's mistaken belief in consent on the part of the appellant is still a valid and strong defence unless some amendments to the law are made.

Thus, when an accused mistakenly believed that a victim had consented to penetrative sex, then that mistake would result in the absence of intent,<sup>76</sup> which could lead to the acquittal of the accused.<sup>77</sup> Whether that mistake in belief was reasonable or unreasonable is another separate matter, as the court's inquiry was not based on whether it was reasonable for the appellant to believe that the complainant had given consent,<sup>78</sup> but on whether the

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<sup>75</sup> In *Director of Public Prosecutions Gauteng Local Division, Johannesburg v Ramolefi* (705/2018) [2019] ZASCA 90 (3 June 2019) the issue of s 316B of the CPA was raised and up to today the CPA has not been amended.

<sup>76</sup> Hoctor *Snyman's Criminal Law* 170; *S v Zuma* 2006 2 SACR 191 (W).

<sup>77</sup> *Vadervort* 1987 *CJWJ* 233; *Boyle and MacCrimmon* 2001 *Windsor YB Access Just* 64-65.

<sup>78</sup> This view has caused ongoing controversy about whether it is enough that the defendant's mistake is honest (a subjective standard) or that the belief must also be reasonable (an objective standard).

state could prove beyond a reasonable doubt that the appellant penetrated the complainant without her consent.<sup>79</sup>

Regarding the element of intent, the law indicates that intent as an element of rape is of a subjective nature.<sup>80</sup> This means that the Court has to place itself in the mindset of the accused at the time the alleged rape took place,<sup>81</sup> no matter how reasonable or unreasonable the mind-set of the accused might be. When the Magistrate in the Regional Court found that the appellant had planned the rape there was no evidence on record to support this conclusion.<sup>82</sup> Without the element of intent the crime of rape is not constituted.<sup>83</sup> The HC judgment is therefore aligned with the principle of legality.<sup>84</sup> When applying the *ius acceptum*-rule<sup>85</sup> the court could not find the accused guilty of rape since the accused's mistaken belief excluded the possibility of him having the intention of raping the complainant and as mentioned above, without intention there can be no crime. Therefore, the conduct of the accused could not be recognised as a crime in law. One must commend Ngcukaitobi AJ and Gqamana J for abiding by the principle of legality and not creating a new crime.<sup>86</sup>

#### 4.1.2 *Defence of mistaken belief in consent and analysis of the High Court judgment*

The application of the defence of mistaken belief in consent in rape cases has not yet been the focus of widespread academic debate in South Africa. Only a few academics such as Labuschagne,<sup>87</sup> Burchell,<sup>88</sup> and Illsley<sup>89</sup> have written on mistaken belief in consent in rape cases, and their views are that

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<sup>79</sup> *Coko v S* para 73.

<sup>80</sup> Hoctor *Snyman's Criminal Law* 167-168.

<sup>81</sup> Hoctor *Snyman's Criminal Law* 168.

<sup>82</sup> *Coko v S* para 98.

<sup>83</sup> See for example Hubin and Haley 1999 *Law & Phil* 121, where they determine that if the accused reasonably believed that the victim consented to sexual intercourse, he does not have the *mens rea* necessary for the crime.

<sup>84</sup> The principle of legality states that an individual cannot be convicted of a crime unless the specific conduct the person has been accused of has been explicitly defined as criminal by the law prior to or at the time of the occurrence of the conduct. Furthermore, the definition of the crime must be clear and must not require any re-interpretation or stretching of the language in which it is expressed. Additionally, if the accused is found guilty, the punishment must align with the four principles outlined above. See Hoctor *Snyman's Criminal Law* 31.

<sup>85</sup> The concept of "*ius acceptum*" means that a court can convict an accused of a crime only if the conduct the accused has engaged in has been officially recognised by the law as a crime. See Hoctor *Snyman's Criminal Law* 31.

<sup>86</sup> See for example *S v Malgas* 2001 SACR 469 (SCA) 472G-H; *S v Solomon* 1973 4 SA 644 (C).

<sup>87</sup> Labuschagne 1999 *SACJ* 348.

<sup>88</sup> Burchell *Principles of Criminal Law* 347.

<sup>89</sup> Illsley 2008 *SACJ* 63-80.

it is a valid defence to use when coupled with the subjective test. Scholars such as Boyle, McCrimmon,<sup>90</sup> and Vandervort<sup>91</sup> argue that mistaken belief on the part of the accused as to whether the complainant had consented or not should be categorised as a mistake of law. As evident in the *Coko*-case, the accused's mistaken belief in consent should be categorised as a mistake of law. There are no ready statistics on how often the same defence has been successfully raised on similar facts in magistrate's courts, where most rape cases are disposed of. Just as in the *Coko*-case, the *S v Zuma*<sup>92</sup> case was taken to a higher court, and the facts were similar. Mr Zuma had intercourse with the complainant and when the complainant accused Mr Zuma of rape, Mr Zuma raised the defence of mistaken belief in consent. The court *a quo* found Mr Zuma guilty, but the higher court acquitted Mr Zuma of all charges.

Based on the given facts of the *Coko*-case, Ngcukaitobi AJ and Gqamana J decided that the evidence presented by the State did not prove beyond reasonable doubt that the appellant acted intentionally, knowing that there was no consent to penetrative sex from the complainant.<sup>93</sup> Therefore, the Court found the appellant not guilty and acquitted him of the charge of rape. The sentence of the appellant of seven years' imprisonment was therefore set aside.<sup>94</sup>

This decision caused much controversy and angered many people.<sup>95</sup> The subjective standard and the politics of belief and consent have long been criticised by feminist writers on sexual assault, who suggest that the defence essentially denigrates women.<sup>96</sup> It is argued that this defence tends to make men's beliefs about women's consent decisive as to whether women have been raped or not.<sup>97</sup> Narratives of blaming the victim and implied consent

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<sup>90</sup> Boyle and MacCrimmon 2001 *Windsor YB Access Just* 64-65.

<sup>91</sup> Vandervort 1987 *CJWL* 233.

<sup>92</sup> *S v Zuma* 2006 2 SACR 191 (W).

<sup>93</sup> *Coko v S* para 101.

<sup>94</sup> *Coko v S* para 104.

<sup>95</sup> Ngcukana 2021 <https://www.news24.com/citypress/news/sex-vs-rape-ngcukaitobis-ruling-sparks-outage-20211017>; Sibanda 2021 <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/>; Xaso 2021 <https://www.dailymaverick.co.za/opinionista/2021-12-03-we-the-people-being-south-african-means-reaching-out-your-hand-to-humanise-the-inhuman/>; Mangale and O'Brien 2021 *Without Prejudice* 60-61.

<sup>96</sup> MacKinnon *Toward a Feminist Theory* 183; Gore 2021 *Social and Legal Studies* 524.

<sup>97</sup> MacKinnon *Toward a Feminist Theory* 183; Gore 2021 *Social and Legal Studies* 524.

are founded on such beliefs.<sup>98</sup> Therefore, the legal endorsement undermines the safety and autonomy of women and exacerbates gender inequality.<sup>99</sup> Dr Sibanda, for instance, expresses his concern about the *Coko* judgment in that he is of the opinion that the HC did not fully understand and take into account the fact that rape is the darkest form of the violation of the bodily integrity of a woman. He is also of the opinion that the judges made a flawed application of the law applicable to the crime of rape when they stated that the crime of rape is constituted only when it involves force and coercion.<sup>100</sup> Xaso shares the same sentiments as Sibanda. She believes that the judges should have been aware when they delivered the judgment that rape is not always a forced act, an act of brutal violence by a stranger, and that many important facts in the final judgment were left out.<sup>101</sup> Swemmer<sup>102</sup> also believes that it is very troubling and legally dangerous to have a judgment that posits that consensual foreplay implies consent to penetration and sex, and therefore that rape did not occur. She further adds that the judges seem to be wrong about the interest of society in relation to the sentences imposed on accused persons. The International Commission of Jurists-Africa tweeted that they were shocked to see that the judges ruled in favour of the appellant where the appellant argued that the foreplay he had with his ex-girlfriend indicated that she was tacitly engaging in agreed sex. Lawyers for Human Rights responded that they were disappointed by this ruling and that consent to one sexual act can never imply consent to all sexual acts. They were also of the opinion that our laws and judgments must not fall prey to the stereotypes around rape and the effects of rape culture if we aim to see a country with decreasing rates of gender-based violence. It is evident from the above that controversy arose when people interpreted the decision as implying that "consent to oral sex gives consent to penetrative sex" and that "rape cannot occur without force or coercion".<sup>103</sup>

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<sup>98</sup> Burgin and Flynn 2021 *Criminology and Criminal Justice* 335; Gore 2021 *Social and Legal Studies* 524.

<sup>99</sup> Burgin and Flynn 2021 *Criminology and Criminal Justice* 335; Gore 2021 *Social and Legal Studies* 524.

<sup>100</sup> Sibanda 2021 <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/>.

<sup>101</sup> Xaso 2021 <https://www.dailymaverick.co.za/opinionista/2021-12-03-we-the-people-being-south-african-means-reaching-out-your-hand-to-humanise-the-inhuman/>.

<sup>102</sup> Swemmer 2021 <https://www.dailymaverick.co.za/opinionista/2021-10-14-foreplay-judgment-shows-how-problematic-judicial-views-around-consent-in-rape-cases-persists>.

<sup>103</sup> King 2021 <https://www.capetalk.co.za/articles/430119/judge-forced-into-controversial-ruling-due-to-outdated-rape-laws-lawyer>; Sibanda 2021

However, this is an improper interpretation of the judgment. The correct and only interpretation of the HC judgement is that the appellant mistakenly believed that there was consent from the complainant. This mistaken belief in consent as mentioned earlier in this paper would exclude the element of intention and automatically no crime will exist. The HC judgment is also based on the fact that the State could not prove beyond a reasonable doubt that the appellant was guilty of rape.

## 5 Element of consent in rape cases

Having looked at intent as an element of rape, we look at consent as an element of rape. Section 3 of SORMA defines the circumstances under which consent is absent. First, when there is an abuse of power or authority.<sup>104</sup> In this case there was no abuse of power or authority as both the complainant and the appellant were 23 years of age. The Regional Court assumed that the accused used his power arising from being male and his status as a paramedic to have penetrative sex with the complaint, but this was speculative as there was no evidence to prove this. On the face of it, neither party was in a position in which they exerted authority over the other. Second, there may be no consent where a sexual act is committed under false pretences.<sup>105</sup> The Regional Court speculated that the appellant lured the complainant to his apartment under false pretences to have penetrative sex. Again, there was no evidence to sustain this conclusion. Third, consent can be missing when a person is unconscious.<sup>106</sup> The facts show that the complainant was conscious throughout the whole event. Lastly, consent is missing where a child is under 12 years of age,<sup>107</sup> is in an altered state of consciousness or has a mental disability. From the facts, the complainant was 23 years of age, not in an altered state of consciousness and she did not have a mental disability. None of the above circumstances was present in the *Coko*-case.

It was clear from the judgment that the case rested on whether the defendant knew that there was no consent or whether there was a

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<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/>.

<sup>104</sup> See for example the following cases where authority was used in order to get the other party to consent to sexual penetration, *H v S* (A400/2012) [2014] ZAGPJHC 214 (16 September 2014).

<sup>105</sup> Gibson 2020 *OJLS* 84; Feinberg 1986 *Ethics* 330; Alencar 2021 *JCL* 464.

<sup>106</sup> *Notito v The State* (123/11) [2011] ZASCA 198 (23 November 2011) paras 6 and 8 state that consent to penetrative sex should always be voluntary and conscious.

<sup>107</sup> See for example the following cases where sexual penetration took place with a minor, *H v S* (A400/2012) [2014] ZAGPJHC 214 (16 September 2014); *Y v S* (537/2018) [2020] ZASCA 42 (21 April 2020); *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 1 SACR 327 (CC).

reasonable possibility that he thought there was consent.<sup>108</sup> This is a vastly different defence, but it is recognised in our law that if one is mistaken or there is a reasonable possibility that the accused was mistaken, then he has a valid defence against a conviction of rape.<sup>109</sup>

The second issue was whether the state had proven beyond a reasonable doubt that the appellant was guilty of rape. The answer would be no, as the evidence painted a picture of doubt as to the reprehensibility of the appellant.

The *Coko* judgment does not change the law and our understanding of the law concerning rape. The Zuma, case where the facts were similar and a similar decision was reached, is an indication that the *Coko* judgment is still aligned with the law. Jurisdictions such as Queensland and New South Wales are among the other jurisdictions where the defence in rape cases of mistaken belief in consent remains in place and many judgments on this defence have been delivered.<sup>110</sup> It simply clarifies the shades of grey that can exist when issues of consent are up for determination. In a time where the "Me too" movement has almost become commonplace; care should be taken when interpreting the facts of rape cases to ensure both the victim and the accused get a fair trial and outcome.

## 6 Conclusion

The HC judgment in the *Coko*-case sparked a conversation about consent and intent in rape cases. Consent and intent as elements of rape were interpreted as prescribed in section 3 of SORMA even before the amendment of the Act. I submit that this case clarifies that if there is reason to believe that if an accused in a rape case mistakenly believed that a victim consented to penetrative sex, the accused may not be held guilty of the crime of rape. Intent as an element of rape was not present. The HC judgment does not nullify the legislation on rape, so the crime of rape remains one of the most important statutory crimes in South African law. Unfortunately, many commentators assume that the judgment set the principle that consent to foreplay (oral sex) automatically means consent to penetrative sex and that there is no rape without force or coercion.

This note has analysed whether mistakenly/reasonably believing that another person consented to penetrative sex would constitute a defence that could result in an acquittal from a rape charge. Might an acquittal of this

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<sup>108</sup> *Coko v S* para 52.

<sup>109</sup> Hoctor *Snyman's Criminal Law* 167-168.

<sup>110</sup> Gore 2021 *Social and Legal Studies* 523.

nature have the potential to run counter to the tenets of public policy or manifestly ignore the precepts of justice, particularly when considering the prevalence of gender-based violence in South African society? I do not believe so. For rape to take place, all the elements must be present. These elements include sexual penetration of another person; without the consent of the latter person; unlawfulness; and intent. If one element is in doubt, then rape cannot be said to have taken place. If intent as an element of rape was lacking in a charge of rape, the crime of rape did not occur according to the law. Intention as an element of rape should always be tested subjectively. When in doubt about the interpretation and analysis of the crime of rape, one should follow the interpretation and reasoning of *Coko v S*.

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### List of Abbreviations

CJWL	Canadian Journal of Women and the Law
CPA	Criminal Procedure Act 51 of 1977
HC	High Court
JCL	Journal of Criminal Law
J Crim L & Criminology	Journal of Criminal Law and Criminology
Law & Phil	Law and Philosophy
OJLS	Oxford Journal of Legal Studies
SACJ	South African Journal of Criminal Justice
SALJ	South African Law Journal
SCA	Supreme Court of Appeal
Sing JLS	Singapore Journal of Legal Studies
SORMA	Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007
Windsor YB Access Just	Windsor Yearbook of Access to Justice