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IN THE HIGH COURT OF SOUTH AFRICA
Gauteng Division, Pretoria

CASE NO: **2022-048656**

In the matter between:

THE EMBRACE PROJECT NPC,INGE HOLZTRGER	Plaintiff / Applicant / Appellant
and	
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES,MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PERSONS WITH DISABILITIES,PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Defendant / Respondent

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Notice of Motion (Long Form)

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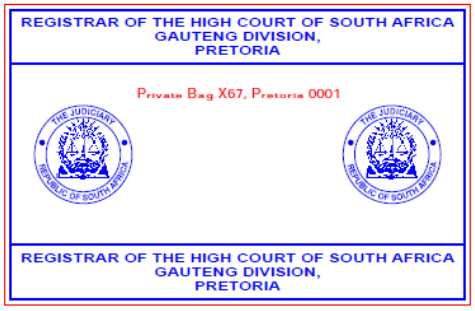

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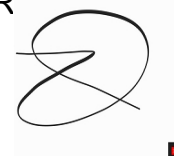

Registrar of High Court of South Africa , Gauteng Division,Pretoria

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 48656/22

In the matter between:

THE EMBRACE PROJECT NPC	First Applicant
INGE HOLZTRÄGER	Second Applicant

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PERSONS WITH DISABILITIES	Second Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent

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DATED at **JOHANNESBURG** on the **16th** day **NOVEMBER** of **2022.**

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TO: **THE REGISTRAR**
High Court of South Africa
Gauteng Division
PRETORIA

AND TO: **MINISTER OF JUSTICE AND CORRECTIONAL SERVICES**
First Respondent
SALU Building, 28th Floor

316 Thabo Sehume Street, (c/o Thabo Sehume and Francis Baard Streets),
PRETORIA, 0001

AND TO: **MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PERSONS WITH DISABILITIES**
Second Respondent
36 Hamilton Street Arcadia
PRETORIA, 0007

AND TO: **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**
Third Respondent
Union Buildings
Government Avenue
PRETORIA, 0002

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 48656/22

In the matter between:

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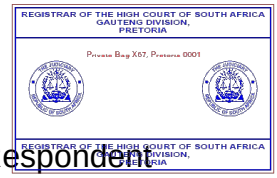
and



MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PERSONS WITH DISABILITIES	Second Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent

NOTICE OF MOTION

TAKE NOTICE that the Applicants apply to this Court for an order in the following terms:

1 Declaring sections 3, 4, 5, 6, 7, 8, 9 and 11A read with section 1(2) of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007 ("**the Act**") unconstitutional, invalid, and inconsistent with the Constitution to the extent that these provisions do not criminalise sexual violence where the perpetrator wrongly and unreasonably believed that the complainant was consenting to the conduct in question, alternatively, to the extent that the provisions permit a

defence against a charge of sexual violence where there is no reasonable objective belief in consent.

2 The declaration of invalidity in paragraph 1 is suspended for a period of 12 months to allow the constitutional defects to be remedied by Parliament.

3 During the 12-month period referred to in paragraph 2, the following words shall be read into the Act:

56(1A) Whenever an accused person is charged with an offence under section 3, 4, 5, 6, 7, 8, 9 or 11A, it is not a valid defence for that accused person to rely on a subjective belief that the complainant was consenting to the conduct in question, unless the accused took objectively reasonable steps to ascertain that the complainant consented to sexual intercourse with the accused.

4 The declaration of invalidity and reading in shall operate only with prospective effect from the date of this order and shall have no effect on conduct which took place before the date of this order.

5 Directing that the costs of this application, including the cost of two counsel, are to be paid jointly and severally by any Respondents opposing the relief sought.

6 Further and/or alternative relief.

TAKE NOTICE FURTHER that the founding affidavit of **LEE-ANNE GERMANOS** and supporting affidavit of **INGE HOLZTRÄGER** will be used in support of this application.

TAKE NOTICE FURTHER that the Applicants have appointed the offices of their attorneys of record, **POWER SINGH INC., C/O GILFILLAN DU PLESSIS INC., 1ST FLOOR, 357 VISAGIE STREET, PRETORIA,** as the address at which they will accept service of all notices and processes in these proceedings. The applicants' attorneys will also accept electronic service at the following email addresses: tina@powersingh.africa, slindile@powersingh.africa, and legal@powersingh.africa.

TAKE NOTICE FURTHER that if you intend to oppose this application, you are required:

a) to notify the applicants' attorneys in writing, within fifteen (15) days of receipt of this application, and in such notice to appoint an address at which you will accept notice and service of all documents in these proceedings; and

b) within fifteen (15) days of delivering such notice, to deliver your answering affidavit, if any, together with any relevant documents.

TAKE NOTICE FURTHER that if no such notice of intention to oppose is delivered, this application will be made on a date to be set by the Registrar or so soon thereafter as counsel may be heard

DATED at **JOHANNESBURG** on the **16th** day **NOVEMBER** of **2022**.

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TO: **THE REGISTRAR**
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Gauteng Division
PRETORIA

AND TO: **MINISTER OF JUSTICE AND CORRECTIONAL SERVICES**
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28th Floor, SALU Building
316 Thabo Sehume Street, (c/o Thabo Sehume and Francis Baard Streets)
PRETORIA, 0001

AND TO: **MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PERSONS WITH DISABILITIES**
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PRETORIA, 0007

AND TO: **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**
Third Respondent
Union Buildings
Government Avenue
PRETORIA, 0002

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 48656/22

In the matter between:

THE EMBRACE PROJECT NPC	First Applicant
INGE HOLZTRÄGER	Second Applicant
and	
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PERSONS WITH DISABILITIES	Second Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

LEE-ANNE GERMANOS

state under oath the following:

1 I am the Director and co-founder of the First Applicant – The Embrace Project NPC – a registered non-profit company incorporated in South Africa bearing registration number 2020/613113/08. I am an adult female attorney and former

Law Clerk of the Constitutional Court of South Africa. I am the head of The Embrace Project's advocacy division and a legal researcher into gender-based violence and femicide, as well as the South African criminal justice system. I am a Master's graduate in International Human Rights Law from the University of Oxford, majoring in International Humanitarian Law, Women and Gender-Related Rights, International Criminal Law and the International Rights of the Child.

2 I am duly authorised to make this application and depose to this affidavit on behalf of the First Applicant. A duly signed resolution by the Directors of The Embrace Project is attached as annexure "**EP1**".

3 The facts contained in this affidavit fall within my personal knowledge, unless indicated otherwise, and are, to the best of my belief, both true and correct. Where I make legal submissions, I do so based on my own expertise as well as the advice of the Applicants' legal representatives, which I believe to be correct.

OVERVIEW

4 This application principally concerns the constitutionality of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007 ("**the Act**") to the extent that it does not criminalise sexual penetration by an accused of a complainant where the accused wrongly and unreasonably believed that the complainant was consenting to the conduct in question. This enables an accused to successfully avoid a conviction on the basis of his subjective understanding of whether the complainant consented to the sexual act in question. Examples of where this is CA

particularly problematic, but not exclusively so, are in cases of intimate partner rape or where consent was initially given but then revoked.

5 Currently, in South Africa, it is not a criminal offence to penetrate the vagina or anus of a person without their consent, as long as the State cannot prove beyond a reasonable doubt that the accused knew that the complainant did not consent.

6 That is because section 3 of the Act defines rape as follows:

> *"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."*

7 The conduct is unlawful if it was committed, objectively, without the consent of the complainant. But it must also be intentional. In South African criminal law concerning *mens rea*, the intention (*dolus*) must not only be to commit the conduct which is unlawful (*actus reus*) but to do so knowing (or recklessly disregarding the risk) that it was unlawful. The word "intentionally" thus requires that the intention is to act unlawfully.

8 In the context of rape, this means that the accused must have not only intended to commit an act of sexual penetration, he must have intended to do so unlawfully, i.e. knowing (or recklessly disregarding the risk) that the complainant was not consenting.

9 In other words, if it is at all "reasonably possibly true" that the accused subjectively believed the complainant was consenting – even if that belief was unreasonable (for example, rooted in rape myths or patriarchal misconceptions

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about women, sex, and consent) – then the accused must be acquitted of a charge of rape, under section 3 of the Act.

10 The same applies to the other sexual violence crimes defined by the absence of consent, in sections 4, 5, 6, 7, 8, 9, and 11A of the Act.

11 This places an almost insurmountable barrier to the conviction of accused persons who have been found, by courts, to have committed acts of sexual penetration *without the consent* of the complainant (objectively), where the prosecution has been unable to prove that the accused persons subjectively *intended* to rape the complainant.

12 By enabling a defence of unreasonable belief in consent, the Act violates the rights of victims and survivors, to equality (section 9 of the Constitution), dignity (section 10), privacy (section 14), bodily and psychological integrity (section 12(2)), and freedom and security of the person (section 12(1)), which includes the right to be free from all forms of violence and the right not to be treated in a cruel, inhumane or degrading way.

13 The State's duty to respect, protect, promote, and fulfil the above rights (section 7(2) of the Constitution) requires that the State address the flaws in the Act that require subjective intent, without qualification, in order to commit sexual offences defined by the absence of consent. This is especially so in light of the rampant and persistent scourge of sexual violence in South Africa. Qualifying the requirement of intention by stipulating that unreasonable belief in consent is not a valid defence, we submit, will ensure that the constitutional rights of people

subjected to sexual violation (as contained in the impugned sections of the Act) are vindicated.

14 Furthermore, international law requires states to prevent and punish all forms of sexual violence. To this end, international and comparative law has developed to define the *mens rea* of rape and other sexual offences, replacing the defence of a purely subjective belief in consent with a defence of *reasonable* belief in consent.

15 Accordingly, the Applicants submit that South Africa's legal position is outdated, unconstitutional, and unjustifiable. The relief sought in this application is twofold:

15.1 First, an order declaring that sections 3, 4, 5, 6, 7, 8, 9 and 11A read with section 1(2) of the Act are unconstitutional, invalid, and inconsistent with the rights of victims and survivors of sexual violence to equality (section 9), dignity (section 10), privacy (section 14), bodily and psychological integrity (section 12(2)), and freedom and security of the person (section 12(1)) to the extent that these provisions do not criminalise sexual violence where the perpetrator wrongly and unreasonably believed that the complainant was consenting to the conduct in question, alternatively, the provisions permit a defence against sexual violence with no reasonable objective belief in consent.

15.2 Second, an order suspending the declaration of invalidity for a period of 12 months, coupled with a proposed interim reading in that it is not a valid defence to a charge under sections 3, 4, 5, 6, 7, 8, 9 or 11A, for the accused person to rely on a subjective belief that the complainant was

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consenting to the conduct in question unless the accused took all reasonable steps to ascertain that the complainant consented.

16 After identifying the parties, this affidavit will address the following:

16.1 the scourge of sexual violence in South Africa;

16.2 background to this application;

16.3 how the Act violates the rights of victims and survivors;

16.4 why the violation cannot be justified;

16.5 the international and comparative law positions; and

16.6 just and equitable relief.

17 Before doing so, I wish to note the following:

17.1 In this affidavit, I use the terms "victim" and "survivor" to refer to those who have been raped or have experienced other forms of sexual assault. However, I note and align myself with the position adopted by the Constitutional Court that these terms have different connotations and implications for those who have "*experienced some of the most challenging affronts to their dignity and bodily integrity.*" The Embrace Project appreciates that different contexts, experiences, and trauma lead to different responses and forms of locating and identifying sexual violence. Accordingly, and while I use the terms "victim" and "survivor", I do not intend to, by any means, impose a definition or response on persons who have been raped or sexually assaulted.

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17.2 I also point out that while I refer in the main in this affidavit to the impact of the current formulation of the impugned provisions with respect to their effect on women and children who have been raped or sexually assaulted – I fully accept that these provisions apply equally to all persons regardless of gender. The available data and our experience at the Embrace Project shows that sexual violence disproportionately affects women and children in South Africa. This does not discount sexual violence which is perpetrated against members of the queer community, gender non-conforming persons, sexual and gender minorities, vulnerable members of society, persons with disabilities, and men. Where specific reference is made in this affidavit to women and children, this should be read as a comment on a descriptive reality, and not be read as a prescriptive or exclusionary statement of which members of society may be victims and survivors of sexual violence.

PARTIES

18 The First Applicant is **THE EMBRACE PROJECT NPC ("EMBRACE")**, a non-profit company which aims to "creatively combat" gender-based violence and femicide ("**GBVF**") through a marriage of art and advocacy. Embrace focuses on raising awareness around the root causes and prevalence of GBVF in South Africa through its social media presence. Embrace is dedicated to effecting real social change, by using art as a medium of healing and expression while simultaneously working at changing the narrative of violence and disempowerment by, among other things, engaging in advocacy and law reform processes.

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19 Moreover, Embrace has made submissions to Parliament in relation to the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill [B16-2020], the Criminal and Related Matters Amendment Bill [B17-2020], the Domestic Violence Amendment Bill [B20-2020], and the Victim Support Services Bill [2019]. Embrace advocated for law reform specifically on the issue of consent in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill, having engaged directly with the President, the Third Respondent, as evidenced by correspondence issued to the President on 22 October 2021, attached hereto as "**EP2**". In addition, Embrace has petitioned the Third Respondent, and made written and oral submissions to the Parliamentary GBVF Work Stream, as well as provided comments to the Second Respondent on the draft Comprehensive National GBVF Prevention Strategy and Framework of Action, and the National Council on Gender-Based Violence and Femicide Bill, 2021. Embrace, with me as its representative, forms part of Pillar 1 of the Second Respondent's National Strategic Plan on Gender-Based Violence and Femicide (NSP-GBVF) Collaborative.

20 Embrace brings this application in three capacities:

20.1 First, in its own interest, as an organisation dedicated to combatting GBVF through advocacy, awareness-raising and participation in the development and amendment of legislation, national policy and strategies impacting GBVF, pursuant to section 38(a) of the Constitution;

20.2 Second, in the interest of victims and survivors of all forms of sexual violence, in terms of section 38(c) of the Constitution; and

20.3 Third, in the public interest, in terms of section 38(d) of the Constitution.

21 The Second Applicant is **INGE HOLZTRÄGER**, an adult female student. Ms Holzträger is a victim of rape and was the complainant in *S v Amos* which was heard at Pretoria Regional Court under Case No14/683/2018 on 27 February 2019 before Magistrate Yolandi Labuschagne. Ms Holzträger's rapist was ultimately not convicted as a result of the current legal position on subjective belief in consent. Ms Holzträger brings this application on her own behalf and in the public interest. A supporting affidavit from Ms Holzträger is filed with this affidavit.

22 The First Respondent is the **MINISTER OF JUSTICE AND CORRECTIONAL SERVICES**, who is cited as the Cabinet member responsible for the administration of the Act, and whose address is 28th Floor, SALU Building 316 Thabo Sehume Street, (c/o Thabo Sehume and Francis Baard Streets), Pretoria, within the jurisdiction of this Court.

23 The Second Respondent is the **MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PERSONS WITH DISABILITIES**, a member of Cabinet whose mandate includes helping combat gender-based violence, and who will likely be part of the National Council on Gender-based Violence and Femicide ("**NCGBVF**"), as well as the Minister responsible for the overall coordination of the Inter-Ministerial Committee ("**IMC**"), in ensuring the successful implementation of the GBVF-NSP. She is cited for the interest she may have in the subject matter of this application. Her address is 36 Hamilton Street, Arcadia, Pretoria, within the jurisdiction of this Court.

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24 The Third Respondent is the **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**, the Head of the National Executive. As the President has claimed to regard the prevention and punishment of gender-based violence as a priority of his administration, he is cited for the interest he may have in the subject matter of this application. The address of the Office of the President is Union Buildings, Government Avenue, Pretoria, similarly within the jurisdiction of this Court.

THE SCOURGE OF SEXUAL VIOLENCE IN SOUTH AFRICA

25 In 2021, the United Nations Special Rapporteur on Violence against Women, its Causes and Consequences reported on the following worldwide systemic issues in the criminal justice system's handling of rape cases:[1]

> "[R]ape is frequently not reported. If rape is reported, it is seldom prosecuted; if prosecuted, the prosecution is rarely pursued in a gender-sensitive manner and often leads to very few convictions, the revictimization of survivors and high attrition rates, resulting in a normalization of rape, a culture of rape or silence on rape, stigmatization of victims and impunity for perpetrators."

26 An inquiry conducted by the United Nations Committee on the Elimination of Discrimination against Women ("**Committee**"), in 2021, under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women ("**CEDAW**"), which specifically focused on the levels of domestic violence in South Africa, found, *inter alia*, that there are concerningly "low levels of prosecution and conviction in domestic and sexual

---

[1] Report of the Special Rapporteur on violence against women, its causes and consequences, Dubravka Šimonović, 'Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention' (19 April 2021), UN Doc A/HRC/47/26 at para 12.

violence cases", to which the Applicants submit the current definitions of consent and rape in the Act significantly contribute.[2] The Committee concluded by finding the South African state responsible for the grave and systematic violation of rights under CEDAW.

27 The effects of sexual violence are well summarised by the African Commission on Human and Peoples' Rights in its Guidelines on Combating Sexual Violence and its Consequences in Africa:[3]

> "Sexual violence has serious consequences for victims. These consequences include but are not limited to long and short-term physical damage, such as unwanted pregnancies; gynaecological complications and genital lesions; vaginal and anal tears, such as traumatic and obstetric gynaecological fistula; miscarriages; forced abortions; stillborn children; chronic pain; and sexually transmitted infections (STI) such as HIV. These consequences can also include psychological consequences such as post-traumatic stress disorder; denial; fear; lack of trust; low self-esteem; shame; guilt; anxiety and mood disorders, sleep disorders, loss of appetite; depression; drug abuse; self-harm and high-risk behaviour, including suicidal behaviour; isolation; decrease in or loss of sexual enjoyment; relationship problems with family, friends and partners; "honour" crimes; trauma that is passed down through generations; the destruction of communities; as well as death. Sexual violence also has social and financial consequences which can include abandoning schooling, job loss, loss of training opportunities, financial difficulties, social exclusion, stigmatization, and difficulty in forming romantic and other personal relationships."

---

2 UN Committee on the Elimination of Discrimination against Women, 'Inquiry concerning South Africa conducted under article 8 of the Optional Protocol to the Convention' (2021) at para 96.

3 African Commission on Human and Peoples' Rights, '*Guidelines on Combating Sexual Violence and its Consequences in Africa*' (2017) at para 3.3.

28 In *Tshabalala*, the Constitutional Court lamented as follows:[4]

> "Violent crimes like rape and abuse of women in our society have not abated. Courts across the country are dealing with instances of rape and abuse of women and children on a daily basis. The media is in general replete with gruesome stories of rape and child abuse on a daily basis. Hardly a day passes without any incident of gender-based violence being reported. This scourge has reached alarming proportions. It is sad and a bad reflection of our society that 25 years into our constitutional democracy, underpinned by a Bill of Rights, which places a premium on the right to equality and the right to human dignity, we are still grappling with what is a scourge in our nation."

29 And most recently in *AK v Minister of Police*,[5] the Constitutional Court described "*the horrific reality that this country has for far too long been, and continues to be, plagued by a scourge of gender-based violence to a degree that few countries in the world can compare*".

30 Back in 2016 already, the United Nations Special Rapporteur on Violence against Women, its Causes and Consequences called the violence perpetrated against women in South Africa a "pandemic". She stated that: [6]

> "The violence inherited from the apartheid still resonate profoundly in today's society dominated by deeply entrenched patriarchal norms and attitudes towards the role of women and which makes violence against women and children, especially in rural areas and in informal settlements, a way of life and an accepted social phenomenon. At the core of this violence against women pandemic lie unequal power gender relations, patriarchy, homophobia, sexism and other harmful discriminatory beliefs

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4 *Tshabalala v S; Ntuli v S* [2019] ZACC 48; 2020 (5) SA 1 (CC); 2020 (3) BCLR 307 (CC); at para 61.

5 *AK v Minister of Police* [2022] ZACC 14; 2022 (11) BCLR 1307 (CC) at para 2.

6 Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to South Africa between 4 to 11 December 2015, (18 November 2016), A/HRC/32/42/Add.2 at para 7.

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> and practices. Additional triggers of VAW include widespread use of drug and alcohol, high unemployment rate and the continuing stereotypical portrayal of women in the media. Compounding the problem is the high incidence of HIV."

31 With grave concern, we record the recent Crime Statistics delivered by Police Minister Bheki Cele on 3 June 2022 which paints a grim picture of GBVF in South Africa. The Minister recorded that "January, February and March of 2022 were especially brutal for women and children of this country. Murder attempted murder and assault GBH of women all recorded double-digit increases."[7] The quarterly statistics further revealed that:

> "All sexual offences recorded a 13.7% increase with contact sexual offences recording the only decrease in this crime category. The first three months of this year, 10 818 people were raped in South Africa. Almost half of the cases, a staggering 4 653 rapes, took place at the home of the rape victim or the home of the rapist. Public parks, beaches, streets, open fields, parking areas and abandoned buildings were the second most likely places for rapes to occur."

BACKGROUND TO THIS APPLICATION

The development of the Act

32 Shortly after the advent of democracy, the South African Law Commission ("**Law Commission**") (as it then was) commenced a project of reforming South Africa's sexual offence laws (Project 107).[8]

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[7] Speaking notes delivered by Police Minister General Bheki Cele (MP) at the occasion of the release of the Quarter Four Crime Statistics 2021/2022 hosted in Pretoria on Friday 3 June 2022.

[8] Chief Justice I Mahomed (Chairperson), Justice Y Mokgoro (Vice-Chairperson), Justice M L Mailula, Adv JJ Gauntlett SC, Mr P Mojapelo, Prof RT Nhlapo and Ms Z Seedat.

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33 In 1999, the Law Commission released Discussion Paper 85 on Sexual Offences: The Substantive Law. It summarised the position on *mens rea* for common law rape as follows:

> "3.4.4.1. **Intention**
>
> 3.4.4.1.1. The man must intend to have sexual intercourse with the woman, knowing, or foreseeing the possibility, that she has not consented to the sexual intercourse. This is what is usually referred to as *mens rea*.
>
> 3.4.4.1.2. Intention must extend to each element of the crime. Though it is difficult to envisage sexual intercourse by mistake, such cases are not impossible. The question whether there is the necessary intent in rape cases usually arises in connection with the element of lack of consent. The accused must foresee the possibility that the woman is not a consenting party, yet proceed with intercourse. If the accused genuinely believes that the woman consents, even though his belief is unreasonable, he lacks the necessary intention. Usually such a mistaken belief will be attributed to the woman's conduct, active or passive, but this is not essential. Where there is actual consent but, because the girl is younger than 12 years and therefore incapable in law of consenting, the accused must foresee the possibility that she is under 12. Likewise, where consent is in fact vitiated by intoxication or mental defect, the accused lacks intention unless he foresees this possibility."

34 After considering the position in several other countries, the Law Commission discussed whether the fault requirement for rape should be objective or subjective. It recorded the following arguments in favour of an objective test:[9]

> "A chief argument against the subjective test is that it allows men to adhere to old-fashioned views about sexual behaviour and female

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[9] Id at para 3.4.7.5.4.

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> sexuality. It leaves the way open for an accused to rely on notions such as 'no really means yes' or that women enjoy being seduced and ravished.
>
> The adoption of an objective test and a requirement of 'reasonableness' would assist in educating the community, particularly men, that proper care should be exercised in sexual relations."

35 The Law Commission, however, elected not to formulate a specific provision on this aspect at that stage but instead invited comments on the following question:[10]

> "Should the accused's mistaken belief that he or she had acted lawfully be a complete defence to a charge of rape where this mistake, objectively viewed, is unreasonable under the circumstances?"

36 Astonishingly, when the Law Commission released its final Sexual Offences Report in 2002, this issue was completely ignored, at least as far as rape was concerned.[11] The Law Commission did recommend an objective test for penetrative sexual acts with consenting children or indecent acts with certain children without their consent. In such cases, the Law Commission recommended that there should only be one defence available - namely that the accused was deceived into believing that the child (between the ages of 12 and 16 years) was over the age of 16 and that belief was reasonable.

37 It did the same in respect of indecent acts or acts which cause penetration with certain mentally impaired persons.[12] Inexplicably, the Law Commission simply

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[10] Id at para 4.3.7.5.6.

[11] South African Law Reform Commission, Project 107, Sexual Offences Report, (2002).

[12] Id at Annexure A (Draft Bill), clause 8.

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ignored the possibility of an objective test for fault in respect of all other sexual offences defined by the lack of consent, and recommended the following statutory prohibition on rape:

> "3. **Rape**
>
> (1) Any person who unlawfully and intentionally commits any act which causes penetration to any extent whatsoever by the genital organs of that person into or beyond the anus or genital organs of another person, or any act which causes penetration to any extent whatsoever by the genital organs of another person into or beyond the anus or genital organs of the person committing the act, is guilty of the offence of rape.
>
> (2) An act which causes penetration is prima facie unlawful if it is committed—
>
> (a) in any coercive circumstance;
>
> (b) under false pretences or by fraudulent means; or
>
> (c) in respect of a person who is incapable in law of appreciating the nature of an act which causes penetration.
>
> (3) Coercive circumstances, as referred to in subsection (2)(a), include any circumstances where—
>
> (a) there is any use of force against the complainant or another person or against the property of the complainant or that of any other person;
>
> (b) there is any threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or
>
> (c) there is an abuse of power or authority to the extent that the person in respect of whom an act which causes penetration is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.
>
> (4) False pretences or fraudulent means, as referred to in subsection (2)(b), are circumstances where a person—

(a) in respect of whom an act which causes penetration is being committed, is led to believe that he or she is committing such an act with a particular person who is in fact a different person;

(b) in respect of whom an act which causes penetration is being committed, is led to believe that such an act is something other than that act; or

(c) intentionally fails to disclose to the person in respect of whom an act which causes penetration is being committed, that he or she is infected by a life-threatening sexually transmissible infection in circumstances in which there is a significant risk of transmission of such infection to that person.

(5) The circumstances in which a person is incapable in law of appreciating the nature of an act which causes penetration as referred to in subsection (2)(c) include circumstances where such person is, at the time of the commission of such act—

(a) asleep;

(b) unconscious;

(c) in an altered state of consciousness;

(d) under the influence of any medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgement is adversely affected;

(e) a mentally impaired person; or

(f) below the age of 12 years.

(6) A marital or other relationship, previous or existing, shall not be a defence to a charge of rape.

(7) The common law relating to—

(a) the irrebuttable presumption that a female person under the age of 12 years is incapable of consenting to sexual intercourse; and

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(b) the offence of rape, except where a person has been charged with, but not convicted of such offence prior to the commencement of this Act,

is repealed

(8) Subject to the provisions of this Act, any reference to "rape" in any law shall be construed as a reference to the offence of rape under this section, unless it is a reference to rape committed before the commencement of this Act which shall be construed to be a reference to the common law offence of rape.

(9) Nothing in this section may be construed as precluding any person charged with the offence of rape from raising any defence at common law to such charge, nor does it adjust the standard of proof required for adducing evidence in rebuttal."

38 The Law Commission's draft Bill was later introduced into Parliament, in more or less the same form, and formed the basis of the deliberations in Parliament. As an obvious result of the Law Commission's failure to revisit the question of *mens rea* for rape (and other sexual offences defined by lack of consent), the question did not arise in Parliament.

39 I pause to note that the Applicants are of the view that Parliament wrongly rejected the Law Commission's proposal that sexual penetration is "prima facie unlawful if it is committed in any coercive circumstance" (including "abuse of power or authority"). Embrace has previously brought to the attention of Parliament the need for this proposal to be revisited, to no avail. This, however, lies outside the scope of the present application.

40 The Act was finally passed in 2007, criminalising the following offences defined by the lack of consent:

40.1 rape (section 3);

40.2 compelled rape (section 4);

40.3 sexual assault (section 5);

40.4 compelled sexual assault (section 6);

40.5 compelled self-sexual assault (section 7);

40.6 compelled witnessing of sexual acts (section 8); and

40.7 flashing (section 9).

41 An eighth offence was added by the Amendment Act 19 of 2020: "harmful disclosure of pornography" (section 11A) – this criminalises the non-consensual sharing of intimate images, or content, which is real or simulated, and is explicit and sexual in nature.

42 The standard of fault for each of these offences is "intention", with no qualification as to the reasonableness of a mistaken belief in the presence of consent. As a result, an unreasonable belief in the presence of consent, even where the State has proved the absence of consent, is a complete defence to a charge of any of these offences. The State bears the extraordinarily high burden to prove that the accused's claim that he perceived consent is not reasonably possibly true. For example, in a case where the complainant knew their attacker (which is the vast majority of cases of rape and other sexual violence), did not physically resist or loudly protest, or consented to some but not other intimate acts, this burden will, more often than not, be insuperable.

43 This is borne out by two recent cases, discussed below.

The *Coko* case

44 In October 2021, in *Coko v S*,[13] the Grahamstown High Court overturned a young man's conviction of having raped his then girlfriend.

45 The facts were that the couple (both aged 23) had met for an intimate evening at the accused's residence, on the express agreement that they would not have penile-vaginal sex, which the complainant had never done before and had said she was not ready to do. They had been kissing and cuddling in the accused's bed before he removed the complainant's pyjama bottoms and performed oral sex on her. This much was consensual on the complainant's version.

46 The accused then removed his own trousers and began penile-vaginal sex. He claimed that the complainant's "body language" indicated that she had changed her mind about having sex that night and that she had given "tacit consent" to penetration.

47 The complainant testified that "I kept saying he must stop, he is hurting me", but the accused claimed that he took this to mean that he should stop momentarily, for her to become more comfortable, and then resume – not that she wanted him to stop altogether.

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[13] *Coko v S* [2021] ZAECGHC 91; [2021] 4 All SA 768 (ECG); 2022 (1) SACR 24 (ECG).

48 The Magistrate's Court convicted the accused of rape. On appeal, the High Court acquitted him.

49 The High Court began by explaining how high the burden of proof is to convict someone of rape under the Act. The State needs to prove, beyond a reasonable doubt, that the accused unlawfully and intentionally committed sexual penetration with the complainant, without her consent. The onus rests on the State to prove both elements. The accused does not even need to prove that he subjectively perceived consent – he needs only to raise the defence and, if it finds any support in the evidence, it must be accepted. As the Court quoted from time-honoured precedent: "*if his version is reasonably possibly true, he is entitled to an acquittal even though his explanation is improbable*".[14]

50 The Court found that the complainant had objectively not consented to the penile-vaginal penetration. However, the Court went on to find that the State had not proved beyond a reasonable doubt that the appellant's version that he genuinely believed that there was at least tacit consent, was false. He was thus acquitted.

51 The judgment is presently on appeal. Regardless of whether it was rightly decided *Coko v S* has starkly spotlighted the unconstitutional shortcomings in the Act, as identified and challenged in this application.

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[14] Id at para 74.

Ms Holzträger's case

52 Ms Holzträger was raped in 2018, by a man she had met through an online dating application. She met him in person for the first time at his home, as he had invited her to a "party" there. Once she arrived at his house, it transpired that there was never any party planned and she was the only guest. Ms Holzträger's harrowing ordeal that night at the hands of her rapist, as well as subsequently at the hands of the criminal justice system, is documented in detail in her supporting affidavit.

53 After a traumatising trial (for Ms Holzträger), her rapist was acquitted in February 2019. In its reasoning, the Pretoria Regional Court found that Ms Holzträger had objectively not consented to the accused's penile penetration of her vagina and anus, but that, because she had neither physically resisted nor loudly protested, the State had not excluded the possibility that the accused did not hear her say "no", and thus had not proved beyond a reasonable doubt that the accused knew or foresaw that she was not consenting (despite the fact that the court found that the accused was not a credible witness). The transcribed judgment in *S v Amos* is attached hereto as "**EP3**".

54 Importantly, the Magistrate lamented the fact that the Act sets an unqualified subjective test for fault in rape cases, and that this was unconstitutional. It is instructive to quote the following passages from the judgment:[15]

[15] *S v Amos* transcript at 14-20.

"[The accused] did not impress the Court with his evidence... He changed the sequence of events several times. He came across as arrogant and self-entitled. He took no responsibility for his actions or rather the lack thereof. Instead, he attempted to exonerate himself by blaming the complainant for not doing more...

One of the purposes of criminal law is to prevent harm and to provide retribution where harm is caused. Inadvertent or careless actions that could result in harm should not be ignored. Especially where the harm can easily be avoided by a simple inquiry.

It is arguable that in a situation as intimate and mutual as sexual intercourse where the whole legality of such act is premised on the consent that there should be a moral obligation to take the minimal step of ensuring that such act is indeed consensual. In my view by criminalising conscious advertence to the possibility of non-consent but excusing the failure of the accused to give minimal thought to consent at all to the extent that such complainant could be said to be completely objectified is arguably contrary to the right of such complainant to have his or her dignity protected and respected as envisaged in the bill of rights that form part of the Constitution of this country...

According to the complainant, she did not object when the accused kissed her on the lips and she even kissed him back. But the next moment he put his hand under her shirt and squeezed her breasts where after he proceeded to pull down her pants and underwear up to her boots. Her legs were lifted up to her head while both legs were confined by the pants that held them together.

The accused penetrated her vagina with his penis and also later penetrated her anus before reinserting his penis into her vagina. The accused did not even use a condom. The complainant testified that she was shell-shocked and that it felt as if she was in trance or had an out of body experience.

From the fact that the complainant had no previous experience in sexual intercourse and the incident occurred so fast this can be expected and her reaction or rather her lack of any reaction cannot be frowned upon. Due to the state of shock she was in she did not shout or scream and in

the position, she was sitting with her legs raised above her head she cannot be expected to have shown any physical resistance either.

Although she said no she could not say if the accused even heard her voice.

The Court is convinced that if consent had to be evaluated objectively in this case the reasonable man in the same position as the accused would not have assumed or accepted in circumstances that he had consent and would have done more to ensure that consent was indeed present. Due to the fact that the test for unlawfulness is indeed an objective one the Court is satisfied that the evidence proves the element of unlawfulness beyond reasonable doubt.

Rape can however only be committed intentionally. The test to establish if the accused acted within intent is a purely subjective one. The mindset of the accused at the time of the act is, therefore, the test. The state also bears the onus to prove this intent beyond reasonable doubt and therefore the state must prove that the accused knew that the complainant had not consented to the act.

Although dolus eventualis is sufficient to establish intent, dolus eventualis consists of two legs, namely the connective element and the cognitive element. The accused must have foreseen the possibility that the complainant's consent might be lacking and the accused must have reconciled himself with this possibility and nevertheless proceeded to commit the act in order for intent to be sufficiently proved.

In our law and the reported case law that I am bound to follow, the belief that a woman consent to sexual intercourse need not be a reasonable one as the test to establish intent is a purely subjective one. The fact that the complainant did not signify her opposition to the acts in any way makes it impossible for the Court to be satisfied that the accused subjectively knew that he did not have consent to proceed with the acts."

55 With respect, and regrettably, the Magistrate's reasoning cannot be faulted. While it is so that Ms Holzträger has been severely let down by South Africa's criminal justice system, the fault for that lies not with the Court (or the prosecution

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or police) but with the Act. Sadly, Ms Holzträger's case is by no means unique or uncommon. It is for this reason that the Applicants approach this Court for relief.

HOW THE ACT VIOLATES THE RIGHTS OF VICTIMS AND SURVIVORS

56 The law as it presently stands violates the rights of victims/survivors - most of whom are women - to equality, dignity, privacy and freedom and security of the person.

57 I am advised that the Constitutional Court has recognised that the crime of rape has at its core, the breach of the right to bodily integrity and freedom and security of the person and the right to be protected from degradation and abuse. The crime of rape further disproportionately affects women specifically, thereby falling foul of section 9 of the Constitution. Moreover, our courts have recognised that rape constitutes a brutal invasion of the privacy, dignity and person of the victim. By giving primacy to the subjective intention of an accused, the impugned provisions infringe the constitutional rights of a victim in an unjustifiable and impermissible manner.

58 This is particularly so when viewed in the context of rape and sexual violence more generally in South Africa.

Entrenching rape myths

59 Rape culture, rape stereotypes, and rape myths are prevalent in South Africa, and are frequently perpetuated. For example, there is a misconceived notion

that a person must be forced or threatened in order for a rape to be "legitimate". There is a further misguided expectation that consent is present unless there is a vocal or physical response of fighting, kicking, or screaming. Of further concern is the notion that if one consents to one type of sexual act, then they have consented to everything and that consent cannot be withdrawn once sexual contact has begun. More specifically, as evidenced by recent cases, there is a perception, among some, that any form of foreplay can be construed as consent. This further adds to the myth that perpetrators of sexual violence are monsters. We submit that this line of thinking ignores the hard lessons learned in *Tshabalala* that the perpetrators are often fathers, brothers, uncles, husbands, colleagues or lovers. They are often people who victims know well.

60 These myths, particularly in relation to the identity of perpetrators, fuels the misnomers around consent, particularly for victims and survivors who know the perpetrator.

61 While we accept that various amendments to the Act have served to combat several debunked rape myths and stereotypes and has made it relatively easier for the State to prove unlawfulness (i.e. objective lack of consent), we submit that the Act nullifies these developments by allowing rape myths and stereotypes to frustrate proof of intention. In this way, the current legal framework validifies false narratives and reinforces harmful and dangerous perceptions and behaviours that diminish a person's sexual autonomy, and dignity, among others. The same discredited rape myths and stereotypes are legitimised and entrenched in our law through the retention of an unqualified subjective standard of fault.

62 The Act further perpetuates rape culture and victim blaming, in that there have been, for example, courts that find that a victim or survivor objectively consented to penetration because they had no physical injuries, did not call for help, wore revealing clothes, flirted with the accused, or perhaps even engaged in foreplay with the accused.

63 Moreover, some courts find that it is reasonably possibly true that the accused subjectively perceived consent from one or more of those things. If the accused subjectively believes that "no" can mean "yes" (as many men claim to believe), then he may be entitled to an acquittal despite the complainant credibly testifying that they said "no". This entrenches male sexual entitlement.

64 It is trite, by now, that many victims and survivors of sexual violations do not either "fight" or "flee", but "freeze". While the Court can no longer infer consent from their silence or passivity, the accused can – and the Act compels the Court to treat this as a valid defence.

65 And because the State bears the onus to prove guilt beyond a reasonable doubt, an accused is entitled to be acquitted if the State is unable to exclude beyond all reasonable doubt the possibility that the accused subjectively believed that the complainant was consenting to the sexual act in question – even if the accused's belief was unreasonable (for example, rooted in rape myths or in patriarchal notions of male sexual entitlement). Most perversely, the less progressive the man's views about consent, the more likely he is to be acquitted.

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66 The outdated beliefs which men may hold about consent mean that, in South Africa, the initiator of a sexual act has no legal duty, under current criminal law, to exercise any care regarding whether his target is consenting. The current law allows him, and in fact encourages him, not to take any reasonable steps to ascertain whether there is consent.

67 The corollary is that victims and survivors have a legal duty to place their non-consent beyond any reasonable doubt in the eyes of even the most unreasonable man. Victims and survivors are not legally allowed to freeze (or to submit because they believe fighting or fleeing will be futile or life-threatening). The obscene assumption underlying this (which is endorsed and entrenched by the Act) is that women exist in a perpetual state of consent until they show otherwise.

68 In short, the Act currently tells women and children "don't get raped" instead of telling men and boys "don't rape". It saddles the burden of preventing sexual violence firmly on the shoulders of the very targets of that violence.

69 The practical result of this legal position is that the focus of the criminal trial is on the conduct of the complainant (whether they should have done more to make it undoubtable that they were not consenting or no longer consenting) rather than the conduct of the accused (whether he should have done more to make sure that she was freely, comfortably, and continuously consenting).

70 Seen clearly in this context, the impugned provisions of the Act, in failing to include a requirement of objective consent, infringe the constitutional rights of victims of sexual violence.

The State's duty to prevent and punish all sexual violence

71 Early in our constitutional dispensation, the Supreme Court of Appeal and Constitutional Court recognised rape as a human rights violation. The Constitutional Court also recognised that rape is criminal because it affects the dignity and personal integrity of women and limits an individual's bodily integrity and psychological integrity, and is a degrading and brutal invasion of a person's most intimate and private space.

72 The Supreme Court of Appeal has held that the very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way. The Constitutional Court has upheld the State's duty to protect women from all types of gender-based violence.

73 To reiterate, sexual violence violates the following constitutional rights of victims and survivors:

73.1 equality (section 9);

73.2 human dignity (section 10)

73.3 privacy (section 14);

73.4 bodily and psychological integrity (section 12(2)); and

73.5 freedom and security of the person (section 12(1)), which includes the right to be free from all forms of violence and the right not to be treated in a cruel, inhuman or degrading way.

74 All the same rights are violated, with the same excruciating effects, regardless of whether the perpetrator subjectively knew or foresaw that the complainant was not consenting. Yet, if he acted 'only' unreasonably, the victim or survivor is left without any criminal law recognition that they were violated. What is more, society is informed that such violations are not criminally prohibited and punishable. There is nothing in criminal law to prevent or deter men from committing these serious violations.

75 Under section 7(2) of the Constitution, the State has the duty to respect, protect, promote and fulfil the above-mentioned rights. This means that the State has a duty to take positive and effective measures to combat sexual violence, in all its forms – including where the target's right to withhold consent has been simply ignored rather than intentionally violated. In order to combat it, the State must (among other things) prohibit, punish and thus deter it. As explained below, this duty is buttressed by binding international law.

76 By enabling the defence of a purely subjective belief, the Act, in essence, legalises sexual violence where there is no reasonable belief in consent. In doing so, the State is failing to take necessary and effective measures to respect, protect, promote and fulfil the above-named rights of all South Africans,

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particularly women and children. This, the Applicants submit, is illustrative of the limitation on certain rights caused by the Act. As we will explain next, this limitation cannot be justified, and the Act is accordingly unconstitutional to that extent.

WHY THE VIOLATION CANNOT BE JUSTIFIED

Even negligence is blameworthy

77 There is nothing constitutionally wrong with criminalising negligence, as long as society regards it as morally blameworthy.

78 A constitutional society founded on dignity, equality and freedom, which respects women's rights, not only may but must regard it as morally blameworthy for men to act with selfish, careless and callous disregard for the sexual autonomy of children and women.

79 Sexual violence has the same excruciating and life-destroying effects on the victims and survivors irrespective of the accused's state of mind. As the Irish Law Reform Commission has explained:[16]

> "Sexual offences are very serious and can cause great physical and mental injury to victims, regardless of the accused's mental state. If one of the purposes of criminal law is to prevent harm and provide retribution where harm is caused, it arguably does not follow that inadvertent or careless actions should be ignored, particularly where the harm can be easily avoided by a simple inquiry."

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[16] Law Reform Commission of Ireland, *Issues Paper: Knowledge or Belief Concerning Consent in Rape Law*, 2018 at para 1.43.

80 Because of the premium society places on the right to life, unlawful and negligent killing is criminalised as culpable homicide. Even lesser offences, such as reckless or negligent driving and a failure to report corruption, offences born of negligence can attract criminal liability.

81 If the legislative purpose of the criminalisation of sexual violence is to protect and vindicate the rights of victims and survivors, it is irrational to legalise negligent acts that cause precisely the same harm.

82 The Constitution permits – and commands – the State to take firm steps to make men more responsible for respecting women's sexual autonomy.

83 It follows that the Constitution cannot countenance a law that entrenches rape culture and patriarchy, which the Act currently does.

84 There is simply no conceivable reason why negligence should not be regarded as blameworthy when it results in a violation of a person's sexual integrity.

The Act criminalises negligence for other sexual offences

85 The Act already criminalises the negligent sexual violation of a "consenting" child between the ages of 12 and 16 years, under sections 15 ("statutory rape") and 16 ("statutory sexual assault"). Section 56(2)(a) of the Act provides as follows (with emphasis added):

> "Whenever an accused person is charged with an offence under section 15 or 16, it is, subject to subsection (3),[17] a valid defence to such a charge to contend that the child deceived the accused person into believing that he or she was 16 years or older at the time of the alleged commission of the offence and the accused person reasonably believed that the child was 16 years or older".

86 The Act also criminalises the negligent involvement in making child sexual abuse material. Section 56(6) provides as follows (with emphasis added):

> "It is not a valid defence to a charge under section 20(1) ["using children for or benefitting from child pornography], in respect of a visual representation that—
>
> (a) the accused person believed that a person shown in the representation that is alleged to constitute child pornography, was or was depicted as being 18 years or older unless the accused took all reasonable steps to ascertain the age of that person; and
>
> (b) took all reasonable steps to ensure that, where the person was 18 years or older, the representation did not depict that person as being under the age of 18 years."

87 Parliament seemingly had no conceptual difficulty or constitutional reservations about criminalising these negligent acts (and the Law Commission had no issue with proposing them). It is thus difficult to fathom why Parliament did not consider it appropriate and constitutionally imperative to protect women (and children) from negligent violation when they are old enough to consent but did not consent.

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[17] Subsection (3) provides: "The provisions of subsection (2)(a) do not apply if the accused person is related to the child within the prohibited incest degrees of blood, affinity or an adoptive relationship."

INTERNATIONAL LAW

88 South Africa has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms . This duty has been recognised by the Constitutional Court as a "customary norm of international law."

89 I now turn to set out the relevant international law instruments.

United Nations ("UN")

90 On 15 December 1995, South Africa ratified CEDAW. Among other things, it obliges state parties to:

90.1 "adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women";[18]

90.2 "establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination";[19]

90.3 "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise";[20]

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[18] Article 2(b) (emphasis added).

[19] Article 2(c)

[20] Article 2(e).

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90.4 "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women";[21]

90.5 "repeal all national penal provisions which constitute discrimination against women".[22]

91 Moreover, state parties to CEDAW are obliged to take "all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men".[23]

92 Finally, state parties to CEDAW are obliged to "take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".[24]

93 In 1993, the UN General Assembly adopted the Declaration on the Elimination of Violence against Women. It declares that states should, among other things:

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[21] Article 2(f).

[22] Article 2(g).

[23] Article 3.

[24] Article 5(a).

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93.1 "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons";[25]

93.2 "develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered";[26]

93.3 "develop, in a comprehensive way, preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence, and ensure that the re-victimization of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions".[27]

94 Importantly, the Declaration defines violence against women by reference to its effects on the survivor (i.e. not the state of mind of the perpetrator):[28]

> "For the purposes of this Declaration, the term 'violence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women,

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[25] Article 4(c).

[26] Article 4(d).

[27] Article 4(f).

[28] Article 1 (emphasis added).

including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."

95 In 2017, the Committee issued its General Recommendation No. 35 on gender-based violence against women. The Committee explained as follows:[29]

> "At the legislative level, according to article 2(b), (c), (e), (f) and (g) and article 5 (a) [of CEDAW], States are required to adopt legislation prohibiting all forms of gender-based violence against women and girls, harmonising domestic law with the Convention. This legislation should consider women victims/survivors as right holders and include age and gender-sensitive provisions and effective legal protection, including sanctions and reparation in cases of such violence. The Convention also requires the harmonization of any existing religious, customary, indigenous and community justice system norms with its standards, as well as the repeal of all laws that constitute discrimination against women, including those which cause, promote or justify gender-based violence or perpetuate impunity for these acts.

96 The Committee made, among others, the following recommendations:

96.1 "ensure that all forms of gender-based violence against women in all spheres, which amount to a violation of their physical, sexual, or psychological integrity, are criminalized and introduce, without delay, or strengthen legal sanctions commensurate with the gravity of the offence as well as civil remedies";[30]

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[29] Paragraph 25(a) (emphasis added).

[30] Paragraph 29 (emphasis added).

96.2 "repeal all legal provisions that discriminate against women, and thereby enshrine, encourage, facilitate, justify or tolerate any form of gender-based violence against them";[31]

96.3 "in particular repeal ... provisions that allow, tolerate or condone forms of gender-based violence against women... [and] all laws that prevent or deter women from reporting gender-based violence";[32]

96.4 "ensure that the definition of sexual crimes, including marital and acquaintance/date rape is based on lack of freely given consent, and takes account of coercive circumstances";[33]

96.5 "adopt and implement effective legislative and other appropriate preventive measures to address the underlying causes of gender-based violence against women, including patriarchal attitudes and stereotypes".[34]

97 I am advised and submit that this makes clear that South Africa has an international law obligation to criminalise all forms of sexual violence – including negligent sexual violence – as well as to repeal any laws that justify or tolerate patriarchal attitudes.

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[31] Paragraph 31.

[32] Paragraph 31(a) and (c).

[33] Paragraph 33.

[34] Paragraph 34.

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98 In 2010, the Committee decided the case of *Vertido v Philippines*, where it found that the domestic court had erred in acquitting a rape accused on the basis of various "gender-based myths and misconceptions". The Committee held:[35]

> "[B]y articles 2(f) and 5(a) [of CEDAW], the State party is obligated to take appropriate measures to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women. In this regard, the Committee stresses that stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general. In the particular case, the compliance of the State party's due diligence obligation to banish gender stereotypes on the grounds of articles 2(f) and 5(a) needs to be assessed in the light of the level of gender sensitivity applied in the judicial handling of the author's case."

99 The Committee recommended that the Philippines take the following corrective steps, among others:[36]

> "Ensure that all legal procedures in cases involving crimes of rape and other sexual offences are impartial and fair, and not affected by prejudices or stereotypical gender notions. To achieve this, a wide range of measures are needed, targeted at the legal system, to improve the judicial handling of rape cases, as well as training and education to change discriminatory attitudes towards women. Concrete measures include:
>
> (i) Review of the definition of rape in the legislation so as to place the lack of consent at its centre;

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[35] *Vertido v Philippines*, Communication No. 18/2008, Views of the Committee on the Elimination of Discrimination against Women (16 July 2010), UN Doc CEDAW/C/46/D/18/2008, paragraph 8.4.

[36] Id at para 8.9(b) (emphasis added).

(ii) Removal of any requirement in the legislation that sexual assault be committed by force or violence, and any requirement of proof of penetration, and minimization of secondary victimization of the complainant/survivor in proceedings by enacting a definition of sexual assault that either:

a. Requires the existence of "unequivocal and voluntary agreement" and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting; or

b. Requires that the act take place in "coercive circumstances" and includes a broad range of coercive circumstances..."

100 The latter recommendation was also urged in the 2009 UN Model Framework for Legislation on Violence against Women.[37]

101 The 2021 framework for legislation on rape (model rape law) addresses the criminalisation of rape as follows:[38]

"**Article 1. Definition of rape**

A person (the perpetrator) commits rape when they:

(a) engage in non-consensual vagina l, anal or oral penetration of a sexual nature, however slight, of the body of another person (the victim) by any bodily part or object; or

(b) cause non-consensual vaginal, anal or oral penetration of a sexual nature, however slight, of the body of another person (the victim) by a third person; or

(c) cause the victim to engage in the non-consensual vaginal, anal or oral penetration of a sexual nature, however slight, of the body of the perpetrator or another person.

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[37] UN Department of Economic and Social Affairs: Division for the Advancement of Women, *Handbook for Legislation on Violence against Women*, 2010, UN Doc ST/ESA/329 at para 3.4.3.1.

[38] Report of the Special Rapporteur on violence against women, its causes and consequences, *A framework for legislation on rape (model rape law)* (15 June 2021) A/HRC/47/26/Add.1 at V.

Article 2. On consent

Consent must be given voluntarily and must be genuine and result from the person's free will, assessed in the context of the surrounding circumstances, and can be withdrawn at any moment. While consent need not be explicit in all cases, it cannot be inferred from:

(a) silence by the victim;

(b) non-resistance, verbal or physical, by the victim;

(c) the victim's past sexual behaviour; or

(d) the victim's status, occupation or relationship to the accused."

102 The UN Model Rape Law regrettably does not address the required state of mind of the perpetrator. However, it certainly does not require (as South African law presently does) that the perpetrator must have subjectively known that the other party was not consenting.

103 In the context of war crimes, international law has evolved to impose liability for rape not only where the accused knew, but also where he had reason to know, that the other party was not consenting. In 2006, in *Gacumbitsi v Prosecutor*, the Appeals Chamber of the UN International Criminal Tribunal for Rwanda held as follows:[39]

> "As to the accused's knowledge of the absence of consent of the victim, which as *Kunarac*[40] establishes is also an element of the offence of rape, similar reasoning applies. Knowledge of non-consent may be proven, for instance, if the Prosecution establishes beyond reasonable doubt that the accused was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent."

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[39] *Gacumbitsi v The Prosecutor (Appeal Judgement)*, ICTR-2001-64-A, International Criminal Tribunal for Rwanda, 7 July 2006 at para 157 (emphasis added).

[40] *Prosecutor v Kunarac, Kovac and Vukovic (Appeal Judgment)*, IT-96-23 & IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 12 June 2002.

104 This development was followed in 2009 by the Trial Chamber of the Special Court for Sierra Leone in *Prosecutor v Sesay*:[41]

> "[T]he constitutive elements of rape are as follows:
>
> (i) The Accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the Accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;
>
> (ii) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or another person or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent;
>
> (iii) The Accused intended to effect the sexual penetration or acted in the reasonable knowledge that this was likely to occur; and
>
> (iv) The Accused knew or had reason to know that the victim did not consent."

105 I am advised and submit that this is the proper approach to the criminalisation of rape and other sexual offences defined by the lack of consent. It should not be required that the accused subjectively knew, beyond a reasonable doubt, that consent was lacking; it should be sufficient for the State to prove that the accused could not reasonably have believed that the complainant was consenting.

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[41] *Prosecutor v Sesay, Kallon and Gbao (the RUF accused) (Trial judgment)*, Case No. SCSL-04-15-T, Special Court for Sierra Leone, 2 March 2009 at para 145.

African Union ("AU")

106 The African Charter on Human and Peoples' Rights, 1981 ("**African Charter**"), enshrines the rights to equality,[42] dignity,[43] security of the person,[44] and physical and mental health.[45] South Africa ratified it on 9 July 1995.

107 The Maputo Protocol to the African Charter on the Rights of Women in Africa, 2003 (which South Africa ratified on 17 December 2004) obliges states parties, among other things, to:

107.1 "combat all forms of discrimination against women through appropriate legislative, institutional and other measures";[46]

107.2 "enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women";[47]

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[42] Article 2: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as... sex..." Article 3: "1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law."

[43] Article 5: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

[44] Article 6: "Every individual shall have the right to liberty and to the security of his person."

[45] Article 16(1): "Every individual shall have the right to enjoy the best attainable state of physical and mental health."

[46] Article 2(1).

[47] Article 2(1)(b).

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107.3 "integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life";[48] and

107.4 "take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist";[49]

107.5 "modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men".[50]

108 More specifically, the Maputo Protocol obliges states parties to:

108.1 "adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence";[51]

108.2 "enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public";[52]

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[48] Article 2(1)(c).

[49] Article 2(1)(d).

[50] Article 2(2).

[51] Article 3(4).

[52] Article 4(2)(a).

108.3 "adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women";[53]

108.4 "identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence";[54]

108.5 "punish the perpetrators of violence against women";[55]

108.6 "provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated".[56]

109 In 2007, the African Commission on Human and Peoples' Rights ("**African Commission**"), established under the African Charter, adopted the Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence.[57] In it, the African Commission "urges states parties to the African Charter ... to criminalise all forms of sexual violence, ensure that the perpetrators and accomplices of such crimes are held accountable by the relevant justice system, ... identify the causes and consequences of sexual violence and take all necessary measures to prevent and eradicate it."

110 In 2017, the African Commission developed Guidelines on Combating Sexual Violence and its Consequences in Africa. They recommend that:[58]

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[53] Article 4(2)(b).

[54] Article 4(2)(c).

[55] Article 4(2)(e).

[56] Article 25(a).

[57] Resolution 111(XXXXII)07.

[58] Guideline 7.

> "States must take the necessary measures to prevent all forms of sexual violence and its consequences, particularly by eliminating the root causes of that violence, including sexist and homophobic discrimination, patriarchal preconceptions and stereotypes about women and girls, and/or preconceptions and stereotypes based on gender identity, real or perceived sexual orientation, and/or certain preconceptions of masculinity and virility, irrespective of their source."

111 The Guidelines also recommend that "States must take measures to guarantee access to justice for all victims of sexual violence".[59]

112 Importantly:[60]

> "States must ensure that their national legal framework guarantees that the definitions of all forms of sexual violence set out in criminal legislation are consistent with regional and international standards, including the definitions provided in these Guidelines. They must also guarantee that their national legal framework criminalizes forms of sexual violence that are not yet criminalized within their legislation, specifically by creating new offences in their criminal codes."

Southern African Development Community ("SADC")

113 In 1997, the SADC Heads of State and Government (including South Africa) adopted the Declaration on Gender and Development, in which they committed themselves to, among other things:

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[59] Guideline 9.1

[60] Guideline 39.1.

113.1 "repealing and reforming all laws, amending constitutions and changing social practices which still subject women to discrimination, and enacting empowering gender sensitive laws";[61]

113.2 "recognising, protecting and promoting the reproductive and sexual rights of women and the girl child";[62]

113.3 "taking urgent measures to prevent and deal with the increasing levels of violence against women and children".[63]

114 In 1998, the SADC Heads of State and Government (including South Africa) adopted an addendum to the 1997 Declaration, in which they resolved to do the following, among others:

114.1 "enacting laws such as sexual offences and domestic violence legislation making various forms of violence against women clearly defined crimes, and taking appropriate measures to impose penalties, punishment and other enforcement mechanisms for the prevention and eradication of violence against women and children";[64]

114.2 "reviewing and reforming the criminal laws and procedures applicable to cases of sexual offences, to eliminate gender bias and ensure justice and fairness to both the victim and accused".[65]

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[61] Para H(iv).

[62] Para H(viii).

[63] Para H(ix).

[64] Para 8.

[65] Para 10.

115 In 2008, the binding SADC Protocol on Gender and Development was adopted. South Africa ratified it in 2012 It provides that states parties shall, by 2015:

115.1 "enact and enforce legislation prohibiting all forms of gender-based violence";[66]

115.2 "review and reform their criminal laws and procedures applicable to cases of sexual offences and gender-based violence to: (a) eliminate gender bias; and (b) ensure justice and fairness are accorded to survivors of gender-based violence in a manner that ensures dignity, protection and respect".[67]

116 States parties to this Protocol are also obliged to "provide appropriate remedies in their legislation to any person whose rights or freedoms have been violated on the basis of gender".[68]

117 For the reasons set out above, by legalising sexual violence with no reasonable belief in consent , South Africa is in breach of these binding international obligations.

COMPARATIVE LAW

118 Many open and democratic societies criminalise sexual violence with no reasonable belief in consent. In addition to the progressive countries that have

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66 Article 20(1)(a) (emphasis added).

67 Article 20(3).

68 Article 32.

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already recognised this, more and more countries are moving towards a victim and survivor centred approach towards consent.

Great Lakes

119 The binding Protocol on the Prevention and Suppression of Sexual Violence against Women and Children, adopted in 2006 by the International Conference on the Great Lakes Region, is highly instructive and progressive is the binding.[69] Article 4(i) states as follows (emphasis added):

> "**The Crime of Sexual Violence**
>
> Member States shall punish any person who, with intent, knowledge, recklessness, or negligence, violates the sexual autonomy and bodily integrity of any woman or child..."

New Zealand

120 Section 128(2) of the Crimes Act, 1961 (as amended in 2005) defines rape as follows (with emphasis added):

> "Person A rapes person B if person A has sexual connection with person B, effected by the penetration of person B's genitalia by person A's penis,
>
> (a) without person B's consent to the connection; and
>
> (b) without believing on reasonable grounds that person B consents to the connection."

[69] An intergovernmental organisation composed of Angola, Burundi, Central African Republic, Republic of the Congo, Democratic Republic of the Congo, Kenya, Rwanda, Sudan, South Sudan, Tanzania, Uganda, and Zambia.

United States of America

121 It has long been the position in most of the United States that, in order to exclude the *mens rea* for rape, a belief in the presence of consent must be "honest and reasonable".[70]

Canada

122 Canada amended its Criminal Code in 1992 to introduce a reasonableness test. Section 273.2 now reads as follows (with emphasis added):

> "**Where belief in consent not a defence**
>
> It is not a defence to a charge under section 271 [sexual assault], 272 [sexual assault with a weapon, threats to a third party or causing bodily harm] or 273 [aggravated sexual assault] that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
>
> (a) the accused's belief arose from
>
> (i) the accused's self-induced intoxication,
>
> (ii) the accused's recklessness or wilful blindness, or

[70] See *People v Mayberry* 542 P.2d 1337 (Cal. 1975); *Reynolds v State* 664 P.2d 621 (Alaska Ct. App. 1983); *People v Lowe* 565 P.2d 1352 (Colo. Ct. App. 1977); *State v Smith* 554 A.2d 713 (Conn. 1989); *In Interest of JFF* 341 S.E.2d 465 (Ga. Ct. App. 1986); *State v Dizon* 390 P.2d 759 (Haw. 1964); *State v Williams* 696 S.W.2d 809 (Mo. Ct. App. 1985); *Owens v Nevada*, 620 P.2d 1236 (Nev. 1980); *People v Crispo*, No. 3105-85 (N.Y. Sup. Ct. October 16, 1988); *Green v State* 611 P.2d 262 (Okla. Crim. App. 1980).

(iii) any circumstance referred to in subsection 265(3)[71] or 273.1(2)[72] or (3)[73] in which no consent is obtained;

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or

(c) there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct."

123 The Supreme Court in *R v Barton* recently explained the implications of this provision:[74]

> "While the jurisprudence has consistently referred to the relevant defence as being premised on an honest but mistaken belief in consent, it is clear that in order to make out this defence, the accused must have an honest but mistaken belief that the complainant actually communicated consent, whether by words or conduct. It is therefore appropriate to refine the judicial lexicon and refer to the defence more accurately as an "honest but mistaken belief in *communicated* consent"...
>
> The availability of the defence of honest but mistaken belief in communicated consent is not unlimited. The reasonable steps requirement under s. 273.2(b) of the Criminal Code imposes a precondition to this defence. This requirement, which rejects the outmoded idea that women can be taken to be consenting unless they say "no", has both objective and subjective dimensions: the accused must

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71 "For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of (a) the application of force to the complainant or to a person other than the complainant; (b) threats or fear of the application of force to the complainant or to a person other than the complainant; (c) fraud; or (d) the exercise of authority."

72 For the purpose of subsection (1), no consent is obtained if (a) the agreement is expressed by the words or conduct of a person other than the complainant; (a.1) the complainant is unconscious; (b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1); (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority; (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity."

73 "Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained."

74 [2019] 2 SCR at 583-584.

take steps to ascertain consent that are objectively reasonable, and the reasonableness of those steps must be assessed in light of the circumstances known to the accused at the time. The reasonable steps inquiry is highly fact-specific. Trial judges and juries should take a purposive approach, keeping in mind that the reasonable steps requirement reaffirms that the accused cannot equate silence, passivity, or ambiguity with the communication of consent. Trial judges and juries should also be guided by the need to protect and preserve every person's bodily integrity, sexual autonomy, and human dignity. Steps based on rape myths or stereotypical assumptions about women and consent cannot constitute reasonable steps."

United Kingdom

124 Under the common law, as explained by the House of Lords in 1975 in *Morgan*,[75] if the accused had a mistaken belief in consent, even if there was no reasonable basis for this belief, then the mental element of the offence was not satisfied and he was not guilty of rape. This position was heavily criticised, but nonetheless codified in the Sexual Offences (Amendment) Act, 1976.

125 In 2003, however, England and Wales passed the Sexual Offences Act, which defined rape as follows in section 1 (emphasis added):

> "(1) A person (A) commits an offence if—
>
> (a) he intentionally penetrates the vagina, anus or mouth of another person (B)with his penis,
>
> (b) B does not consent to the penetration, and
>
> (c) A does not reasonably believe that B consents.

[75] *DPP v Morgan* [1975] UKHL 3; [1976] AC 182; [1975] 2 WLR 913; [1975] 2 All ER 347.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents."

126 The same standard of fault applies to assault by penetration (section 2), sexual assault (section 3), and causing a person to engage in sexual activity without consent (section 4).

127 Section 75, importantly, provides as follows:

"Evidential presumptions about consent

(1)If in proceedings for an offence to which this section applies it is proved—

(a) that the defendant did the relevant act,

(b) that any of the circumstances specified in subsection (2) existed, and

(c) that the defendant knew that those circumstances existed, the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.

(2) The circumstances are that—

(a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;

(b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to

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fear that violence was being used, or that immediate violence would be used, against another person;

(c) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;

(d) the complainant was asleep or otherwise unconscious at the time of the relevant act;

(e) because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;

(f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.

(3) In subsection (2)(a) and (b), the reference to the time immediately before the relevant act began is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began."

128 Northern Ireland and Scotland subsequently enacted similar laws.[76]

Australian states

129 In **Victoria**, section 38 of the Crimes Act, 1958 (as amended), provides as follows (emphasis added):

"**Rape**

(1) A person (A) commits an offence if—

[76] Sexual Offences (Northern Ireland) Order, 2008, and Sexual Offences (Scotland) Act, 2009.

(a) A intentionally sexually penetrates another person (B); and

(b) B does not consent to the penetration; and

(c) A does not reasonably believe that B consents to the penetration."

130 The same standard of fault applies to the other sexual offences defined by lack of consent.[77]

131 In **Queensland**, section 348A of the Crimes Act, 1958 (as amended), applicable to rape and other sexual assaults, provides as follows (emphasis added):

"Mistake of fact in relation to consent

(1) This section applies for deciding whether, for section 24 [mistake of fact], a person charged with an offence under this chapter did an act under an honest and reasonable, but mistaken, belief that another person gave consent to the act.

(2) In deciding whether a belief of the person was honest and reasonable, regard may be had to anything the person said or did to ascertain whether the other person was giving consent to the act.

(3) In deciding whether a belief of the person was reasonable, regard may not be had to the voluntary intoxication of the person caused by alcohol, a drug or another substance."

132 Like Canada, **Tasmania** requires the accused not only to have held a reasonable belief but also to have taken reasonable steps. The Criminal Code Act, 1924 (as amended in 2004) states as follows (with emphasis added):

"14. Mistake of fact

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[77] Sections 39 to 42.

Whether criminal responsibility is entailed by an act or omission done or made under an honest and reasonable, but mistaken, belief in the existence of any state of facts the existence of which would excuse such act or omission, is a question of law, to be determined on the construction of the statute constituting the offence.

14A. Mistake as to consent in certain sexual offences

(1) In proceedings for an offence against section 124 [penetrative sexual abuse of child or young person], 125B [indecent act with child or young person], 127 [indecent assault] or 185 [rape], a mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused –

(a) was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or

(b) was reckless as to whether or not the complainant consented; or

(c) did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act."

133 In 2007 **New South Wales** amended its Crimes Act, 1900, by among other things replacing the purely subjective standard of fault with one qualified by "reasonable grounds". Section 61HE stated as follows (emphasis added):

"Knowledge about consent

(3) A person who without the consent of the other person (the "alleged victim") engages in a sexual activity with or towards the alleged victim, incites the alleged victim to engage in a sexual activity or incites a third person to engage in a sexual activity with or towards the alleged victim, knows that the alleged victim does not consent to the sexual activity if—

(a) the person knows that the alleged victim does not consent to the sexual activity, or

(b) the person is reckless as to whether the alleged victim consents to the sexual activity, or

(c) the person has no reasonable grounds for believing that the alleged victim consents to the sexual activity.

(4) For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case—

(a) including any steps taken by the person to ascertain whether the alleged victim consents to the sexual activity, but

(b) not including any self-induced intoxication of the person."

134 This formulation was, however, not entirely satisfactory, as it was not a complete reasonable person standard. In *Lazarus*, the Criminal Court of Appeal found that the jury should not "ask what a reasonable person might have concluded about consent, rather than what the accused himself might have believed in all the circumstances in which he found himself and then test that belief by asking whether there might have been reasonable grounds for it".[78] This judgment was heavily criticised and spurred calls for law reform.

135 On 1 June 2022, New South Wales enacted the Crimes Legislation Amendment (Sexual Consent Reforms) Act, which amended the Crimes Act, 1900, by among other things replacing section 61HE with several more progressive provisions on consent, including the following (emphasis added):

"Section 61HK – Knowledge about consent

(1) A person (the accused person) is taken to know that another person does not consent to a sexual activity if—

[78] *Lazarus v R* [2016] NSWCCA 52 para 156.

(a) the accused person actually knows the other person does not consent to the sexual activity, or

(b) the accused person is reckless as to whether the other person consents to the sexual activity, or

(c) any belief that the accused person has, or may have, that the other person consents to the sexual activity is not reasonable in the circumstances.

(2) Without limiting subsection (1)(c), a belief that the other person consents to sexual activity is not reasonable if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity."

Conclusion on comparative law

136 The above comparative survey shows that in an open and democratic society, criminalising sexual violence where the accused held an unreasonable belief in the presence of consent or did not take reasonable steps to ascertain the presence of consent is not only not objectionable, but it is required to vindicate the constitutional rights of victims.

137 It is clear that societies the world over are adopting more nuanced approaches to sexual violence, and are recalibrating the legal position to ensure that victims and survivors are capable of seeking and securing justice. This is a trend that a progressive constitutional democracy such as ours aligns with. While South Africa has come a long way in advancing the legal framework relating to sexual violence, the Act as it currently stands is unconstitutional and must be amended.

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JUST AND EQUITABLE RELIEF

138 I am advised and submit that it is overwhelmingly clear that the Act is unconstitutional to the extent that it does not criminalise sexual violence where the perpetrator wrongly and unreasonably believed that the complainant was consenting to the conduct in question.

139 I therefore submit that this Court must accordingly declare the relevant provisions of the Act (sections 3, 4, 5, 6, 7, 8, 9 and 11A read with section 1(2)) invalid to that extent, and make a just and equitable order, in terms of section 172(1) of the Constitution.

140 Should this Court be minded to grant the relief sought, it would be appropriate to suspend the order of invalidity for a period of 12 months to afford the relevant-decision makers an opportunity to remedy the defects. I am advised and submit that the Constitutional Court has previously held that this a reasonable period of time to allow for the amendment of legislation.

141 Moreover, the Applicants submit that it would not be just and equitable – in view of the raging scourge of sexual violence our country faces daily – to leave the unconstitutionality unaddressed in the interim. Accordingly, the Applicants would propose an order granting interim relief in order to cure the constitutional defects during the period of suspension. I am advised and submit that this is necessary to render the relief granted appropriate, effective, just, and equitable, and will enable the rights of victims and survivors to be respected, protected, and

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promoted without further delay. An interim reading in of the following words into the Act, at section 56(1A) is thus sought:

> *Whenever an accused person is charged with an offence under section 3, 4, 5, 6, 7, 8, 9 or 11A, it is not a valid defence for that accused person to rely on a subjective belief that the complainant was consenting to the conduct in question, unless the accused took all reasonable steps to ascertain that the complainant was consenting.*

142 This reading is modelled on section 56(6) of the Act, in order to be as faithful as possible to the legislative scheme Parliament has chosen to deal with the reasonableness of belief in the *mens rea* for other sexual offences (in this case, the creation of child sexual exploitation material, "child pornography").

143 I am advised and submit that an interim reading-in amounts to a just and effective remedy that addresses the specific constitutional defects that have been established, and without going beyond that. It is further submitted that this does not unduly trespass upon the powers of Parliament.

144 I further acknowledge that the order sought can have no retrospective effect in keeping with the general approach in our law prohibiting retrospective criminalisation of conduct.

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CONCLUSION

145 For all the reasons set out in this affidavit, I am advised and submit that the Act is unconstitutional. The fact that an unqualified subjective belief in consent means that a victim or survivor cannot secure justice for one of the most heinous affronts to their dignity and bodily and psychological integrity is outdated, and perpetuates disrespect and disregard for women's sexual autonomy. It reinforces rape myths, amplifies sexist stereotypes, legitimises grossly unreasonable beliefs about women's sexuality, and further victimises rape victims and survivors by protecting perpetrators based on their unreasonable states of mind.

146 The law has already failed so many victims and survivors. Keeping the Act in its current form will result in the perpetuation of travesties of justice by prolonging constitutional violations that are certainly contrary to our constitutional dispensation. Accordingly, and for the reasons set out in this affidavit, we respectfully pray for an order in terms of the Notice of Motion.

CA

LEE-ANNE GERMANOS

The deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and solemnly affirmed before me at Bryanston on this the 15 day of November 2022, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

Charmaine Ann Albertyn
Strauss Scher Attorneys
2nd Floor, Four on Anslow
Anslow Lane, Bryanston 2021
Sandton, Gauteng
Commissioner of Oaths - Ex Officio
Practicing Attorney R.S.A.

WRITTEN ROUND ROBIN RESOLUTIONS OF THE DIRECTORS OF
THE EMBRACE PROJECT NPC
(Registration No.: 2020/613113/08)

IT IS NOTED AS FOLLOWS-

1. These resolutions are adopted by written consent of the directors, in accordance with section 74 of the Companies Act, No 71 of 2008 as amended, read with clause 2.2.1 of the memorandum of incorporation of The Embrace Project, and such resolutions shall be valid and effective as if they had been passed at a meeting of the directors duly convened, constituted and held

IT IS HEREBY RESOLVED THAT-

1. That Lee-Anne Germanos in her capacity as one of the founding directors of The Embrace Project will be the authorised representative for The Embrace Project for purposes of instructing Power Singh Inc. in respect of legal support and assistance to The Embrace Project, including litigation support, in relation to challenging the constitutionality of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 22 of 2007; and

2. That Lee-Anne Germanos can depose to any necessary affidavits and take all steps which may be deemed necessary in the proceedings.

LEE-ANNE GERMANOS
Date 01/12/2021

LEANNE BERGER
Date 01/12/2021

DEBORAH VAN ROOYEN
Date 01/12/2021

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the EMBRACE project

CREATIVELY COMBATTING GENDER BASED VIOLENCE

22 October 2021

TO:	**The Presidency, Republic of South Africa**
Attention:	**His Excellency, President Cyril Ramaphosa**
	Union Buildings
	Government Avenue
	Pretoria
Email:	malebo@presidency.gov.za
	presidentrsa@presidency.gov.za

CC:	**Department of Justice and Correctional Services**
Attention:	**Minister Ronald Lamola**
	124 WF Nkomo Street
	Poyntons Building (West Block)
	Pretoria
Email:	zanendlovu@justice.gov.za
	mzenzile@justice.gov.za

CC:	**Parliamentary Portfolio Committee on Justice and Correctional Services**
Attention:	**Vhonani Ramaano**
	Siyabamkela Mthonjeni
	Parliament Street
	Cape Town
Email:	vramaano@parliament.gov.za
	smthonjeni@parliament.gov.za

Dear Mesdames/Sirs

CONSTITUTIONAL INVALIDITY: CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT AMENDMENT BILL [B16-2020]

1. We are The Embrace Project, a non-profit organisation that combines art and advocacy through law to 'creatively' combat gender-based violence and femicide ("GBVF") in South Africa. We wish to raise a constitutional issue with the statutory definition of the crime of rape contained in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("the Act") and, by implication, the meaning of consent in section 1 of the Act.

2. This letter is addressed to Your Excellency on the basis that the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill [B16-2020] ("the Amendment Bill"), one of three 'GBV Bills' introduced by the Minister of Justice and Correctional Services ("the Minister") in August 2020, has failed to remedy the constitutional invalidity contained in the aforementioned sections of the Act. The Amendment Bill was passed by both houses of Parliament in September 2021, and currently sits with Your Excellency for assent.

3. We acknowledge that prior to the passing of the Amendment Bill in both houses of Parliament, the Parliamentary Portfolio Committee on Justice and Correctional Services ("the Committee") conducted a public participation process in September and October 2020. We record that we participated in this process and made written submissions to the Committee on 9 October 2020. We were subsequently invited to make oral representations on 23 October 2020.

4. Regrettably, the Amendment Bill does not address the Act's problematic approach to rape and consent, which, as explained below, is unconstitutional. In our submissions, we attempted to draw attention to problems with the Act's approach to consent, but this was not taken up by the Committee.

5. At the end of August 2021, a rape survivor approached us with her prosecuted case, which was decided in the Gauteng Division of the High Court in 2019. In her case, the High Court found that the accused had committed an act of sexual penetration without her consent, but was acquitted due to the prosecution having failed to prove that he had intended to rape her.

6. Section 3 of the Act currently reads as follows:

> "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."

7. A purely subjective test is imputed in the establishment of the "intentionally" element of the statutory definition of rape. Although a subjective test is also applied to establish fault in common law crimes, sexual assault – and more specifically rape – is neither an ordinary crime, nor a common law crime. The crime of rape, and its statutory definition, implicates and affects a complainant's section 10 constitutional right to dignity, and, if the complainant is not male, implicates and affects their section 9 right to equality. In 2019, in the landmark case of *Tshabalala v S*,[1] the Constitutional Court held that:

> "[F]or far too long rape has been used as a tool to relegate the women of this country to second-class citizens, over whom men can exercise their power and control, and in so doing, strip them of their rights to equality, human dignity and bodily integrity. The high incidence of sexual violence suggests that male control over women and notions of sexual entitlement feature strongly in the social construction of masculinity in South Africa."

8. The constitutional implication of "intentionally['s]" inclusion in the definition of rape is that it places an unreasonable and unjustifiable emphasis on the accused's subjective state of mind, an overreach of the rights and protections afforded an accused person in terms of section 35(5) of the Constitution, at the expense of the complainant's section 12(2) constitutional right to bodily and psychological integrity, which includes the right to security in and control over one's body. Furthermore, "consent" is vaguely defined in section 1(2) of the Act to mean "voluntary and uncoerced agreement", without having defined either "voluntary" or "uncoerced" anywhere else in the Act. Instead, an open list of circumstances in which a complainant "does not voluntarily or without coercion" agree to sexual penetration is provided in section 1(3) of the Act. This, despite the recommendations made to the legislature in the South African Law Reform Commission's Report almost 20 years ago.[2]

[1] [2019] ZACC 48; 2020 (5) SA 1 (CC); 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC).
[2] South African Law Reform Commission Report on Sexual Offences Project 107 (2002) 30.

9. The practical implication of the current statutory definition of rape is that it has proven to be an almost insurmountable barrier to the conviction of accused persons who have been found, by courts, to have committed acts of sexual penetration *without the consent* of the complainant (objectively), where the prosecution have been unable to prove that the accused persons subjectively *intended* to rape the complainant. Additionally, the vague statutory definition of consent results in findings of consent where none ought to have been found. The most recent example of the controversy around intent and consent when it comes to rape is *Coko v S*,[3] which drew both public and legal scrutiny,[4] and which also highlights that the law is no longer reflective of the *boni mores* of society (if it ever was).

10. Sections 1 and 3 of the Act, as they currently stand (unamended by the Amendment Bill before Your Excellency), are not only among the greatest barriers to a better rape conviction rate, which sits at 8.6% in a country with the highest rates of GBVF in the world, but further victimises rape survivors by protecting perpetrators based on their subjective state of mind regarding consent. That is a major setback to South Africa's fight against GBVF.

11. The Act is also out of step with the laws of other jurisdictions, such as the United States, the United Kingdom, Canada and Australia, which, many years ago, replaced the defence of a purely subjective belief in consent with a defence of *reasonable* belief in consent.

12. Should the Amendment Bill be signed into law, in its current state, varying forms of travesties of justice will persist. We accordingly request that Your Excellency urgently exercise your prerogative (under section 79 of the Constitution) to refer the Amendment Bill back to the National Assembly with reservations as to the constitutionality of the Act's approach to rape and consent.

[3] [2021] ZAECGHC 91.
[4] See Ben Winks *Recent rape acquittal shows why we need to revise our laws on sexual consent* News24 (16 October 2021).

Yours faithfully

Lee-Anne Germanos

Director

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Leanne Berger

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IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF GAUTENG HELD AT PRETORIA

CASE NO: 14/683/2018

DATE: 2019.02.27

In the matter between

THE STATE

and

AMOS CHRISTOPHER Accused

BEFORE : MS LABUSCHAGNE

ON BEHALF OF THE STATE : MR SITHOLE

ON BEHALF OF THE ACCUSED: MR STEIL

INTERPRETER : [NO ANNOTATIONS]

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PROCEEDINGS ON 27 FEBRUARY 2019 [11:07]

JUDGMENT

The accused Christopher Amos is charged with one count of sexual assault in contravention of section 5(1) of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007 and three counts of rape in contravention of section 3 of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007.

All the alleged incidence occurred at the same night during one sexual encounter between the accused and the complainant. That was on 7 June 2018. The complainant is an adult woman who was 20 years old at the time.

The accused is represented by Mr Steil and Mr Sithole appears for the state. The minimum sentence of life imprisonment as per section 51(1) of Act 105 of 1997 was explained on the three counts of rape as the state indicated that it would allege that the same complainant was raped more than once. The Court also explained the provisions of section 51(2)(b) of Act 105 of 1997 as an alternative on the said counts of rape. The competent verdicts were also explained to the accused prior to him being required to plead to the charges.

On 8 January 2019, the charges were put to Mr Amos and he pleaded not guilty to all four counts. All the allegations were denied. A plea explanation was advanced. It indicated

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that the accused mechanically and orally stimulated the breasts and vagina of the complainant prior to him penetrating her vagina and anus with his penis. He held that the complainant was in her sound and sober senses at the time and had consented to sexual touching as well as the penetration of her vagina.

The penetration of the anus occurred as an honest mistake which was rectified as soon as the two parties realised that the anus instead of the vagina was penetrated. He indicated that the consent was accepted as the complainant actively participated in the preparation as well as in the sexual acts and at no stage indicated expressly or through actual or physical resistance that such consent was ceased.

The Court recorded a formal or formal admissions that the touching or fondling of the complainant's breasts, as well as the sexual penetration of her vagina and anus with the penis of the accused, occurred on 7 June 2018 at Silver Lakes in Pretoria which falls within the jurisdiction of this Court. The applications by the state in terms of section 153 and 158 of the Criminal Procedure Act 51 of 1977 were not opposed by the defence and the Court accordingly ordered that the evidence of the complainant may be heard in *camera* and through the closed-circuit television system which was readily available.

The Court considered the evidence of four witnesses who testified on behalf of the state and the evidence of the

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accused and one defence witness. Documentary evidence was submitted. EXHIBIT A, a statement in terms of section 112(4) of Act 51 of 1977 by Heidel Borrow was submitted by the state in support of the applications in terms of section 153 and 158. EXHIBIT B, a police statement made by the complainant was submitted by the defence during cross-examination of the witness. EXHIBIT C, a second police statement made by the complainant was submitted by the defence also during cross-examination. EXHIBIT D, WhatsApp communication between the accused and the complainant was submitted by mutual consent and formed part of the evidence that was not in dispute. EXHIBIT E, the J88 completed by Doctor H van der Caver was submitted by the state after the testimony of this witness.

At the close of all the evidence, Mr Sithole for the state applied for the conviction of Mr Amos on all four counts as charged. He asked the Court to accept the evidence of the witnesses and to reject the version presented by the accused as false.

He argued further that the state proved that the sexual penetration and the sexual violation all occurred without the consent required. The Court also took into evidence as EXHIBIT G the heads of argument that was read out and prepared by Mr Sithole.

Mr Steil submitted written heads of argument as well

and read such into the record. These were marked as EXHIBIT H. He held that the state failed to prove that the version presented by his client was not reasonably possibly true. He further held that the version presented by the complainant was unlikely and asked the Court to accept that the evidence showed that there was indeed consent to the sexual touching as well as the intercourse that followed. He asked the Court to acquit his client on all the counts.

The Court is going to give a very short summary of the evidence that was presented due to the fact that such evidence is on record and has been indicated so. A summary in the evidence for the state indicated that Inge Haltstrager[?] went to the house where the accused resided at the time on 7 June 2018 after he invited her to a party.

The parties, that is the accused and the complainant, did not know one another really prior to this meeting of them in person, as they have only met on the website, the dating website Tinder a mere few weeks before and they have since only communicated via electronic media. Her mother dropped her off at this estate and thereafter she went to where Mr Amos was residing at the time. They had a drink of brandy and Coke. According to her, the drink tasted a bit strong but they sat on the couch and got to know one another.

At some stage, the accused proceeded to kiss her. She did not object to the kissing and returned his kiss. In a very

short time, he then proceeded to put his hand underneath her shirt and squeezed her breast. She indicated that it was unexpected and that she did not consent to this but that she did not give any physical indication that she is not consenting thereto.

She indicated that she was shell-shocked and could not really remember whether she did anything or not. She indicated that he pulled down her pants and underwear to her calves as she was wearing boots at the time. She indicated that she think she said no but does not know whether the accused had heard her.

She also tried to pull her pants back up but that it slipped through her fingers. She indicated that she felt as if she was in a trance. The accused then pinned her legs down over her head as she was sitting on the couch. He took off his shirt and pants and penetrated her vagina with his penis while he was sitting on his knees in front of her on the couch.

She could not at the time move her legs. He repeatedly inserted his penis and when he pulled it out he also proceeded to penetrate her anus. This was very painful. He then removed the penis again from the anus and penetrated her vagina with his penis again. He continued doing this until he was about to ejaculate when he then removed his penis and ejaculated onto her stomach.

She indicated that she then saw blood on the couch.

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She proceeded to put back her underwear and pants and all she wanted to do was to get out of there. She did however need the help of the accused as she did not know the estate and it was a big estate. She needed his help to get her to a place where she could get the Uber to take her home. They waited for the Uber for approximately an hour and when she realised that the Uber was taking very long she then phoned her cousin Ettiene who came and took her home.

She indicated that all she had in mind was that she wanted to get home safely and Ettiene then dropped her at her home. She then send a message to her mother to say that she was home safely and went to her room. She saw that she was bleeding quite a bit when she put her pyjamas on. She tried to sleep but could not really and the next morning she took her sister to school where after upon her return she and her mother had coffee and she then disclosed to her mother what had happened and that she was raped. She was then taken for medical examination and charges were opened.

The evidence presented on behalf of the defence, in summary, showed that the accused Mr Amos invited the complainant whom he met on the Tinder website a week or two before to a party at his house. When she arrived there was nobody at the party and him and the complainant went inside the house. He asked her if she wanted anything to drink. He then poured them each a brandy and Coke and they sat on the

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couch talking, getting to know one another.

After a while, they kissed. It was a normal passionate kiss. There was no fondling at the time. There was only extreme light touching. He indicated that his arm was on the back of the couch and the left arm or his left arm was next to her leg. Her arms were near his legs. She did not move away or asked him to stop such.

He then stepped back from the L-shaped couch, removed his shirt and jacket and placed it on the far side of the couch while the complainant was still sitting on the couch. He says he took off the shirt but cannot say why, it is perhaps because they felt that they had a connection. He then knelt on his knees next to the couch where Inge was and they both leaned over to share a short kiss.

He knelt back down. Putting his hands next to the items or the hems of her jeans. She lifted her hip slightly and he with her help removed her pants and underwear. He said that he felt aroused and that he did so in the heat of the moment.

He also undressed himself, knelt on the carpet next to the couch and proceeded to orally stimulate the complainant. He jeans were still attached to her body at ankle height. She was leaning back on the couch in a comfortable position and his head was below her bent knees and below her pants. She never asked him to stop and she never tried to move away from him.

He says he stood up back again from the couch, unbuttoned and removed his jeans and where after he kneeled in between her legs on the couch. They kissed for another one to two minutes and he then removed his underpants as well and they proceeded to have sexual intercourse.

The roughness was normal, the intercourse lasted plus minus 15 to 20 minutes and they never changed positions. He indicated that he penetrated her vagina with his penis. There was one brief moment when they both realised that due to his lack of experience and the fact that he could not see properly what he was doing that he had penetrated the anus of the complainant but that he then corrected himself quickly. He could hear an inaudible word and assumed that the word was wrong but was definitely not stop.

After he ejaculated as he was not using a condom, after he ejaculated outside the complainant's vagina, she got dressed. They then hugged one another and proceeded to walk to the gate. They passed the security house and they sat at the gate waiting for a long period of time where he placed his hands inside her pockets and they stood until her cousin eventually picked her up.

The following facts are not in dispute. That on 7 June 2018 in the jurisdiction of this Court the accused touched the breasts of the complainant, Inge Haltstrager[?]. She was an adult at the time. She was also a virgin at the time.

On the same date and at the same house the accused sexually penetrated her vagina twice and her anus once with his penis. The accused and the complainant met each other on a dating website and communicated via electronic media but physically met for the first time on the date in question between one and two hours prior to the incidences.

The following facts were found to be in dispute that Inge Haltstrager[?] consented to the touching of her breasts by the accused and to the penetration of her vagina and anus by the accused. That the accused acted on the basis of consent and therefore did not act unlawfully. He also lacked *mens rea* to commit sexual assault and rape.

Evaluation of the evidence showed the following. The complainant who testified as the first witness for the state was 20 years old when the incident occurred. She testified as a single witness regarding the alleged incident. Section 60 of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007 states that the Court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court with caution on account of the nature of the offence. But Inge Haltstrager[?] testified as a single witness regarding the incidence and therefore the provisions of section 208 of Act 51 of 1977 had bearing when her evidence was evaluated.

In terms of section 208, any person may be convicted of any offence on the evidence of any competent witness. This evidence must, however, be approached with caution, it must be such that after a fair appraisal of the accused's denial it outweighs that denial to satisfy the Court that the guilt of the accused have proven beyond a reasonable doubt.

In *State v Artman en andere* 1968 (3) SA 339 the Appellate Division held that:

> "In accepting the evidence of a single witness all that is required is that this evidence should be clear and satisfactory in all material aspects. Corroboration of such evidence is not required but merely some or other safeguards which eliminates the risk of wrong conviction. Failing corroboration a court will look for some feature in the evidence which gives the implication by a single complainant enough of an assurance of trustworthiness to reduce substantially the risk of wrong reliance upon her evidence."

The complainant's evidence, in this case, was presented in a manner that enabled the Court to establish how the incidence unfolded. The Court bore in mind that she had no previous experience with intercourse and that she had consumed one brandy and Coke after her arrival at the accused's house.

There was no indication that her state of sobriety at the

time of the incident impacted negatively on the reliability or credibility of her evidence. The medical evidence confirmed penetration with a blunt object and indicated several injuries were found on the genitalia. Doctor Van der Caver testified that one would not expect to see so many injuries present where sexual intercourse was by consent as the sexual intercourse would normally be stopped or ceased as it would be too painful to proceed. She could however not exclude the possibility of consensual intercourse.

She explained further that a virgin would not be prone to sustain more injuries during sexual intercourse than a sexually active individual but when the complainant's explanation of the position she was in during penetration was put to Doctor Van der Caver she held that because the pelvis was bend, facing upwards one would expect to find more injuries on the bottom part thereof. This is also where most of the injuries were found.

The complainant's version of the position she was in during intercourse is in line with the medical evidence. Inge spontaneously answered all questions put to her relating to the alleged incident and she did not contradict her evidence-in-chief when she was cross-examined on any material aspect. Her evidence was also consistent with the evidence of her mother to whom she made the first report later that day.

It is also consistent with the circumstances that

surrounded the alleged offences. She gave reasonable explanations to the questions asked and did not attempt to provide answers to questions that she did not have knowledge of or could not remember.

She did not really know Mr Amos prior to the incident and she told the Court that she told the accused to stop but then admitted that she did not know if the accused heard her or not. The Court could not find any motive for her to falsify evidence against the accused.

The defence took issue with the complainant's actions immediately following the incidences. The defence submitted that her actions were not in line with that of a reasonable person who suffered the same ordeal. Inge gave a reasonable explanation of why she acted in that fashion. In the circumstances, the response of the complainant cannot be faltered and the Court finds that her lack of immediate response does not impact negatively on the credibility nor the reliability of her evidence.

The defence further took issue with the fact that she did not report the incident to the security guards at the complex or to Ettiene that same night. Her explanation in this regard is reasonable under the circumstances if the evidence is evaluated as a whole. The evidence presented by Inge Haltstrager[?] is found to be an honest account of what she experienced and is found to be credible and reliable.

Maria Haltstrager[?] the mother of the complainant testified as the third witness for the state. Her evidence was related with clarity and cogency. Her version was tested against the probabilities and improbabilities. There exist no material discrepancies between her evidence-in-chief and that which she gave during cross-examination nor between her evidence and that of the complainant. Her evidence is found to be an honest account of what she heard and observed and is found to be credible and reliable.

Doctor Hermien van der Caver, state witness two, convinced the Court that she was qualified and experienced enough to examine and or complete the medical assessment forms. Her evidence is found to be credible and her findings to be reliable.

Mr E Terreblanche testified as a witness for the state. His evidence did not take the issue in dispute much further. His evidence could not be faltered.

Evaluating the evidence of the accused Mr Amos the following can be said. His version is based on the contention that the complainant consented to the touching of her breasts and the penetration of her vagina with his penis. He accepted that the complainant consented to his actions as there was mutual interaction and reaction by both parties.

The complainant also never indicated verbally or physically for him to stop. Mr Amos did not impress the Court

with his evidence. He kept on adding to the version that was put to the complainant during cross-examination and also to the plea explanation that was submitted on his behalf. He even added to his own version during cross-examination in a clear attempt to make his version more plausible.

He changed the sequence of events several times. He came across as arrogant and self-entitled. He took no responsibility for his actions or rather the lack thereof. Instead, he attempted to exonerate himself by blaming the complainant for not doing more.

The unreliability of his version was further substantiated by the manner in which he could apparently describe and remember every little detail of his own actions as well as every reaction of the complainant thereto. He could even say how long oral stimulation lasted and how long sexual penetration lasted.

When it came to his explanation of why the alleged party did not proceed and why the persons who were supposed to return to the house did not Mr Amos appeared to be unsure of himself. He also adjusted his evidence on this aspect. His version that a party was going to be held at his house that evening is highly unlikely. He did not impress the Court as an honest witness and his evidence is found not to be reliable. His version is rejected as false and farfetched.

The evidence of the defence witness F Grobler did not

take the issue in dispute much further. Most of his evidence is common cause and his evidence would not be faltered.

Evaluation of the facts in dispute and applying these facts to the law. The rejection of the version of the accused is not equal to a conviction. The Court still needs to ask itself at the end whether the guilt of the accused had been established in that the state proved the elements of the offences alleged beyond reasonable doubt. There is no onus in our law for the accused to prove his innocence.

The definitional elements of rape are sexual penetration, without consent, unlawfulness and intent. The state bears the onus to prove all the elements beyond reasonable doubt. In section 1 of Act 32 of 2007 sexual penetration includes any act which causes penetration to any extent whatsoever by any part of the body of one person or any object, including any part of the body of an animal into or beyond the genital organs or anus of another person. It is common cause in this case that the accused sexually penetrated the vagina and the anus of the complainant with his penis.

Consent is described in sections 2 and 3 of Act 32 of 2007 and what is clear is that the consent must be un-cohorts and the person consenting must have proper knowledge of what he or she is consenting to as well as to whom such consent is given. Absence of consent is a separate

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definitional element of the crime of rape and sexual assault and not just a way of describing the requirement of unlawfulness. For this see Snyman Criminal Law, 6th Edition, page 495.

The duty of this Court is to establish if the State who bears the onus of proof managed to prove through the evidence presented that consent was absent during the act of penetration. The complainant's consent to the act may be signified either expressly or by implication. Her refusal to consent may be portrayed in the same manner. It is therefore wrong to assume that a Court may find that penetration took place without consent only if the complainant had offered actual physical resistance or had expressly stated or shouted heer opposition to the act.

For consent to be present that consent must have been given consciously and voluntarily by the complainant who had the mental ability to do so and also understood what she was consenting to. Consent must be based on the true knowledge of the material facts relating to intercourse.

The question is how to evaluate this element of consent. Is the test an objective one or a subjective one? This Court's submission is that it should be an objective test as consent is so closely related to the act itself. Consent is the element that would cause the act to be committed either lawfully or unlawfully.

To consciously penetrate the body of another lawfully therefore to act lawfully consent must be present in cases of rape. One of the purposes of criminal law is to prevent harm and to provide retribution where harm is caused. Inadvertent or careless actions that could result in harm should not be ignored. Especially where the harm can easily be avoided by a simple inquiry.

It is arguable that in a situation as intimate and mutual as sexual intercourse where the whole legality of such act is premised on consent that there should be a moral obligation to take the minimal step of ensuring that such act is indeed consensual. In my view by criminalising conscious advertence to the possibility of nonconsent but excusing the failure of the accused to give minimal thought to consent at all to the extent that such complainant could be said to be completely objectified is arguable contrary to the right of such complainant to have his or her dignity protected and respected as envisaged in the bill of rights that form part of the constitution of this country.

In my view therefore the test should be an objective one when it comes to the evaluation of the element of consent in rape cases. In the present case, it is not in dispute that the complainant was still a virgin at the time. She did not really know the accused and he did not know her either as they only met in person for the first time a mere one to two hours prior

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to the sexual deed.

According to the complainant, she did not object when the accused kissed her on the lips and she even kissed him back. But the next moment he put his hand under her shirt and squeezed her breasts where after he proceeded to pull down her pants and underwear up to her boots. Her legs were lifted up to her head while both legs were confined by the pants that held them together.

The accused penetrated her vagina with his penis and also later penetrated her anus before reinserting his penis into her vagina. The accused did not even use a condom. The complainant testified that she was shell-shocked and that it felt as if she was in trance or had an out of body experience.

From the fact that the complainant had no previous experience in sexual intercourse and the incident occurred so fast this can be expected and her reaction or rather her lack of any reaction cannot be frowned upon. Due to the state of shock she was in she did not shout or scream and in the position, she was sitting with her legs raised above her head she cannot be expected to have shown any physical resistance either.

Although she said no she could not say if the accused even heard her voice. This ordeal caused bleeding and severe trauma to her genitals. Doctor Van der Caver testified that she could not even examine the complainant the following day

without first administering a local anaesthetic to the area. Although Doctor Van der Carver conceded that consensual intercourse could not be ruled out she indicated that consensual intercourse would normally be discontinued before it caused such painful injuries.

The Court is convinced that if consent had to be evaluated objectively in this case the reasonable man in the same position as the accused would not have assumed or accepted in circumstances that he had consent and would have done more to ensure that consent was indeed present. Due to the fact that the test for unlawfulness is indeed an objective one the Court is satisfied that the evidence proves the element of unlawfulness beyond reasonable doubt.

Rape can however only be committed intentionally. The test to establish if the accused acted within intent is a purely subjective one. The mindset of the accused at the time of the act is, therefore, the test.

The state also bears the onus to prove this intent beyond reasonable doubt and therefore the state must prove that the accused knew that the complainant had not consented to the act. Although *dolus eventualis* is sufficient to establish intent *dolus eventualis* consists of two legs, namely the connective element and the cognitive element. The accused must have foreseen the possibility that the complainant's consent might be lacking and the accused must have

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reconciled himself with this possibility and nevertheless proceeded to commit the act in order for intent to be sufficiently proved.

In our law and the reported case law that I am bound to follow the belief that a woman consent to sexual intercourse need not be a reasonable one as the test to establish intent is a purely subjective one. The fact that the complainant did not signify her opposition to the acts in any way makes it impossible for the Court to be satisfied that the accused subjectively knew that he did not have consent to proceed with the acts.

Furthermore, the state must prove the lack of consent beyond reasonable doubt. And the Court cannot as the law stands today say the state had proved this. Mr Amos, you are accordingly acquitted on all four counts.

TRANSCRIBER'S CERTIFICATE

I, the undersigned, hereby certify that **so far as it is audible to me**, the aforegoing is a true and correct transcript of the proceedings recorded by means of a digital recorder in the matter between:

STATE // AMOS CHRISTOPHER

CASE NUMBER	: 14/683/2018
RECORDED AT	: PRETORIA
DATE HELD	: 2019.02.27
NUMBER OF PAGES	: 21

PROBLEMS EXPERIENCED WITH RECORDING

1. **No names of parties on protocol.**
2. **Only judgment was typed as per client's request.**

DATE COMPLETED: 2021.11.26
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ANETTE DE NEYS

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.:48656/22

In the matter between:

THE EMBRACE PROJECT NPC	First Applicant
INGE HOLZTRÄGER	Second Applicant
and	
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PERSONS WITH DISABILITIES	Second Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent

SUPPORTING AFFIDAVIT

I, the undersigned,

INGE HOLZTRÄGER

state under oath the following:

1 I am an adult female student residing in Pretoria. I am cited as the Second Applicant in this matter.

2 The facts contained in this affidavit fall within my personal knowledge, unless indicated otherwise, and are, to the best of my belief, both true and correct.

Where I make legal submissions, I do so based on the advice of my legal representatives, which I believe to be correct.

INTRODUCTION

3 This matter concerns a constitutional challenge to the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007 ("**the Act**"), to the extent that it maintains a purely subjective belief in consent as a complete defence against a charge of rape (and other sexual offences defined by the absence of consent).

4 As noted in the affidavit of the First Applicant, the current construction of consent, the definition of rape, and the ability of a perpetrator to rely on a defence of a reasonable belief in consent is a significant problem resulting in what the Applicants understand to be a violation of various rights provided for in our Constitution.

5 As I understand it, and as I have experienced, the system and the law currently favour the perpetrator and the focus is always on what the victim or survivor should or could have done to prevent the rape. In support of this application, I submit that the legal position is outdated and unconstitutional . I say this because the Constitution protects victims and survivors, and because I have experienced first-hand how the law failed me, and how despite everything that I went through, and the magistrate seeming to support my version, I was not able to access justice. I know that my case will not change if the law changes, but I hope, through this application that the law can change for the better so that the law will

not fail others as it failed me.

6 I have read the founding affidavit of Lee-Anne Germanos and confirm its content in so far as it relates to me. The purpose of my affidavit is to illustrate how the law and criminal justice system failed me. In order to do so, I will take the court through my ordeal.

MY ORDEAL

7 I have sustained and endured many painful experiences in my life, none of them can match nor surpass however, what I went through on 7 June 2018 – the night that changed my life. I had heard of stories of rape but never thought it would happen to me. I am a victim of rape.

8 On 7 June 2018, I was invited to a party by someone I met on a dating site called Tinder. I had exchanged contact details with him on 3 June 2018 but only started talking to him on the day he invited me to the party.

9 When I asked my mother to drop me off at the location he had sent me, it did not cross my mind that this person would be the reason why I would be labelled as a "Rape Survivor" and be inadvertently exposed to the shortfalls of our law and criminal justice system when it comes to victims of sexual offences getting access to justice.

10 I met Chris Amos, the man that raped me, for the first time on 7 June 2018, when he invited me to a party which never took place.

11 When I arrived at what I thought was his apartment, I noticed that there was no one else there, but myself and him. I enquired about other people and he told me that the rest of the people who were at the party had left to go get pizza and would be back soon. Those people never returned.

12 We sat on the couch and got acquainted with each other. He offered me a brandy and coke, which was very strong. After about an hour he started kissing me, touching my private parts, taking my clothes off and before I knew it, he was having sex with me. He penetrated my vagina with his penis and later penetrated my anus before reinserting his penis into my vagina. He did not use a condom. It was very painful and I said no and I told him to stop numerous times but he did not stop until he was done having sex with me.

13 I was shell-shocked and felt as if I was in a trance or had had an out-of-body experience. I did not shout or scream. I could not move.

14 The man that raped me did not obtain my consent, and he did not take any steps to ensure that I had given consent. Even after I told him to stop, he did not stop.

15 After he had finished, all I wanted to do was leave but I didn't know how to get out of the estate in which he lived without calling an uber and having him wait with me until it arrived. After struggling to find an uber, and being desperate to get out of there, I called my cousin to collect and drive me home.

16 I tried to find out what to do, but I struggled to get proper information on what steps I should take after being raped. There was not a lot of information online.

But I knew that I was not supposed to shower so I did not (I could not even wash the experience away) instead I put the clothes that I was wearing in a bag. I also knew I should go to the hospital.

17 At the time I was not thinking about a criminal case, but I felt that evidence might be important. I understood that without evidence I would not be able to prove that I was a victim of rape and would subsequently not obtain justice. I endured the pain that followed so that evidence from that night was not lost or destroyed. I think I hoped this would somehow assist the police officers in their investigations and that I could somewhat do my part in ensuring that justice prevails.

18 In the morning, with great difficulty, I told my mother what happened to me. She then took me to the nearest hospital to where we lived.

19 I was moved from one hospital to the next. The first hospital did not have a rape kit. We waited for approximately three hours before we were told that they did not do sexual assault evidence collection at that hospital. I had to recount my experience to a number of hospital personnel. I did not feel very supported.

20 My mother and I eventually found the hospital that could conduct a sexual assault forensic exam. I remember being told that it needed to be proven that I was sexually assaulted and if that could not be proven, the medical expenses would have to be paid by us.

21 The examination commenced and while that was being conducted, the police officers arrived to take my statement. The police officer who was taking my

statement was a woman. I was asked whether I was making it up, falsely accusing Chris Amos of raping me out of spite or because I was angry at him as my boyfriend. She also asked what I was wearing. Her line of questioning displayed doubt about the veracity of my rape account and made it seem like what I was wearing was a factor to be explored in determining why and how I was raped. Again, I felt unsupported, and as if I had done something wrong.

22 I was then bombarded with documents to sign from both the hospital personnel and the police officers. Various medication was prescribed to me, I had to take antibiotics, a morning-after pill, probiotics and antiretrovirals. All I wanted was to take a shower, for the entire experience to be over, and for the suffering and the pain to end, not only for me but for my mom as well because she was hurting for me too.

23 While the nurse and doctor who conducted my medical examination were supportive, the treatment from the various reception hospital staff and the police officers who I engaged with was detrimental to my mental and emotional wellbeing and was re-traumatising.

24 When I got home from the hospital all I remember was sleeping all the time, my body had shut down. I barely ate or did anything except sleep for the next two weeks.

25 The following week I began therapy, I began therapy in an attempt not to completely lose myself. I remember not being able to leave the house alone for months.

26 A few months later, in or around October 2018, I got the news that the matter was going to trial. This was really triggering and led to a decline in the progress I had made in relation to my mental health. I was frightened of seeing my rapist and of being in the same room as him. I was absolutely terrified.

HOW THE LAW FAILED ME

27 Going to court, meeting with a prosecutor, retelling my story, and reliving everything that happened was really challenging.

28 I testified in-camera, and the magistrate noted that my evidence was credible and reliable and found that there appeared to be no motive for me to falsify evidence against the accused.[1] In terms of the evidence of the accused, the magistrate found inconsistencies in his testimony. The magistrate found that "he took no responsibility for his actions or rather the lack thereof. Instead, he attempted to exonerate himself by blaming [me] for not doing more". His evidence was found to be unreliable, and his version was rejected as "false and far-fetched".[2]

29 I was therefore devastated when the judgment was given. I could not believe it. The court believed me and believed what happened to me, but he left a free man.

30 Despite the evidence that the I did not consent to intercourse with the accused and consistently objected to his advances, the magistrate instead found that the

1 *S v Amos* Transcript attached as annexure "**EP3**" at 12.
2 Id at 13.

state did not prove beyond a reasonable doubt that the accused knew I did not consent.

31 The court was satisfied that the evidence proved all the other elements of unlawfulness beyond reasonable doubt and it was "convinced that if consent had to be evaluated objectively, the reasonable man in the same position as the accused would not have assumed or accepted under those circumstances that he had obtained consent and would have accordingly done more to ensure that consent was indeed present."[3]

32 I felt vilified as if I was the one who did something wrong as if I was the "accuser" until proven to be the victim. I felt like I was the guilty one trying to prove my innocence. Yet even after I proved my version of events and the court fully accepted my evidence as proof, I received no justice.

33 The person that sexually violated me was acquitted because it was "impossible for the Court to be satisfied that the accused subjectively knew that he did not have consent to proceed with the acts".[4]

34 As a result of the Act's maintenance of a purely subjective belief in consent as a complete defence to a charge of rape, I had to watch a person that sexually violated me and my right to dignity, privacy, equality and bodily and psychological integrity, escape conviction because he apparently subjectively believed that I

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[3] Id at 19.
[4] Id at para 10.

consented to have sex with him when I had given no indication of such consent – in fact, I did the opposite.

35 It did not make sense to me, and from what I understand the court recognised the injustice tied to this subjective belief. The court said:

> "The question is how to evaluate this element of consent. Is the test an objective one or a subjective one? This Court's submission is that it should be an objective test as consent is so closely related to the act itself. Consent is the element that would cause the act to be committed either lawfully or unlawfully. To consciously penetrate the body of another lawfully therefore to act lawfully consent must be present in cases of rape." (my emphasis)

36 The court further stated:

> "Inadvertent or careless actions that could result in harm should not be ignored. Especially where the harm can easily be avoided by a simple inquiry. It is arguable that in a situation as intimate and mutual as sexual intercourse where the whole legality of such act is premised on consent that there should be a moral obligation to take the minimal step of ensuring that such act is indeed consensual. In my view by criminalising conscious advertence to the possibility of no consent but excusing the failure of the accused to give minimal thought to consent at all to the extent that such complainant could be said to be completely objectified is arguably contrary to the right of such complainant to have his or her dignity protected and respected as envisaged in the bill of rights that form part of the constitution of this country. " (My own emphasis)

37 It is my understanding, and my submission, along with the First Applicant that the law is unconstitutional. I now find myself being a corollary, and end product, of the law's failure as to protect those who have experienced some of the most challenging affronts to their dignity and bodily integrity, among others.

CONCLUSION

38 I am an applicant in this matter because I have experienced the failures of the law, and I do not want other victims and survivors to be let down the way I was. I therefore submit that the Act is unconstitutional and invalid and that the law should change.

39 Accordingly, and for the reasons set out in this affidavit and the founding affidavit, I respectfully pray for an order in terms of the Notice of Motion.

INGE HOLZTRÄGER

The deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and solemnly affirmed before me at Pretoria on this the 15 day of November 2022, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

Christel Liebenberg
Commissioner of Oaths
Practising Attorney RSA
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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.:48656/22

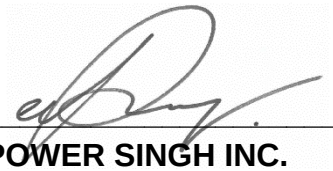
In the matter between:

THE EMBRACE PROJECT NPC	First Applicant
INGE HOLZTRÄGER	Second Applicant
and	
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PERSONS WITH DISABILITIES	Second Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent

NOTICE OF OPPOSITION TO MEDIATION IN TERMS OF RULE 41A(2)

TAKE NOTICE THAT the Applicants oppose referral of this matter to mediation as the Applicants are of the view that the dispute is one which is not capable of being resolved through mediation.

DATED at **JOHANNESBURG** on the **16th** day **NOVEMBER** of **2022.**



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Gauteng Division
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NOTICE IN TERMS OF RULE 16A

KINDLY TAKE NOTICE THAT that this application raises the following constitutional issue:

1 Whether sections 3, 4, 5, 6, 7, 8, 9 and 11A read with section 1(2) of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007 are unconstitutional, invalid and inconsistent with the Constitution on the ground that these provisions do not criminalise sexual violence where the perpetrator wrongly and unreasonably believed that the complainant was consenting to the conduct in question alternatively, to the extent that the provisions permit a defence against a charge of sexual violence where there is no reasonable objective belief in consent.

TAKE NOTICE FURTHER that any interested party may, with the written consent of all the parties to the proceedings, given not later than 20 days after this notice has been filed, be admitted therein as *amicus curiae* upon such terms and conditions as may be agreed upon in writing by the parties.

TAKE NOTICE FURTHER that the written consent referred to above shall, within five (5) days of its having been obtained, be lodged with the Registrar and the *amicus curiae* shall, in addition to any other provision of the Rules, comply with the times agreed upon for the lodging of the written argument.

TAKE NOTICE FURTHER that if the interested party is unable to obtain written consent they may, within five days of the expiry of the 20-day period prescribed above, apply to the Court in the manner contemplated by Rule16A(6) to be admitted as an *amicus curiae* in the proceedings.

DATED at **JOHANNESBURG** on the **16th** day **NOVEMBER** of **2022.**

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