



**WOMEN'S  
LEGAL  
CENTRE**

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**Director of Public Prosecutions, Eastern Cape, Makhanda v Coko (Women's Legal Centre Trust, Initiative for Strategic Litigation in Africa and Commission for Gender Equality intervening as Amici Curiae)**

The Women's Legal Centre Trust (WLC) welcomes the judgment handed down by the Supreme Court of Appeal (SCA) in the matter of *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko (Women's Legal Centre Trust, Initiative for Strategic Litigation in Africa and Commission for Gender Equality intervening as Amici Curiae)* which at its core examines the approach and interpretation adopted by the High Court to two crucial elements of rape: the nature of consent to a sexual penetrative act, and the form of intention required for conviction.

The SCA judgment originates from an Appeal by the NPA against the Eastern Cape High Court judgment which set aside the conviction and sentence of the regional court (the trial court), acquitting the accused primarily on the basis that, contrary to the magistrate's court's finding, the accused had not intended to rape the complainant in that he held the genuine (albeit mistaken) belief that the complainant consented to penetrative sexual intercourse.

In responding to the High Court judgment, the WLC was admitted as *amicus curiae* in the Supreme Court of Appeal. The WLC's submissions focused on the specific questions of law by setting out the correct application for the test of intention (*dolus eventualis*) and the legal principles relevant thereto in evaluating an accused's intention to commit rape. The WLC also sought to provide the SCA with a feminist analysis of the issues before the court, including the impact the High Court Judgment would have on the lived realities of women. It has consistently been the WLC's position that the High Court failed to correctly consider and apply the principles of *dolus eventualis* in its assessment of the evidence before it.

The SCA accepted the WLC arguments and held that in the context of rape, an accused acts with *dolus eventualis* if he foresees (based on the facts) the possibility that the complainant does not consent, but nevertheless continues to act (recklessly so), while appreciating that he may be acting without the complainant's consent, therefore 'gambling as it were [with the right to security of the person, bodily integrity and dignity] of the person who the act is directed.' The WLC in its arguments submitted that there is no legal justification for applying a purely subjective test to the defence of mistaken belief in consent aimed at excluding intention and that there is no room in our constitutional dispensation to excuse reckless ignorance of the absence of consent.

Furthermore, the Court noted the WLC submission that in this case there were unquestionable factors that were indicative of the presence of intent in the form of *dolus eventualis* on the part of the accused and held that the state had, as correctly found by the trial court, proved its case against the accused beyond a reasonable doubt. The SCA found that the High Court misdirected itself in holding that the regional magistrate had committed material misdirections in reaching his conclusion to convict the accused of rape.

The decision has great legal and practical significance for the work against gender-based violence in South Africa. By clarifying the correct legal position the SCA has not only remedied the dangerous precedent set by the High Court for women who are victims/survivors of rape or sexual assault by an intimate partner but have also ensures that women's constitutional rights to dignity, privacy, and the right to be free from violence is protected.

We thank our counsel, Adv. Ashleigh Christians and our correspondents in Bloemfontein, Maduba Attorneys, for their invaluable contributions and support during this case.