IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, BHISHO)

CASE NO.: CA &R 11/2023

In the matter between:

LUVUYO WAPI Appellant

and

THE STATE Respondent

JUDGMENT

JOLWANA J

[1] The appellant was arraigned in the Regional Court, Zwelitsha on charges of contravening the provisions of section 3, read with sections 1, 56 (1), 57, 58, 59, 60 and 61 of Act 32 of 2007, also read with section 51 (2) of Act 105 of 1997, further read with Schedule 2 thereof. It was alleged that on or about 22 September 2017, at or near the Time Housing residential area in Dimbaza, the appellant unlawfully and intentionally committed an act of sexual penetration with the

complainant, *per vaginum*, without her consent. The appellant who was legally represented during the proceedings a quo pleaded not guilty to the said charge of rape and elected not to divulge the basis of his defence. He was convicted as charged and sentenced to 8 years direct imprisonment. With the leave of the court a quo, he now appeals to this Court against conviction.

[2] The evidence of the complainant was that the appellant was her boyfriend until they broke up in 2016. After they broke up they would meet each other but would not have any conversations. She met the appellant on 5 May 2017 in her matric dance and had a conversation with him during which he obtained her cell phone number. Since the matric dance, they would have conversations with each other. On 22 September 2017, she and her friends were preparing to go to Coke's tavern but ended up being at Nkululeko's tavern. At their table, it was herself and her friends Zine and Nomzamo, the appellant and his friends Thando and Luyanda. She went to the toilet with Zine and they again spoke about going to Coke's tavern. The appellant approached them saying he wanted to talk to her. She told the appellant to let go of her as she wanted to go to Coke's tavern to meet her boyfriend. He let go of her and they returned to their table where they continued drinking.

[3] Nomzamo said she wanted to buy a soft drink and gave the complainant R7.00 which was R3.00 short. The complainant gave the R7.00 to the appellant and asked him to add to it or buy them a soft drink. The appellant said that they

should go outside to talk. They went outside where they were joined by Thando. The appellant head-butted her on the nose without saying anything as a result of which she bled from the nose. The appellant said that they must go and Nomzamo got out and as she was about to intervene, Thando told her not to get involved. Nomzamo tried to speak to the appellant, and he insulted her. The appellant then dragged her and the two of them left the tavern. The appellant continued dragging and assaulting her with open hands on the way. When they reached a certain corner of the appellant's homestead, they met five young men whom she did not know who tried to intervene and the appellant told them that it was none of their business.

[4] When they arrived at the appellant's homestead, he picked her up and threw her over the fence and they proceeded to his flat. They found the appellant's uncle, Lindelani there. The flat was a backyard structure detached from the main house and the appellant lived in that flat. The appellant opened the burglar door to his flat. Lindelani tried to stop him from assaulting her. At that time the appellant was carrying a broomstick he got from the toilet saying he was going to assault her because she was disrespectful. The appellant stopped assaulting her and left the broomstick outside and when they entered the flat, he threatened to cut her into pieces with a chain saw which was in the flat. The flat was a two-roomed structure, and the chainsaw was in the other room.

[5] The appellant told her to go to the bathroom to wash her face as she was bleeding so that they could sleep. She went to the bathroom and washed her face after which she proceeded to the appellant's room where she found the appellant already undressed. The appellant undressed her and told her to lie on her back. She lay on her back and he got on top of her. When she would not let him insert his penis into her vagina, the appellant said he was not going to insert it. The appellant then stood up and took a lover's gel from underneath the bed and smeared her vagina with it. He thereafter inserted his penis into her vagina and copulated with her until he was satisfied. After having sexual intercourse with her, they slept. He did not use a condom.

[6] In the morning, the appellant gave her money for a taxi and accompanied her to a nearby church. She testified that she could not leave during the night because she was afraid of the appellant and her homestead was far from that of the appellant. She went straight to her homestead and called her mother to come and open the gate for her. Her mother came and opened the gate. She told her that she wanted her flat shoes because she wanted to go to the police station. Her mother noticed that her face was swollen and asked her what happened, and she told her what happened. Her mother accompanied her to the police station. When they got out of the gate in her homestead, they met Zine who said that she would also accompany her to the police station. They went to the police station and she reported the incident. The police took her to Grey Hospital where she was

examined by a doctor. With reference to the doctor's medico-legal examination report which reflected that there were no physical injuries, she explained that her nose bridge was swollen, and the police officer who opened the case saw that her nose was swollen.

[7] Under cross-examination, the complainant testified that she arrived at her home at about 09:00 in the morning. When she left the previous night she had told her mother that she would sleep over at her boyfriend's place. When her mother came to open the gate, she was shocked when she saw her face and asked her what happened. She told her to open the gate and she would tell her inside. She wanted to pick up her flat shoes because she wanted to go to the police station. When they got inside the house, she told her mother what the appellant did to her. They went to the police station where she narrated the incident to the police.

[8] She testified that when they went to the tavern the night before, the appellant had phoned her offering to fetch them, and he did so. She was with Zine and Nomzamo and the appellant came with Thando. The time was about 21:00 to 22:00 at night and they arrived at Nkululeko's tavern at about 22:30. It was put to the complainant that the appellant was at his home, and she sent him a call-back message which was why he called her. She denied sending the applellant a callback message insisting that it was the appellant who just called her. She denied that she and the appellant went from Nkululeko's tavern to the appellant's

homestead in a car. She testified that the car that fetched them from her homestead did not belong to the appellant. It was a white bantam vehicle which was driven by Thando. When she was being dragged by the appellant from Nkululeko's tavern to his homestead, she was crying and apologising. Nomzamo saw her crying when she was being dragged but Thando told her to leave them alone. It was put to the complainant that the appellant would say that he did engage in consensual sexual intercourse with her and she responded that she was not willing to have sexual intercourse with him. It was further put to her that according to the J88 medico-legal examination report, there were no physical injuries and there was no evidence of forceful penetration. She testified that the appellant head-butted her on the bridge of her nose and he did insert his penis into her vagina without her consent.

[9] She described the appellant's flat as a backyard structure consisting of two separate flat-roofed structures joined in the middle by a bathroom. The second room was the one in which Lindelani was sleeping and it was the one that had a chainsaw. She did not see the appellant undressing because she had gone to the bathroom for the second time to wash her face again as it was still bleeding. The complainant further testified that in the morning, the appellant's mother knocked at the door and she and the appellant woke up. When they were about to get out, the appellant said that they should wait for his mother to get into the main house so that she did not see her. She agreed to do so because she respected her as an

elderly person. She testified that she did not intend to expose the appellant and even when she went to the police station, she did not have any intention to report the rape, she wanted to open a case of assault. The police asked her to explain the reason she was assaulted which she did. When she reported the incident to her mother, she told her that the appellant forcefully engaged in sexual intercourse with her. Her mother said that it would be a matter for the police. When she was testifying in re-examination, the complainant explained that she was not going to report that the appellant raped her because she was afraid that he might come back and assault her as he had threatened her with a chainsaw.

[10] The State called Ms Mjalo who testified that she is the complainant's mother. She knew the appellant as her daughter's ex-boyfriend. The complainant had told her that she ended her relationship with him because the appellant liked women. On 23 September 2017, the complainant came home after 08:00 in the morning. The complainant called her and asked her to open the gate for her as it was locked. She said that she needed to change her shoes as she was going to the police station. When she opened the gate, she noticed that her face was swollen and greenish in colour. She was carrying her white cell phone which had blood stains. The complainant told her that she was assaulted by the appellant. She further told her that the appellant took her by force from Dongeni's tavern and continued assaulting her on the way to his home. She told her that they were on the way to Coke's tavern but they met the appellant, but she was not sure if they

met by arrangement or by chance. The complainant told the appellant that she was on her way to her boyfriend at Coke's tavern, but the appellant said that she could not do that to him.

[11] They ended up going to Dongeni's tavern. While they were there, she asked the appellant for R7.00. She and the appellant went outside to talk where they then argued. The appellant took her by force and left with her. During the commotion, her phone fell down, and it was picked up by another young man who assembled it and gave it back to her. The appellant dragged and pulled her to his homestead where he forced her to jump over the fence. They found a man he called an uncle who tried to intervene. The complainant told her that the appellant threatened her with a chainsaw that was there. She went to the police station with the complainant as the complainant said she wanted to open a case because the appellant slept with her without her consent and assaulted her. She did not notice any blood on her clothing, the bloodstains she saw were on the phone. There were no open wounds but the complainant was just swollen on her face. She was told by the complainant that she had been head-butted on her nose by the appellant.

[12] She did not confront the appellant about the incident but on the way to the police station, they met him and he wanted to speak to her. She was still angry and therefore she did not want to speak to him. After some weeks after his arrest, the appellant phoned her saying he would like to speak to her about what

happened between him and the complainant. The appellant's mother came to apologise on the Sunday on which the appellant was arrested. After the appellant was released from custody, he also came to her homestead to apologise. The appellant said that the case would cause problems for him and he would like to apologise and would do anything for the complainant.

[13] Under cross-examination, Ms Mjalo testified that police arrived at her house and took a statement from her. She testified regarding her statement in which she said that the complainant told her that she had sexual intercourse with the appellant two times that night. She further testified that she did not accompany the complainant to the police station in order to get the appellant arrested. She was narrating what the complainant told her as she was the first person who was informed by the complainant about the incident. She explained that Dongeni and Nkululeko's tavern was the same place.

[14] The next witness for the State was Nomzamo who testified that she was friends with the complainant and Zine. She testified that they were going to Coke's tavern to enjoy themselves from about 22:00 to 23:00 on 22 September 2017. The complainant received a call from an unknown number. The complainant said to the caller that they were going to Coke's tavern. She was later told by the complainant that the caller was the appellant and that he was coming to fetch them in a vehicle and would take them to Coke's tavern. The vehicle arrived driven by Thando. The appellant asked the complainant where they were

going, and she said that they were going to Coke's tavern. On the way to Coke's tavern, the appellant said that the complainant was not going there. The vehicle proceeded and did not turn to Coke's tavern. It proceeded to Dongeni's tavern, where they alighted from the vehicle. The appellant and the complainant stood aside talking. Thando then said that they must go inside Dongeni's tavern as what they were going to do at Coke's tavern could be done there. Thando bought alcohol and they sat together and consumed it. The appellant and the complainant were talking to each other reminiscing about what happened in matric. She then said to the complainant that she should ask the appellant for R3.00 to add to her R7.00 to buy a drink that was going to be used to dilute the Gin they were consuming. The complainant asked the appellant for R3.00 and the appellant said that they must go outside. They got out and at some point, she saw the appellant assaulting the complainant.

[15] Thando said that they must not intervene as the appellant and the complainant usually fought. They then sat down and Zine said that they must get out. They went out and met the appellant and asked him about the whereabouts of the complainant. However, the appellant insulted her. She could hear screams but could not figure out where they were coming from. She was told by the appellant to go and buy him a cigarette which she did because she was scared of him. She went inside and told Zine that she had been insulted by the appellant. She did not see the complainant outside with the appellant, she last saw her when

he assaulted her. She heard her screaming but did not know where she was. She explained that outside there was a passage where vehicles were parked, and one could not see a person there. She later went home without the complainant as she did not know where she was.

[16] When she met the complainant the following morning, she had a swollen face and a greenish eye. She was crying saying that the appellant raped her at his homestead. They went to the police station and on the way, they met the appellant. He asked the complainant where she was going, and she said that she was accompanying her mother to the shops. She testified that the complainant's matric jacket had bloodstains, and she had seen her bleeding from the nose and from the mouth when she was being assaulted. After this witness, the State closed its case after which the appellant's attorney made an application for the discharge of the appellant in terms of section 174 of the Criminal Procedure Act 51 of 1977. That application was, however, turned down.

[17] The appellant testified in his defence. His evidence was that on 22 September 2017, he was at Nkululeko's Tavern also known as Dongeni's Tavern. He had received a callback message from the complainant. When he called her back, she asked him to fetch her. He and Ntando went to fetch her and her friends, and they all went to Dongeni's Tavern. On arrival there, Ntando bought old buck brandy, and they sat down to drink. There was no time at which the complainant and her friends wanted to alight from the vehicle along the way. At some point,

the complainant asked to see him outside. They stepped away from their other friends and the complainant asked him to add some money to her money because she wanted to buy a soft drink. He gave her the money and they went back inside the tavern where they continued drinking. At some point, he told them that he wanted to go and sleep because he was feeling tipsy. He went home with the complainant. They had dated before but at that time they were just getting along. When he and the complainant left the tavern, all was well and she said that they could leave together, and he would bring her back the next day.

[18] He denied dragging or assaulting the complainant. His home was not far from the tavern. He used his own key to open the gate and to open his flat. He denied throwing the complainant over the fence into the yard. When he got into his flat, he found his cousin, Lungile in his flat and his cousin left. There was never a fight between him and the complainant in the flat. He entered the flat, went straight into his room and slept and the complainant slept next to him. He never forced her to have sexual intercourse with him. They woke up in the morning, had some conversation and then slept again. He woke up because he wanted to go back to Dongeni's Tavern, but the complainant wanted them to have sexual intercourse before he left. They engaged in sexual intercourse during which they used a condom. He denied using a gel in order to have sex with the complainant. After they had sexual intercourse, he gave her R50.00 for transport. He and Ntando went to town and on the way back from town, they met the

complainant who was coming back from Dimbaza. Ntando stopped the vehicle, and he (the appellant) had a conversation with the complainant. It was a normal conversation, and the complainant did not show any signs of being emotional or stressed.

[19] Under cross-examination, the appellant testified that he never had a fight or argument with the complainant. Even when he saw her the following day at about 10:30, there was no blood and she was not swollen. She was with her friends whom he did not know. They were the same friends she was with the previous night. When they met that morning, they had a normal conversation in which she asked him where he was coming from. He told her that they were coming from a town where they had gone to buy a cake for Ntando's child as it was her birthday. On the day they went to Dongeni's Tavern, there was never a talk of going to Coke's Tavern. He never hit the complainant at all. She willingly went with him to his home where they slept together. They were conveyed to his home in his friend's vehicle with which he had fetched them initially.

[20] He testified that he and the complainant were in a love relationship. He then got a job in East London as a result of which he left Dimbaza to stay in East London. While he was in East London, they would call each other and they used to see each other when he was in Dimbaza. There was never a talk of breaking up. When he was with her on the day of the incident, she had no blood stains and she had no injury. He never assaulted her and she was never swollen. When the

complainant left the following morning, everything was fine and he was shocked when he got arrested. There was no chainsaw at his home and she lied about a gel having been smeared in her vagina. That night he did not have sexual intercourse with the complainant. They only engaged in sexual intercourse the following morning and no gel was used. Before they had sexual intercourse, he told her that he had no condoms, and she said that they should go and get them from the Clinic. They went to the Clinic, got the condoms, came back and then had sex before she left. After the evidence of the appellant, his case was closed.

[21] After summarising the evidence of all the witnesses, the court correctly pointed out that while the versions of the complainant and that of the appellant were mutually destructive in most material respects, it was common cause that they did have sexual intercourse. They just disagreed about whether it happened that night on their arrival at his flat or the following morning. The court went on to say that it accepted that at that time the complainant was no longer in a relationship with the appellant, having moved on and had another boyfriend. It said that it accepted that the appellant was the complainant's ex-boyfriend. It further accepted that their sexual encounter on that occasion was forced on the complainant by the appellant. The court found that at some point at Dongeni's Tavern, the appellant and the complainant were outside where the appellant assaulted the complainant. They then moved to his home and the appellant did not want her to go to Coke's tavern where her boyfriend was. It then concluded

that the appellant took the complainant to his home by force where he threatened her and had sexual intercourse with her without her consent. The court found that in doing so, the appellant acted very brazenly, and the complainant was overwhelmed and gave in and had sexual intercourse with him which was non-consensual. It thereupon convicted the appellant of rape and sentenced him to eight years of direct imprisonment.

[22] There are a number of concerning aspects about the judgment of the court a quo. I mention just a few of them hereunder. The court pronounced that it was accepting the version of the complainant. However, in doing so, it did not account for the evidence of the appellant by either rejecting it or making credibility findings against him. The court a quo's approach in this regard was at variance with the trite legal position which was aptly articulated in *Shackell*[1] as follows

> "….It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my

[1] S v Shackell [2001] 4 All SA 279 (A) at para 30.

reading of the judgment of the court *a quo* its reasoning lacks this final and crucial step. On this final enquiry I consider the answer to be that, notwithstanding certain improbabilities in the appellant's version, the reasonable possibility remains that the substance thereof may be true…."

[23] The *Shackell* matter is on all fours with this matter in that the court a quo's reasoning lacks the final and crucial step referred to in that matter. In the final analysis, the court a quo did not even try to embark on the analysis of the appellant's version for purposes of looking at whether despite certain improbabilities it might have identified, there was no reasonable possibility that the substance of his version that the sexual intercourse was consensual was true. Some of the complainant's evidence was that the appellant head-butted her at Dongeni's Tavern and thereafter dragged her to his home. It is also apparent from the statement the complainant's mother made to the police that the complainant's aunt lived near Dongeni's Tavern. It further appears from that statement about which her mother was cross-examined that the complainant did not scream while she was being assaulted and dragged there for the reason that she respected her auntand did not want her to hear her name being called there. I am struggling to understand a person being forcibly taken away, being abducted basically, who did not want to draw attention to what was being done to her out of respect for her aunt who could have saved her or called the police.

[24] When they arrived at the appellant's home, her evidence was that she was thrown over the fencing which her mother referred to as a wall in her and fell on

the crushed stone but was neither injured nor sprained. She still did not run while the appellant was still trying to scale the fencing. She did not scream to attract the attention of the other people in that homestead. Even when they came across Lungile in the flat, she did not ask for help from him or scream to raise alarm or try to draw the attention of the other people in the main house. Before they slept, her evidence was that she went into the bathroom to wash the blood from the head-butting incident. This bathroom was not inside the appellant's room but it was outside. As Mr Jikwana, the appellant's counsel pointed out, this was yet another opportunity for her to escape and run to the main house where the appellant's mother was apparently sleeping. Instead, after washing her face she returned to the appellant's room where she found him already naked.

[25] Finally, the complainant's version was also that when her mother saw her that morning at her home when she opened the gate for her, she noticed that her face was swollen. Her mother's evidence and that of her friend Nomzamo was that her face was swollen and greenish. However, the doctor who examined the complainant on the same day and completed the medico-legal examination report found no injuries, not even the swelling or greenish pigmentation. Lastly, it was the complainant's evidence that she went to the police to report assault, not rape. Her decision that despite being raped and assaulted, she was not going to report the rape and yet she had told her mother that she had been raped is difficult to understand. The possibility that the evidence of the State witnesses might have

been curated in some instances cannot be excluded. There were also a number of glaring inconsistencies among the State witnesses' accounts of what happened or said to have happened.

[26] This brings me back to the trite principle to which I alluded earlier, that a court must account for all the evidence. In *Van der Meyden*[2] the court expressed this principle as follows:

> "The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the Court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or acquit) must account for all the evidence. Some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it might be ignored."

[27] Precisely because it is the duty of the State to prove its case beyond reasonable doubt, a court does not have to be convinced that every detail of an accused's version is true[3]. I am mentioning this principle to make the point that while there might have been improbabilities in the version of the appellant, even on the acceptance of certain elements of his version being improbable, it did not

[2] S v Van der Meyden 1999 (2) SA 79 (W) at 82 C-Y

[3] Olawale v S [2010] All SA 457 (SCA) at 455 at paras 13-15.

follow that he should be convicted without more. He had no onus to prove his innocence.

[28] The last point is that the complainant was a single witness whose evidence needed to be considered with the required degree of circumspection, the so-called cautionary rule. This has nothing to do with the complainant being a rape victim but everything to do with her being a single witness, a caution that applies to all single witnesses regardless of the nature of the offence. The court a quo did not seem to be factoring the cautionary rule into account in the assessment of the complainant's evidence on the crucial issue of consent to sexual intercourse. The court simply pronounced that it accepted the evidence of the complainant. Inexplicably, Lungile was not called to testify and yet he was the only person who interacted with the appellant and the complainant at the appellant's homestead that night and who, on the complainant's version, witnessed the assault there and tried to intervene.

[29] In *Ximba*[4] the Supreme Court of Appeal restated the approach to the application of the cautionary rule as follows:

> "Invariably, in any rape matter, the complainant will be a single witness. There is no formula for assessing the credibility of a single witness. A trial court should consider the evidence in its totality and should determine whether the truth has been told, despite any shortcomings and contradictions. As has been repeatedly stated by this Court, the

[4] Ximba v S (957/2022) [2024] ZASCA 6 (19 January 2024) at para 26.

> correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. In other words, what is required is credible evidence which renders the complainant's version more likely that the sexual intercourse took place without her consent, and the appellant's version less likely that it did not."

[30] The court a quo misdirected itself in a number of ways as alluded to hereinbefore. How it came to the conclusion that the State had proved its case beyond reasonable doubt without any attempt at assessing the version of the State against that of the appellant remains unfathomable. Cases like this one are a cause for concern if not disquiet in light of the crime of rape which has reached alarming proportions in this country. As Mr Sinclair, counsel for the State correctly pointed out, this case appears to have been a comedy of errors from poor investigation by the police to poor prosecution and, unfortunately the failure of justice at the hands of the hapless magistrate who also failed to do the basics in doing a proper assessment of all the evidence.

[31] The importance of a proper analysis of all the evidence cannot be over-emphasised as a general proposition. This becomes even more indispensible in rape cases where the offence was committed in the context of the history of an intimate relationship between the rape victim and the accused. As the Supreme

Court of Appeal pointed out in *Coko*[5], sexual violence committed in the context of an intimate relationship does call for a thorough assessment of all the evidence. The court expressed the principle as follows in *Coko:*

> "[13] It bears mentioning that this case falls within the category of sexual violence committed in the context of an intimate relationship. Consequently, this can be particularly difficult to navigate given the intimate nature of such relationship, familiarity coupled with the fact that the parties would in most cases have previously been involved in some form of sexual contact prior to an allegation of rape by one of the parties against the other. This point was studiously emphasised by counsel for the second amicus curiae, Initiative for Strategic Litigation in Africa. However, it must be stressed that this in no way means that consent by one party to a specific form of sexual act should be taken to be a licence to every other sexual act. It is, *inter alia,* those types of situations that the Sexual Offences Act was designed to address.
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> …
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> [62] As to the element of *mens rea,* it is beyond question that intention is a prerequisite for a conviction as it is an integral part of the definition of the statutory crime of rape. A must know that B had not consented to a penetrative sexual act. Therefore, the accused may only 'escape [criminal] liability on the ground of absence of knowledge of unlawfulness of his conduct if he [or she] believed the complainant … was in fact consenting.' Even *dolus eventualis* suffices, which means that it is sufficient to prove that A foresaw the possibility that B's free and conscious consent might be lacking, 'but nevertheless continues to act [recklessly] appreciating that [he/she may be acting

[5] Director of Public Prosecutions, Eastern Cape, Makhanda v Coko 2024 (2) SACR 113 (SCA); [2024] 3 All SA 674 (SCA) paras 13 and 62.

without his/her consent], therefore "gambling" as it were [with the security, bodily integrity and dignity] of the person against whom the act is directed.' ''

[32] The basis on which there could have been any inkling of the absence of consent at any stage during the night of the 22 or the morning of the 23 September 2017 is indecipherable from the court a quo's judgment. How *mens rea* was established in any form was, at best, not explained by the court a quo, at least, not as properly as one would have expected in as serious a matter as this one. It follows that the State failed to discharge the onus resting upon it to prove the guilt of the appellant beyond reasonable doubt. It follows that the appeal must be upheld and the appellant must therefore be acquitted.

[33] In the result, the following order is issued:

1. The appeal is upheld.

2. The conviction and sentence of the appellant are set aside.

M.S. JOLWANA
JUDGE OF THE HIGH COURT

I agree:

B.M. PAKATI

JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Appellant	:	Adv T.M. Jikwana
Instructed by	:	B.N. Jikwana Attorneys Inc. Butterworth
Counsel for the Respondent	:	Adv L.W. Sinclair
Instructed by	:	Director of Public Prosecutions Bhisho
Heard on	:	26 March 2025
Judgment Delivered on	:	08 April 2025