

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case Number:
2022/049656

In the matter between:

THE EMBRACE PROJECT NPC First Applicant

IH Second Applicant

CENTRE FOR APPLIED LEGAL STUDIES Third 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

CENTRE FOR HUMAN RIGHTS First *Amicus Curia*

PSYCHOLOGICAL SOCIETY OF SOUTH AFRICA Second *Amicus Curia*

FIRST AND SECOND AMICUS CURIAE'S HEADS OF ARGUMENT

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INTRODUCTION AND BACKGROUND

1. On 12 March 2024, the Office of the Deputy Judge President convened a case management meeting between the parties before Honourable Justice EM Kubushi. In the meeting, all parties consented to the admission of the Centre for Human Rights (“CHR”) and the Psychological Society of South Africa (“PsySSA”) as the first and second *amici curiae* (collectively referred to as “the amici”) in this matter. Honourable Justice Kubushi accordingly directed that the *amici* be admitted to the proceedings and that they file heads of argument and present oral submissions. These heads of argument have been prepared pursuant to that directive.
2. The present submissions are prepared in compliance with this Honourable Court’s directions and constitute the *amici*’s submissions.

OVERVIEW OF SUBMISSIONS

3. This case challenges, at its core, traditional notions around the element of consent in rape and sexual assault cases. In a South African context, consent is the central cog on which the prosecution of rape cases rises or falls, given

that the definition and prosecution of the offence depends on the absence of the victim's consent¹.

4. The considerations of our criminal courts in assessing consent are of crucial importance when prosecuting rape cases. Psychological findings on the factors that influence how consent is given, refused or withdrawn during intimate sexual acts have allowed psychologists to better understand how individuals communicate or express their non – consent, either verbally or non-verbally. The *amici* accordingly submit that there is significant value in incorporating these psychological perspectives when assessing consent as an element of the crime of the rape.
5. The first and second *amici curiae* shall furnish the court with submissions from a psychological vantage point pertinent to sexual assault cases. This perspective will be adeptly tethered to South Africa's legal system, as well as the prosecution dynamics of rape cases, thereby ensuring a thorough examination from the prism of human rights considerations.
6. In sum, the *amici* make the following submissions:
 - 6.1. First, the *amici* submit that victims may experience various peritraumatic responses to sexual assault. The *amici* shall set out these various peritraumatic responses by analysing the subjective feelings experienced during these responses and exploring the concept of the

¹ Section 3 of the Sexual Offences and Related Matters Amendment Act, 2007 ("SORMA").

“defence cascade”. The *amici* shall draw on pertinent psychological academic literature.

6.2. Second, the *amici* shall further analyse the legal concept of consent in South Africa and will thereafter canvass how hardwired peri - traumatic responses to rape can incapacitate victims, rendering them unable to articulate verbal or behavioural responses during an attack. In doing so, the *amici* shall refer to relevant South African judgments to demonstrate the current position and need for developments in law which factor peritraumatic responses when assessing consent.

6.3. Third, the *amici* submit the defence of mistaken belief has evolved to replace the “resistance requirement” which has been since removed from our law. The *amici* shall further discuss how the defence of mistaken of belief is more likely to be raised when survivors exhibit more “passive” peritraumatic responses to rape. In this context, the *amici* submit that in the there is a need to consider peritraumatic responses (and the subsequent effect on ability to communicate consent or non – consent) even where the defence of mistaken belief is raised.

7. These submissions are elaborated sequentially below.

PERITRAUMATIC RESPONSES TO RAPE AND SEXUAL ASSAULT

8. Peritraumatic responses are defined as reactions that occur during or immediately after a traumatic event i.e. the immediate response to a traumatic

stressor². Survivors of sexual assault may exhibit varied peri - traumatic responses to attackers at the time of the sexual assault.

9. During sexual assaults, survivors may experience subjective feelings of fear, paralysis, numbness and detachment. These feelings can also be experienced alongside behaviours such as passivity and extreme immobilisation³. Whilst some survivors of sexual assault may resist the attacker, a substantial number of survivors do not⁴. These differing responses to sexual assault can be explained by the physiological constitution of the individual as well as a number of complex and intersecting variables that can affect how individuals communicate their willingness or unwillingness to participate in a sexual act, or to withdraw their consent, either verbally or non-verbally.
10. It must be noted that the responses of victims, which will be set out below, are varied, and there is no “normative”, “appropriate” or “expected” way for a victim to behave during or after a rape or sexual assault. These Heads of Argument do not purport to convey a mechanism for the prediction of responses by survivors of rape or sexual assault. Instead, this submission shall focus specifically on the various peritraumatic responses that can be experienced by survivors of rape and sexual assault and the way these responses can affect an individual’s ability to communicate their willingness or unwillingness to

² Gorman, Kaitlyn & Engel-Rebitzer, Eden & Ledoux, Annie & Bovin, Michelle & Marx, Brian, (2015), “*Peritraumatic Experience and Traumatic Stress.*”, 10.1007/978-3-319-08613-2_73-1.

³ Ibid (Moller et al., 2017).

⁴ Moller A., Sondergaard H.P., & Helstrom L. (2017), “*Tonic immobility during sexual assault – a common reaction predicting post-traumatic stress disorder and severe depression.*”, Acta Obstet Gynecol Scand, 96, 932–938. DOI: 10.1111/aogs.13174.

participate in a sexual act, or to withdraw their consent, either verbally or non-verbally.

The defence cascade

11. In response to traumatic stressors (such as sexual assault), human beings are equipped with a spectrum of hard – wired, automatic activated responses. This spectrum of responses is known as the “defence cascade”⁵. The defence cascade is an important survival response in humans which describes progressive defence or fear responses in human beings when exposed to traumatic events⁶.
12. The defence cascade is characterised by physiological changes that can be experienced as being overwhelming and out of the individual’s conscious control⁷. The defence cascade is commonly associated with peritraumatic

⁵ Kozłowska K, Walker P, McLean L, Carrive P. (2015). “*Fear and the Defense Cascade: Clinical Implications and Management*”, *Harv Rev Psychiatry*, 23(4), 263-87. doi: 10.1097/HRP.0000000000000065.

⁶ Ibid (Kozłowska et al., 2015) See also:-

Richter Levin, G., & Sandi, C. 2021, “*Labels matter: Is it stress or is it trauma*”, *Translational Psychiatry*. 11: 385. <https://doi.org/10.1038/s41398-021-01514-4>.

Mobbs D, Marchant JL, Hassabis D, Seymour B, Tan G, Gray M, Petrovic P, Dolan RJ, Frith CD. (2009), “*From threat to fear: the neural organization of defensive fear systems in humans.*”, *J Neurosci*, 29(39):12236-43. doi: 10.1523/JNEUROSCI.2378-09.2009.

Niermann, H. C. M., Figner, B., & Roelofs, K. (2017), “*Individual differences in defensive stress-responses: The potential relevance for psychopathology.*”, *Current Opinion in Behavioral Sciences* , 14, 94–101. <https://doi.org/10.1016/j.cobeha.2017.01.002>

⁷ Ibid (Kozłowska et al, 2015)

reactions to physical and sexual assaults. The sequence of the defence cascade (or defensive response) includes:-

- 12.1. Arousal, which potentiates the body to deal with the perceived danger through the activation of the sympathetic nervous system;
- 12.2. Flight or fight responses which are an active defence response characterised by co – ordinated emotional behavioural and physiological responses. This response is activated in response to perceived imminent danger⁸.
- 12.3. The freeze response, also known as “attentive immobility”, which is another common transient adaptive response⁹. This response is characterised by hypervigilance, heightened attention, vigilance to cues of threat and a tense body. The freeze response is also described as a “stop, look, listen” response¹⁰.
- 12.4. Tonic immobility (also referred to as rape – induced paralysis or fright) which may occur when threats to life escalate. It is described as being an involuntary temporary state involving physical immobility and the

⁸ Ibid (Kozłowska et al, 2015)

⁹ Ibid (Kozłowska et al, 2015)

¹⁰ Bracha, H.S., Ralston, T.C. & Matsukawa, M.A. (2004), “Does “fight or flight” need updating?”, *Psychosomatics*, 45(5), 448-449

perceived inability to escape¹¹. Tonic immobility is characterised by a loss of the ability to move or vocalise. From an evolutionary perspective, tonic immobility may occur in order to reduce the possibility of further attack¹². During this response, victims describe subjective feelings of fear, immobility, coldness, numbness, paralysis, being unable to call out or scream during the event, shaking, eye closure, depersonalisation (feeling detached from oneself during the event), derealisation (feeling detached from the surroundings/ environment during the event), a sense of futility, hopelessness and inescapability¹³. Some survivors of sexual assault have been noted to exhibit extreme passivity during the assault¹⁴ and tonic immobility has also been described as a catatonic-like state¹⁵.

12.4.1. A Swedish study¹⁶ on tonic immobility during assault found that 70% of 298 rape survivors reported significant tonic immobility during the assault. It was noted by the authors of

¹¹ Magalhaes AA, Gama CMF, Gonçalves RM, Portugal LCL, David IA, Serpeloni F, Wernersbach Pinto L, Assis SG, Avanci JQ, Volchan E, Figueira I, Vilete LMP, Luz MP, Berger W, Erthal FS, Mendlowicz MV, Mocaiber I, Pereira MG, de Oliveira L. (2021). "Tonic Immobility is Associated with PTSD Symptoms in Traumatized Adolescents", *Psychol Res Behav Manag*,14:1359-1369. doi: 10.2147/PRBM.S317343.

Volchan,E., Souza, G.G., Franklin, C.M., Norte, C.E., Rocha-Rego, V., Oliveira, J.M., Isabel A., David, I.A., Mendlowicz, M.V., Silva, E., Coutinho, F., Fiszman, A., Berger, W., Marques-Portella, C.& Figueira, I. (2011), "Is there tonic immobility in humans? Biological evidence from victims of traumatic stress", *Biological Psychology*, 88(1),13-19. <https://doi.org/10.1016/j.biopsycho.2011.06.002>.

Ibid (Moller et al.,2017).

¹² Ibid (Mobbs et al., 2014).

¹³ Ibid (Moller et al., 2017).

¹⁴ Ibid (Bracha, 2014).

¹⁵ Ibid (Moller et al., 2017).

¹⁶ Ibid (Moller et al., 2017).

this study that within the criminal justice system, courts may misinterpret victim passivity as passive consent whereas the passivity represents an expected biological reaction to a threatening situation. A number of studies have corroborated findings on tonic immobility during sexual assault¹⁷.

- 12.5. Collapsed immunity (threat induced fainting) which is characterised by a sudden drop in one's heart rate and blood pressure leading to changes in consciousness. These changes in consciousness range from compromised consciousness to complete loss of consciousness¹⁸.
13. Compared to victims of crimes such as robbery and assault, it has been found that a higher percentage of rape survivors employed non-physically active behaviour responses. These non-physically active behaviour responses include, *inter alia*, attempts to reason with the perpetrator or crying¹⁹. For some survivors of sexual assault and rape, not resisting the perpetrator is a survival mechanism to mitigate against further physical injury or death whilst other survivors are unable to react at all during the attack.

¹⁷ Fusé, T John P. Forsyth, J.P., Brian Marx, B., Gordon G. Gallup, G.G. & Weaver, S. (2007), "Factor structure of the Tonic Immobility Scale in female sexual assault survivors: An exploratory and Confirmatory Factor Analysis", *Journal of Anxiety Disorders*, 21(3), 265-283.

¹⁸ Lempert T, Bauer M, Schmidt D. (1994), "Syncope: a videometric analysis of 56 episodes of transient cerebral hypoxia.", *Ann Neurol* 36:233–7.

¹⁹ Kaysen, D., Morris, M.K., Rizvi, S.L. & Restock, P.A. (2005), "Peritraumatic responses and their relationship to perceptions of threat in female crime victims.", *Violence Against Women*, 11(12) 1515-1535.

PERITRAUMATIC RESPONSES TO RAPE & THE EFFECT ON COMMUNICATING CONSENT

Consent in the current legal framework

14. In South Africa, the offence of rape is delineated, proscribed, and punished under the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 (“Sexual Offences Act”). Section 3 of the Sexual Offences 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.”

15. In South Africa, 42780 cases of rape were reported between 2022-2023 with a mere 591 convictions. This translates to a 1,38% successful prosecution rate. The alarming reality can be explained by the nature of the crime itself and how rape cases are handled by the courts.
16. The crime of rape is typically committed without witnesses; as such, it is in the hands of the decision-maker to assess the opposing accounts from the survivor and the accused. In the majority of rape cases, the central legal issue presented to the court is consent. The prosecution must thus convince the court that the survivor did not consent, and that the accused did not have a mistaken belief that there was consent.

17. The issue of consent is therefore of significant importance as the prosecution of the offence of rape depends on the absence of the survivor's consent. Consent must have been given consciously and voluntarily, either expressly or tacitly. The consent must be given by a person who has the mental ability to understand what they are consenting to, and the consent must be based on a true knowledge of the material facts relating to the intercourse²⁰.
18. Consent has been described as an on-going process which may be negotiated during a sexual encounter. An individual may not be certain at the outset of sexual activity what activities they will consent to as the act unfolds²¹. It is also trite that consent to a particular sexual activity or act may be withdrawn at any time during the activity or act in question.

Peritraumatic responses to rape and sexual assault & the ability to communicate willingness, or unwillingness, to consent

19. The normative or preferred position in relation to consent, particularly in the context of rape and sexual assault, is that it is expressed verbally. Ordinarily, any ambiguity or ambivalence regarding whether consent is present during a sexual encounter is clarified through verbal, or non – verbal, communication.

²⁰ R, Snyman. "*Criminal Law*", 5 ed (2008) at 364 in *S v Nitito* (123/11) [2011] ZASCA 198 (23 November 2011) at para 8.

²¹ Beres, M.A., 2014, "*Rethinking the concept of consent for anti-sexual violence activism and education.*", *Feminism & Psychology*, 24(3), 373-389. DOI: 10.1177/0959353514539652.

However, the hardwired neurobiological responses canvassed above as the defence cascade (fight/flight, freeze, tonic immobility etc) may render the survivor unable to express a verbal and/or behavioural response during the attack.

20. Specifically, the freeze response, tonic immobility and collapsed immunity are characterised by non – active behaviours associated with peritraumatic responses to rape and sexual assault. Survivors who experience these responses within the defence cascade may not be able to express their non – consent, verbally or non-verbally.
21. The *amici* submit that consent is therefore much more complex than simply saying “yes” or “no” and instead involves a diversity of behaviour²² including the responses associated with the defence cascade canvassed above.
22. Our courts have recognised that passivity and submission by a survivor during a rape does not necessarily constitute valid consent. The Supreme Court of Appeal (“SCA”) in *Mugridge v S* recognised that our law requires that consent be active, and that mere submission is not sufficient. Here the SCA further cited Murray AJA in the case of *Rex v Swiggelaar* wherein it was stated that:-

“...it is fallacious to take the absence of resistance as per se proof of consent. Submission by itself is no grant of consent, and if a man so

²² Humphreys, T. (2007), “Perceptions of sexual consent: The impact of relationship history and gender.”, *Journal of Sex Research*, 44(4), 307-315.

intimidates a woman as to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape. All the circumstances must be taken into account to determine whether passivity is proof of implied consent or whether it is merely the abandonment of outward resistance which the woman, while persisting in her objection to intercourse, is afraid to display or realises is useless". (Emphasis added).

23. The court in *Swiggelaar*²³ correctly recognised that passivity and submission, in relation to a sexual act, does not necessarily indicate valid consent. However, it must be noted that the court only considered the responses of passivity and submission as potential non-consenting indicators in the presence of acts of intimidation by the perpetrator in question.
24. In summation, the present and accepted view is that passivity and submission to a sexual act will only be regarded as “*the abandonment of outward resistance*” if one intimidates another with a view to induce them to abandon resistance and submit to intercourse to which they are unwilling to participate in. Responses of passivity, and submission, are therefore not assessed in relation to other forms of sexual violence, such as intimate partner violence where the threat of physical violence may not always be overt²⁴. Furthermore,

²³ *Rex v Swiggelaar* 1950 (1) PH H61 (A).

²⁴ Intimate partner violence includes behaviour by an intimate partner or ex-partner that causes physical, sexual or psychological harm. Intimate partner violence can manifest as physical aggression, sexual coercion, psychological abuse and controlling behaviours (World Health Organisation, “Violence Against Women”, accessed at https://www.who.int/health-topics/violence-against-women#tab=tab_1 on 19 April 2024).

passivity and submission do not constitute the entirety of the various peritraumatic responses to sexual assault and violence, as detailed above.

25. The *amici* therefore submit that the broader range of peritraumatic responses must be taken into consideration by our courts when assessing consent in a range of rape and sexual assault scenarios.

PERITRAUMATIC RESPONSES AND THE DEFENCE OF MISTAKEN BELIEF

26. The *amici* submit that there is a need to consider peritraumatic responses to sexual assault and rape even where an accused raises the defence of mistaken belief.
27. In the 2020 case of *Coko v S*²⁵, the Eastern Cape High Court ruled that an individual's mistaken belief in consent to penetrative sex could service as a legitimate legal defence. The reasonable belief defence is one that is rooted in the need to guard against feared miscarriages of justice against accused persons that could result from miscommunication²⁶.

²⁵ *Coko v S* [2021] ZAECGHC 91; [2021] 4 ALL SA 768 (ECG); 2022 (1) SACR 24 (ECG) (8 October 2021).

²⁶ D, Berliner, "Rethinking the reasonable belief defense to rape", (1991) 100 Yale Law Journal in T, Illsey, "The defence of mistaken belief in consent", (2008) 21 *South African Journal of Criminal Justice* 63 68.

28. Presently the defence of mistaken belief of consent has evolved into a substitution for the “resistance” requirement which has since been eliminated from South Africa’s legal system. Illsey, T states that:-

“Although the demise of the resistance requirement may, theoretically, have been a victory for the reform of sexual assault law it may have the practical result of introducing an implicit resistance requirement and, consequently, opening the door to the defence of mistaken belief. In the absence of physical resistance by the victim, the accused has more scope to argue that he thought, albeit mistakenly, that the victim had consented because she did not offer any signs of resistance” (Emphasis added).²⁷

29. Essentially, where a survivor responds to a sexual assault in the form of a “passive” peritraumatic response, an accused person is more likely to succeed in raising the defence of a mistaken belief of consent. Once the defence of mistaken belief is raised, the focus is then placed on assessing what actions led to the accused believing there was consent instead of separately assessing whether valid consent was in fact present.
30. It is against this backdrop that the *amici* submit that peritraumatic responses to rape (which may incapacitate survivors) are not adequately considered especially when the defence of mistaken belief is raised.

²⁷ Ibid (Illsey, 2008).

31. The *amici* submit that to continue with the current stance in our law would be to ignore the well-established psychological findings on peritraumatic responses, as set out above, to rape and sexual assault particularly in establishing whether valid consent was present during the sexual act complained of. These peritraumatic responses are psychologically valid, and influence the way that survivors communicate their non-consent.
32. The *amici* assert that the raising of the defence of mistaken belief cannot be allowed to continue to act as a “get out of jail free card” which results in the neglect of an assessment of peritraumatic responses and its impact on consent.
33. Accordingly, the *amici* submit that the range of peritraumatic responses to rape and sexual assault (particularly those that manifest in “passive” behaviours) must be ardently considered by our courts in the prosecution of rape and sexual assault cases even where the defence of mistaken belief is raised.

CONCLUSION

34. Psychological understandings of peritraumatic responses in situations of rape and sexual assault provide critical information into the various ways that survivors may respond. Peritraumatic responses, especially those associated with non-active behaviours, can heavily influence the manner in which an individual is able to express their non-consent to sexual activity, or the revocation of their consent to activities they are already engaging in. Courts must consider these peritraumatic responses in order to best assess whether there was in fact valid consent present when adjudicating rape, and sexual assault, cases.

35. These psychological considerations are pertinent in assessing consent even where an accused person raises the defence of a mistaken belief of consent. Our jurisprudence needs to evolve to incorporate these psychological perspectives in assessing the dynamics around the pivotal element of consent.

ADV. T. THUMBIRAN

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19 April 2024