

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA,

Case Number: A494/14
Date: 29/05/2015

In the matter between:

EPHRAIM THIBEDI KGATLA

APPELLANT

and

THE STATE

RESPONDENT

Coram: HUGHES J et AWAKOUMIDES AJ

JUDGMENT

Delivered on: 29 May 2015

Heard on: 26 May 2015

HUGHES J

1. The appellant, Ephraim Thibedi Kgatla, was convicted on 8 August 2012 and sentence on 10 October 2012. He only sought leave to appeal on 19 February 2013, leave was granted by the trial court on 12 June 2014 in respect of the conviction.

2. Condonation was sought before this court as the request for leave to appeal is out of time. There was no opposition from the State and this court was of the view that in the interest of justice condonation should be granted. In the circumstances, condonation is granted to prosecute the appeal against the conviction.

3. The appellant was charged in terms of section 3 read with sections 1, 56(1), 58, 59, 60, and 61 of the Sexual offences Act 32 of 2007 read with section 256 and 261 of the Criminal Procedure Act 51 of 1977 read with the provisions of section 51(2) of the Criminal Amendment Act 105 of 1977.

4. On 7 July 2011 at Sekukune, in the district of Limpopo, the appellant allegedly raped the complainant, P. K., by inserting his penis in her vagina without her consent.

5. On the night in question, the appellant was intoxicated, as he had been drinking a mixture of alcohol being beers and whiskey. He arrived at his home during the course of the evening and proceeded to prepare a plate of the meal already prepared by the complainant. The complainant in this matter is the seventeen-year-old stepdaughter of the appellant as he is married to her mother.

6. At some stage he sought the complainant's assistance to establish where the herbs and spices were as they were not in their usual place. The complainant was in her bedroom on the bed busy with her cellphone when she heeded the appellant call for assistance. She only had a bath towel wrapped around her body when she assisted the appellant. She return to her bedroom and slept on her bed. In the same room was her three-year-old sibling.

7. The appellant after he completed eating entered her room. He found her fast asleep, he wake her up and fondled her. He pushed her back onto the bed and had sexual intercourse with her without her consent. The complainant said she was afraid and feared for her life as she thought he would kill her. She also said she cried when he undressed her and she could not believe that her own [...] could do such a thing to her. Subsequently, the appellant returned twice within that evening and removed her from her room taking her to another room, and raped her twice.

8. The crux of the appellants case is that the sexual intercourse that he had with the complainant was consensual. The complaint contends otherwise.

9. Mr Swart, who represented the appellant, argued that the State had failed to prove beyond a reasonable doubt that the sexual intercourse between the appellant and the complainant was not consensual. He further argued that the complainant did not clearly indicate or state that she did not want to engage in sexual intercourse with the appellant. Another issue raised by Mr Swart is that the complainant did not resist the sexual advance and sexual intercourse with the appellant. He also made much of the complainant's reply in cross-examination about the fact that she had said that she during all three episodes of rape she was not prepared as the appellant did not fondler her and kiss her before having sexual intercourse with her. These factors, he argued were a clear indication that the State had failed to prove intention to rape the complainant. The end result, being, that there are a host of circumstantial facts that the trial court took into account which were not conclusive that resulted in the trial court coming to the wrong conclusion that the appellant had sexual intercourse with the complainant without her consent.

10. Mr Moetaesi, for the State, argued that this was an open and shut case. The evidence of the appellant alone corroborated that of the complainant that the sexual intercourse was without consent. He indicated on two occasions, firstly at a family meeting and in the trial court proceedings, that he was sorry he had sexual intercourse with the complainant without her consent. His wife and the complainant who were present at the family meeting further corroborated his statement at the family meeting. He also argued that the appellant's representative did not challenge the evidence of the complainant by advancing the version that he advanced in his evidence in chief. Therefore, he concluded, the complainant's version remains unchallenged.

11. It is trite that consent or lack thereof needs to be established, in rape cases, in order for the accused to be convicted. As referred to see *R v Z 1960 (1) SA 739 (A)*. In this instance the contested facts as stated by the complainant:

(a) The appellant when he entered the room and sat on the bed with the complainant said "you have grown up and only wore a t-shirt";

- (b) He then proceeded to fondle the complainant;
- (c) He made mention that the mother of the complainant was not home;
- (d) The complainant was in the room alone with her three year old sibling;
- (e) She stated "in fact I was scared, I was so scared I thought he will kill me...";
- (f) She cried when he undressed her and she stated that she cried because she was afraid wondering how could her [.....] do such a thing to her;
- (g) She testified, "From he inserted his penis into my vagina and forced to have intercourse with me against my wish."

[From the record pages 5 and 6].

12. Together with the above there is also the statement on the appellant's own version that he admitted at the meeting and in the trial court that he did have sexual intercourse with the complainant without consent and he was sorry. This to my mind is a clear indication that the appellant had the knowledge from the reaction and actions of the complainant that she was not consenting and was not a willing participant. However, in the face of this he continued recklessly to rape the complainant three times on the night in question. Least, we forget that, the evidence before the trial court was that the mother of the complainant did not believe the accusations levelled against her [.....] by the complainant. However, she corroborated the evidence of the complainant in material respects, a further material corroboration is the fact that the complainant testified that she scratched the appellant, the mother's evidence is that she noticed the said scratch marks on the appellant.

13. Lastly, the fact that the complainant after the first act of rape was submissive toward the appellant does not constitute consent.

See *R v Z* at 7450-F:

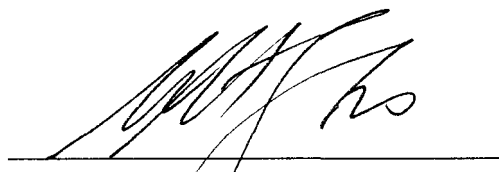
"Rape is a crime in which intention is an element; there must be an intention to have unlawful carnal connection with a woman without her consent. That intention must be proved as an essential element in the Crown case. If the accused believed that the woman had consented, the guilty intent or *mens rea* is lacking. The *onus* is on the Crown to prove that the accused had the necessary *mens rea*, and therefore the Crown must prove that the accused knew that the woman had not consented. Submission, of course, is not consent. That the accused had that knowledge may be proved in many ways, and

proof that the accused was aware of the possibility of non-consent and was reckless whether the woman consented or not will suffice, but the necessary *mens rea*, like the other elements in the crime must be proved beyond ail reasonable doubt".

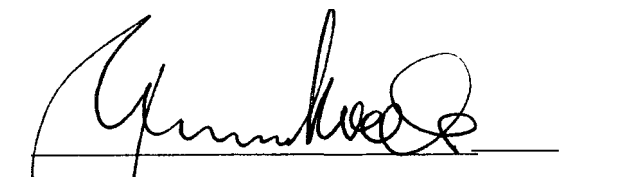
14. The principles enunciated in the case *supra* are applicable in this instance. As I set out above the State in my vien proved beyond reasonable doubt that the complainant did not give the appellant consent to have sexual intercourse with her and he did so against her will, even on the second and third occasion when she was submissive. The conclusion reached is that the conduct and actions of the complainant could not and cannot be confused as consent. The appellant states himself that he is sorry for raping the complainant.

15. In result I make the following order:

15.1 The appeal on conviction is dismissed.


W. Hughes Judge of the High Court

I agree and it is so ordered


G. T. Avvakoumides Judge of the High Court