151/1959

G.P.-S.4706—1950-1—6,000.

U.P.J. 445.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE DIVISION).
AFDELING).

151/1959

APPEAL IN CRIMINAL CASE.
APPÈL IN KRIMINELE SAAK.

KENNETH NXELE

Appellant.

versus

THE QUEEN

Respondent.

Appellant's Attorney _____ *Respondent's Attorney* _____
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate E. Stals *Respondent's Advocate* J. Kopelowitz.
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on:— Tuesday, 24th November, 1959.
Op die rol geplaas vir verhoor op:—

(A) 11 a.m.

C. A. V.

9.45

Coram: Steyn C.J. de Beer et Holmes JJA

The appeal is dismissed, save that the corporal punishment is set aside.

27.11.59

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION.)

In the matter of:

K. NXELE ..... Appellant.

versus

REGINA ..... Respondent.

CORAM: STEYN,C.J. DE BEER,J.A. et HOLMES,A.J.A.

HEARD: 24th November, 1959. DELIVERED:

J U D G M E N T.

HOLMES, A.J.A.: The appellant, a Native man, was convicted in the Springs Circuit Local Division of the crime of rape. He was declared an habitual criminal and was also sentenced to a whipping of three strokes, the latter being suspended upon certain conditions. He appeals with the leave of the trial judge. There were originally two accused, but the other accused was acquitted.

The complainant was a young married Native female, aged about 16 years. The gist of her evidence is as follows. She lives with her husband in or near

the Payneville location in the district of Springs. About 6 a.m. on 30 August 1958 her husband sent her to a chemist in the location to buy some medicine which he wished to apply to his leg before going to work. While running to the chemist she was accosted and caught hold of by the appellant. He threatened her with a knife and forced her to enter a hall in the location. There he tripped her and had intercourse with her against her will. When he had finished he kicked her with his booted foot on her private parts. Thereupon the other accused, who had arrived on the scene, also had intercourse with her against her will. When he had finished, she managed to run out of the hall. When she reached her home she found that her husband had already left for work. She went to his place of employment and told him what had happened. They lodged a complaint with the police that afternoon. She was examined by the district surgeon shortly before midday on the following day. He found an abrasion on one elbow and he said that her private parts showed a swelling on one side, consistent with the use of violence, such as a kick. He could not

exclude the possibility of this injury having been self-inflicted.

The appellant admitted having had intercourse with the complainant but claimed that it was by consent, without payment or promise of payment, although they were strangers. The other accused denied that he had intercourse with the complainant. He said that he saw her enter the hall with the appellant, and later emerge; that he suspected that they had had intercourse, and that he threatened to tell her husband.

The trial court (Bekker,J. sitting with two assessors) acquitted this other accused upon the ground that it was a case of the complainant's oath against his, and that he must be given the benefit of the doubt. We think that he was fortunate to be acquitted, in as much as the Court believed that the complainant was telling the truth, and disbelieved this other accused, being satisfied that he was a liar. However, it is not necessary to say anything more about his acquittal.

With regard to the appellant, the Court made no finding of demeanour against him but (by a majority) regarded his story as incredible, and believed the complainant, regarding her as a "simple soul" who would be

true that the trial court did not spacifically refer to this consideration in its judgment. Nevertheless the court was at considerable pains to be fair to the appellant, and referred more than once to the careful approach necessary in trying sexual offences, and I cannot think that the consideration referred to was absent from its mind.

With regard to Mr. Stals' analysis of the evidence of the complainant, I do not think that it is necessary to deal with all his criticisms seriatim. The trial court considered the imperfections in her evidence, and found that they did not prevent the acceptance of her version, especially in the light of the grave improbability of the appellant's story. I am unable to hold that the trial court was wrong.

The improbability just referred to is this: would a wife, who has been sent urgently by her husband to fetch medicine, dally on the way to the extent of consenting to intercourse with a total stranger, and that without reward or promise of reward? The trial court considered this question, not in vacuo, but in relation to the person before them, namely the complainant, and answered it in the negative. I am unable to say that they

were wrong.

In addition to all the foregoing there is a factor which is corroborative of the complainant, namely the injury to her private parts. She says that the appellant kicked her there. The injury is consistent with this, and tends to negative consent. Although the district surgeon concedes the possibility of the injury having been self inflicted, he thought that this was unlikely. Presumably his view was based on medical grounds. In addition, it seems to me inherently improbable that such an injury would be self inflicted, nor indeed was this suggested to the complainant.

Reviewing all the foregoing considerations, the position is that the appellant has not satisfied us that the trial court was wrong. The conviction therefore cannot be disturbed.

In regard to sentence, it is not disputed that the court was obliged to declare the appellant an habitual criminal, because of his previous convictions. The court also regarded itself as obliged to order corporal punishment. This was a misdirection. According to the law which was in force when the crime was committed (30 August 1958) and when the appellant was convicted

and sentenced (20 April 1959), the compulsory whipping provisions of section 329(2)(a) of Act 56 of 1955 were expressed to be subject, inter alia to the provisions of section 335, which ~~dealt~~ deals with the declaration of persons as habitual criminals.

In view of the trial Court's misdirection, in the respect mentioned, we are at large to substitute our own discretion in the matter of corporal punishment. As to that, there is a settled rule of practice that an accused who is declared an habitual criminal should not also be sentenced to receive a whipping. R. v. Hlongwane 1959(3) S.A. 337 (A.D.) at 341(G).

In the result, the appeal is dismissed save that the sentence of corporal punishment is set aside.

Neville Holmes
.....

THE CHIEF JUSTICE.
DE BEER, J.A. } Concurred.

JUDGMENT.

BEKKER, J:

The two accused, Philemon Kumalo and Kenneth Nxele are charged with the crime of rape. The indictment alleges that on or about the 30th August, 1958 in the Payneville location in the district of Springs, the accused did wrongfully and unlawfully and violently have sexual intercourse with the complainant Maria Msibi, a Native girl, without her consent.

Insofar as accused No. 2 is concerned he admits that intercourse took place but says that it occurred with the consent of the complainant. The sole issue in his case, therefore, is whether or not the Crown has proved to the required degree that the complainant did not consent. In the case of accused No. 1 the defence is a denial of intercourse. The issue in his case is accordingly wider. It becomes necessary to set out the version of the complainant. She stated that at about 6 o'clock on the morning of the 30th August, a Saturday morning, her husband sent her to a chemist shop to purchase some medicine which he desired to apply to his leg before proceeding to his work. Whilst running to the chemist, she heard a whistle. She looked round and observed accused No. 2 on the other side of the street and he asked her where she was going to so early in the morning. She says she did not know accused No. 2, took no further notice of him and proceeded on her errand. She was still running when she was grabbed from behind and arrested in her progress; on turning round she observed it was No. 2 accused, who had caught her. He then asked her again where she was going to - and she said it had nothing to do with him. He then produced a knife and told her that resistance or objection on her part would compel him to use the knife on her.

She.....

Shen then stopped protesting; he pulled or pushed her in the direction of a hall situated in Payneville location. She says that being in fear of the accused, she desisted from further objection or resistance and was taken into the hall. Once inside, he tripped her, put his hand underneath her frock, ripped and tore her bloomers, and then proceeded to have intercourse with her, which occupied a considerable period of time. During the act of intercourse she became aware of the presence of a second male person. At the time she first noticed him he stood somewhere near the position occupied by her head. Accused No. 2 then instructed this person to leave, indicating to him however that once he, accused No. 2, had completed his purpose, he (the second male) could do with the woman as he pleased. She then noticed the second person somewhere in the vicinity of her legs. Accused No. 2 then instructed this person to go and stand next to the door, repeating that as soon as he, No. 2 had completed his purpose, this other person would do as he pleased. For sometime after that the accused No. 2 continued to have intercourse with her and when at last he was finished, he instructed complainant to open her legs wide, a request which she complied with, whereupon he kicked her with his booted foot on her private parts, causing her pain and injury. I should perhaps mention that she also said that during the act of intercourse she wriggled about, trying to defeat the purpose accused No. 2 had in mind whereupon he instructed her to put her arms around him, an action which apparently is known as "covering." During the whole of the proceedings thereafter she said she "covered" the accused being in fear of the knife. After accused No. 2 had finished he directed himself to the other person and said to him "Nou toe, ou vriend, nou kan jy gaan proe."

gaan proe." She then became aware of the fact that this second person was accused No. 1, and as he got on top of her, she said to him, using his native name, I think Tubeko - "Tubeko, what are you doing?" He told her to shut up and proceeded to have intercourse with her. When he finished he told her to put on her bloomers which incidentally she said she never removed; the two accused then accompanied and instructed her to proceed to a place where she should wash herself. On the way to this place they came across a sleeping native male and she was told to step over him. Some discussion then ensued during the course of which she managed to make good her escape; she ran out of the building, followed by No. 1 and No. 2 accused, and it is not clear which of the two accused gave the instruction but an instruction was given by one or other to a third native standing somewhere in the street to stop the woman from running away. She evaded detention and ran towards her home. On her arrival she found that her husband had left and she thereupon proceeded to his place of employment and there told him what had happened to her that morning. The husband could only report to the police after he came off duty and accompanied by his wife, went to the nearest police station where a complaint was lodged and the torn bloomers which the complainant had been wearing, were handed over. This took place approximately 12 o'clock on Saturday the 30th August, 1958. That, in the main, is the version given by the complainant.

The Crown called Dr. Gravett as a witness. He examined the complainant on 31st August at 11.45 a.m. On her right elbow she had a bruise and he said that the private parts of the complainant showed a swelling on the one side, consistent with the use of violence, such as a kick; he

agreed.....

agreed in reply to a question put to him by accused No. 2, that it was difficult to conclude that the bruise on the elbow could have been caused by her coming into contact with a floor "as smooth as the floor of the courtroom." (In the course of his evidence accused No. 2 stated that the floor of the hall where the act of intercourse took place, was not dissimilar from the floor of the present courtroom. I shall assume the correctness of his statement.)

I may mention that Dr. Gravett, on being recalled said that having regard to the nature and extent of the injury on complainant's private parts, he could not rule out, as a possibility, that the injury was capable of self-infliction.

The husband of the complainant, one Twala, was also called in evidence and he corroborated complainant insofar as he confirmed that he had sent her to a chemist shop on the 30th August and on her failure to return before the expected hour, he being somewhat annoyed, set out to find her. He walked in the direction of the chemist shop but was unable to trace the complainant and as the hour of his employment was approaching, he had no option but to take the bus and to report for duty. During the course of the morning his wife arrived in a very sorry state, emotionally upset, crying and reported to him what had happened. He says he then told her to wait and he accompanied her later on to the police station. His wife told him that one of the two assailants was accused No. 1, a person whom, it is common cause, was known to both him and the complainant. On Tuesday following, whilst the husband of the complainant was walking about in the location, he stopped accused No. 1, summoned the nearest policeman, and told him to arrest accused No. 1 since he was the man who had

raped....

raped his wife on the previous Saturday. No. 1 was then arrested and offered no explanation to the policeman.

A further witness called on behalf of the Crown was James Moloko, a Native Detective constable who arrested both accused; he stated, having duly warned the accused, that they furnished him with statements. I do not think it will serve any good purpose if I go into the details of these statements since both accused in giving evidence, challenged the correctness of the statements as recorded by N/Det. James Moloko. It suffices to state that if what James Moloko recorded is correct, this case would not have presented the difficulties which we have experienced. On these statements there would be no difficulty in convicting the accused but they both say that they were not correctly recorded and deny that the statements were read back to them. On the other hand there is the evidence of N/Det. James. He is equally adamant that he correctly recorded these statements and that both accused signed their respective statements. Because these statements, although exculpatory are nevertheless, so incriminating in the circumstances of the case, we have given the question, whether it is safe or not in the circumstances to rely on these statements, much consideration. We have come to the conclusion that it would not be safe to do so. We do not for a minute suggest that N/Det. James Moloko has been dishonest or that he might have given incorrect evidence but the fact of the matter is this:- it is his oath against that of the two accused and for present purposes we are going to ignore the statements and assess the case against the accused on the remaining evidence.

I think it is perhaps convenient if I discuss the case of No. 2 accused in the first instance. Accused No. 2

stated.....

stated that on the morning of the 30th August he saw the complainant; he asked her where she was going to so early in the morning; she explained to him that she had had some argument with her "boy friend," whereupon his, No. 2 accused's interest was aroused, and he proposed intercourse to her; she willingly agreed and she suggested that a suitable place for this purpose would be, not the place where he wanted to take her to, but a more secluded locality. He accordingly took her to the hall and there she lay on the ground and he proceeded to have intercourse with her. Before having reached the door of the hall, however, they met up with accused No. 1, and he said to complainant "I am going to tell Twala"; she ignored him and they then entered the hall where the events which I have mentioned, took place. On departure from the hall they again met accused No. 1 and once more he repeated "I am going to tell Twala." Accused No. 2 said he paid little attention to this but complainant then asked him, No. 2 accused, to take her to Kwatema location; he did not have any money or sufficient money for that purpose; he accordingly took the nearest taxi and left her.

He stated in evidence that this was the first time he had ever spoken to the complainant in his life, although he had seen her about the area for some time previously but he was quite clear in his evidence that to all intents and purposes she was a complete stranger to him. He also repeated in evidence that the intercourse which took place was with her full consent, without payment or any promise of payment on his part.

Accused No. 1's version is somewhat contradictory to that given by No. 2 accussd, insofar as the movements of accused No. 1 are concerned. No. 1 says he knew the com-

plainant....

plainant and saw her in the company of accused No. 2 early that morning - she was alughing and it appeared as if she was enjoying herself and that nothing untowards was happening. He observed the two of them entering the hall and being much concerned about the welfare of his friend Twala, he thought it advisable to investigate what these two people were up to. When they entered the hall, he was about 30 yards away from the entrance of the hall. As soon as they had entered the hall, he started walking in the direction of the hall. He was unable to discover what actually went on because when he was about 10 yards from the entrance of the hall, these two people came out again. He said he suspected they had had intercourse and then thought it advisable to inform the complainant that he, accused No. 1 was going to tell Twala. She indicated it did not concern her much and No. 2 accused then took a taxi and whilst the complainant walked in a direction, away from the chemist shop, he went home. This is the version put up by No. 1 accused.

It is now necessary for us to come to a conclusion as to the guilt or innocence of the two accused. I propose considering the case of No. 2 accused immediately. Insofar as he is concerned we eliminate from consideration the weight that might have been attached to the fact that the complainant made a statement to her husband to the effect that she was raped. Normally such evidence serves to negative consent but in the present case we are of the opinion it might be unsafe to rely on that evidence, because proceeding from an assumption that the version of the accused No. 2 might be true, in the sense that intercourse took place with consent, the circumstances in which the complainant found herself, nemely that her husband was waiting for the medicine, her

return.....

return home after her husband had gone to work, would, to say the least, call for some explanation from the complainant. The same may be said of the fact that she had a torn bloomer; she could have done that herself even if intercourse had taken place with consent, to add colour to the explanation which she offered to her husband. Similarly, with reference to the injury to her private parts; on the evidence of the doctor, tho' extremely unlikely, the injury to her private parts might have been self-inflicted. We mention these matters because although we do not disbelieve the complainant, this is a sexual offence, and the Courts have from time to time indicated that a very careful approach is necessary. But this is not the end of the matter. Two members of this Court are satisfied that accused No. 2 is guilty of the crime as charged; the third member of the Court is of the view that there is a doubt which must be resolved in favour of the second accused, and that he should be found not guilty. Insofar as the majority of the members of the Court are concerned the reasons for having come to the conclusion that he is guilty, are the following: Even ignoring the statements made to Det. Const. James Moloko, ignoring the fact that a complaint had been made by complainant to her husband, ignoring the torn bloomers and the injuries which complainant received, there is an improbability present in the version of accused No. 2 and by the same token a probability in favour of the complainant's version which compels a finding in favour of the Crown. This feature is the following: We all accept as a fact, that the complainant was sent to the chemist in the early hours of the morning of the 30th August. The person who sent her was her husband and he had told her to hurry to the chemist to fetch some medicine and to

bring....

bring it back before he left for work. Accused No. 2 says that he had never before spoken to the complainant but met her that morning for the first time and spoke to her; he did not offer her any reward for the act of intercourse, but she nevertheless was willing to oblige. In this setting the majority members hold the view that it creates such a high degree of improbability in his version that it stands to be rejected as false and that it is sufficient to tip the scales in favour of a finding in favour of the Crown. It may be repetitive, but it seems beyond the bounds of all probability that a woman in the circumstances in which the complainant found herself that morning, would consent to an act of intercourse with a complete and total stranger; for these reasons the majority members of the Court do not hesitate in finding the accused guilty of the crime as charged. In so doing they are not unmindful of the features which gave rise to points of criticism in the evidence of the complainant, which incidentally, have influenced the third and dissenting member of the Court in his conclusion that there is not enough evidence against accused No. 2; for instance the "coverage" to which the complainant admitted has caused some doubt to arise in the mind of the third member of the Court as to whether infact she was not a consenting party; but strange as her story may seem in certain regards, as far as the majority members are concerned, they are satisfied, despite this and other points of criticism that her version, in the main, is a truthful one. The complainant is a young girl of 16 years of age, who had been "labolaed" by her husband or was in the process of being "labolaed" and of a very small stature when compared with the accused, particularly accused No. 2. She appears to be a simple soul and the threats to use a knife were sufficient in her case to subdue her.

The improbability in the version put up by accused No. 2 is such that it suffices to justify and compels a conviction in the minds of the majority of the members of the Court.

Accused No. 2 is accordingly found guilty of the crime as charged.

The case of accused No. 1 is a bit different. He has denied intercourse but complainant states he infact raped her. We have seen fit not to rely on any of the statements made by him to N/Det. James Moloko; there is nothing in the evidence of the complainant or in the other crown evidence to support the complainant in one way or the other, and it creates the position where the accused's oath stands against the oath of the complainant with no probabilities or sufficient probabilities in favour of the complainant to justify the finding that accused No. 1's version is false. Had it not been for the fact that the provisions of the criminal law are such that they require the Crown to prove its case beyond a reasonable doubt, moreso in the case of a sexual offence, different results might have followed because we are all satisfied that No. 1 accused is a little liar and we have a very, very grave suspicion that he infact did what the complainant says he did, fortunately for him a grave suspicion does not suffice to justify a conviction. The complainant we think, is telling the truth but other than having her oath against his oath, there is not sufficient evidence which would make us feel safe in our conclusion that he too is guilty.

Philemon, you are indeed a lucky man because if you had been found guilty very, very serious results might ensue but as things stand at the moment, we are satisfied, despite this high degree of suspicion which we have and despite the

fact...

fact that complainant might be telling the truth, that the Crown has failed in its case against you. You are found not guilty and are discharged.

---oOo---

Accused No. 2 admits his previous convictions. Addresses Court on question of sentence.

---oOo---

JUDGE'S REMARKS IN PASSING SENTENCE.

Kenneth, I see you were found guilty of robbery in 1951 and you received 4 months imprisonment with compulsory labour. Thereafter, in 1952 you were found guilty of the crime of rape and sentenced to 5 years imprisonment with compulsory labour. Without having regard to the other convictions which figure on your list of previous convictions, the provisions of the law as they stand at the moment compel me to declare you an habitual criminal because this is the third conviction following on two previous convictions of robbery and rape. The law also requires me to impose lashes but inasmuch as you are about to be declared an habitual criminal, I do not think that part of the sentence will be put into execution because I am going to suspend the execution of lashes. In any event the only sentence I can pass in view of what the law requires me to do is that you be declared an habitual criminal. In addition I impose a sentence of three lashes but I suspend the execution thereof on condition that you are not convicted of any offence within the period of two years, involving indecency or assault on a female.

---oOo---