

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

(DIVISION).
(AFDELING).

APPEAL IN CRIMINAL CASE.
APPÊL IN KRIMINELE SAAK.

MFANYANA

ZONDO

Appellant.

versus

THE

QUEEN

Respondent.

Appellant's Attorney
Prokureur van Appellant

Respondent's Attorney
Prokureur van Respondent

Appellant's Advocate
Advokaat van Appellant

Respondent's Advocate
Advokaat van Respondent

Set down for hearing on:—
Op die rol geplaas vir verhoor op:—

Monday, 7th December, 1959.

A

Foran: van Bloek, Ramsbottom, Botha,
Holmes et van Wyk.

B.A.V. Ashmond

Postea: maandag 14 Desember, 1959

Die eerste voorleesbare regerings
woord ten gunste van die Staatkeaninspraak
en die tweede ten gunste van die appellant.
Die skuldige bevestiging aan verkragting
word verneeg deur een van oortreding
van artikel 74(1)(a) van Wet 23 van
1957 en die eennis word bekragtig

Griffioen
Griffioen

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

MFANYANA ZONDO

Appellant

and

R E G I N A

Respondent

Coram: Van Blerk, Ramsbottom, J.J.A. Botha, van Wyk and Holmes A.J.J.A.

Heard: 7th December, 1959.

Delivered: 14-12-59

J U D G M E N T

EAMSBOROUGH J.A.:-

I agree with the judgment of my

brother Van BLERK, but wish to add a few remarks with regard to the second question which was reserved by JANSEN J.

The accused was charged with rape.

The indictment, which was in the ordinary form, alleged that

"the accused did wrongfully and unlawfully assault Ndiza Langa, and her the said Ndiza Langa then and there wrongfully, unlawfully, violently and against her will did ravish and carnally know."

There was no allegation that Ndiza Langa was under the age of twelve, and that was not, originally, part of the Crown case; it was a fact that emerged from evidence that was given at a late stage at the trial.

To prove its case, the Crown had to

prove/.....

prove beyond all reasonable doubt that the accused had unlawful sexual intercourse with the child and that she did not consent. The fact of unlawful intercourse was clearly proved. With regard to the element of non-consent, the court found that

"the complainant's knowledge and intelligence was such that she at the time realised the nature and consequences of the act of intercourse,"

and

"it was not proved that the complainant did not in fact consent to the intercourse. "

If, therefore, the child had been more than twelve years of age, the Crown would not have proved that the accused had committed the crime of rape. It was, however, proved that the child was not yet 12 years of age when the act of intercourse took place. The trial court held that in law she was incapable of consenting to the act and that non-consent was, therefore, proved. In relation to the element of non-consent JANSSEN J. reserved his first question of law, namely :-

"Was the trial court correct in holding (1) that the mere fact that complainant was under 12, precluded her, in law, from giving an effective consent so as to negative rape."

I agree with my brother VAN BLERK that that question must be answered in favour of the Crown, and I do not wish to add anything to what he has said.

The second question reserved by

the/.....

the learned judge presents more difficulty. The accused was charged with the common-law crime of rape and the question arose as to whether the onus was on the Crown to prove mens rea. JANSSEN J. dealt with the question in his judgment. After discussing certain authorities dealing with mens rea in rape, the learned judge said :-

"If ^{the} these are general principles underlying rape and what the Crown has to prove, it seems logical that the Crown must prove, in a case where consent is excluded by the fact that the child is under twelve, that the accused was aware of that fact. Perhaps this is too strongly put. It would appear that the Crown would then have to show that at least the accused was aware of the possibility that the child might be under twelve and yet recklessly proceeded to have intercourse with her.

If this were the true position, it would be difficult in the present case to find with any degree of conviction that the accused knew that the possibility existed that the complainant was under the age of 12 and recklessly proceeded to have intercourse with her. The complainant has, at most, childlike features, but she is tall for her age, and after examination of her the doctor thought she was between 13 and 14 or even older. Her reputed age also appears to have been over twelve.

The fact, however, remains that, as far as I am aware, it has never been required of the Crown to prove the knowledge on the part of the accused in respect of the age of the complainant, although many hundreds of cases such as this must have been decided in past years. This may be due to the influence of English law and to the influence of Act ³~~13~~ of 1916, which appears to presuppose that the Crown is not called upon to prove knowledge on the part of an accused in respect of the age of the complainant.

In regard to this question, I feel that it is too late for a single judge to deviate from the accepted view. The position is, therefore/.....

therefore, that the accused had intercourse with a child under the age of twelve. I accept the law to mean that she was, therefore, in law unable to consent, whatever she might have done in fact. We are therefore unanimous in finding the accused guilty of rape. "

After stating that

"It was not proved that the accused was aware at the time of the possibility that complainant was not yet 12 years of age "

the learned judge framed his second question in these terms :-

"Was the trial court correct in ruling (11) that the accused's knowledge or otherwise relating to the complainant's age was irrelevant and thereupon convicting the accused of rape ? "

In order to answer the question it will be useful, I think, to consider the general question viz :-

In order to obtain a conviction on a charge of rape, must the Crown prove that the accused knew that the woman had not consented ?

In Rex v. Mosago (1935 A.D.32) the question was left open whether

"in a case where apart from any words or conduct of the complainant the accused believes on reasonable grounds that the complainant consents.....the accused could avail himself of the defence of justus error. "

In Rex v. Bourke (1916 T.P.D. 203), the accused was charged with rape. The jury found that he was so drunk when he committed the offence that he was unconscious of what he was doing. A question was reserved whether upon this verdict the accused should be acquitted or convicted or declared a "criminal lunatic". The answer of the full court of the Transvaal Provincial Division was that

the/.....

the finding of the jury amounted to a verdict of guilty. That case was decided on the law relating to the effect of intoxication on criminal liability, and as Professor Glanville Williams (Criminal Law, The General Part, paragraph 112, page 380) points out, the possibility that drunkenness may help to show that the accused believed himself to have the woman's consent was not considered. The question was, however, answered in Regina v. K. (1958(3) S.A. 420) in which SCHREINER J.A. said "The offence" (rape) "consists of having connection with a woman, other than with the man's wife, without her consent, from which it follows that if the Crown proves that there was no consent, and also, of course, that the accused knew this, it has established his guilt." STEYN J. A. (at page 423) said :- "Omdat verkragting alleen met opset gepleeg kan word ~~daarbenewens~~ moes die Staat ~~benewens~~ bewys dat die appellant se opset ook die willoosheid van die klaagster omvat het, d.w.s. dat toe hy tot die daad oorgegaan het, hy inderdaad ook gewet het dat die klaagster te dronk was om te kan toestem of ten minste die moontlikheid daarvan besef het en nie omgee het of sy in staat was om toe te stem al dan nie."

Rape is a crime in which ~~the~~ 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/.....

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

If/.....

