

Supreme Court's JUDGMENT

delivered in Stockholm on 21 February 2024

Case no.

B 6770-22

PARTIES

Appellant

IAF

Counsel and Public Defender: Attorney GK

Respondents

1. Prosecutor General

Box 5553

114 85 Stockholm

2. Secrecy A

Represented by the Prosecutor General

THE MATTER

Rape, lesser offence, etc.

RULING APPEALED

Judgment of the Svea Court of Appeal of 28/09/2022 in case B 10199-21

JUDGMENT

The Supreme Court affirms the Court of Appeal's judgment in that the Court of Appeal has convicted IAF of rape under Chapter 6, Section 1, first paragraph, first sentence and second paragraph of the Criminal Code (in its wording before 1 August 2022).

The Supreme Court does not grant leave to appeal in those parts of the case where a stay in proceedings has been issued.

The ruling of the Court of Appeal therefore stands.

The Supreme Court affirms the Court of Appeal's secrecy order.

The secrecy provision in Chapter 35, Section 12 of the Public Access to Information and Secrecy Act (2009:400) shall continue to apply to the information regarding Secrecy A's identity.

GK shall receive compensation from public funds for the defence of IAF in the Supreme Court in the amount of SEK 14,171. Of the amount, SEK 11,337 relates to work and SEK 2,834.25 relates to value added tax. The State shall bear the cost.

CLAIMS IN THE SUPREME COURT

IAF has claimed that the Supreme Court shall acquit him of the charge of rape, release him from liability for damages and impose a non-custodial sentence, or, alternatively, reduce the length of the prison sentence.

The Prosecutor General and the injured party have opposed modification of the judgment of the Court of Appeal.

The Supreme Court has issued leave to appeal as set out in para. 5.

REASONS FOR THE JUDGMENT

Background

1. IAF was prosecuted for gross violation of a woman's integrity and rape. The prosecutor, after some adjustment of the statement of the criminal act as charged, made the following claims about the charge of rape.

IAF did carry out a sexual act that in view of the seriousness of the violation is comparable to sexual intercourse, with a person who was not participating voluntarily. This sexual act consisted of inserting his finger(s) into the injured party's vagina. This occurred on 15 January 2020 [in] Huddinge municipality.

IAF committed the offence with intent.

2. The District Court found it established that the sexual act had occurred and that it had been done for the purpose of verifying whether the injured party had been unfaithful. As the injured party had not consented to the act being done for that purpose, the District Court deemed that it constituted rape. The offence was classified as less serious in view of the special circumstances at hand. The District Court emphasised, *inter alia*, that both parties were initially prepared to engage in sex with each other, that this act began with the sexual act prosecuted, that the injured party only learned of the purpose of the

act afterwards and that they proceeded to participate voluntarily in sex together.

3. The District Court also convicted IAF of gross violation of a woman's integrity. The sentence was one year and six months' imprisonment. IAF was also ordered to pay a certain amount of damages.

4. The Court of Appeal has agreed with the District Court regarding whether IAF committed the offences charged and their classification. The amount of damages was reduced slightly, but the Court of Appeal has not changed the District Court's judgment in any other respect.

What is at issue in the Supreme Court

5. The Supreme Court has issued leave to appeal concerning criminal responsibility for rape pursuant to Chapter 6, Section 1 of the Criminal Code.

6. In particular, the case concerns the exact meaning of the 'voluntariness requirement'.

Rape

7. In the case, Chapter 6, Section 1 of the Criminal Code in its wording before 1 August 2022 is applicable. According to the first paragraph of that provision, a person is guilty of rape who, with a person who is not participating voluntarily, performs sexual intercourse or some other sexual act that in view of the seriousness of the violation is comparable to sexual intercourse. When assessing whether participation is voluntary or not, particular consideration is given to whether voluntariness was expressed by word or deed or in some other way.

Sexual act

8. The term ‘sexual act’ includes acts with a clear sexual character and which, when carried out against someone's will, have been committed in a way that is liable to violate the injured party's sexual integrity. The insertion of fingers into a woman's vagina is an act which, while not strictly constituting sexual intercourse, is normally considered a sexual act. Such an act must in principle be considered comparable to sexual intercourse. (Cf. NJA 2013 p. 548 paras. 9 and 11.)

9. The purpose of an act of this character is not relevant to the assessment of whether or not an act is sexual. A sexual purpose on the part of the perpetrator is, in other words, not required. (Cf. NJA 2013 p. 548 para. 10.)

Voluntariness

10. In principle, anyone carrying out a sexual act against another person must ensure that this person wishes to participate. Thus, a decisive factor in distinguishing between a criminal and non-criminal act is whether participation in the sexual act is voluntary.

11. The person's inner attitude towards the sexual act is of no significance when assessing voluntariness. When an individual has chosen to engage in sex, and no factor such as concurrent violence, threats or improper exploitation of a particularly vulnerable situation has arisen, the act is not criminal, despite the individual's fundamental opposition to the act. That an individual who is subjected to pressure or attempted persuasion (of a different type than what is referred to in Chapter 6, Section 1, first paragraph [now the fourth sentence] of the Criminal Code) subsequently agrees to a sexual act does not in itself mean that participation was involuntary. The decisive factor is whether the individual could freely decide whether to participate in the

sexual act. (Cf. Govt. bill 2017/18:177 pp. 33 and 78 and Govt. bill. 2021/22:231 p. 27.)

12. An assessment of voluntariness must relate to the act as such; the purpose of the act has no independent meaning in this context (cf. paragraph 9 above). Therefore, an individual's attempt to mislead or conceal the underlying purpose of a sexual act – if it has no bearing on the performance of the act itself or its nature – is also irrelevant (cf. Govt. bill 2017/ 18:177 p. 79).

13. The voluntariness of participation in a sexual act is to be assessed on the basis of the situation as a whole (cf. Govt. bill *ibid.* p. 78 and "The Overnight Stay" NJA 2019 p. 668 para. 15).

14. An individual's voluntary participation in a certain type of sexual act does not mean that other types of sexual acts, occurring on the same occasion, must also be considered voluntary. To the extent that a particular sexual act is clearly differentiated from other acts, there may be reasons to look at that particular act differently.

15. A single course of events may therefore, in some cases, constitute several distinct parts which are assessed in different ways. An individual may have participated voluntarily in some parts, but not in others. Therefore, the extent as well as the intent of an individual's voluntariness must be assessed. A given situation may be difficult to interpret, factually as well as legally, but the limits of voluntary participation need to be assessed nonetheless. Such an assessment may, in some cases, be linked to the fact that the sexual acts have changed in character or gone beyond what the other person might reasonably have imagined.

16. The decisive factor is whether there is voluntariness at the time the act is carried out. The fact that a person has given prior notice that he or she wishes to participate in a sexual act does not mean that a subsequent sexual act

is to be regarded as voluntary. Participation must be voluntary throughout the entire sexual act. (Cf. Govt. bill *ibid.* p. 79.)

17. Likewise, the subsequent involuntariness of an already performed voluntary sexual act does not entail that the earlier act must be deemed involuntary.

18. In so-called ‘surprise cases’, i.e., cases where the sexual act is performed in such a way that the injured party is caught unawares by it, there is normally no voluntary participation (cf. Govt. bill *ibid.*, p. 78 et seq.). In such situations, the other individual has not had the opportunity to freely decide whether to participate.

The assessment in this case

19. The injured party has stated that, on the occasion in question, she did not really wish to have sex with IAF, but that she nevertheless chose to do so. She must therefore be considered to have participated voluntarily in sexual acts with him. (Cf. para. 11.)

20. The specific act to which the indictment refers, i.e., IAF’s insertion of his fingers into the injured party’s genitals, is a sexual act comparable to sexual intercourse (cf. para. 8 and 9). This was done in connection with the other sexual acts in which the injured party participated voluntarily. The question is whether the particular act charged is to be deemed to have been voluntary.

21. The injured party’s voluntary participation in certain sexual acts with IAF does not mean that other types of sexual acts, occurring on the same occasion, must also be considered voluntary. To the extent that a particular sexual act is clearly differentiated from other acts, there may be reasons to look at that particular act differently. A single course of events may constitute

several distinct parts which must be assessed in different ways. (See para. 14 and 15.)

22. The facts in the case show that the injured party believed that she and IAF would have sexual intercourse. The facts also show that, despite her surprise, she voluntarily allowed him to insert his fingers into her vagina, in the belief that this was a prelude to sexual intercourse. However, in connection with the performance of the act, she realised that he was seeking to feel whether another man's semen was present in her genitals. She has provided testimony describing the manner in which he placed two fingers of his left hand inside of her, then rubbed them against his thumb. She was not at all prepared for such a probing act on his part. She found it unpleasant and reacted immediately.

23. The measure implemented by IAF thus clearly differs, both in its nature and in the manner in which it was carried out, from the other sexual acts in which the injured party voluntarily participated, and it fundamentally changed the situation. It has been shown that IAF carried out the measure despite knowing that she did not wish to be subjected to such a check. He is thereby guilty of rape, which, in accordance with the Court of Appeal's judgment, is to be assessed as a less serious offence.

24. In the light of that assessment, there are no grounds for granting leave to appeal in respect of the remainder of the case.

Justices of the Supreme Court Gudmund Toijer, Svante O. Johansson (dissenting), Thomas Bull, Stefan Reimer (dissenting) and Johan Danelius (reporting Justice) participated in the decision.
Judge referee: Maria Schöllin

DISSENTING OPINION

Justices Svante O. Johansson and Stefan Reimer dissent, arguing that IAF must be acquitted of rape. The reasons for the judgment should, they consider, read as follows from para. 22.

22. The facts in the case show that the injured party believed that she and IAF would have sexual intercourse. The facts also show that she voluntarily allowed him to insert his fingers into her vagina in the belief that this was a prelude to sexual intercourse. After this act, she realised that he was seeking to feel whether another man's semen was present in her genitals. She provided testimony regarding how, after removing his fingers, he rubbed his thumb against his fingers to see whether there was semen. She reacted to this behaviour and found it unpleasant.

23. However, the facts in the case do not establish beyond a reasonable doubt that the sexual act which IAF performed with her differs in nature from the sexual act in which the injured party voluntarily participated.

24. For the assessment of voluntariness, it is irrelevant for what purpose IAF performed the act (see p. 12), as is the injured party's inner attitude when she subsequently, after he removed his fingers from her genitals, became aware of that purpose.

25. Thus, it has not been proven that the sexual act to which the rape charge relates was involuntary within the meaning of Chapter 6, Section 1 of the Criminal Code. IAF must therefore be acquitted of rape.

In the minority on this matter, we are otherwise in agreement with the majority.
