

**COURT OF APPEAL OF
FADA N'GOURMA**

BURKINA FASO
Unity — Progress — Justice

HIGH COURT OF KOUPELA

Hearing of March 20, 2018, on criminal matters

Judgement No.

50 of 20/03/2018

Legal Department No.:

033/2017

RI No.: 24/2017

Public Prosecution

Vs/

D. A

TYPE OF OFFENCE

Rape and attempted abortion

Warrant of committal:

12/04/2017

Provisional Release :

10/01/2018

DECISION:

(See verdict)

PANEL

President:

SOUGA Gnagréba Dramane

Legal Department

OUATTARA Jean Eudes

Court Registrar:

ILBOUDOU Moubarak

The High Court of Koupèla (Burkina Faso), ruling in criminal matters and in first resort, in its open ordinary court session of the twentieth of march two thousand eighteen the Court of the said town, in which were present:

SOUGA Gnagréba Dramane, Judge at the Bench of the said Court, acting as President,

PRESIDENT

Mr **OUATTARA Jean Eudes**, Deputy State Counsel of Faso, representing the Legal Department

LEGAL DEPARTMENT

With Mr **ILBOUDO Moubarak**, Secretary of Registries and Legal Departments, recording the hearing,

COURT REGISTRAR

The following judgement was delivered

BETWEEN

-**The State Counsel of Faso**, petitioner;

-**S.D, T R. and S. S** all victims appearing before the court;

ON THE ONE HAND

AND

D.A, who declares to have never been convicted, recruited, or given an award;

Accused of having:

- committed during the month of December 2014, less than 10 (ten) years ago, by violence, coercion, or surprise, an act of sexual penetration of any kind on a woman or girl, in the case at hand the act of having had non-consensual sexual relations with a minor girl named S.D;

Acts provided for and punished by Article 14 of Law No. 061-2015/CNT on the prevention, punishment and reparation of violence against women and girls, and the support for victims;

- induced or attempted to induce the abortion of S.D., a minor girl pregnant of him, in Koupèla, during the months of January and February 2015, less than 3 (three) years ago, with food, drink, medicines, manoeuvres, in the case at hand by means of a black medicinal product;

Acts provided for and punished by articles 59, 60, 61, 62 and 383 of the Penal Code

ON THE OTHER HAND

THE COURT

Having regard to the initial indictment of the State Counsel of Faso before the High Court of Tenkodogo dated 18 July 2016;

Having regard to Law No. 061-2015/CNT on the prevention,

punishment and reparation of violence against women and girls, and the support for victims;

Having regard to the Supplementary indictment of the State Counsel of Faso at the High Court of Koupèla, dated 20 February 2017, for the prosecution of the case;

Having regard to the documents in the information case against DIESSONGO Adama;

Having regard to the oral submissions of the Legal Department

FACTS

On ... April ... T.R lodged a complaint with the Koupèla territorial gendarmerie brigade against D.A for rape committed in his home against his wife's niece S.D, a minor girl aged 16 (sixteen) years old; he added that S.D had become pregnant after the commission of the rape and the author had tried to terminate the pregnancy by giving S.D a product for this purpose; He explained that D.A had used tricks to repeat the offence by suggesting abortion to the girl, while indicating that the product was effective when taken immediately after sexual intercourse; he went on to point out that all these events had taken place without his knowledge and that he had only learned of these events almost 25 (twenty-five) weeks after the commission of the acts;

Upon receipt of this complaint, the aforementioned unit opened an investigation and heard the accused explain that he is a dealer and that he went to TR's home to buy eggs; that it was there that he met his victim; that one day he went back there to stock up on eggs and that upon his arrival, he made jokes with his victim, who let herself go and he ended up sleeping with her; He explained that the sexual act had taken place at Mr T's home and more precisely on the couch in the living room; he went on to say that his victim had consented and that the sexual intercourse had been carried out without protection; he also stated that this was not his first sexual intercourse because he had performed the said intercourse five or six times with his victim;

That 1 (one) month after the sexual act, his victim informed him that she had not seen her menstrual cycle and that she did not desire the pregnancy; That this is how he gave her a "paracetamol" tablet and invited her to insert it into her genitals and to wait for two to three days after which she would see a liquid dripping from her genitals; The next day, he went to Ghana and from there he called one of his friends named K to ask him to give the sum of one thousand five (1500) francs to S.D so that she could take the pregnancy test; On his return from Ghana, he phoned his victim, who told him that she did not take the pregnancy test; That he succeeded in convincing her to take the pregnancy test, which was positive, and his victim invited him to come to her house to inform T.R; That he went to the house and a

number of undertakings were made; That, against all expectations, Mr. T.R set aside the undertakings he had just made and summoned him to the gendarmerie;

When questioned by the investigating officers of the above-mentioned unit, S.D explained that, one day, D.A had come to her aunt's husband's home to stock up on eggs and that after taking two egg packets and handing over the sum of five thousand, D.A followed her inside when she came back to deposit the said sum on the table and took her by surprise by having sexual intercourse with her on the living room couch; She added that she had sexual intercourse with the accused only on two occasions;

That one month after the sexual act was committed, she did not see her menstrual period and that she went to D.A's place of work to inform him of this; That on that day, she had requested a sum of one thousand francs from the accused and that she went to the CSPA for a pregnancy test which proved to be positive; That she brought this information to the attention of the DA, who in return recommended an abortion; That from the outset, she agreed and D.A brought a product to her home and explained the dosage; That after using it, she noticed drops of blood coming out of her sex; That D.A then sent his friend K. with the sum of one thousand five hundred francs and proposed to take her to a neighbourhood of Koupèla or to Ouagadougou to have an abortion, but she refused for fear that her aunt's husband might get informed; That as her pregnancy progressed, she asked D.A to come and inform her aunt's husband;

When heard in her turn by the above-mentioned unit, S.S, the victim's aunt, explained that the man called D.A had sexually abused his niece in their house on the couch and that her niece was currently pregnant; She explained that the act committed by D.A was rape, because, according to the victim, D.A had forced her to sleep with him; she added that, according to her niece's statements, one month after the sexual act, D.A had returned to give a black product to her niece so that she could abort, while indicating to the victim that her doctor had instructed him to have sexual intercourse before introducing the product into her genitals; In conclusion, still according to her niece's statements, D.A had broken an egg and applied it all over her niece's body; That after several abortion attempts that had caused bleeding in the victim's sex, D.A sent one of her friends named K, to give the sum of CFAF 1,500 (one thousand five hundred) for a pregnancy test and asked her if she consented to an abortion; That in the end it was D.A who came back to try to convince her niece to abort by reassuring her that she did not need to worry about it, because his friend who carries out abortions in Ouagadougou, had already succeeded with two

other girls; That everything took place without her knowledge and that it was only on April 8, 2016, that her niece gave her this information on the phone;

Upon completion of the preliminary investigation, the aforementioned unit drew up a report on the complaint and transmitted the entire file to the State Counsel of Faso at the Tenkodogo High Court, which, in an initial indictment, requested the opening of an investigation against the accused for rape and attempted abortion; During the investigation of the case, the accused partly admitted the facts of rape but contested the charges of attempted abortion;

Entered on the cause list of September 5, 2017, the case was called and debated and the accused admitted the acts of rape but denied the charges of attempted abortion; In fact, he explained that with regard to the rape, he had had sexual relations with the victim on several occasions (more than seven or eight times) and stated that most of the said sexual intercourse had been performed outside the victim's home; On the other hand, with regard to the attempted abortion, he did not recognise the said acts, as he had just flattered S.D by suggesting her paracetamol, while at the same time letting her know that by taking the said product, the pregnancy was going to run; He went on pointing out that his act was justified by the fact that the victim had not stopped harassing him since the moment she had noticed the absence of her menstrual period;

When heard before the court on the charges against the accused, the victim refuted the acts as recounted by D. A, pointing out that the latter had only had sexual intercourse with her twice without her consent;

She stated that the very first sexual intercourse had taken place at T.R.'s home when D.A had come to stock up on eggs; that he took advantage of the occasion to have sexual relations with her on the living room couch under duress; That, following the sexual act, she became pregnant and consequently, she informed DA who was at Mr. T's home; That he had the second sexual intercourse after giving her a black product contained in a sachet, while indicating that, according to his doctor, the product was effective if taken immediately after sex; That he used this strategy to have the second sexual intercourse with her;

That after the second sexual act, D.A gave her the said product, indicating that she had to swallow it with water; these statements are contrary to those recorded in the minutes of the preliminary investigation and to those made at the victim's hearings before the investigating judge;

At the close of the proceedings, the court, after having deliberated in accordance with the law, ruled as follows;

II- PROCEDURE

A- PROSECUTION

1- On the acts of rape

Whereas DA is accused of acts of rape committed on S.D, a minor girl aged sixteen;

Whereas under the terms of Article 14 of Law No. 061-2015/CNT on the prevention, punishment and compensation of violence against women and girls, and the support for victims, the offence of rape, to be constituted, presupposes, first of all, an act of sexual penetration of any kind whatsoever committed against a woman or girl by violence, coercion or surprise and, finally, guilty intent;

Whereas it emerges from the proceedings at the hearing and from the documents produced in the case file that the accused D.A committed rape on a minor girl (SD); Whereas the accused fully acknowledges the acts alleged against him and does not contest them by arguing that the said intercourse was performed with the victim's consent; Having regard to the age of the victim, who is a minor girl aged only sixteen at the time of the events, the victim's consent to the sexual act in no way constitutes an obstacle to the prosecution of the said offence; Even supposing that the victim freely consented to the sexual act, the said consent cannot be valid in view of her minority;

That in view of all the above, it is consistently established at the hearing that the accused committed rape on S.D by having sexual relations with her;

That, moreover, for the offence of rape to be established, the act of sexual penetration alone is not sufficient to classify the said offence, but there must also be a guilty mind on the part of the accused; That, in the case at hand, the accused knowingly violated the criminal law by carrying out his sexual act, since he was aware of the illegal nature of the said act;

That on the basis of the foregoing, all the elements constituting the offence of rape as provided for in Article 14 are sufficiently established against the accused and that he should be found guilty of it;

2. On the acts of attempted abortion

Whereas the DA is also accused of the acts of attempted abortion; these acts are provided for and punishable by articles 59, 60, 62 and 383 of the Penal Code;

Whereas under the terms of Article 59 paragraph 1 of the Penal Code: "the attempt consists in the undertaking to commit a crime or offence, manifested by unequivocal acts tending to its execution, if these have been suspended or have failed to take effect only due to circumstances beyond the control of the perpetrator".

That in accordance with Article 383 of the Penal Code, anyone who, by means of food, drink, medicine, inducements, violence or by any other means, procures or attempts to trigger the abortion of a pregnant or supposedly pregnant woman, whether or not she has consented to it, shall be punished by 1 (one) to 5 (five) years' imprisonment and a fine of CFA F 300,000 to 1,500,000.

For the purposes of these provisions, anyone who, by means of food, drink, medicine, inducements, violence or any other means, induces or attempts to induce the abortion of a woman or girl who is or is presumed to be pregnant and which was suspended or failed to take effect only because of circumstances beyond the control of the perpetrator, shall be liable to attempted abortion;

Whereas, in the case at hand, D.A contested the acts of abortion before the court, arguing that he admitted having given S.D a product that did not have an abortifacient effect, in the case at hand paracetamol; that he had agreed to give the said product to the victim to put an end to her persecution of him and not with the aim of terminating the pregnancy; That the victim maintains, on the other hand, that she swallowed with water a black product contained in a sachet after having had sexual intercourse with D.A for the second time; That it should be noted that the statements made by the victim during the hearing are contrary to those contained in the minutes of the victim's hearing before the investigating judge and the investigating officers;

That in view of this contradiction and the lack of evidence of the constitution of the said offence, it is therefore appropriate to release D.A from the scope of this lawsuit for the benefit of doubt;

3. Sentence

Whereas Article 14 of Law No. 061-2015/CNT of September 6, 2015, on the prevention, punishment and compensation of violence against women and girls, and the support for victims, punishes with 5 (five) to 10 (ten) years imprisonment, any person who commits by violence, coercion or surprise, an act of sexual penetration of any kind whatsoever on a woman or girl;

Whereas, in the case at hand D.A. was found guilty of the acts of rape committed on a girl under the age of 16 (sixteen) years; Whereas, therefore, he should be sentenced to an actual prison term of 5 (five) years which corresponds to the minimum sentence provided for in article 14 of the above-mentioned law and given that the circumstances of the case at hand shows that this is a just punishment;

4. Warrant of committal

Whereas under the terms of article 465 of the Code of Criminal Procedure, the court may, in the case of a common law offence and if the sentence handed down is at least 6 (six) months imprisonment, issue a committal or arrest warrant;

Whereas, in the case at hand, D.A was sentenced to an actual prison term of 5 (five) years; Whereas a warrant of committal should be issued against him;

B- CIVIL ACTION

Whereas pursuant to Article 2 of the Code of Criminal Procedure, any person who claims to be a victim of a criminal offence may claim compensation for the resulting damage directly before the criminal courts hearing the prosecution;

Whereas at today's hearing, S.D was represented by S.S, T.R and S.S who declared to be a civil party; Whereas, as shown above, S.D was the only victim of the crime of rape committed by D.A; Whereas, as a result, she is the only person who can claim compensation for damages suffered by her to the exclusion of any other person;

But whereas the victim SD is a minor girl of 18 (eighteen) years of age and therefore can only validly make a claim for compensation for damages caused by the said crime through a legal representative; That in the case at hand S.S, which claims to represent the victim, did not produce any special warrant in the file authorizing him to act in the name and on behalf of the victim's father and mother;

That, moreover, T.R and S.S have each made a claim at the bar, each in his or her own right, for compensation for the prejudice suffered and caused by the crime; That the accused's counsel has requested the dismissal of this claim for damages, since it does not meet the condition set out in the above-mentioned article, insofar as they did not personally suffer the prejudice directly caused by the crime; That, therefore, this request should be granted by declaring their civil action inadmissible;

5. Costs

Whereas under the terms of article 473 of the Code of Criminal Procedure, the accused against whom there is a judgement of conviction, is also ordered to pay the costs;

That, in the case at hand, D.A having been convicted of rape, it is also appropriate to order him to pay the entire costs;

UPON THESE GROUNDS

Ruling in a public hearing following full trial on criminal

matters in first resort, the court;
Releases the accused of the acts of attempted abortion for the benefit of the doubt;
Declares, on the other hand, the accused guilty of the acts of rape alleged against him;
In repression, condemns him to an actual prison term of 5 (five) years;
Issues against him a warrant of committal;
Declares all claim for damages parallel to prosecution inadmissible; Condemns the accused to pay the costs;

Thus acted, judged and pronounced publicly by the High Court of Koupèla on the aforementioned days, months and years

And signed:

The President

The Court Registrar