

Pennsylvania Supreme Court

Commonwealth v. Berkowitz, 641 A.2d 1161 (Pa. 1994). Opinion by: Cappy, J.

The Commonwealth appeals from an order of the Superior Court which overturned the conviction by a jury of Appellee, Robert A. Berkowitz, of one count of rape and one count of indecent assault. The Superior Court discharged Appellee as to the charge of rape. . . . For the reasons that follow, we affirm the Superior Court's reversal of the conviction for rape. . . .

Issue

The crime of rape is defined as follows:

18 Pennsylvania Consolidated Statutes Annotated (PCSA) Section 3121. Rape

A person commits a felony of the first degree when he engages in sexual intercourse with another person not one's spouse:

- (1) by forcible compulsion;
- (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
- (3) who is unconscious; or
- (4) who is so mentally deranged or deficient that such person is incapable of consent.

The victim of a rape need not resist. "The force necessary to support a conviction of rape . . . need only be such as to establish lack of consent and to induce the [victim] to submit without additional resistance. . . . The degree of force required to constitute rape is relative and depends on the facts and particular circumstance of the case." . . .

Was Berkowitz guilty of sexual intercourse with the victim by "forcible compulsion"?

Reasoning

In regard to the critical issue of forcible compulsion, the complainant's testimony is devoid of any statement that clearly or adequately describes the use of force or the threat of force against her. In response to defense counsel's question, "Is it possible that [when Appellee lifted your bra and shirt] you took no physical action to discourage him," the complainant replied, "It's possible." When asked, "Is it possible that [Appellee] was not making any physical contact with you . . . aside from attempting to untie the knot [in the drawstrings of complainant's sweatpants],"

she answered, "It's possible." She testified, "He put me down on the bed. It was kind of like—He didn't throw me on the bed. It's hard to explain. It was kind of like a push but not—I can't explain what I'm trying to say." She concluded that "it wasn't much" in reference to whether she bounced on the bed, and further detailed that their movement to the bed "wasn't slow like a romantic kind of thing, but it wasn't a fast shove either. It was kind of in the middle." She agreed that Appellee's hands were not restraining her in any manner during the actual penetration, and that the weight of his body on top of her was the only force applied. She testified that at no time did Appellee verbally threaten her. The complainant did testify that she sought to leave the room, and said "no" throughout the encounter. As to the complainant's desire to leave the room, the record clearly demonstrates that the door could be unlocked easily from the inside, that she was aware of this fact, but that she never attempted to go to the door or unlock it.

As to the complainant's testimony that she stated "no" throughout the encounter with Appellee, we point out that, while such an allegation of fact would be relevant to the issue of consent, it is not relevant to the issue of force. . . . [W]here there is a lack of consent, but no showing of either physical force, a threat of physical force, or psychological coercion, the "forcible compulsion" requirement . . . is not met. . . .

If the legislature had intended to define rape, a felony of the first degree, as nonconsensual intercourse, it could have done so. It did not do this. It defined rape as sexual intercourse by "forcible compulsion." If the legislature means what it said, then where, as here, no evidence was adduced by the Commonwealth that established either that mental coercion or a threat, or force inherently inconsistent with consensual intercourse was used to complete the act of intercourse, the evidence is insufficient to support a rape conviction. According, we hold that the trial court erred in determining that the evidence adduced by the Commonwealth was sufficient to convict appellant of rape. . . .

Holding

Reviewed in light of the above described standard, the complainant's testimony simply fails to establish that the Appellee forcibly compelled her to engage in sexual intercourse as required under 18 PCSA section 3121. Thus, even if all of the complainant's testimony was believed, the jury, as a matter of law, could not have found Appellee guilty of rape. . . . [T]he crime of