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**Beyond 16 Days of Activism**



“

As we continue to stand in solidarity with the activists of the inauguration of the Women’s Global Leadership Institute in 1991, we take a moment to reflect on what has been achieved through collective commitment and resilience in building a safer South Africa for all.

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***Embrace Project NPC and Others v Minister of Justice and Correctional Services and Others***

**(04856/22) [2024] ZAGPPHC 967 (30 September 2024)**

***The Embrace Project has successfully challenged the legislative definition of rape, sexual assault and other forms of sexual abuse, and their application is now on its way to the Constitutional Court.***

## **What was the legal position prior to the judgment and what did this mean for survivors of sexual abuse?**

Various sections of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Act) criminalised, among others, rape and sexual assault only where the accused not only intended to commit an act of sexual violation, but also intended to do so unlawfully and knowing that the complainant was not consenting.

This means that the Act did not criminalise sexual violence where the perpetrator wrongly and unreasonably believed that the complainant had consented. So, when a perpetrator subjectively believed that there was consent, for example because the survivor didn't physically resist, cry or loudly protest, the accused could not be convicted.

This violated the rights of sexual abuse survivors to equality, dignity, privacy, bodily and psychological integrity, and freedom and security of the person.



## ***What is the outcome and effect of the judgment?***

The provisions have been declared unconstitutional, invalid and inconsistent with the Constitution of the Republic of South Africa 1996, to the extent that they did not criminalise sexual violence where the perpetrator wrongly and unreasonably believed that the complainant was consenting, or to the extent that they permitted a defence against a charge of sexual violence where there was no reasonable objective belief of consent.

The result is that the focus of the criminal trial is no longer on the conduct of the complainant (whether she should have done more to make it undoubtable that she was not consenting or no longer consenting) but rather on the conduct of the accused (whether he should have done more to make sure that the survivor was freely, comfortably and continuously consenting).



## ***What is the legal position for the prosecution of rape and sexual offense cases now?***

When someone is charged with an offence under these provisions, it is not a valid defence for that person to rely on a subjective belief that the complainant was consenting, unless the accused took objectively reasonable steps to make sure that the complainant consented to the sexual conduct.



***What is the effect of this judgment on past and current criminal proceedings for rape and sexual offenses?***

The development of an objective standard test (pending legislative amendment) will only operate with effect from 30 September 2024 and won't have an effect on conduct that took place before then.