

IN THE HIGH COURT OF SWAZILAND

In the matter between: CASE NO. S.138/80

REX

VS.

1. NOAH JABULANI MBINGO

2. PAUL ELVIS MTHEMBU

COBAM: NATHAN, C. J.

FOR CROWN: K. DONKOH

FOR DEFENCE: IN PERSONS

JUDGMENT

(Delivered 8th December, 1980)

NATHAN, C.J.

The two Accused are charged with the rape of Busisiwe Dlamini on 8th June, 1980, No. 2 Accused being the principal offender and No. 1 Accused an aider and abetter.

The complainant was found by Dr. J.B. Munnik who examined her the day after the incident to have had recent intercourse. There was some evidence of forcible entry, there being some snail tears at the entrance to the vagina. Sperm was found to be present. The complainant was not a virgin. Dr. Munnik said the injuries could have occurred as a result of rough handling even in the course of normal intercourse. But on the basis that it was a rape, it does not appear to have been a very serious one.

The complainant had been the girl friend of No. 1 Accused. She told the Court that on the day in question she and her sister in law met No. 1 Accused in the late afternoon. After some time No. 1 Accused suggested to the complainant that they should go to his place, presumably for intercourse. She said she could not do this as she was menstruating. He said he would not do anything to her i.e, he would not have intercourse with her.

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He later suggested that they go to his brother or cousin's place. The so - called brother or cousin is No. 2 Accused. It was then getting late. No. 1 Accused gave as his reason the fact that they could not go to his place as they might find his new girl friend or wife there. The complainant said they went to the room of No. 2 Accused whom No. 1 introduced as Vilane. She said that after they arrived there No. 1 Accused went to his own place. But he returned and she was given neat and tea by No. 1 Accused. It was then about 11p.m. No. 1 Accused suggested that she spend the night in No. 2 Accused's room. She demurred, saying she could not spend the night in the room of a man who had no wife. She also apparently suggested that she should go to her own compound; but nothing came of this. She said Nos. 1 and 2 Accused went outside and spoke and then returned. No. 1 Accused left taking a dish of neat and saying he would be back.

The Crown seeks to put a sinister interpretation on the conversation outside - if indeed it took place - as being the time when the plot between No. 1 and No. 2 Accused was hatched.

The Complainant said she remained in the room with No. 2 Accused. He eventually suggested they

should go to sleep. The Complainant was somewhat hesitant in agreeing that this meant for intercourse; but I think this can be accepted. She says she told No. 2 Accused that she was menstruating; but he said this did not matter. She also said she did not wish to have intercourse with him as he was not her lover. She then described some assaults upon her and the actual rape. She says she struggled and attempted to shout but he over-powered her. He also threatened her with a knife that they had been eating with. She only mentioned this at a late stage in her evidence.

After the intercourse she said she wanted to pass water and excrete and according to her he offered her a dish. But

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she prevailed on him to take her to the toilet. However, she managed to escape from him and ran crying to the house of one Khumalo who raised a Security Guard. She was obviously very upset then they went to No. 1 Accused's house; but he said he only knew her by sight and denied that she was his girl friend. She was corroborated in regard to this by Khumalo, the Security Guard Shabangu.

Although there may be some exaggerations in the Complainant account and she was not an entirely satisfactory witness. I accept from her running in an upset state to Khumalo's to make a complaint, that she was in fact raped.

The denial of knowledge of the Complainant by No. 1 Accused also admits of a sinister interpretation. But as I will show, I think there is a reasonable explanation of this.

They all went to No. 2 Accused's home and knocked hard on the door but could not gain entrance. The radio was playing. No. 2 Accused suggests that he was asleep. I do not regard this as probable.

In cross examination of Complainant it was put by No. 1 Accused that she had not told him she was menstruating. She said she had done so, and added that when she asked the Accused about it the next day he asked her to forgive him because he had been drunk. She had not mentioned this in her evidence in chief; and in my view it may be an after thought. She proceeded to vary her account somewhat by saying that No. 1 Accused told her he did not know his friend would have intercourse with her. This may be nearer the truth.

She denied that she had been to No. 1 Accused's place with him but found the door locked and that it was only then that they decided to go to No. 2 Accused's home. No. 1 Accused's cross-examination of the Complainant on this aspect of the case seems not improbable.

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The Complainant was unsatisfactory in the following evidence

Q. When you arrived at my room with the Compound Induna did I not say I had asked No. 2 Accused to accommodate you and was I not wearing only a bedspread then?

A. Yes, he did say that

Q. by Court: I thought he told the Security Guard you were not his girl friend?

A. Correct.

Q. Did he say he asked No. 2 Accused to accommodate you?

A. There have been so many questions that this was a slip.

Under cross-examination by No. 2 Accused the Complainant said that when she and No. 1 Accused

arrived at his house No. 1 Accused introduced her as his girl friend. If this is so, it seems unlikely that No. 1 Accused would have made over his girl friend (with whom he had actually wanted to have intercourse that night) to No. 2 Accused for the night.

The Complainant was not convincing in regard to why she had not left No. 2 Accused's house with No. 1 when he went away with the neat. According to her No. 1 Accused said he was coming back. She said her Compound was far away. She suggested that No. 1 Accused should take her to her sister's; but he said NO. 2 Accused would not do any thing to her and she should spend the night there.

It appeared from No. 2 Accused's cross-examination that he acted as if he expected, through out, that the Complainant would be a willing partner for the night - he gave her tea and bread, thanked her for coming and gave her water to wash with. The Complainant denied all these suggestions put to her in cross-examination,

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No. 1 Accused stated in evidence that he had taken the Complainant to his home before they went to No. 2 Accused's house, but they found the door locked from the inside. While they were at No. 2 Accused's he went back to his own house to check whether his other woman was indeed there. He gave the impression that he thought it would be quite all right for the Complainant to spend the night with No. 2 Accused, According to him he told Khumalo and Shabangu he had asked No. 2 Accused to accommodate the Complainant for the night. This it will be remembered is not in line with the evidence of the Complainant, Khumalo and Shabangu.

The key to the case in regard to No. 1 Accused is in my opinion to be found in the evidence of No. 2 Accused who stated that after the Complainant eluded him on the way to the toilet he went to No. 1 Accused's room and told him that the girl he had brought had left. I think it is probable that No. 1 and No. 2 Accused then decided upon a conspiracy of silence. This would explain why No. 1 Accused, when confronted by the Complainant, Khumalo and Shabangu, said he only knew her by sight and denied that she was his girl friend, and it would also explain why No. 2 Accused refused to open the door to them.

No. 2 Accused admitted in evidence that he had intercourse with the Complainant after No. 1 Accused finally left. But he said that this was with her consent. He said that after the intercourse she demanded £5.

Although I accept that No. 2 Accused went to report to No. 1 Accused what had happened, I found the rest of his evidence to be very unsatisfactory. He tried to make out that the Complainant was a prostitute who had been ordered away from the Compound by the Security Guards; and said that when he told No. 1 Accused that the Complainant had disappeared, No. 1 Accused

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No. 1 Accused said that of course she would have left because she was a prostitute and it was likely that she had gone to other men. It is very unlikely that even if a prostitute she would have done this at that time of night.

He went on to say that No. 1 Accused had told him that on a previous occasion the Complainant had given him a venereal disease and that on the day in question No. 1 Accused had demanded £15 from her in order to get himself cured of this disease and that that was why he had brought her to No. 2 Accused's home. He went on to say that No. 1 Accused really hated him because No. 1 Accused had been transferred from the work they were doing together and No. 2 Accused had remained behind. But in cross-examination he admitted they were close friends

In regard to the V.D. aspect of the matter I cannot accept that No. 1 Accused who on No. 2 Accused's evidence had contracted a V.D. from the Complainant would pass her on to his close friend so that she could earn money with which No. 1 Accused could be cured of his disease.

No. 2 Accused could give no explanation of how the Complainant got the tears on her vagina. He suggested that it might have happened with No. 1 Accused as they came along. This, too, is wholly fanciful. The Complainant showed no signs of injury when she arrived at No. 2 Accused place.

In my opinion it is clear that No. 2 Accused raped the Complainant. In regard to No. 1 Accused I find that the Crown has not established beyond a reasonable doubt that No. 1 Accused took the Complainant to No. 2 Accused's home with the intention that No. 2 Accused should have forcible intercourse with her. There is a very real possibility that No. 1 Accused merely took the Complainant to No. 2 Accused's home to spend the night but without realising that any intercourse, forcible or otherwise

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otherwise, would take place. No. 1 Accused had dropped the idea of intercourse on hearing that the Complainant was allegedly menstruating and he may well have thought that if the subject was broached No. 2 Accused would do likewise.

No. 1 Accused made things difficult for himself when confronted by the Complainant, Khumalo and Shabangu; but in all the circumstances of the case I think he must be given the benefit of the doubt.

In the result I find No. 1 Accused not guilty and No. 2 Accused guilty of rape as charged.

C. J. M. NATHAN

CHIEF JUSTICE