

IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO. S224/84

In the matter of:

REGINA

vs

NHLANHLA COOLBOY NHLABATSI

CORAM: WILL, C.J.

FOR THE CROWN: MR NDZIMANDZE

FOR THE DEFENCE: MR D. LUKHELE

JUDGEMENT

(30/1/85)

Will, C.J.

The Accused pleaded not guilty to a charge of rape.

Complainant, a girl of about 18 years of age, was a member of a religious group of 3 men and 6 women who had left Mbabane to attend a prayer meeting. To reach the place where the prayer meeting was to be held it was necessary to travel to a certain place by bus and from there to take another bus. The second bus broke down with the result that it became necessary for the group to walk across country and through the bush to their destination.

A summary of the Crown evidence which included that of the Complainant, the Minister of the Church who was in charge of the group, and other members of it was that as they were passing a kraal they heard someone pretending to cry for help. A member of the group recognised the voice of the person pretending to cry for help and shouted to him that he was drunk and should go to bed. Instead of doing so Accused and his friend came to the group. They had been drinking and they asked questions mainly as to the identity of the persons in the group and where they were going. They were told that

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the group were on their way to attend a prayer meeting as it was Assension Day. The Accused or his friend then said that as Christ had already ascended they should return home and they tried to get the group to turn back and go home. They hit one of the men of the group with a stone and tried to stab him. The Accused and his friend then lined up the girls of the group and shone a torch into their faces apparently with the intention of choosing the two most attractive of them. The Minister then told his party to scatter but to find their way to the Prayer meeting. He did this because he was afraid of what might happen to them. The Minister intended organising, and in fact did organise, a party of men at the prayer meeting to go to the assistance of the two girls who had been chosen, one by the Accused, and the other, Elizabeth, who was chosen by the Accused's friend. They took the two girls away with them threatening to kill them if they should refuse to carryout instructions. Accused took Complainant to a hut, kicked open the door, told Complainant to enter, lighted a lamp and bolted the door. He told her to lie on a bed and removed his trousers and then her panties and had intercourse. She carried out all these instructions as he had a knife and she was afraid he would carry out his threat to kill her. He asked her if she loved him and answered in the affirmative but gave that answer only because of fear. When Accused was finished she put on her panies and Accused accompanied her as she set out for the prayer meeting. On the way

they saw the group of men who, with the Minister, had gone out to help her and Elizabeth. When the group arrived Accused put Complainant in front of him. The group surrounded Accused and Complainant but Accused wielded his knife. One of the group said that he knew who the Accused was and where 30 he lived and should let him go. Complainant, the Minister and the group then went to the Accused's house where Accused apologized for what he had done and asked to be forgiven. Complainant

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refused to forgive him and reported to the police.

I have no doubt that the Complainant and the other witnesses for the Crown were truthful. There were slight differences here and there in their evidence but when the nature of events which they described is taken into account slight inconsistencies were only to be expected.

Accused's evidence was ridiculous. According to him he and his friend had been drinking. His friend cried for help because he had seen a cobra. A reply came from a group of people who were passing by that he was drunk. Accused and his friend went to the group and looked for two attractive girls. Accused picked Complainant and his friend picked Elizabeth. The girls agreed to become their girl friends and to leave their party and to accompany the Accused and his friend for intercourse. The girls had never seen the two men before; the men had been drinking; the girls had travelled far from Mbabane to attend this prayer meeting; but immediately the Accused and his friend asked them to be their girl friends and to have intercourse they agreed and they left their companions to proceed to the prayer meeting whilst Complainant and Elizabeth went with the two men for intercourse. All this happened without any interference or remonstrance from the Minister and his group. Why then did the Minister return with the men of the congregation to come to the assistance of the girls?

Counsel for the Defence pointed out that Complainant walked with the Accused to the hut where intercourse took place; she entered the hut when told to do so; she climbed on to the bed herself; did not resist when her panties were removed; and allowed her legs to be opened. She bore no bruises or other signs of injury. These facts are of course true but Complainant's conduct amounted to no more than submission. It did not amount

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to consent.

To submit means to be resigned to a situation. In the case of *Rex vs Taylor* 1927 CPD there was the following quotation from the case of *Rex vs Wollastans* 12 Cox 186;

"Mere submission is not consent, for there may be submission without consent ..... mere submission is totally different from consent".

Complainant was in abject fear of the Accused who was armed with a knife and told her that he had a revolver in his suit case: that he was a member of the A. N. C.; and that he would kill her. She submitted but she did not consent.

Counsel for the Defence, however, argued that the Accused reasonably mistook the Complainant's submission for consent and that he did not therefore have the necessary mens rea for the offence. It is not clear that such a defence is open to an Accused person in the circumstances of this case but I do not have to consider that question further because, in the circumstances in which the submission was brought about the Accused must have known that Complainant was merely submitting and was not consenting. In addition Complainant even offered Accused E35 in an endeavour to buy him off; and the Accused would not have run away when the search party came upon him if he thought there had been a consent. Why, too, did he find it necessary later to apologise if he really believed that Complainant had consented?

I convict the Accused of Rape.

D.D. Will

CHIEF JUSTICE