

IN THE HIGH COURT OF SWAZILAND

Cr. Appeal No. 40/96

In the matter between:

THE KING

vs

THEMBA RICHARD EARNSHAW

CORAM:

S.W. Sapire A.C.J.

J. M. Matsebula J.

FOR THE CROWN

Mr. Kilukumi

FOR THE APPELLANT In person

Judgment

(3/6/96)

The appellant Themba Richard Earnshaw was charged in the subordinate court Piggs Peak with a charge of rape.

The charge is that on or about the 23rd September 1995, at or near Nkamazi in the Hhohho region, the said accused being a male adult unlawfully and intentionally had sexual intercourse with Thulie Nelisiwe Simelane, a female without her consent and did there commit a crime of rape.

To this charge, the accused pleaded not guilty and was represented by Mr Maseko an attorney. The complainant told a very simple story. The appellant is known to her. He is in fact a neighbour.

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On the day in question, she was sent by her sister to a nearby shop. On her way she was met by you the accused who is now the appellant, who spoke to her and asked her surname. Apparently she answered and then she was attacked by the appellant who through her to the ground. He then took her to an isolated spot not far from the path and raped her. When the appellant so she says was through, he released her. Instead of going on to the shop she went home immediately and made a report.

She was however on her way home, she met another person Linah who asked her why she was crying, and she made the report to this Linah that she had been raped by the accused. She then went back to her home where she reported the incident. An alarm was raised and the appellant was then apprehended by members of the community and brought to the homestead where the complainant lived.

The appellant's defence in the matter is that he is not the man who committed the rape. Of course there is no corroboration of the complainant's evidence identifying the appellant as the rapist. The

magistrate found that there was no reason for the complainant to identify the appellant as the rapist if it is in fact not so and in this view he is supported by circumstances to which he has not alluded in his judgment but which appear in the record. These circumstances are that when the appellant was arrested, he was brought to the home of the complainant and confronted with the allegations as to what he had done. It was not put to any of the witnesses or suggested in any way that he denied the charges, and the only inference that can be drawn is that he in fact did not deny it and in this way admitted that he was the person who assaulted the complainant.

One would have expected him to protest to the community his innocence and if the allegations against him were not true he would have told the police and said that he had been falsely arrested. I find his failure to do so is corroboration of the allegation made by the complainant.

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Furthermore this appeal as it has been pointed out is made completely out of time. The notice of appeal is dated 10th April 1996 and it was apparently served on 11th April 1996. The judgment on 24th October 1995. There is no explanation why this appeal was made out of time and it is not properly before the court.

In view of my opinion on the merits I would not allow an application of condonation because the appeal is completely without merit.

As far as the sentence is concerned, the appellant did not even advance any reason why this should be changed in any way.

For these reasons, the appeal is dismissed.

S.W. SAPIRE

J. M. MATSEBULA

ACTING CHIEF JUSTICE

JUDGE