

IN THE APPEAL COURT OF SWAZILAND

In the matter of: APP. NO. CA/2/81

PAUL ELVIS MTHEMBU

vs.

CORAM: MAISELS P. I. ISAACS J.A., VAN WINSEN J.A.

FOR APPELLANT: IN PERSON

FOR RESPONDENT: MR. DONKOH

JUDGMENT

(Delivered on 3rd June, 1981)

I. ISAACS J.A.

The appellant in this matter was charged jointly with Noah Jabulani Mbingo with the crime of rape, in that the appellant, who had been No.2 accused, aided and abetted by Noah Mbingo, who had been No.1 accused, had unlawful sexual intercourse with the complainant Busisiwe Dlamini without her consent. The appellant was convicted by the learned Chief Justice and sentenced to 3 years imprisonment. The Accused No. 1, Noah, was acquitted.

Dr. J.B. Munnik examined the complainant a day after the incident. He said that he found no signs of injuries except the entrance to the vagina was bruised and there were small tears, he said the girl was not a virgin.

The complainant gave evidence to the effect that on the day on which the incident occurred, she and her sister-in-law had met accused No. 1. The complainant appeared to be No. 1's girl friend. She met him in the afternoon and accused No.1 had suggested going to his brother's place. In fact they subsequently went to the appellant's room. Accused No.1 first left but later returned and she was given refreshments. It was then about 11.00 at night Accused No. 1 suggested that she should spend the night

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in appellant's room. She said she objected, but the accused No. 1 left her. She said that the appellant then suggested intercourse with her but she refused. She then gave evidence describing how appellant forcibly had intercourse with her, including how he threatened her with a knife. She said that after the intercourse she managed to escape from him and ran crying to the house of one Khumalo, who roused the compound Indiana., They went to the house of No. 1 accused. No. 1 denied that the complainant was his girl friend. They went to the appellant's house and he did not open the door although they knocked. The girl spent the night at the house of the compound Induna. The Induna gave evidence that the complainant reported to him. He sent her to the police in the morning. The accused No. 1 gave evidence to the effect that he had taken the complainant first to his home and then to the appellant's house. He said he asked the complainant to spend the night there. He said he did not think the complainant and the appellant would do anything.

The appellant gave evidence. He admitted having intercourse with the complainant but said that it was with her consent. He said the complainant asked him for money, E5,00, which he refused to give her, A witness by the name of Simelane was called by the appellant. He was a deputy Induna to whom the complainant had been brought. He gave evidence that the appellant had said No.1 accused had him the girl to sleep with, but this was evidently denied by accused No. 1. This witness did not assist the accused in any way.

In his judgment the learned Judge accepted the evidence of the complainant, although he criticised part of her story. He rejected the evidence of any agreement with her and held that she had been raped. The learned

Chief Justice found the evidence of the appellant unacceptable. He said he gave no explanation of how the complainant had tears in the vagina as found by the doctor. The report by the complainant made to CW. 3 was not corroborator of her story but having regard to her condition when she made the report - he said that she was crying - it does tend to negative any evidence of consent.

In my opinion this Court cannot say that the learned Chief Justice was not correct in rejecting the accused's story and in finding the Crown had proved lack of consent.

This Court has listened to the submissions of the appellant. He still repeats that the reason the girl had complained about him was that he had not given her the money. We cannot, however, disagree with findings of the learned Chief Justice. The sentence of 3 years imprisonment does not seem to be unreasonable under all circumstances.

I would dismiss the appeal against conviction and sentence.

...(SIGHED).....

(I. ISAACS.)

JUDGE OF APPEAL.

I agree:

..(SIGHED).....

(I.A. MAISELS.)

JUDGE PRESIDENT :

I agree:

..(SIGNED).....

(L. VAN WINSEN.)

JUDGE OF APPEAL.