

IN THE HIGH COURT OF SWAZILAND

In the matter between:

THE KING

vs.

JUSTON PAYMASTER BANDA

REVIEW ORDER NO.26/79

DISTRICT OF HHOHHO

MBABANE ON 7TH DECEMBER 1979.

REVIEW CASE NO.151/79

JUDGMENT ON REVIEW

NATHAN, C. J.:

The Accused in this case was convicted of rape and was sentenced to imprisonment for two years.

The Accused is an elderly man- the Magistrate says sovt -of about the age of 65; and the Magistrate found the complainant to be 14 or 15 years old. He found that she is certainly less than 16. The medical evidence wavered somewhat; in his original medical report the doctor put her apparent age at 16. He later said she was around 15 years - old, and less than 16, However in the view I take of a charge of rape I do not find it very material whether she was 15 or 16. I have referred to her age in same detail because the Prosecutor appears to have been under the impression that a girl of that age cannot consent to sexual intercourse; and this may have influenced the Magistrate. This is not the law. It is only in regard to girls under 12 that the law deems them incapable of consenting to sexual intercourse, and intercourse in such circumstances is regarded as rape even if the complainant purports to consent. See Hunt, S.A. Criminal Law, Vol.2 page 406-7. I am, of course, referring to charges of rape, and not to charges of unlawful intercourse with a girl under the age of 16 under Section 3(1) of Act 39/1920. It would appear that the Prosecutor did not appreciate the distinction

The complainant said she knew the Accused "by sight" because they are neighbours. According to her, on the day in question as she walked past the Accused's house he gestured

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to her by hand to come to him,, She did so as she had been advised at home that if she was called by an elderly person she should go to him as he could send her to the shop. She says the Accused then left her in the house and locked her inside saying he was going to the toilet. When he came back he completely undressed himself and then grabbed her and made her sleep on her back. They then had intercourse. "Ho then thereafter gave me medicine saying it would give me luck. He said I should wash with it. He then gave me money, the sum of E0.45. He said I should buy cakes with it. My mother came and Accused pushed me out of the house. My mother was from Nkanini going home, she was just passing and Accused pushed me out, Accused saw my mother outside. I told my mother at home -----When I told her she had not asked me anything.

I gave the money and the muti to my mother ----- I did not consent to Accused having sexual intercourse with me ----- I did. not cry when Accused had sexual intercourse with me. I as afraid that he might hit me if I cried,, "

The cross-examination by the Accused., who was undefended, reads as follows:-

"Q: Did you not fall in love with me?

A: I have never been in love with you.

Q: Have you not come to my house daily and we had sexual intercourse together?

A: That is not true.

Q: That day I did not call you, you came on your own?

A: That is not true, you had. always waved at us to come to you when we are selling".

Under examination by the Court the complainant said "Before that day I had never had sexual intercourse with any man, but young boys of my age have had. sexual intercourse with me."

The medical report disclosed that there was an old rupture of the complainant's hymen, and examination was easy.

The mother gave evidence that she was walking past the Accused's house and then saw the Accused pushing out Lindiwe (the complainant),, Lindiwe came out and ran away. She then

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asked the Accused what her child was doing in his house. The Accused said she was looking for firewood. "At home I found Lindiwe with money and muti. When I asked her about these she said they had been given to her by Accused."

The Accused gave evidence in which he said "we were lovers with this girl. She is my girlfriend". He was then cross-examined in regard to his age and as to whether he knew that a girl of the complainant's age could not consent (see above), and he said she agreed to have intercourse with him. When asked whether she was not young enough to be his granddaughter, he said they were just good lovers.

The Magistrate in his reasons for judgment says that the complainant's evidence was unassailable,. He went on to say that she impressed the Court in her evidence, gave the evidence coherently and was firm in her denial that she was ever in love with the Accused.:. He said that it was highly improbable that he should be in love with her, and that this was a made-up story. In regard to the alleged complainant to the complainant's mother he said that he came to the conclusion that the complainant voluntarily told her mother what the Accused did to her. He also said that she had told her mother hat the Accused had done to her without any suggestion having been made to her.

Whilst one naturally has considerable regard for a trial Magistrate's impressions of a witness - see in this connection R. V. Dhlumay, 1948(2) S.A. 677 (A.D.) at p. 705) - I do not share the Magistrate's view that the evidence of the complainant was "unassailable" ,, Her evidence that she did not cry out because she was afraid the Accused might hit her does not strike me as convincing. It is not suggested that he made any threat to hit her; and this is no more than she would be expected to say if she was fabricating her story. But further than this, why did the complainant not immediately complain to her mother when she was pushed out of the house? She only told her at home. In regard to what happened at home there is a clear conflict between her evidence and that of her mother. She said that when she told her mother the latter had not asked her anything. The mother said, "I asked her about these things ----" The Magistrate in my opinion, was not justified

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in finding that the complainant voluntarily told her mother what the Accused did to her.

Moreover for the Accused voluntarily to give the complainant muti to wash herself with and money for cakes is not :hat one would expect of a rapist.

It may be - I put it no higher than that - that the Accused was overstating his case in suggesting and saying that he and the complainant were old lovers. But the evidence is still wholly consistent with this having "been an intercourse by consent. I have no doubt that the Magistrate should have given the Accused the benefit of the doubt in this case, and that the conviction for rape cannot stand.

I have considered whether the Accused should have been convicted under Section 3(1) of Act 39/1920, referred to above. This, in terms of Section 135(1) of Act 67/1938, would be competent "if such be the facts proved," But I do not consider that the evidence establishes an offence under Section 3(1) of Act 39/1920. The uncertainty in regard to the complainant's age to which I have referred is increased by the evidence of her mother who first stated that the complainant is 16 years of age and then went on to say that she was born during Dumisa's strike, would. put her at 22-23.

The conviction and sentence are set aside.

C. J. M. NATHAN.

CHIEF JUSTICE