

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate) DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN STRAFSAAK.

JOHN WILLIAM FANDER

Appellant.

versus/teen

THE QUEEN

Respondent.

Appellant's Attorney
Prokureur van Appellant

Respondent's Attorney
Prokureur van Respondent

Appellant's Advocate
Advokaat van Appellant

Respondent's Advocate
Advokaat van Respondent

Set down for hearing on:— Monday September 17th
Op die rol geplaas vir verhoor op:—

(D.L.)

Coram

Jagan, S'gyn, de Beer, Regan, Binn, v.

— Appeal dismissed.

W. J. M. M. M.
Regn. 23/10/56.

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Counsel for the Crown addressed the Court.

Counsel for the Defence proceeded to address the Court.

(The Court adjourned until 9.30 a.m. tomorrow morning, 22nd June, 1956).

Third Day's Proceedings.

Friday, 22nd June, 1956.

On resuming at 9.30 a.m.:

Counsel for the Defence continued his address to the Court and concluded same.

Counsel for the Crown replied.

10 The Judge intimated that judgment would be reserved until Thursday, 28th June, at 9.30 a.m.

Fourth Day's Proceedings.

Thursday, 28th June, 1956.

J U D G M E N T.

BROKENSHA, J.:

The accused is charged with the crime of rape, alternatively, contravening sec.1, Act 5 of 1927, as amended.

20 The Crown case is that the alleged offence was committed on 27th December, 1955, near Scottburgh in the district of Umzinto; that the complainant is Mabel Ngeme, a non-European female, and that the accused is a European male.

For reasons which I will give, in the circumstances of
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the case; we are of the opinion that the appropriate verdicts are either the main or the alternative charge.

We rule out of consideration a possible verdict of contravening section 2(1) of Act 3 of 1916, because the Crown did not prove that at the time of the alleged offence the complainant was under the age of sixteen years.

10 We approach this case with the knowledge and in appreciation of the caution and special treatment required because of the facts that the charge is one of a sexual nature, and that the complainant is a young person, and in all the circumstances of the case, we deem it inadvisable to convict on either charge unless we are satisfied (a) that there is corroboration of the complainant in some material respect, although that corroboration need not go to the extent of implicating the accused, and (b) that the merits of the complainant and the demerits of the accused are beyond question: see Rex v. W., 1949(3), S.A. 772 (A.D.) and R. v. Ncanana, 1948(4) S.A., 399 (A.D.).

20 Dr. Harford, assistant district surgeon, Umzinto, examined the complainant at about midday on 27th December last and he formed the opinion she was fourteen years of age. The complainant said she was born in 1941. This is the only evidence of the complainant's age. From her appearance it appeared to us that she might have been sixteen years of age at the time in question, thus the Crown failed to discharge the onus of proving she was under the age of sixteen.

30 The complainant said she lived in the mission reserve, Umkomaas, which is about four miles from Scottburgh camping place. During last December she worked for Mr. A.L. Erasmus, who was camping with his family at Scottburgh. She worked as a general servant, and according to Mr. Erasmus, came to work at about 6.30 a.m. He said on the 27th December she was late.

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The complainant said usually she left home at 5 a.m. and arrived at work at 6 a.m. On the 27th December, and I may say that date is definitely fixed by the fact that complainant said she was examined by the assistant district surgeon, and that she interviewed detective sergeant Smit, on the day she says she was assaulted by the accused, and these official witnesses fix the date as the 27th December. On the way to work the complainant met another Native girl, Ebi Kwela, aged about fourteen years. These two girls walked towards the
10 camping area and when they got to the beach car park area a car met them and stopped next to them. The complainant says it was driven by the accused, who beckoned to them. She went up to the car. The accused asked if she wanted work, and she told him she was employed. He asked if she could leave her employment and work for him. She said she could not do that and that it would be better if he got another girl. She
20 She said he asked her if she could get a girl. She said she thought she could and the accused then asked her to get into his car so that he could show her where he lived, the intention being that complainant would know where to take this other girl. The complainant entered the rear seat of the car and accused drove off. Whilst driving the accused asked her name and complainant told him it was Mabel. She said he asked where she worked and she told him at the tents, number 56. The accused drove on in the direction of Umkomaas. The complainant said she asked him where was his home. He pointed to a residence above the road and said "There it is". Complainant said she asked him to turn the car and take her
30 back to her work as she was in a hurry. She said he took four shillings from his pocket and handed it to her. He said he would cross the bridge as the road was narrow. The four shillings consisted of two florins, and she added that accused
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said she was not to tell her missus. After a little while he turned the car, then he drove the car off the national road into an opening, which is depicted in the photograph, put in, exhibit "C", as spot "C". He stopped the car, then jumped over the front seat and came to where she was. She said the accused took hold of her. She demonstrated that he placed his hands on her shoulders, and made her lie on her back on the back seat. In a demonstration in Court she indicated that her head was towards the left hand side of the car. She

10 continued that the accused put his hand under her dress and pulled down her drawers as far as her knees. She said she cried out asking what was he doing. She struggled. She was trying to break away from the accused. He held her, having his left arm round her neck. His fly buttons were open. He then placed his penis in her private parts. He pushed her legs apart with his hands. The elastic of her bloomers stretched and he had full intercourse with her and ejaculated. She said she was crying all the time. After he had completed his purpose he gave her one shilling. She says she had no

20 opportunity to scratch him. She was extremely frightened. She said the thought did not occur to her to scratch his face. He returned to the front of the car, started it and took her to the Scottburgh bridge on the national road, where she got out and accused then drove off. She said when he had finished his purpose he said, "Don't tell the missus." On the way she met a Native girl, whose name she did not know, but whom she knew by sight, and whom she identified in Court. This person is Maggie Kwela. She made a brief report to Maggie, but as Maggie was not called by the Crown the report made by

30 her to Maggie is inadmissible. When she got to the camping place she saw Mr. and Mrs. Erasmus. Mr. Erasmus said she was

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crying and very distressed. She then made a report to Mr. Erasmus. I will not deal with this report at this stage. Complainant showed Mr. Erasmus the five shillings which she had, and Mr. Erasmus confirmed that. She then went to the police station and reported the incident. Detective Sergeant Smit sent her to Dr. Harford, who, in his examination, found no bruises or abrasions and nothing abnormal in the genital organs, except that the hymen was not intact. Dr. Harford said the hymen had been removed some time prior to his
10 examination. He took two glass slide specimens from the vagina and one swab. These specimens were subsequently examined by the assistant government pathologist for spermatozoa with a positive result in each case. This evidence establishes that very shortly before the examination by Dr. Harford the complainant had had sexual intercourse, as a result of which spermatozoa had been deposited in her genital organs, but in the absence of information, whether the germs were alive or dead when the tests were made by the assistant government pathologist, Dr. Harford was unable to give an
20 opinion as to when the intercourse took place, but it seems to us, on the evidence, that it must have been shortly before the examination. I may here say that the complainant admitted in evidence that before the 27th December she had had internal intercourse twice. She said about four days later she attended an identification parade where she pointed out the accused as the person who had sexually assaulted her.

I may here interpolate that Head-Constable Ohlenesdal said he arranged the identification parade, which was held on the 31st December. Owing to the fact that the accused has a
30 dark complexion, Ohlenesdal obtained ten Italians to parade with the accused. This was a wise step on the part of Ohlenesdal because it was obvious that if the accused had been
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placed in a parade composed of fair complexioned Europeans he would have stood out as being different from the other members of the parade. Ohlenesdal said that the accused's attorney was at the parade, and both he and the accused were satisfied with its formation, and in fact the accused's attorney, at his own request, formed one of the parade. Ohlenesdal did not accept the first Italians whom he interviewed, but chose persons who were about the same height as the accused.

10 In cross-examination the complainant said her clothing was not soiled as a result of anything the accused did to her, nor was it torn. She said he held her tightly; it was painful, but there were no marks on her. She said she told the doctor the accused had done this to her and she could not explain why the doctor made no mention of her telling him this, but she added that when the doctor examined her her neck was no longer painful. She said that when she met the accused it was towards 7 a.m. The train which passes Scottburgh between 6.30 a.m. and 7 a.m. had already passed. She was late when the accused asked her to go in his car to
30 his house. She did not know where his house was. He said it was not far. She said there was no fixed time for her to start work and sometimes she had started at 7 a.m. although she was accustomed to going at 6 a.m. She then corrected herself by saying that before this day she always started work at 6 a.m. She said when the accused stopped his car the car was about two paces from her. He beckoned to her and she went up to him. He beckoned in the direction of herself and Ebi, and as she was nearer to him she went to him. She could not say if Ebi heard or should have heard what passed between
30 the accused and herself, but that they both spoke softly. At this time she knew of a girl who was looking for work. She said that when she got out of the car, after she had been
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raped, the accused told her to bring the girl to him next day. She said he spoke pleasantly and she agreed to do so, although she did not intend to carry out that promise.

10 Asked about the four shillings which she said the accused gave her in the car, she said that she thought it was given because she said she would get the accused a girl. She said she took the money to show her mistress as proof of her story. She said that when he handed her the money on both occasions the accused said "Don't tell your missus". She did not know
10 why he said that, nor did she ask him. She denied that she had invented the story which she told. This was the first time she had seen the accused and it was the first time she had got into a European's car. She had no idea where the accused lived and she did not ask. He indicated it was not far and said he would bring her back in time for her work. She said where the car was parked it could have been seen by people travelling from Scottburgh towards Durban, both by motorists and pedestrians, but they would not have seen inside the car as there were trees obscuring the view. She said she
20 tried to push the accused away when he was on top of her, but could not do so.

I may here state that the accused is a very heavily built man. His height was taken in Court and found to be 5 ft. 7½ inches and he said he weighted about 200 lbs. Complainant's height is 5 ft. 6 inches but she is slightly built and physically she would be no match at all for the accused.

30 Questioned about statements which it was alleged she made to the magistrate, many of them she admitted, others she said she had not made, and asked about other matters which she gave in evidence before us and had not given at the preparatory examination, she said the explanation was that she was not questioned on those points at the preparatory examination.

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This explanation seems to us to be a reasonable one. She said accused over-powered her and there was not a violent struggle. She said that she noticed the number of the car and that it was T.J. 14, followed by other numbers, including one or more noughts. In further cross-examination she said that she first saw the number of the car after she alighted when the accused drove off. Questioned as to what language she and the accused spoke, she said the accused spoke "Fana-kalo" Zulu and partly in English. She said she understands
10 a little English. She said accused wore khaki shorts similar to exhibit 1, and a nylon shirt similar to exhibit 2. In answer to the Court she said she next saw the accused after the day when she says he raped her when he was in a car with another man at Scottburgh. She said he stopped the car and pointed at her. She went to a garage attendant, borrowed a pencil, and wrote down the number of the car, and then she saw him on the identification parade held on December 31st.

Mr. Erasmus said that when the complainant came to work on 27th December she was crying and in a distressed condition.
20 She showed him the two florins and a shilling piece and made a report to him. She arrived that day at 7.30 a.m.

Detective Sergeant Smit, who was in charge of the investigations in the case, said that on the 27th December complainant made a complaint. He took her to the assistant district surgeon. He then took complainant out and she pointed to various spots, upon which, and on his own observation, he prepared the plan put in, together with the key. Later that same day when Smit took complainant on a tour of
30 inspection she pointed out a motor car in which she said she had been raped. It was a 1938 Ford Sedan, light grey in colour, T.J. 14060. No one was then in the car. Later that

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day Smit interviewed the accused, who claimed ownership of the car. Smit informed the accused of the allegations made by the complainant and the accused denied all knowledge of the matter. Smit said he gave him the proper warning and told the accused he would hold an identification parade at 3 p.m. at Umzinto next day, where the accused was told to report. It is admitted that the accused went to Johannesburg and did not attend at Umzinto on the 28th. On 29th December, when Smit was at the Scottburgh police station the complainant ran
10 in and made a report, and in response to that Smit went along the national road looking for car number T.J.19025. It was admitted by the accused that this was his brother-in-law's car in which he returned from Johannesburg to Durban, but accused denied that he had pointed out the complainant or seen her when he was in the car. On the 30th December, in response to a report received from accused's attorney, Smit arranged for the accused to be arrested in Durban. Accused said he had panicked and gone back to Johannesburg. There he had realised the foolishness of his actions and had
20 returned to the Coast. The exhibits, the shirt and trousers, were in a case in the brother-in-law's car and handed by the accused to Smit.

The native girl, Ebi Kwele, said that she was with the complainant early one morning when a European in a motor car stopped his car. The European was alone. He beckoned to them and complainant went to the car. Ebi did not hear what was said. She did not take any notice of the man and could not identify him. She saw complainant open the rear door of the car and enter it, and the car then drove off. She did
30 not know what the time was.

The accused gave evidence on oath. He said on the
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morning of 27th December he found that a back tyre of his car was nearly flat and he went to a garage where he had it pumped up. He left the garage at about 6.25 a.m. and decided to get bait at Scottburgh. He went to Scottburgh beach, parked his car in the parking area and went to the beach, but failed to get bait. He returned to the car and then drove back to his camp. He arrived back in the camp at 6.45 a.m., had coffee and then went fishing. He denied in toto the evidence of the complainant. He said he did not see her and certainly did not
10 take her in his motor car and did not have intercourse with her. He admitted that Smit interviewed him on the afternoon of the 27th. He said Smit's information shocked him. When he got to Johannesburg he came back with his brother-in-law in the latter's car. He admitted Smit had told him to attend an identification parade on 28th and that he agreed to do so. He was satisfied as to his innocence, but was shocked at the charge and wanted to tell his wife about the matter. He said when he went to the garage the Native attendant was standing in the door. He said when he went to the camp he spoke to
20 one of the party, Mr. van Vuuren. In answer to the Court the accused said he did not think it important to ask Smit at what time the offence he was alleged to have committed had taken place, nor where.

The Native attendant, Ntondo Ngondwe, was called by the accused. He said he remembered when the accused called at his garage early on a Tuesday morning to have a tyre pumped. The accused spoke to him about this visit about a fortnight later. Ntondo said when the accused arrived he was seated in the spares department and when the accused arrived he went
30 out. He noted the time the accused drove off and it was then 6.30 a.m. Van Vuuren gave evidence, but I may say at once he was a most unsatisfactory witness. He said he spoke to
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the accused in their camp at 6.45 a.m. on the 27th. His watch was not keeping accurate time so he asked the accused for the time. He admitted in cross-examination that he had made a statement on the 28th December to Detective Sergeant Smit in which he said, referring to the 27th December; "I woke at 4.50 a.m. I woke again about 7 a.m. I am not sure what time I got up. When I got up I saw accused's car was there." He denied he told Smit the accused had not left the camp that morning, but Detective Sergeant Smit was re-called and he said
10 van Vuuren told him that the accused had not left the camp before 8 a.m. on the 27th.

We have no hesitation in coming to the conclusion that van Vuuren's evidence that he spoke to the accused at 6.45 a.m. is false. Van Vuuren's demeanour and the manner in which he gave evidence was most unsatisfactory. We accept Smit's evidence as to what van Vuuren told him and we therefore reject the accused's evidence when he said he said he had returned to the camp at 6.45 a.m.

The evidence of the garage attendant, Ntondo, as to his
20 having specifically noted the time when the accused left, is open to grave suspicion, but on the basis that the accused was at the garage at 6.30 a.m. it does not assist the accused because the time when he spoke to the complainant, according to her, is indefinite, but fixed by her as between half past six and seven o'clock.

We formed a very favourable impression of the complainant as a trustworthy witness. It seemed to us she was, for her race and standard of education, an intelligent girl. She did not appear to exaggerate, and we have no hesitation in
30 accepting her evidence as truthful, although, in our opinion, she did not take steps which were open to her to have avoided the sexual assault by the accused, nor to have offered that
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resistance which one would expect. The acceptance by her of the money from the accused, and the way in which she says he spoke to her when she got out of the car seem more consistent with there having been intercourse by consent. All these factors leave us with a reasonable doubt whether the Crown has proved that the intercourse was not with the complainant's consent.

In the circumstances, therefore, the accused is found not guilty on the charge of rape.

10 In regard to the alternative charge, we have not taken into consideration the reports made by the complainant either to the girl Maggie Kwela or to Erasmus. The report made by complainant to Mr. Erasmus was ruled by me to be admissible in respect of the rape charge.

Mr. Leon cited authority that the complainant's report was not admissible upon a charge of contravening the Statute.

20 We accept the evidence of Ebi Kwela as corroboration of the complainant in a material respect, namely, that she got into a motor car driven by a European, who drove off with complainant in the car. We accept the complainant's evidence that the accused had intercourse with her in the car. We reject his denial.

Factors which weigh heavily with us in accepting the complainant's story were that she, when with Smit, pointed out the accused's car and that she said she saw the accused in another car, the number of which was that of accused's brother-in-law's car, in which the accused admitted he had been. Also that the accused, through the assistance of van Vuuren, endeavoured to set up an alibi, which we find was false, and
30 further, that the reaction of the accused when confronted by Smit with the serious allegation against him, was not that which one would expect from an innocent person. Mr. Leon,
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in this regard, referred to the fact that the accused was only educated up to standard six and that the Court should not expect him to react in the manner which members of the Court would be expected to react in similar circumstances. Making full allowance for that, it seems to us, however, that the accused, as a man of business, and of apparent intelligence, if innocent, when told of this serious charge, would immediately have not only denied it, but expressed his indignation and have asked particulars of the time and place where the offence was alleged to have taken place, and demanded that the question of his alibi be immediately investigated by Detective Sergeant Smit. Instead of acting in that way he says he panicked and went to Johannesburg to tell his wife. At that time his wife was pregnant and ill. It seems the obvious as well as the prudent thing for him to have done was to have had the matter investigated immediately, so that he could clear himself and then be able to tell his wife of the incident, without it causing her any worry or anxiety.

We have given this matter very careful consideration. We are satisfied with the merits of the complainant as a witness, and in our view, the merits of her and the demerits of the accused and his case are beyond question. We are left in no doubt that the accused had intercourse with the complainant in the motor car as alleged by her, and he is, therefore, found guilty of contravening sec.1, Act 5 of 1927, as amended.

Counsel for the Crown said accused had one previous conviction of escaping from custody in 1942 for which he got one month's imprisonment.

Counsel for the Defence addressed the Court on mitigation.

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