

TANZANIA / JUDGMENT

19730531 TZHC Mwanza

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TZHCDECIDED
31 May 1973

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- L. J. .LJ .j..LT \. LT MW:ITZA. rrE1:TE JURISDICTION HIGH COURT CHIIILL :FEL NC. 275 F 1972. (Original Criminal Case No. 40 of 1972o1 the District Court of Karagwe District at Karage Before F,IT Bubarwa, sq f , District Magiatrata. JOHNSON s/o B!SISIL' , • t •iPI'EL .NT VERSUS T:4; R2'PUBLIC . , • , • , • RESPONDENT H!RGL': Rapc c/s 131 of the Penal Code Cap. 16 Vol. 1 of the laws, J U D G ' M i& N T. ELKiNDY, J, Johnson s/o Basjsile was charged with and convicted of rape contrary to sections 130 and 131 of the Penal Cods Cap.
- 16. he was sentenced to imprisonment for 3 years subject to confirmation by the High Court. He appealed against conviction and sentcncc-. The anpellant ws absent at the hearing of this appeal as he indicated that h. n did notwih to attend, but his grounds of appeal were taken into account. The learned State Jttorn3y,
- r. Butrnbala appeared for the respondent Republic. The evidence, which was accepted by the trial court, disclosed that on tc 11ti day of March., 1972, the complainant (and the victim) Teodoria w/o fmani (PU1) and Lgnes w/o ?ikuta (PLI2) were walking towards the house of' one Zuceda. Th time was 8 p.m. The complainant carried a lit hurricane lamp and ignes carried a lit electric torcli. Ls they walked along, three people—males—confronted them. gnes was walking infront of the complainant and the three male persons grabbed the complainant. It was alleged that one of the men wore a heavy overcoat. The complainant was draged towards the corperative society building 4 and on the wey j one of her cgthes was -taken off her. One of the three person demanded money, but she (the Complainant) had none. The one who demanded money, searched in tLe brasie of the complainant but he found none. Nevertheless, she was dra'ed along and after tearing her clotnes, the three male persons had sexual intercourse with her in turns, When the complainant was carried away, Lgnes ran away and returned with one Mama imas, but it was alleged that the men frightened them beore they ran away, and left the complainant alone. Neither the complainant nor Lgnes made any formal complainant or report to the Police on the same night or the subsequent day. However, on the 17th day of March, 1972, the apsilant was arrested by the Police, on the allegation that he was one of the three mae perso1s who took part in the allegc-d incident, The learned trial Magistrate was satisfied,, beyond reasonable

doubt, that the appellant was one of three male persons who committed the alleged offence although the appellant pleaded alibi. The learned State Attorney, so rightly pointed out, in his submission, the case is not free of difficulty. In the first place, the incident was alleged to have taken place at night. Time was given as 8 p.m. It is not clear, from the evidence, whether, at 21 '1' '1' from which side of the proceeding woman, the first man approached them although the learned judge said that the male persons appeared from behind them. In those circumstances, it is impossible to say that the way in which at least one of them, approached them, was capable of giving ample opportunity for the woman to see and to recognise at least one of them. In other words, it is difficult to say that in the light of the light they had, the two women were in a position to identify at least one of them. The incident was not immediately reported. The complainant said that she was too afraid to do so. I may be inclined to give her benefit of doubt but I do not understand why the learned judge did not report the incident. It is not clear how the alleged incident was reported. These matters seem to cloud the credibility of two witnesses who were, in any case, close friends. Surely if they were certain that one of them was the appellant and who was known to them at the time, one of them would have taken up the matter with the Police authorities. The delay tends to lend weight to the possibility that the women did not or could not have seen any of the alleged male crooks. The complainant was not medically examined, at any time. It was not explained why it was not done. If she had been examined, even on the second or third day, the medical officer would, probably, have been in a position to discover if there were any injuries to the region of the private parts of the complainant. The omission to have the complainant medically examined in the circumstances of these facts, is suspect. If she was 'done' against her consent what better evidence than medical report would have been to support the complainant's claim that three male persons, one after the other, had sexual intercourse with her against her consent. And by the way, the two women were not in any danger. It was alleged that the complainant was the wife of a school teacher and was a wife of a priest. If so, either the women or their husbands would have appreciated the importance of ascertaining the facts through medical examination. According to the evidence, the two women or at least one of them, began by demanding money from the complainant and this would tend to show that the three people, or at least one of them, had formed intent to rob and not to rape the complainant. It was only the complainant who said that after they misused the money they wanted they began to mishandle her and raped her. Her evidence is not impossible. It is not uncommon for criminals to switch out of one type of offence and end up by committing another after a change of attitude. Therefore, I am only sure that the three were out to rob the complainant because of the fact that she heard one of them say so but upon her return, at a distance of about 35 paces away she claimed that the men ran away. And lastly the appellant was arrested on the 17th of March 1972 when the incident took place. On the 11th of March 1972 both women claimed that they knew the appellant for not less than 2 months although they did not know his name. And yet there was no move to arrest him before that date when he was still in the village or township where the incident took place. Having regard to all these matters, and with due respect to the learned trial magistrate, I cannot say that the charge was indeed proved.

round reasonable doubt. The conviction cannot, therefore, be upheld.

- The learned State- Attorney General neither supported nor relied to support this conviction. Ordinarily, the conviction is quashed and the sentence imposed set aside. The appellant should be released forth with unless otherwise lawfully held. - delivered in Court. on the 31st day of May 1973;; 319th May 1913. - ZN LK r miA thittliba1 - foi Raphlib

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