671 Kamè, J. 671

IN THE SUPREME COURT OF PAPUA NEW GUINEA

CORAM : FROST, S.P.J.
Thursday,
17th February, 1972

THE QUEEN v. MAMA KAMZO

1972

Feb.14,15, 17.

PORT MORESBY

Frost,SPJ.

The accused man, Mama Kamzo, is charged upon indictment that, under Section 208 of the Criminal Code, on 21st October, 1971, he permitted a man called Debozina to have carnal knowledge of him against the order of nature.

Debozina was the "boss-boi" on a rubber plantation in the Central District of Papua and the accused, a much younger man, a labourer from the Highlands. It is undisputed that Debozina, shortly before mid-day on the day in question, went to the part of the plantation where the accused was working, found that he had failed to cut and tap one of the rubber trees, a matter, apparently, of some importance, for the trees were all noted on the plantation records, he then upbraided the accused for neglecting his duty, and the act alleged then took place between the two men. Debozina swore in evidence that the prisoner was the instigating party, but because of my assessment of him as a witness I do not accept this evidence. On the next day it is important to note that when questioned by Sub-Inspector Tali and asked why he allowed the act to be done upon him, the accused said that he was afraid that Debozina would report him to the manager of the plantation. The other relevant evidence consists of a similar account by the accused man in a record of interview taken on 22nd October, 1971 by Constable Micah Thomas at the Boroko Police Station. The accused's story was that Debozina made the approach, but he admitted that he did not go away from Debozina. He was asked did he agree to what Debozina had done to him and he answered "No". He was further asked, "Why did you permit him to have carnal knowledge with you?" and he answered "I was frightened because he got a knife with him and in my opinion if I refused to permit him he

might harm me with the knife". But the accused admitted that Debozina did not say he would use the knife, there was no struggle, he merely stood still and let Debozina have his way. There is no reason to doubt that Debozina did have a knife, for a pocket knife was found in his shorts immediately after the incident.

No evidence was called on behalf of the accused.

The learned Crown Prosecutor submitted that the word "permit" under s.208 of the Code is to be given the meaning, according to the Oxford Dictionary, of "allow, suffer, give leave, not prevent", which was the meaning given to the word "permit" as used in the Victorian Road Transport Regulation Act, s.39(1)(c), by Herring, C.J. in Broadhurst v. Larkin (1).

The learned Prosecutor's submission was that once the evidence supports the conclusion that the accused man did permit the act to be done within that meaning of the word, the only defence which could be said to be raised on the facts of this case is the defence of compulsion under s.31(4) of the Code, which provides that a person is not criminally responsible for an act or omission, if he does or omits to do the act under any of the following circumstances, viz - when he does or omits to do the act in order to save himself from immediate death or grievous bodily harm threatened to be inflicted upon him by some person actually present and in a position to execute the threats, and believing himself to be unable otherwise to escape the carrying of the threats into execution. The learned Prosecutor then submitted that having regard to the fact that the knife was found in Debozina's shorts, the absence of any threat by Debozina to use it, and the fact that the accused could easily have run away from Debozina, the Court should be satisfied beyond reasonable doubt that that defence has been excluded.

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(1) (1954) V.L.R. 541 at 544

Mr. O'Neill submitted that the word "permit" should be given the meaning of consent, so that it was not necessary for the accused to go so far as to raise a defence under s.31(4) (supra). He relied upon a passage from the judgment of Dixon, J. (as he then was) in Proudman v. Dayman (2). In that case it was held that on a charge under s.30 of the Road Traffic Act of South Australia to permit an unlicensed person to drive a motor vehicle on a road, proof that the defendant knew that the driver was unlicensed was necessary. Upon an application of special leave to appeal against the conviction, the applicant's contention, His Honour stated, was "based upon the ground that the very idea of permission connotes knowledge of or advertance to the act or thing permitted. In other words, you cannot permit without consenting and consent involves a consciousness or understanding of the act or conduct to which it is directed. Be it so," It thus appears that His Honour accepted that part of the submission as sound, but it was held that it was inapplicable upon the actual terms of the legislation.

The other authority relied upon by Mr. O'Neill is the case of Dimes (3). That was a case in which the appellant, who upon indictment was accused of the rape of his sister, was found guilty of incest, and the question was whether the prosecutrix was a consenting party so as to make her an accomplice, with the consequence that her evidence was required to be corroborated. It was held that it was not necessarily implied from the verdict that the prosecutrix was a consenting party so as to make her an accomplice. The passage of the judgment upon which reliance is placed in this Court is as follows, "The jury found that there was not sufficient evidence that she was raped, but they did not find that she with consent permitted the appellant to have carnal knowledge of her. We do not agree with Mr. Leycester that the mere oath of the prosecutrix that she resisted to the best of her strength prevents her from being an accomplice. It was open to the jury to believe that she offered some resistance and eventually submitted, without consenting in the sense of acting of her own free will. There is a distinction between submission and permission". (page 46). This statement of the law is more relevant to the facts of the present case. It carries great weight as it was delivered by Hamilton, J., who later became Lord Sumner.

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(2) (1943) 67 C.L.R. 536

(3) (1911-12) 7 Cr. App. R. 43

In my opinion the word "permit" in s.208 of the Code should be similarly interpreted as connoting consent as defined by the two eminent judges in the cases cited. Thus it is not sufficient for the Crown to establish beyond reasonable doubt, merely that the accused man allowed or suffered, or did not prevent the act being committed upon him; the Crown must go further and show that there was permission in the sense that the accused consented in the sense of acting of his own free will. If the Court is left in doubt that there was no more than submission on the part of the accused man then the charge is not made out.

Normally when the accused man does not give evidence the Court is slow to act upon matters of exculpation which are referred to in a previous statement made by him which is admitted in evidence. However, there is no dispute that Debozina was the "boss-boi", that the accused was a much younger man, and that Debozina had discovered the accused in a neglect of duty, so that it would be natural for the accused man to be afraid that he would be reported to the manager and thus get into trouble. I am not impressed by the submission that the accused might have been afraid of personal violence but in all the circumstances of this case I am left in doubt whether the accused man did more than submit to the act done by Debozina, and accordingly, in my judgment, he is entitled to an acquittal.

Solicitor for the Accused - W.A. Lalor, Public Solicitor

Solicitor for the Crown - P.J. Clay, Crown Solicitor