CIV/A/2/80

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

LIKA MAMOOE — Appellant

v

TSOKOLO MOKONE — Respondent

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice T.S. Cotran on the 31st day of May, 1983

This is an appeal from the Judgment of the Judicial Commissioner who allowed the appeal from the Judgment of the Matsieng Central Court which allowed the appeal and absolved the original defendant (the appellant before me) from the instance (for reasons which are both childish and legally unsound) and restored the Judgment of the Matala Local Court that found in favour of the original plaintiff (and respondent before me) awarding him 6 heads of cattle or M240 for the seduction of his daughter Sefora Mokone by the son of the defendant(and appellant before me) Lika Mamooe.

For convenience I shall refer to the parties as they appear in the Court a quo.

The evidence for the plaintiff before the Court consisted of that of the girl Sefora, her mother Makhanyapa Moseli, and one Litaba Moree, a person who does not appear to be related to the parties. The evidence for the defendant came only from him and his son Mamooe Mamooe. The plaintiff and defendant each conducted his own case (very usual this) but each made a statement, the defendant after having been warned. The plaintiff was apparently not. I do not think much can be made of the latter irregularity.

The evidence in chief of the main witness Sefora was

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quite short and lacked the details that one would like to see in cases of this nature but from the cross examination and questions by the President of the Court it emerged that Sefora was seduced by Mamooe after a "strall in the mountains" but did not tell her parents about this seduction until she found herself pregnant with child. She then informed them that Mamooe Mamooe was the boy responsible for her condition. She eventually gave birth to a child. Mamooe Mamooe denied that he impregnated Sefora. He and his father tried to foist the pregnancy on another boy. So as far as direct evidence goes there is only the word of one person against the word of the other.

Mr. Sello contended, and I think it is generally agreed, that amongst humble people in rural areas, the normal procedure for settling a matter of this nature, would be for the parents of the girl to go and see (or to send messengers to) the parents of the boy to inform them what their daughter says. The parents of the boy would invariably answer (either at a meeting or by messenger) that they would ask their son about the allegations. If the son accepts responsibility the matter may end up either by payment of compensation to the parents of the girl, or a marriage is arranged if the son is agreeable to it. The compensation for the seduction (usually 6 heads of cattle) will then be merged or deducted from the bohali, usually anything between 10 - 20 heads depending on the agreement.

It is common cause, I think, that what transpires in the meeting or meetings (if evidence thereon is forthcoming) may throw light on the solution of the problems. The first problem arises when the boy denies either intercourse or responsibility for the girl's pregnancy. A "confrontation" is often then arranged (the parents will be told of the details and both take stock of their respective positions) and it is not unusual in those cases when the child is not yet born to await its birth and then call in "knowledgeable" people to come and pronounce on the existance or otherwise of resemblance to the alleged father. The Courts have held that these "opinions" are unreliable and the evidence of such "experts" if I may use the word, worthless. As a general proposition this makes sense except where a child is born from an alleged association of different ethnic groups. In

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a case before Mofokeng J many years ago a Mosotho married lady alleged that the person responsible for her pregnancy was an Indian gentleman. He denied it. The husband of the Mosotho lady killed the gentleman before she gave birth to the child. At the trial of her husband in the High Court which took place after the child's birth, the latter was produced as an exhibit before the learned Judge for him to see that the child had unmistakable Indian features thus confirming the wife's allegation, negativing the denial of the deceased Indian gentleman of responsibly for the pregnancy, and establishing one factor, amongst others, (including heat of passion) that operated in the Judge's finding that extenuating circumstances exist (R. v. Sepanya - CRI/T/17/77 dated 31st May 1977 - unreported).

The task of the judge at first instance is both difficult and unenviable in Lesotho as elsewhere in these instances but it is, in my view, quite wrong for an appellate court to interfere with findings on credibility. This is the sum total of what the Judicial Commissioner's judgment, now appealed from, is all about. Mr. Sello for the appellant submits there are good grounds for upsetting it, foremost amongst these, if I may paraphrase the argument as I understand it, is the fact that the trial Court made an adverse finding of credibility only with regard to the evidence of the boy. When it found it contradictory and unsatisfactory, the Court concluded automatically that the evidence of the girl was truthful. Mr. Sello argues that the onus of proof was on the plaintiff, the defendant bore no onus. What the Judicial Commissioner did was to read the record of the lower court and come to his own conclusion on credibility of the plaintiff's witnesses unsupported by any finding to this effect. Mr. Sello then pointed out to several discrepancies (and these appear in the heads of argument) in the evidence of the witnesses of the plaintiff from which discrepancies only one thing could emerge, viz, that there was only one meeting between the parents from the inception in which not only did the boy disclaim responsibility but also that his father could not have admitted his son's responsibility by agreeing to pay compensation which formed the only piece of evidence, corroborating, if I may use the word loosely, the evidence of the girl. The trial court was aware of this because it made reference (at p.8 line 8) that "the respondent's witnesses

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said there was a misunderstanding "from the beginning" hence the suggestion that the baby's birth be awaited to see if some resemblance exists, and so no reliance could be placed on anything allegedly said at that meeting if there was a misunderstanding.

The Judgment of the trial court was based on the evidence of the boy and the girl respectively. The President's view seems to have been that acts of intercourse do not take place in public (he was quite right of course) and he "need not refer to the evidence of other witnesses who do not know anything about the impregnation (I think he meant intercourse when where and how it had occurred) except in passing". He did not make reference to either Makhanyapa the girl's mother or Litaba Moree. In this he was wrong but the law as regards seduction, customary as well as civil, as I understand it, is that "corroboration" is not required. What is required is that the trier of facts should be on guard and look for some indices not based necessarily on legal concepts or scientific articulation of legal principles but on the Local and Central Courts presidents knowledge of the society in which they were born and bred and their own common sense and experience of cases of this nature. The President in the Court a quo perhaps was going somewhat further than Mr.Justice Van Der Heever's views on the subject in his book entitled "Breach of Promise and Seduction in South African Law" published by Juta's in 1954. After reviewing the history of the action in Roman Dutch, English and South African law, the Judge offered the following critique to some of the cases where judges elevated a rule of caution (to look for evidence aliunde to enable them to pronounce for the plaintiff) to a rule of law : He wrote at page 55 :

> "Let us examine judicial reasoning in the application of the alleged rule: 'After hearing the evidence, and with a full sense of the very serious nature of the case, not only to the plaintiff herself, but to the defendant and his family, I have no hesitation in accepting the evidence of the plaintiff... I am quite alive to the possibility of a designing woman inventing a great number of details, but I do not think we have a case of that nature here, and I have come to the conclusion that, while I must accept her evidence, I have very great difficulty in accepting the evidence of the defendant.

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In the name of common sense that should be anough. The court is mindful of the onus resting on plaintiff and accumulated experience has shown that an embarrassed woman might readily seek to father her child upon an innocent man. If nevertheless and giving due weight to these considerations the court is convinced of the truth of her allegations and of the falseness of defendant's denials, it would be artificial to order absolution from the instance."

The learned Judge author added :

"If after both parties and their witnesses have been examined and cross-examined under oath a judge who is fully convinced of the truth of plaintiff's allegation is so lacking in astuteness that in the whole complex of surrounding, circumstances he cannot find and formulate a few considerations which are'in some degree' consistent with plaintiff's story and inconsistent with the innocence of the defendant, he would probably never have attained to the Bench. Moreover he would fail to do justice. If it is contended that the corroborating factors must be aliunde in the sense that they must be sought outside those which have a bearing merely upon the credibility of the parties, then the rule is arbitrary and based on no principle at all. Seduction is usually committed in private. Whether or not there are facts extraneous to the conduct of the parties which support the testimony of one, would be a fortuitous circumstance. The alleged rule is so artificial and casuistical that it is no safeguard against chicanery."

I adopted the same approach in Nthabiseng Mpheulane v Lesoli (CIV/T/55/81 dated 24th November 1981 - unreported) in which I cited examples of how some Judges dealt with the problem of mutually destructive versions. In Van der Merwe v Nel 1929 TPD 551 De Waal JP found for the plf because he believed the defendant "had told lies", i.e. exactly what the learned president in the lower court has found. In L. v M. 1911 TPD 946 Wessells and Curlewiss JJ thought (headnote) that "the way in which they (the parties) gave evidence may provide a clue to the truth".

I do not therefore see anything wrong in the Judicial Commissioner perusing the trial court's record to see if there is in it any evidence, not mentioned by the President a quo in his judgment, which is "in some way" consistent with the plaintiff's

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story. This surely can be found in the evidence of Litaba Moree who swore that defendant had conceded (at any rate initially) in his presence, his son's responsibility and agreed to pay. His exclamation (on being cross-examined by defendant) "I am only surprised to see you here" can mean only one thing, viz, that he was surprised the defendant had reneged on his previous stance and had decided to defend.

For reasons which I have endeavoured to state I am unable to interfere with the Judicial Commissioner's Judgment and the appeal is accordingly dismissed with costs.

T. S. Cotran

CHIEF JUSTICE
31st May 1983

For Appellant : Mr. Sello
For Respondent: Mr. Gwentshe