

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

AUPA KALI                      Appellant

v

REX                              Respondent

J U D G M E N T

Delivered by the Hon. Acting Chief Justice, Mr. Justice  
M.P. Mofokeng on the 15th day of August 1983

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The appellant Aupa Kali, aged 22 years of age, was charged with the offence of rape it being alleged that upon or about the 11th day of July 1982 and at or near Thabaneng in the district of Mafeteng he wrongfully unlawfully and intentionally had unlawful sexual intercourse with one 'Matebalo Tsemame, (hereinafter referred to as the complainant). He pleaded not guilty to the charge but was found guilty and was sentenced to 18 months imprisonment plus six strokes. The appellant appealed to this Court on the following grounds .

- "(1) the judgment is against the weight of evidence and is unsupported thereby;
- (2) Magistrate erred in rejecting Doctor's evidence without giving strong reasons therefore;
- (3) Magistrate erred in giving credibility to (the) unsupported evidence of the complainant;
- (4) Magistrate erred in rejecting accused's story which could have been reasonably true;
- (5) If the court had not therefore misdirected itself on the evidence of the complainant, the court would have found that the Crown had not proved its case beyond reasonable doubt."

The evidence was briefly to the effect that the complainant had attended a function called a Disco and it was

/during

during the said dance that the accused made some sexual approaches or innuendoes to her. She, together with others left (and this is not clear whether it was towards morning or midnight as the evidence of the Crown witnesses is conflicting). She was going to her in-laws' place and she is apparently newly married to her husband being one of the many Basotho men employed in the Republic of South Africa. When she passed near the place where tractors are kept somebody called her name from behind. Nevertheless/<sup>she</sup>did not stop but continued to walk. Then somebody caught hold of her and she tried to free herself in the manner that women will do. It emerges from the evidence of the Crown witnesses who were with her that the expression they used indicated that they thought these two people were lovers, i.e. the manner in which the whole episode was carried out. It is from this point that we heard the word of the complainant against that of the accused.

The complainant deposes that the accused then assaulted her by kicking her, beating her with fists on the face and throwing her on to the ground and forcefully having sexual intercourse with her. It was during the cross-examination of the complainant that the defence counsel made a startling admission which he said the accused would make, namely, that the accused would say he did have intercourse with the complainant but it was not at the spot as described by the complainant but near the St. John's Church. However, the complainant says the place where the sexual intercourse took place was near the home of some person known to her. As she puts it "next to Malejane's home". She tried to scream, shout but nobody came out and the accused having satisfied his lust, got up and promised her that he was going to spend the whole night with her. He dragged her a distance of about  $3\frac{1}{2}$  miles away to his home, she was struggling all along and when they got to the place where the accused slept they found a man sleeping in the kitchen. This man asked the accused with whom he was and the accused replied rather cheekily, "Whom did you want me to bring?" It was at this time that the accused passed on to another room and left the complainant in the kitchen warming herself next to the stove.

/Accused

Accused then came and dragged the complainant into the bedroom where apparently he had intercourse with her and later, whilst the accused had fallen asleep, she managed to escape and made report to various people and reported the matter to the Police Station where she was accompanied by a policewoman to her home just to change her clothes and not to wash and went for medical examination. This must have been in the morning because there is evidence that she was accommodated elsewhere after her escape except to solicit help.

The doctor who gave the evidence had this to say in her report: the laboratory findings, there were no sperms found in the vagina; smears, there was no evidence of recent intercourse; uterus was not of the pregnant woman; there was some blood discharge the cause of the blood could have been infection or the doctor's examination as she says this was not a menstrual blood and she says sperms can remain in the vagina for forty hours if the victim does not wash herself. There was no cross-examination of the doctor whatever.

It is trite law that in cases of this nature the Court has to be extremely careful before it can convict an accused person. It is quite obvious from the reading of the record that the learned Magistrate did not warn himself against the danger of convicting in such cases. As was said by Watermeyer in Rex v W, 1949(3) SA 772 at 780 :

"In rape cases, for instance, the established and proper practice is not to require that the complainant's evidence be corroborated before a conviction is competent. But what is required is that the trier of fact should have clearly in mind that these cases of sexual assaults require special treatment, that charges of the kind are generally difficult to disprove, and that various considerations may lead to their being falsely laid".

and some of these considerations were stated by Schreiner, J.A. in R. v Rautenbach, 1949(1) SA 135 at 144-145 at 143 :

/"It is

"It is not only the risk of conscious fabrication that must be guarded against, there is also the danger that a frightened woman especially if inclined to hysteria, may imagine things that happened which did not happen".

It is strange that nobody came out of the house a few paces from where the first sexual intercourse is alleged to have taken place. It is also strange that the complainant did not appeal to this man whom she found in the kitchen that here is the accused assaulting her and appeal for a help. She did nothing of the sort.

There is also the doctor's evidence that there were no signs of any recent intercourse having taken place. It is not improbable therefore, that there was a love affair as the appellant suggested in his evidence and the complainant, hearing that there would be questions asked in the morning either by her in-laws or her husband, thought of the story to either of them. It is instructive that it has repeatedly been stated that the position of the complainant in rape cases should be carefully scrutinized, almost on the same par as that of an accomplice. It should be approached, as I said earlier, with the greatest caution and this I find lacking in the judicial officer's approach.

The appellant's story was quite simple. It was that he hired a vehicle wherein the complainant was conveyed to his home in accordance with the agreement and there they were going to have sex. At first the complainant told him that she was having her menstrual period but he did not believe the story and when he got home she insisted that she did and no intercourse took place. He was rather embarrassed by the admission made by his counsel and when he was asked why his counsel had made such he said, well he said his counsel sucked that from his (counsel's) own thumb literally.

Anyway, the explanation which the appellant gave, and if the proper test be applied, can it reasonably possibly be true and if it can reasonably possibly be true that is the

test it has to satisfy and in the circumstances it has satisfied that test.

In my view the appellant did not commit the crime of rape. There is however, undisputed evidence of assault on the complainant. Her word in this respect is corroborated by that of the doctor. The appellant ought to have been found guilty of assault common by the Court a quo. It is a competent verdict on a charge of rape. It is accordingly so ordered.

The appellant is sentenced to pay a fine of R25.00 or in default of payment to undergo imprisonment for a period of twenty-five (25) days from the date of this Judgment.

*M. M. M. M. M.*

ACTING CHIEF JUSTICE  
15th August, 1983

For Appellant : Mr. T.Mda  
For Respondent: Mrs. Bosiu