

IN THE HIGH COURT OF LESOTHO

In the Application of :

KHETHISA MANAMA MOLAPO

Applicant

V

THE DIRECTOR OF PUBLIC PROSECUTIONS Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 15th October, 1984.

On 17th June, 1983 the Applicant was convicted of rape and sentenced to 2 years' imprisonment by the Resident Magistrate of Leribe. He appealed to the High Court against both his conviction and sentence. The appeal was however, dismissed on 6th August, 1984. The applicant has now filed an application in which he seeks an order of this Court granting him leave to appeal to the Court of Appeal, admitting him to bail pending the outcome of his appeal and/or alternative relief.

In his founding affidavit the applicant avers, inter alia, that there are reasonable prospects of success in his appeal. The Court of Appeal may take a different view from the High Court and uphold the appeal. The Director of Public Prosecutions opposes the application, and avers in his answering

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affidavit, that the appeal has no prospects of success. It is unlikely, therefore, that the Court of Appeal will interfere with the decision of the High Court.

The detailed facts of this case are contained in my judgment in CRI/A/72/83 dated 10th October, 1984 and I do not propose to go over them again. Suffice it to say the trial magistrate before whom all witnesses appeared and testified accepted complainant's corroborated evidence that before the applicant had sexual intercourse with her she was physically assaulted and injured. The magistrate accepted her evidence that complainant did not consent to sexual intercourse but for fear of sustaining further injuries decided to submit and offer no resistance. That could not be construed as consent.

It is worth noting that at his Criminal trial the applicant was charged together with two other persons who, according to complainant's evidence, also had sexual intercourse with her without her consent. Applicant's co-accused were however acquitted and discharged at the end of the trial. It was contended in argument that that was an indication that the trial magistrate regarded the complainant as an unreliable witness whose evidence should not, therefore, have been accepted on other aspects, particularly that she had not consented to sexual intercourse with the applicant. I was unable to agree with that argument for it was clear from his judgment that the trial magistrate took the view that in order that a conviction on a charge of rape

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might be sustained it was necessary that complainant's evidence should be corroborated. That did not mean that even where it had been corroborated complainant's evidence could not be accepted and used to sustain a conviction.

It was further argued that complainant's story that she did not consent to sexual intercourse with the applicant was inconsistent with undisputed fact that applicant had undressed to have sex with her. A rapist would never undress for fear of being caught in his unlawful act, so the argument went.

It should, however, not be forgotten that, according to the evidence accepted by the trial Court, after she had been physically assaulted and injured complainant decided to submit and offer no resistance to sexual intercourse for fear of her life. If for the reason she had advanced the complainant was submitting and offering no resistance to sexual intercourse I find nothing unreasonable in that the applicant could have relaxed and undressed to have sexual intercourse with her.

In my view there are no prospects of success in the appeal and for that reason I have no alternative but to refuse leave for further appeal. It follows that the application to admit the applicant on bail pending the outcome of his appeal to the Court of Appeal

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must likewise be refused and I accordingly order.



J U D G E.

15th October, 1984.

For the Appellant : Mr. Unterhaultner

For the Respondent : Mrs. Bosiu