

IN THE HIGH COURT OF LESOTHO

In the Matter of

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SECHABA MATHOKA

Appellant

v

R E X

Respondent

REASONS FOR JUDGMENT

Filed by the Hon. Acting Mr. Justice  
J.L. Kheola on the 28th day of December, 1984.

On the 22nd October, 1984, I dismissed the appeal and intimated that my reasons for judgment would follow later. These now follow.

The appellant appeared before the former Resident Magistrate for the district of Mophale's Hoek charged with contravening section 3(1) of Proclamation No. 60 of 1959 as amended, in that from the 19th day of September, 1977 and at or near Taung in the district of Mophale's Hoek the accused, being a person legally liable to maintain Lillo Masienyane, born of him and Moselantja Masienyane, failed to provide the said Lillo with adequate food, clothing and medical aid while able to do so. The appellant was found guilty as charged and was sentenced to pay a fine of R100 or 6 months' imprisonment in default of payment of the fine. The sentence was suspended for 3 years on condition that the appellant is not convicted of any offence under Proclamation 60 of 1959 as amended by Order 29 of 1971.

In addition he was ordered to pay R30.00 every month towards the maintenance of the child, Lillo Masienyane, till she reaches the age of 18 years, payment is to be made to the Clerk of Court, Mophale's Hoek on or before the

2/ last working day .....

last working day of each month and which payment is to start from the end of June, 1982. The appellant is now appealing against such conviction and sentence.

P.W.1 is Adelina Marake. She is the sister of the complainant. Her evidence is to the effect that one day she was in Mafeteng and carrying Lillo Masienyane in her arms. Lillo was not happy because he was ill. When the complainant and the accused came to her, the latter asked why his child was not happy. The complainant explained to him that the child was not well and that she did not have the money to pay for medical treatment of the child. The accused instructed the complainant to take the child to Dr. G.S. Mohale whose surgery is at the Mafeteng bus stop. He explained that although he did not have money Dr. Mohale was a friend of his and would allow him to pay later. The child was taken to the surgery by the complainant accompanied by the accused. She said that the child was born on the 9th September, 1977.

P.W.2 is Julius Sentje Ntsane. In September, 1976 he was working as a bus conductor of one of the buses of the Lesotho National Bus Service. The driver of the bus in which he worked was the accused. He first met the complainant in September, 1976 when the accused introduced her as the girl he intended to marry. In December, 1976 he and accused were working together in a bus that was supposed to operate between Mohale's Hoek, Mpharane and 'Masemousu. One day before the bus left for 'Masemousu' he accused requested him that as he had a visitor that day he (the witness) should remain at his home at Ntjepeleng so that the accused could be alone with his visitor (the complainant). P.W.2 asked the accused why he wanted to be alone with the complainant who appeared to be only a girl. The accused said that the complainant was his wife and that they had already agreed to marry each other. He agreed to the request and when the bus came to Ntjepeleng he alighted leaving accused with the complainant. On the following day he boarded the bus at Ntjepeleng and found the complainant

3/ in the company .....

in the company of the accused. When the bus arrived at Mohale's Hoek, the accused escorted the complainant to a bus from Quthing to Maserú. P.W.2 explained that at 'Masemousu there is only one room used by the staff of the Lesotho National Bus Service.

On the second occasion, P.W.2 saw the complainant in the company of the accused. They all went to Quthing in a bus driven by the accused. When they arrived at Quthing, the accused and the complainant slept in the same room while he (P.W.2) had to sleep in another room with other employees of the Corporation. On the third occasion the complainant joined them at the Maseru bus stop and travelled to Quthing with the accused. On arrival in Quthing, the complainant and the accused slept in the same room. The normal practice was that he used to sleep in the same room with the accused but on the two occasions the accused requested him to sleep in another room so that he could have a chance to be alone with the complainant to whom he referred as his wife. In 1977 the accused came to him and told him that he had impregnated the complainant and that he (P.W.2) should help him in the denial of the charge. He refused to do so and actually gave evidence in favour of the complainant at Tsoloane Local Court in which the mother of the complainant claimed six (6) head of cattle or R600-00 compensation for seduction of her daughter. The plaintiff won the case (See Exh A).

Under cross-examination, P.W.2 denied that he was in love with the complainant, he also denied that on the occasion they went to 'Masemousu the complainant remained at Ntjepeleng with him. He also denied that at one time he said the complainant was in love with Tsolo Lisene.

P.W.3 is Moselantja Masienyane, the complainant. Her evidence is that she fell in love with the accused in 1976. On the 6th December, 1976 the accused invited her to go to 'Masemousu with him. Arrangements were made that P.W. 2 should remain at his home at Ntjepeleng so that the accused and complainant could have the chance to sleep together. When P.W.2 asked the accused what would happen if she became pregnant, accused said he had decided to

4/marry her .....

marry her. When they arrived at 'Masemousu she slept with the accused in the same room as man and wife and they had sexual intercourse that night. On the second and third occasions she had sexual intercourse with the accused at Quthing. She confirms that the accused asked P.W.2 to sleep in another room so that he (accused) could be alone with her. About a month after she had had sexual intercourse with the accused she did not menstruate and informed the accused that she was pregnant. He expressed surprise and disbelief because on the occasions he had sexual intercourse with her he had taken some pills. After they had agreed that she should be examined by Dr. Maitin to ascertain whether she was pregnant or not, the accused suggested that she must have an abortion as he had some problems. He had seduced one girl at Morija and her parents insisted that he must marry that girl. The accused threatened to deny paternity of the child if she refused to have an abortion. They parted. She refused to have an abortion.

In March, 1977, she was already pregnant when the accused again invited her to Quthing and they again had sexual intercourse. She totally refused to have an abortion. After the child was born, the accused took the child to Dr. Mohale when it was not well. She handed in a card or receipt with the letterheads of Dr. G.S. Mohale. It is dated 17th July, 1978 and showing R3.00 and the name of the accused and the signature of Dr. Mohale. On the other side there is the name Lillo. It is Exhibit A. She said that Exhibit A was issued by Dr. Mohale on the day the accused had taken the child to him for medical examination.

Under cross-examination the complainant explained that at the time she got pregnant, her mother was working in Bloemfontein. She reported to her elder sister that the accused had impregnated her but she hid her mother's address because she was ashamed of her pregnancy. Her mother came home during the Easter holidays in 1977 and a report was made to her. She sent complainant's aunt, 'Masepinko Ralefifi, to inform the parents of the appellant

5/ of the seduction .....

of the seduction of her daughter. 'Masepinkı went to Motimpose where she met the mother of the accused who was insane at the time. The accused denied that he was responsible for her pregnancy.

The first defence witness is Rasera Sera. His evidence was that in 1977 and 1978 he was the chief's counsellor at Motimpose and that during that period P.W.4 'Masepinkı Ralefifi never came to him and complained that the accused had seduced the complainant. He later admitted that during 1977 and 1978 he was in prison and did no administrative duties at Motimpose. His evidence is totally irrelevant to these proceedings.

The accused gave evidence and totally denied that he ever had sexual intercourse with the complainant. On the occasion they went to 'Masemousu, the complainant and P.W.2 alighted from the bus at Ntjepeleng and spent the night together. He picked them up on the following morning. On the occasion the complainant accompanied them to Outhing, she slept in a different room and he never had sexual intercourse with her. He denies that he ever took the child to Dr. Mohale for medical examination.

The learned Resident Magistrate who saw the witnesses believed the Crown witnesses and rejected the denial of the accused. In his grounds of appeal, Mr. Mda who appeared for the appellant at the trial based the appeal on the ground that the accused gave a reasonably true explanation or version, and the Honourable Court could not reasonably hold that accused's story was not reasonably true. He referred me to the cases of Rex v. due Plessis, 1924 T.P.D. 103 at p.124, Rex v. Difford, 1937 A.D. 370 at p. 373 and Mphonyane Leboqo v. Rex, 1981 (1) L.L.R. 163. I think the learned Resident Magistrate was right in rejecting the story of the accused because it seems to me that it was not only improbable but false beyond reasonable doubt. Take one example of the lies accused told: he said the reason why the complainant went with him to Outhing was because when they arrived at 'Malintja bus stop the complainant was the only passenger in the bus and she was the only one to alight there.

6/ She then asked .....

She then asked the accused to take her to Mohale's Hoek because it was dark and she was afraid of walking alone to her parents' home which was far away. Immediately after saying the complainant was the only passenger when the bus arrived at Malintja bus stop, the accused says from 'Malintja bus stop I went on with P.W.3 and other passengers. If the accused was not lying when he said the complainant was the only passenger, where did the other passengers suddenly appear?

The accused then agreed to take the complainant to Mohale's Hoek which is the home town of the complainant. When they arrived there, she again requested him to take her to Quthing because the people were already in bed and it was dark. I find this story to be most improbable that the complainant could pass her own town and elect to go and sleep with strangers about 50 miles from her home town. She must have known several people in Mohale's Hoek and the accused who appears to have been so kind to the complainant would have taken her in his bus to the home of a person she knew. The truth is that the bus arrived at Mohale's Hoek at broad daylight and the accused decided to take his girl friend to have a nice time with her.

Mr. Mda has argued that assuming that P.W.2 had an interest in the matter and that his evidence was possibly in nature of accomplice evidence, his own evidence required corroboration implicating the accused, on the crucial issue. I entirely disagree with him on this point. I do not see how P.W.2 can possibly be regarded as an accomplice in this case. The charge against the accused is failure to maintain his child in contravention of section 3(1) of Proclamation No. 60 of 1959 as amended. I do not see any circumstances under which P.W.2 could be charged with the same offence.

It is also argued that there was considerable delay in bringing the matter to the family of the appellant although their address was known at all material times.

7/ We are .....

We are here not concerned with what action the parents of the complainant took to recover their compensation for seduction, but we are dealing with what action the complainant took when she realized that she was pregnant. She informed the accused immediately she missed her menstruation in December, 1976. The accused suggested an abortion which she rejected outright. Even on the side of the parents, I do not agree that there was a long delay. A delay of three months does not appear to be too long especially when it is remembered that the mother of the complainant became aware of her pregnancy in March, 1977 when she came home. She immediately approached the parents of the appellant. The subsequent delay to take the case to a court of law is neither here nor there because we know that the mother of the complainant lived and worked in Bloemfontein.

Mr. Pheko for the appellant referred me to a recent decision of the Court of Appeal in Robert Potlane Ntle v. Khubelu Khaketla, C. of A. (CIV) No. 3 of 1983 where Goldin, J.A. said :

"Fourthly, if it is established, however, that such an illegitimate child who belongs to the mother's family is without adequate means of support because the mother's guardian, or whoever is responsible for his maintenance under customary law, is unable, or cannot be compelled, to support such child, then the mother and father of the child become liable for its maintenance. It would obviously be repugnant to justice or morality to leave a child without adequate provision for its maintenance (cf R. v. Rantsane, supra, p. 286 and Nkoko v. Nkoko, 1967 - 70 L.L.R. 328).

Mr. Pheko has submitted that in the present case there was no evidence that the mother's family were unable to maintain the child. I disagree with this contention because on the occasion, the child was ill, the mother did not have the money to pay for its medical examination and that was the reason why the accused had to go to Dr. Mohale and an agreement was made that he would pay later. It is clear that the mother's family were unable to maintain the child. The fact that the grandmother of the child found it necessary to leave her home and children to go and work in the Republic

of South Africa proves clearly that she could not make ends meet. I am of the view that this is a proper case where the common law should be enforced because those responsible under the customary law are unable to support the child adequately. Although there was no evidence as to the whereabouts of the father of the complainant, it is clear that he does not come into the picture at all as far as the family affairs are concerned. The mother seems to be the sole head of the family and no male member of the family was ever mentioned in the trial as well as the civil case at Tsoloane Local Court.

For the reasons stated above I found no valid grounds to disturb the finding of the trial court. The appeal was dismissed.

The appellant is liable to pay the maintenance ordered by the Resident Magistrate with effect from the date of the judgment of the learned Resident Magistrate.

*J.L. Kheola*  
J.L. KHEOLA,  
ACTING JUDGE.

28th December, 1984.

For Appellant : Mr. Pheko  
For Crown : Miss Nku.