CRI/A/98/83

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

ISHMAEL MOHLOTSANE

V

R E X

J U D G M E N T

Delivered by the Hon. Acting Mr. Justice
J.L. Kheola on the 29th May, 1984.

The appellant appeared before the Resident Magistrate of Leribe charged with rape, in that on the 12th day of July, 1983 at or near Ha Nyenye in the district of Leribe the accused wrongfully and unlawfully and intentionally had unlawful sexual intercourse with 'Matumane Mahlatsi, a Mosotho female, without her consent.

The appellant pleaded not guilty but he was found guilty as charged and sentenced to four years' imprisonment. He now appeals on the following grounds:

1. There was no corroboration of the complainant's evidence in that she said she reported to Koqo that the appellant had raped her but Koqo gave no evidence. Instead Thabo gave evidence that the complaint was made to him.
2. The complainant said she submitted to the rape because of threat of assault. Neither the gun nor the bullet was produced before the Court in corroboration.

/3.

3. The spermatozoa if she went to consult a doctor a day later could not be alive.

4. The appellant was prejudiced in that he did not know what it meant to allow medical evidence to be handed in by consent.

The facts of this case are very simple and straightforward. At about 6.00 p.m. on the 12th July, 1983 the complainant was returning from Maputsoe and going to her home at Ha Nyenye. The appellant was also going to Ha Nyenye and suggested to the complainant that she should join him. She agreed and they walked together till they came to a tree. The appellant ordered the complainant to give him vagina. She refused and asked him not to say such indecent things to her. Whereupon the appellant punched her on the eye with a closed fist. She fell down and a struggle followed. He produced a pistol and threatened to shoot her if she continued to struggle. She submitted and the appellant had full intercourse with her. After he had satisfied himself the complainant went to the house of one Mohlakoana and made a complaint to Koqo that the appellant had raped her. Thabo arrived at this stage and she asked him to convey her in his truck to Maputsoe police station.

After she had entered into the truck cabin the appellant opened the door and forcibly attempted to drag the complainant out. Thabo threatened to beat him up and he (appellant) refrained.

The medical evidence was to the effect that on

/examination

examination spermatozoa were seen and there were bruises on both eyes. The appellant gave an unsworn statement in which he said he begged the complainant not to report their trouble to the police but to the chief who would reconcile them but she refused. He then went to the chief and gave a report of their altercations.

The trial court found corroboration of the complainant in the fact that she had sustained injuries on the face and that the appellant followed her to the house of Mohlakoana where he forcibly attempted to take her out of the truck so that she could not report the matter to the police. I may add here that medical evidence also proved that there had been recent penetration and found sperms in the complainant's private parts. I have had cases in which medical practitioners have given evidence that sperms are capable of surviving up to 24 hours after they have been deposited in the vagina.

Mr. Molapo for the appellant submitted that there was no corroboration because Koqo had not given evidence. I disagree because a complaint made immediately after the rape is not the sort of corroboration required in a case where the accused person denies identity of the culprit. It is not independent testimony showing that the crime charged has been committed but is rather evidence to show the truthfulness of the complainant and to repel the suggestion that the story has been made up. See Rex v. Bell 1929 C.P.D. 478. It is clear from the record that the first person to whom the complaint was made is Koqo but

/at

at the time of the trial he was not available. Thabo Moipatli arrived soon after the complainant had reported to Koqo and asked Thabo to convey her in his truck to the police. She obviously told him what had happened. Be that as it may, I think there was overwhelming evidence corroborating the complainant.

The absence of the pistol did not in any way prove that the complainant was not telling the truth. The appellant was not arrested at the scene of the crime and had ample time to get rid of the pistol before the police arrived.

It was also contended on behalf of the appellant that he was prejudiced in that he did not know what it meant to allow medical evidence to be handed in by consent. It has not been shown what prejudice the appellant has suffered because the medical practitioner's evidence is that he found live sperms in the vagina and that she had bruises which were also seen by PW.2 and PW.3. The doctor did not say that the sperms he found came from the appellant. There was no prejudice. I am of the opinion that the appellant was properly convicted of rape.

The appeal on conviction is dismissed.

As far as the sentence of 4 years' imprisonment is concerned I am aware of a number of cases of this Court in which the magistrates were criticized for imposing very light sentences on people convicted of rape See Rex v. Lebonejoang Ramphobole Review Order No. 41/82, unreported. In most of those cases the complainants were small girls of

/less

less than 16 years of age and that was the reason why it was suggested that the accused ought to have been charged under section 3(1) of the women and girls' Protection Proclamation No. 14 of 1949. The present complainant is a young woman of 28 years of age and there were no serious injuries inflicted by the appellant in the course of rape except bruises on both eyes. There were no injuries to her external genital organs. It is trite law that the passing of sentence on accused person is pre-eminently in the discretion of the trial court. However, that discretion must be exercised judicially and not arbitrarily. In Ntsompe Shoto and Others v. Regina 1960 H.C.T.L.R. 1 at p. 6 Roper, J.A. said:

> "But where no such consideration enters into the matter it is clear that we are not entitled to substitute our own discretion for that of the trial Judge and to alter the sentence imposed on the mere ground that we would have passed a different sentence. Something further is necessary, for example, that the sentence was unreasonable in the circumstances of the case, or its severity was quite out of proportion to the gravity of the offence, so that it can be said that a proper judicial discretion was not exercised."

I entirely agree with these remarks and wish to state that the sentence of 4 years' imprisonment in the circumstances of the present case was substantially different from what this Court would have imposed. In my view the sentence was out of proportion to the gravity of the offence and this Court is justified to set aside the

/sentence

sentence of the trial Court and to substitute it with its own. I must emphasize that rape is a very serious crime but each case must be approached on its own merits. Taking into account the circumstances of this case and the fact that the appellant is a first offender and a fairly young man I set aside the sentence of four years' imprisonment and substitute it with a sentence of Two (2) years' imprisonment.

ACTING JUDGE.

29th May, 1984.

For the Appellant : Mr. Molapo

For the Crown : Miss Moruthoane.