CRI/A/30/84

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

SELLO MONTOELI

V

R E X

REASONS FOR JUDGMENT

Filed by the Hon. Acting Mr. Justice J.L. Kheola
on the 9th July, 1984.

The appellant was charged before the Subordinate Court of Mafeteng with the rape of one 'Matsosane Khantsi on the 12th March, 1983 at Ha Makintane. He pleaded not guilty but at the end of the day he was found guilty as charged and sentenced to two years' imprisonment. He is now appealing against both conviction and sentence on the following grounds:

(a) The complainant testified before this Court that I raped her which contradicted the evidence of Tsoeu Namane, who did not see the action.

(b) The same Tsoeu Namane was first charged at the chief's place and afterwards taught the complainant that I wanted to rape those two women. Tsoeu Namane implicated me because we come from different villages and we are not in good terms.

The evidence of the Crown was that at about 8 p.m.

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on the 12th March, 1983 the complainant was returning to her home after accompanying Sefora Makintane (PW.2) half-way to her home. On her way back the complainant had to pass near the aloes on the side of the path. She was passing near these aloes when the accused suddenly appeared from the aloes and hit her on the head with a stick. She fell down and he hit her on the arms till she got tired. The appellant then removed her panty and had sexual intercourse with her. She felt that there was full penetration of her vagina. She struggled and shouted for help while the appellant was raping her. She said that she identified the appellant very well though there was no moonlight. Sello Khantsi (PW.4) was arriving in the village from Mafeteng when he heard a woman screaming at the aloes. He rushed towards the aloes and when he was about 8 paces from the woman he saw that there was another person on top of that woman who was lying on the ground. The person who was on top of the woman rose and ran away before he could identify him but he saw that he was a man. Tsoeu Kolane (PW.3) testified that he was passing near the aloes when he was called by the appellant who was sitting amongst the aloes. He (appellant) asked him who the two women who had just passed were. He told him that they were the complainant and one Sefora. The appellant then told him that he wanted to "eat women" and followed them. Dr. Van der lygt's evidence was to the effect that he examined the complainant on the 23rd March, 1983, the left hand was swollen and her uterus was enlarged. He was not able to say whether there had been recent penetration because the complainant

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who had had five children was examined by him about two weeks after the alleged rape.

The appellant denied that he raped the complainant and said that his mother would support him that he was at home that day. She gave evidence that the appellant was at home till 9 p.m. when he went to bed in a different house. The trial Court held that as they did not sleep in the same house the appellant could have left his bedroom immediately after they parted. I am of the opinion that her evidence was correctly rejected by the Court. She could not be precise that it was at nine o'clock when the appellant went to bed. It could have been 8 p.m. or 8.30 p.m. and the Crown witnesses estimated the time to have been 8 p.m.

I am of the opinion that there was over-whelming evidence that the complainant was raped. It seems to me that the only dispute is the identity of the culprit. The appellant was seen at the scene of the crime by a person who knows him very well and he told him that he wanted to 'eat women' and asked who the two women, the complainant and Sefora were. When the complainant returned alone after taking Sefora half-way to her house he (appellant) attacked her and raped her. As it was dark the evidence of the complainant could not be relied upon if there was no corroboration because there would be a possibility of mistaken identity due to the state of light that night. That corroboration was found in the evidence of Tsoeu Kolane (PW.3).

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The appellant's grounds of appeal do not make sense at all. I see no contradiction in the evidence of the complainant and Tsoeu Kolane. He (Tsoeu) never said he saw the appellant rape the complainant. His evidence merely puts the appellant at the scene of the crime just before the crime was committed. Tsoeu made it quite clear that after telling the appellant who the two women were he went to his home. His second ground of appeal is a complete bolt from the blue. It was never raised in the cross-examination of Tsoeu at the trial that initially he (Tsoeu) was charged with rape. It was not raised in the evidence in chief of the appellant at the trial. I have come to the conclusion that it is an after-thought and must be rejected. If it had been the appellant's case that the complainant did not know the person who raped her and that she first said it was Tsoeu and later changed her story and accused the appellant, he ought to have raised this issue at the trial and not in this Court. That would have given the Crown a chance to call the chief of the village to whom the complainant made a report.

The appeal against sentence is based on the ground that the trial Court sentenced him to two months' imprisonment but the public prosecutor asked that he should be sentenced to two years' imprisonment. I have checked the original manuscript and there is nothing to show that the sentence imposed was two months. In other words, there was no cancellation. In any case, if the learned magistrate pronounced the wrong sentence and the prosecutor immediately

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drew his attention to that fact the sentence could be corrected in terms of section 178(2) of the Criminal Procedure and Evidence Act 1981 which reads:

> "When by mistake a wrong judgment or sentence is delivered, the Court may before the judgment is issued to the Clerk or Registrar (as the case may be) as soon as possible thereafter amend the judgment or sentence and it shall stand as ultimately amended."

For the reasons I have attempted to give I formed the opinion that the appellant had been correctly found guilty and I find no reason to disturb the sentence.

The appeal is therefore dismissed.

ACTING JUDGE.

9th July, 1984.

For the Appellant : In Person

For the Crown : Mrs. Bosiu.