CRI/T/47/83

IN THE HIGH COURT OF LESOTHO

In the Matter of

R E X

v

LEAOOA MAKHOBENG

J U D G M E N T

Delivered by the Hon Mr. Justice J L. Kheola
on the 10th day of March, 1986

The accused is charged with the offence of raping Morongoe on the 27th June, 1983 at Tsatsalemeno in the district of Qacha's Nek To this charge the accused has pleaded not guilty.

Mr Gwentshe on behalf of the accused admitted as evidence before this Court all the depositions of the Crown witnesses who gave evidence at the preparatory examination Despite this admission by the defence, Mr Kamalanathan, for the Crown, elected to call some of the Crown witnesses to give evidence before this Court. He wanted to clarify some points which were obscure on the preparatory examination record Mr Gwentshe strongly opposed the application on the ground that the defence had not been given any notice as to what kind of new evidence the Crown intended to lead. I ruled that the Crown was not going to lead any new evidence but merely wanted some witnesses to clarify certain obscure points. Under normal circumstances where the Director of Public Prosecutions notices that the evidence in the preparatory record is too scanty and obscure he has the right to direct the magistrate to re-open the preparatory examination and take further evidence generally or in respect of any particular matter in terms of section 90 (g) of the

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Criminal Procedure and Evidence Act 1981.

What has happened in this case is that the Director of Public Prosecutions indicted the accused before this Court on obviously insufficient evidence and this is why he was embarrassed when the defence admitted the entire preparatory examination record. If the evidence recorded at the preparatory examination had disclosed an offence the Crown would have closed its case as soon as the admission of the record was made. I came to the conclusion that the so called clarification would not prejudice the accused in any way because if it changed the substance of the original evidence this would create a doubt in favour of the accused

This is a rather unfortunate case because the complainant/victim is a deaf and dumb young woman of about 21 years of age. She did not give evidence in this Court and in the court below. An attempt was made by the Crown to seek the services of an expert in deaf and dumb alphabet but he failed to communicate with the complainant. So we have a situation where a complainant in a rape case has not given evidence. The authorities are very clear that if the complainant gives no evidence at all,neither the terms of the complaint nor the fact that it was made can be admitted (R. v. Smith Malete 1907 T H. 235, R. v. Kgaladi 1943 A D. 255 at p. 261). In the instant case 'Malimakatso Makhobeng told the Court that the complainant made a report to her that the accused had raped her. That part of her evidence is inadmissible because the complainant has not given any evidence It would have been admissible if the report was made in the presence of the accused (R v Kgaladi, supra, at p 260)

In the present case there is no doubt at all that the complainant was sexually assaulted. When 'Malimakatso examined the complainant immediately after the alleged assault, she found that her vagina was swollen and there was what appeared to be semen and some blood. Her dress was torn and she was crying There are two eye-witnesses who claim

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to have seen when "a person" chased the complainant and caught her. He threw her down and lay on top of her The main issue here is the identity of that "person" who was seen by the two witnesses, namely, 'Mamakhamise Mile (P.W 2) and 'Mantsebo Mothibeli (P W.3) Their story before this Court is almost identical. It is to the effect that while they were drawing water from a well just outside their village, they saw complainant walking along the road The accused suddenly came from under a tree and caught her. She got free and ran away, the accused chased her and caught her again She struggled and again got free and ran away He picked up a stone and hit her with it He caught her for the third time and threw her to the ground and lay on top of her Despite the fact that they raised shout, the accused remained on top of the complainant for some time. He eventually rose and walked away towards the forest. The complainant went home. They stated that they were about 300 to 400 yards away from where the accused raped the complainant. He was wearing a black and grey coloured blanket and a grey trousers When they arrived at their homes they left their cans of water and immediately went to 'Malimakatso and reported what they had seen.

It is common cause that the evidence of the two eye-witnesses before this Court differs from their evidence at the preparatory examination in very material respects At the preparatory examination P.W 2 never said that the person he saw was the accused. Throughout her evidence she referred to the person she saw as "the man" and it is very clear that she did not recognize that man as the accused. She says that when she was going to her home after reporting to 'Malimakatso, she met the accused and asked him from where he got the herbs he was carrying in his hands, the accused pointed to the forest where the man who had assaulted the complainant had gone. She also noticed that the accused was wearing a black blanket and a grey trousers similar to those of the man they had seen. It will be noted that she says that the blanket was "black", however before this Court she now says it was a "black and grey" coloured blanket.

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The colour of the blanket becomes very important when one takes into account that even P.W.3 referred to a "black blanket" in her evidence at the preparatory examination but before this Court she claims that the colour of the blanket was "black and grey". I find it very strange that both witnesses forgot the grey colour when they were giving evidence in the court a quo but suddenly remember it when they appear before this Court. What 'Malimakatso said becomes very significant. She told the Court that on several occasions after the alleged rape she and the two eye-witnesses came together and compared their versions of what took place. It is clear that the Crown witnesses have been comparing notes several times until they decided that the story they gave at the preparatory examination was not good enough because they had not implicated the accused Hence their new story that they identified the accused as the person who attacked the complainant. P.W. 3 told the court a quo in no uncertain terms that she did not recognize complainant's assailant because she was 300 yards away from the scene of the crime She is now obviously lying when she says that she recognize the attacker as the accused. She told the Court that when she gave evidence at the preparatory examination she was confused and frightened and that was the reason why there were discrepancies in her evidence in this Court as compared to her evidence in the court a quo She, however, said that she was still confused and frightened

At the close of the Crown case an application was made for the discharge of the accused on the ground that the Crown had failed to establish a prima facie case. The well known test at this stage is whether a reasonable man acting carefully might convict (R. v Sikumba, 1955 (3) S A 125) In R v. Dladla and others (2), 1961 (3) S.A. 921 it was held that in considering the application for the discharge of accused at the close of the Crown case, the credibility of the witnesses is not a matter to which the judge may pay regard. His sole duty is to

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consider whether the evidence advanced by the Crown, if believed, might be sufficient to satisfy reasonable men acting carefully that the accused is guilty In S. v Nanda Gopal Naidoo, 1966 (1) P H. H104 (W), Vieyra, J., differed from Dladla's case, supra by saying that at this stage the sole concern of the judge is the assessment of the evidence, and in this regard there can be no warrant for excluding the question of credibility. I entirely agree with the views of Vieyra, J. In the instant case the prosecution evidence is so patently unworthy of credit that a reasonable man acting carefully might not convict. P W.2 was so evasive that throughout the cross-examination whenever a question was put to her, she did not answer at once but put a question to the Crown counsel purporting to seek clarification even where the question was as clear as cyrstal. It was very clear that she merely wanted to gain more time to think of the answer to the question.

P.W 3 was also totally unworthy of credit and she confessed that she was confused and frightened To me she appeared to be fairly well collected. The only confusion in her mind was due to the fact that they had been comparing notes so many times that she did not know what her origial version was.

For the reasons stated above I have no alternative but to grant the application for the discharge of the accused at this stage on the ground that the Crown has failed to establish a prima facie case.

The accused is found not guilty and is discharged.

J.L. KHEOLA
J U D G E .

10th March, 1986.

For Crown - Mr. Kamalanathan
For Defence - Mr. Gwentshe.