CRI/A/108/86

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MORIANA HLAO — Appellant

v

R E X — Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai on the 24th day of March, 1987.

The appellant, a 35 years old taxi driver, was charged with and convicted of rape before a magistrate with Second Class powers on the allegations that on or about 31st August, 1986 and at or near Ha Ranko in the district of Mafeteng he unlawfully and intentionally had sexual intercourse with Lydia Lenko, a 15 years old girl without her consent. A sentence of M250 plus 12 months imprisonment was imposed.

When the charge was put to him, the appellant had pleaded guilty and the provisions of S. 240(1)(b) of the Criminal Procedure and Evidence Act, 1981 were invoked.

The facts, and these were admitted as correct by the appellant, disclosed that on the late evening of 31st August, 1986, the complainant a 15 years old school girl, was returning from school when she embarked on the taxi driven by the appellant. There were no passengers in the taxi basides the conductor. When the taxi came to her bus stop the complainant did not alight. After it had passed the bus stop the appellant stopped the taxi and proposed (love) to the complainant. At that stage the conductor went out leaving the appellant and the complainant alone in the taxi.

The appellant then pulled off complainant's panties and started having sexual intercourse with her. The sexual intercourse was without complainant's consent. It was not until the

2/ following day, ...

following day, 1st September, 1986, that the complainant returned home.

On arrival at home, complainant's parents questioned her as to where she had been and in reply she reported that the appellant had been raping her. The matter was first reported to the village headman and then to the police who referred complainant to a medical doctor for examination.

It was only on 2nd September, 1986 that the medical doctor examined her and made a report that complainant had facial injuries viz. a swollen eye and two(2) scratches. The hymen was torn but no vaginal smears could be detected as the examination was made two days after the alleged incident. The medical doctor formed the opinion that recent intercourse had taken place. On 2nd September, 1986 the appellant was arrested, cautioned and charged as aforesaid.

The appeal was initially against both conviction and sentence on the grounds that in the circumstances of the case the trial magistrate should have entered a plea of not guilty, the age of the complainant was not proved. The statement of facts given by the public prosecutor in support of the charge differed from the medical evidence in material respects and the sentence was excessive.

When the matter came for argument Dr. Tsotsi who represented the appellant in this matter told the court that the appeal against sentence was withdrawn and the question of the complainant's age abandoned.

According to the record of proceedings when, on 3rd September, 1986, he appeared before the trial court, the charge was read and explained to the Appellant who then pleaded guilty. That being so, the trial magistrate had no alternative but to enter a plea of guilty.

What the appellant is having in mind is, perhaps, that after he had given his reply to the question whether or not he admitted the facts as outlined by the public prosecutor, the trial magistrate should have altered the "plea of guilty" to that of "not guilty". In my view the magistrate could do so only if the appellant's reply was that he did not admit the

facts as outlined by the public prosecutor. Where the appellant had as in the present case catagorically told the court that he admitted the facts as outlined by the public prosecutor, the trial magistrate could not, in my view have altered the plea of guilty to that of not guilty.

In the circumstances of this case there is, therefore, no substance in the ground of appeal that the magistrate should have entered a plea of not guilty.

In outlining the facts in his possession, the public prosecutor stated that had he not pleaded guilty to the charge he would have adduced evidence to show that the appellant had had sexual intercourse with the complainant. The medical report would also show that the doctor who had examined the complainant on 2nd September, 1986 formed the opinion that sexual intercourse had in fact recently taken place. That granted, I am unable to apprehend how the appellant can, under the 3rd ground of appeal, seriously contend that the statement of facts given by the public prosecutor in support of the charge differed from the medical evidence in material respects. Indeed I was told in argument that the appellant himself did not dispute that he had had sexual intercourse with the complainant. In my view there is no substance in the 3rd ground of appeal which must also fall away.

Having accepted that the appellant did have sexual intercourse with the complainant, the salient question was whether or not it was with her consent. I have given serious consideration to the facts that when the taxi came to her bus stop the complainant did not alight; after the taxi had passed the bus stop the appellant stopped it and proposed (love) to the complainant; when she returned home on the following day, 1st September, 1986 it was only in reply to a question by her parents that complainant reported that the appellant had raped her.

Regard being had to all these facts it may well be said, at the time the sexual intercourse took place, the complainant and the appellant were lovers. But can it be concluded, from the fact that at the time it took place, the appellant and the complainant were lovers, that the sexual intercourse was with

the latter's consent - I can envisage a situation where a girl falls in love with a man but refuses to have sexual intercourse with him - The conclusion would in my view be a non-sequitur.

According to the facts outlined by the public prosecutor and, indeed, admitted by the appellant himself the sexual intercourse took place without the consent of the complainant. There is no good reason, in my view, why the trial court should have rejected the fact admitted by the appellant that the sexual intercourse did take place without the complainant's consent. Assuming the correctness of the view I have taken on this point, it must be accepted that the amswer to the question whether or not sexual intercourse took place with the consent of the complainant is in the negative.

Although the appeal against the sentence was withdrawm it was pointed out in argument that the sentence imposed by the learned trial magistrate was irregular in that the appellant was to pay a fine and serve a term of imprisonment. It is, however, to be observed that S.62(2) of the Subordinate Courts Proclamation No. 58 of 1938 empowered the trial magistrate to punish the appellant by both payment of a fine and a term of imprisonment.

The Section reads :

> "(2) Any person convicted of any offence may be punished by both such fine and such imprisonment or by both such imprisonment and such whipping, but an offender shall not for the same offence be punished both by fine and by whipping."

If the appellant does not pay the fine, the magistrate may decide on the legality of substituting corporal punishment for payment of a fine. I am not convinced,therefore, that the sentence imposed by the trial magistrate is irregular.

For the foregoing reasons, I come to the conclusion that this appeal ought not to succeed and it is accordingly dismissed.

B.K. MOLAI
JUDGE
24th March, 1987.

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