CRI/A/75/85

IN THE HIGH COURT OF LESOTHO

In the Appeal of

THEMBA KEPHE Appellant

v.

R E X

JUDGMENT

Delivered by the Hon. Acting Chief Justice
J.L. Kheola on the 26th day of May, 1986.

The appellant was charged with the offence of contravening section 3 (1) of the Women and Girls' Protection Proclamation No.14 of 1949, it being alleged that on the 14th day of March, 1984 and at or near Paballong in the district of Quthing the said accused did intentionally have or solicit or entice Nomathemba Thotho a girl who is under 16 years of age to have unlawful sexual intercourse with him and he did have sexual intercourse with her In the alternative the appellant was charged with abduction He pleaded guilty to the main charge but qualified the plea by saying' "I did not know that I was committing an offence "

Despite this equivocal admission of guilt the learned magistrate entered a plea of guilty and allowed the public prosecutor to state the facts of the case in terms of Section 240 of the Criminal Procedure and Evidence Act 1981. The facts were very brief and straightforward. On

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the 14th March, 1984 the accused abducted the complainant and took her to the Republic of South Africa where he worked. He stayed with her as man and wife for a month. During that period he regularly had sexual intercourse with her. The complainant was fourteen (14) years old at the material time and had been taken and removed from the control and against the will of her parents After a month she "escaped" and came back to Lesotho

The appellant admitted the facts as correct He was found guilty of indecent assault and sentenced to six (6) months' imprisonment without the option of a fine.

Mr Ramodibedi, for the appellant, submitted that the appellant's plea was undoubtedly not unequivocal and consequently the learned trial magistrate misdirected herself by entering a plea of "guilty" instead of a plea of "not guilty". He further submitted that it is significant that the public prosecutor in fact accepted the appellant's plea. In other words, the public presecutor admitted as a fact that the appellant did not know that he was committing an offence. He argued that the conviction was improper.

The charge sheet was read and explained to the appellant and he answered that he understood it He clearly understood what allegations were levelled against him and then pleaded guilty. He further explained that he did not know that what he did was a criminal offence. Now our law is expressed in the maxim ignorantia juris non excusat An accused person who admits that he did certain things which amount to a breach of our common law offences or statutory offences cannot escape conviction on the ground that he did not know the law.

In S. v. Tshwape, 1964 (4) S.A. 327 (c) at p. 330 Corbett J. held that the fact that the accused did not know a permit was required was

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not relevant to the question of mens rea, in the following terms

> "Without attempting to formulate a proper definition of mens rea, it seems to me that conduct, which falls within the terms of a statutory offence, will only escape the taint of criminality on the ground of the absence of mens rea where it appears that the person, through ignorance or mistake, was at the time unaware of some fact or circumstance which, either by itself or in conjunction with other facts and circumstances, rendered such conduct an offence. I know of no principle whereby a person who is aware of all the material facts constituting the offence, can escape criminal responsibility - on the ground of lack of mens rea - merely because he was unaware that his conduct constituted a contravention of the law On the contrary, the rule is that every person is presumed to know the law and that ignorance of the law is no excuse The ground of appeal advanced by appellant. .. is simply a plea of ignorance of the law and, in my view, it cannot succeed."
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> (See S.v. Kazi, 1963 (3) S.A 742 (W) at pages 749-50).

In the instant case the appellant was definitely conscious of some wrong-doing and that is the reason why he eloped with the girl Every Mosotho boy knows that abduction is a breach of the law.

I have come to the conclusion that the plea was in order, the words which purported to qualify it did not have any effect on it.

The learned trial magistrate was of the opinion that although the accused had pleaded guilty to the main charge he could not be convicted of that offence because the doctor who examined complainant was unable to say that recent sexual intercouse had taken place. This was obviously a misconstruction of section 3 (1) of Proclamation No 14 of 1949. The section covers a number of offences other than the situation where actual sexual intercourse has taken place - the first thing is unlawful carnal connection, the second is commission of immoral or indecent acts with the girl under the prescribed age, the third is a situation where the accused solicits or entices a girl under the

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prescribed age to the commission of the above acts. If the learned magistrate found that an assault of indecent nature had been committed she ought to have convicted him of the main charge. As far as the outline of the case goes I am unable to find any facts which support the view that the assault was of an indecent nature. In fact, there was no assault at all because the girl was a willing party

It seems to me that the case was one of abduction in the Sesotho customary way which is usually regarded as the first stage towards a marriage. There is no doubt that most young men are not aware that if the girl is under 16 years of age, the act amounts to a contravention of section 3 (1) of Proclamation No.14 of 1949.

The appeal is allowed The conviction and sentence of the trial court are set aside and substituted with one of "guilty of abduction and sentenced to pay a fine of R100-00 or to 5 months' imprisonment in default of payment of the fine.

J L. KHEOLA
ACTING CHIEF JUSTICE.

3rd July, 1986

For Appellant - Mr. Ramodibedi

For Crown - Miss Nku.