CRI/A/20/86

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

TEFO RAMPHOBOLE Appellant

v.

R E X

JUDGMENT

Delivered by the Hon. Acting Chief Justice
on the 2nd day of June, 1986

The appellant was charged with the crime of rape; in that on the 22nd April, 1985 and at Lithabaneng in the district of Maseru the accused did unlawfully and intentionally have sexual intercourse with 'Matieho Sekhobe, a minor of about 15 years, without her consent. To this charge the appellant pleaded not guilty but was found guilty of contravening section 3 of the Women and Girls' Protection Proclamation No. 14 of 1949 and was sentenced to three (3) years imprisonment.

It was common cause that on the day in question the appellant had sexual intercourse with the complainant. The only issue before the trial court was whether or not there was consent. The complainant's evidence was to the effect that the appellant who was the driver of a taxi in which the complainant was the only passenger that evening, had stopped the taxi near a certain cafe and dragged her out of it. The appellant was carrying a knife and a stick in his left hand. When the complainant resisted and raised alarm the appellant threatened to stab her with the knife. He dragged her to Mejametalana forest where he

/raped her.....

raped her. Under cross-examination the complainant denied that she had told him that she was twenty (20) years old.

No medical evidence was led because the doctor who examined the complainant immediately after the alleged rape was out of the country.

The appellant's story was that the complainant agreed to go to the forest with him and consented to have sexual intercourse with him.

The learned Chief Magistrate came to the right conclusion that there was no corroboration of the complainant's story because the only evidence before him was the word of the complainant against that of the appellant. He convicted the appellant of having had sexual intercourse with the complainant who was at the relevant time below the age of sixteen (16) years of age.

Mr. Khasipe, counsel for the appellant, is challenging the conviction on two grounds. The first ground is that at the close of the Crown case the prosecution had not established any prima facie case. He contends that at that stage the Crown established neither the common law rape nor the statutory rape because the age of the complainant had not been proved. The second ground is that the learned Chief Magistrate committed a gross irregularity by recalling a Crown witness after the close of the defence case with the sole intention of establishing what the Crown had failed to prove which was in fact the gravamen of the offence of which the appellant was convicted.

What happened in this case is that at the close of the defence case and before the addresses by the public prosecutor and the appellant, the trial court found that the age of the complainant had not been proved. On its own motion the trial court recalled the father of the complainant (P.W.2) and elicited evidence from him that she was fifteen (15) years old having been born in NOvember or December, 1969. Section

202 (2) of the Criminal Procedure and Evidence Act 1981 compels the court to subpoena and examine or recall and re-examine any person if his evidence appears to it essential to the just decision of the case.

The criticism against the Chief Magistrate's conduct is that he built up a case against the appellant where the Crown had failed to prove its case. The purpose of section 202 (2)- supra - is to give the court the duty to call any person or to recall any person at any stage of the criminal trial if he regards his evidence as essential to the just decision of the case. A witness is essential to the just decision of the case if without his evidence there would be an unmerited conviction or acquittal, and if the judge calls a witness whose evidence results in conviction instead of acquittal he must thereby have made a case against the accused where none existed before (Hoffmann: South African Law of Evidence, 1st edition, page 236). If the witness recalled by the court had given evidence favourable to the appellant there would have been no complaint that the court recalled the witness. It must be very clear to everybody that an unmerited acquittal like unmerited conviction are not the just decision of the case contemplated by section 202- supra. The learned Chief Magistrate had a duty to call that witness. In R v. Hepworth 1928 A.D.265 (a case which concerned the interpretation of section 210 of the South African Criminal Procedure which is identical with our section 202) Curlewis, J.A. said at page 277:

> "A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done."

/I come.....

I come to the conclusion that there is no substance in this ground of appeal. However, I must emphasize that although the court has very wide powers under section 202 they must of necessity be sparingly and cautiously exercised so that the impartiality of the court may not be questioned. The magistrate must always remember that under our accusatorial system of trial the judge must not be seen to be taking a very active role in the inquiry. His main duty is to hear evidence adduced by the parties and make his decision.

The other ground of appeal is that at the close of the Crown case there was no prima facie case against the appellant and that the court ought to have found him not guilty and discharged him. Section 175 (3) reads:-

> "If, at the close of the case for the prosecution, the court considers that there is no evidence that the accused committed the offence charged in the charge, or any other offence of which he might be convicted thereon, the court may return a verdict of not guilty."

I agree with this submission that at the close of the Crown case the Crown had not established a prima facie case of rape because the girl's evidence had not been corroborated and no medical evidence was led to prove that secual intercourse had taken place. Regarding statutory rape the age of the complainant had not been proved.

In Pheko v. Rex 1981 (1) L.L.R. 1 at p.3 Rooney, J. said:

> "This is one of the most important rules of our criminal procedure because no man should be obliged to answer when he has no case to meet. The section should never be regarded as an empty formula and the record of any trial is not complete without an indication that the judicial officer has considered the section and complied with its terms" and "I take the view that in every case where an accused appears in person, the trial court has the duty to consider at the end of Crown case the evidence against him as if an application for discharge under section 172(3) had been made. Thereafter the preciding officer should note on the record of the proceedings that the secion has been so considered."

/The appellant.....

The appellant was not represented by a lawyer in the trial and was unaware when he elected to go into the witness box that there was no case to answer. It seems to me to have been a serious irregularity to call upon the appellant to answer a non-existent case which was build up after the appellant had closed his case. It was such a gross departure from the established rules of procedure that the appellant has not been properly tried and there was failure of justice.

The appeal is allowed and the conviction and sentence are set aside. The appeal fee must be refunded to the appellant.

J.L. KHEOLA
ACTING CHIEF JUSTICE.

4th June, 1986.

For Appellant - Mr. Khasipe

For Crown - Mr. Seholoholo