IN THE HIGH COURT OF LESOTHO

In the Appeal of:

KALEBE MOLAPO Appellant

v

REX Respondent

JUDGMENT

This Appeal was argued before me on 30th June, 1986. I indicated that I would give reasons later. Here do they now follow:

The appellant was charged with the crime of rape. The Charge Sheet alleges that "on or about 5th September, 1984, and at or near Ts'akholo in the Mafeteng district accused did wrongfully and intentionally have unlawful sexual intercourse with Mots'eoa Mokeki, a Mosotho girl of 16 years there residing without her consent and did thereby commit the crime of rape".

The appellant pleaded not guilty before the Resident Magistrate. At the end of the day he was convicted of rape as charged and sentenced to nine months' imprisonment.

The appeal is based on the following grounds that:

i) the prosecution failed to discharge its onus of proving beyond reasonable

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doubt that the crime of rape was committed,

ii) the learned magistrate's conviction is against the weight of evidence.

The reserved right to file further grounds of appeal was never exercised by the appellant.

In his reply to these grounds of appeal the learned magistrate indicated that he held a contrary view and added very aptly that accused elected not to give evidence on how his knife came to be involved in the case of rape.

The complainant P.W.1 Mots'eoa Motseki in this appeal was 16 year old girl who gave evidence before the magistrate after, as the record reveals, the Court had been cleared.

She testified that she and the accused were lovers and that even at the time of the trial their love affair was still in existence. She is a pupil at Tsakholo Primary School. On 5th September, 1984, she went to a cafe at around 1.00 p.m. She was in the company of one Mpho Mokhele. On arriving at the cafe the two met with the accused who asked complainant to accompany him a short distance from the cafe.

However, when she and he came to the spot where accused had promised complainant that she would return he reneged on

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his promise and gave his word that complainant would return at a spot further ahead. The two continued walking until it was well after 4.00 p.m. When evening set accused grabbed hold of the complainant and produced a knife which was later produced in Court as an exhibit. They sat down. Accused fortified in his intent by the louring gloaming and the great distance from the nearest household removed complainant's panties, put off his trousers and had sex with her without the latter's consent.

After gratifying his sexual fervour, accused then asked complainant to go along with him to the school building where, as it was near lived in houses, accused threatened to stab complainant with a knife if she shouted. They entered the school and he further had sex with her without her consent. After some rest, he went into a further bout of sexual intercourse with complainant and when the latter shouted, caught her by the neck and threatened to stab her with the knife. They stayed in the school until day-break. In the morning accused accompanied complainant to her home but returned some 200 to 300 yards from complainant's home.

Complainant reported the matter to her mother who in turn reported to her son before proceeding to the chief's place to relate this disgusting episode that befell her young daughter. The Chief referred the mother with a letter to the Ts'akholo police who in turn directed her and complainant to Mafeteng Dispensary where complainant was examined by a medical doctor.

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Complainant and indeed the rest of Crown witnesses bar P.W.3 and P.W.5 were subjected to a detailed and lengthy cross-examination despite which regard being had to her age complainant was not shaken in her stand.

Complainant said she had not slept with any boy before the date in question. She frankly admitted that there are things which she did not want her friend Mpho to hear or know about and denied the question put to her that she knew what she and accused were going to do. If I may add it is a well known matter; practiced throughout all ages and societies, that lovers are disinclined to suffer gladly those playing gooseberry.

It is important to point out even at this stage that accused did not give evidence in his defence. A good many questions were put to Crown witnesses indicating the line of accused's defence including of ourse that sex between the two was with consent. For instance, on Page 7 of the record the question was put to complainant "Accused will say you agreed to have sexual intercourse .....? We did not agree". On Page 9 "Accused will say he did not produce a knife, he merely requested and you agreed? He produced it and I saw it". On Page 13 there is a whole catalogue of questions put to this witness which one would expect accused would be as good as suggested / by his Counsel in backing them up. They range from "Accused will say you agreed to have sexual intercourse with him in the veld and that he did not produce a knife ....? He will not be telling the

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truth" to(five questions later) "He will say you did nothing in the school .....? He will not be telling the truth."

A veiled suggestion was made that accused had sex with complainant because the two were going to marry as arrangements for the envisaged marriage were going apace in any event between parents of both parties. But this was unknown to the complainant and was rejected as baseless by P.W.2, complainant's mother, who testified that contrary to that suggestion accused's father came to her home to request that the charge be withdrawn because the children were lovers. His purpose for coming there was to pass the sponge over this matter.

P.W.4 Sgnt. Sekoala under cross-examination was told that following "your threats accused went to fetch the knife ...? It is not true that I threatened him." What is amazing about this is that the knife whose identity was given by P.W.1 before being produced in Court by P.W.4 should so answer to the former witness's description. True to pattern this witness was told that "There will be evidence that accused reported the threats to his mother .....? It is not true that I threatendd him" and that "Accused will say he is not in the habit of carrying a knife ...? I don't know that" yet at the end of the day none of these intended statements were backed by any witness for the defence including the accused himself.

P.W.5 was Dr. Westenhuis who testified that he examined

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P.W.1 on 6-9-84 and that "there is no medical proof or disproof of rape". He took vaginal smear but there were no sperms. He further said even if the witness had washed he would determine that she had had sex recently on account of resultant cracks provided that she was a virgin.

Indeed P.W.1 may have given a white lie in saying she is a virgin. But a word of caution is often overlooked by judicial officers that no one is bound to testify to his or her baseness. In other words P.W.1 should have been afforded the opportunity to know that she was at large to either answer or refrain from answering the question which tended to expose her lack of chastity. In any event the criticism levelled against P.W.1 by appellant's counsel in that regard was too little to the point to outweigh the gravity of the evidence that pointed to the guilt of the accused.

It should be clear that accused in not backing up questions put to the Crown witnesses cut a wide swath in his defence. In keeping with the dictum quoted with approval from S. vs. Letsoko and others 1964(4) SA by Holmes J.A. in S. vs. Madiala 1969 (2) SA at 642 that:

> "The true position is that, in cases resting upon circumstantial evidence, if there is a prima facie case against the accused which he could answer if innocent, the failure to answer becomes a factor, to be considered along with the other factors; and from that totality the Court may draw the inference of guilt"

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the learned Magistrate convicted the accused. Ogilvie Thompson J.A. later a Judge of the Lesotho Court of Appeal had expressed similar views in R vs. Davidson 1960(1)P.H. H 109.

It has also been urged on me that in matters of this nature exercise of common sense should be displayed as was stated by Lewis A.J.A. in R vs. J 1966 (1) SA at Page 90 where he said that

> "while there is always the need for special caution in scrutinising and weighing the evidence of young children (and) complainant's in sexual cases ..... the exercise of caution should not be allowed to displace the exercise of common sense."

Hence because I am satisfied that the learned Magistrate scrutinised the evidence and satisfied himself against possibility of any conscious or unconscious fabrication his conviction of the appellant does pass muster and thus cannot be faulted by this Court. His treatment and analysis of the evidence carries conviction. He has been alive to the fact that appellant's failure to give evidence casts a long shadow.

If I may add, I have not been referred to any authorities by appellant's Counsel in the heads of arguments supplied to me right in Court. However, his heads laid stress on the unsatisfactory nature of the evidence and the unreliability of Crown witnesses.

I have, however, found solace in the words of Lewis A.J.A. in the R vs. J supra at Page 90 where he expressed the view that if evidence of a single Crown witness may

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......"be safely accepted as proving the guilt of the accused beyond a reasonable doubt, he (a judicial officer) should not allow his judgment to be swayed by fanciful and unrealistic fears."

Nothing induces me to find that the learned Magistrate erred or that his error consists in convicting against the weight of the evidence. Appellant took caution not to have appealed against sentence.

The appeal against conviction is dismissed.

M.L. LEHOHLA
ACTING JUDGE

23rd July, 1986.

For Appellant : Mr. Kambule

For Crown : Mr. Lenono