CRI/REV/572/88

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

GRIFFITH LEHANA

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 13th day of February, 1989.

When this matter came before me on automatic review and having perused the record I directed that accused be informed that on an appointed day he should come before court and say why sentence should not be enhanced in the event that it is found that he was properly convicted.

Accused appeared before a second class magistrate on 24-10-88 and pleaded not guilty to a charge of rape wherein it was alleged he had had unlawful sexual intercourse with one Mphonyane Makhoptjoe. At the end of the day he was convicted and sentenced to five years' imprisonment pursuant to the Revision of Penalties (Amendment) Order of 1988 in respect of which the learned magistrate said

> "this trial court is bound to sentence the accused to a punishment of not less than five years' imprisonment."

My reading of this order does not convey an instruction that irrespective of varying degrees of reprehensibility in the commission of rape a judicial officer has conscientiously discharged his or her function as a trier of fact

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once he has confined himself to imposing the minimum sentence outlined for the offence in that Order.

Even before the coming into effect of the revised minimum penalties Order on 14th July 1988 the Chief Justice had on 25th March 1988 circulated review cases 75 and 81 of 1988 Rex vs Neo Jankie and Katjana Khauta (unreported) in which in a consolidated judgment he borrowed freely from R vs Billam & Others (1936) ALL E.R. 985 (C.A.) where the learned Lord Lane C.J. stated at pp. 987/988 :-

> "There are, however, many reported decisions of the court which give an indication of what current practice ought to be and it may be useful to summarise their general effect."

After suggesting that

> "....... For rape committed by an adult without any mitigating or aggravating features, a figure of five years should be taken as the starting point in a contested case."

the learned Lord Chief Justice proceeded as follows :-

> "The crime should in any event be treated as aggravated by any of the following factors :
>
> (1) violence is used over and above the force necessary to commit the rape;
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> (2) a weapon is used to frighten or wound the victim;
>
> (3) the rape is repeated (My underlining) "the sentence should be substantially higher than the figure suggested as the starting point."

Aware of the fact that not every magistrate has sufficient jurisdiction to mete out appropriate or suitable sentences in the varying degrees of reprehensibility in rape cases the learned Chief Justice of our Court concluded that :-

> "In passing sentence I would once more impress upon all magistrates the gravity of the offence of rape. I have set out the dicta in Billam in extenso above for their guidance. Obviously

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> it is desirable that only Magistrates of the rank of Resident Magistrate or above should try cases of rape. This is not possible of course in some districts. In any event, the provisions of the Criminal Procedure and Evidence Act 1981 are available to a Magistrate, and where in any particular case those provisions are applicable, he must commit the accused to the High Court for sentence if his sentencing powers are inadequate." (My underlining).

In the instant case it appears that complainant while in company of two other girls of her age i.e. 17 years was seized by the accused who dragged her into some fields after complainant had rejected his proposal for love. He slapped her in the face and whipped her with his belt. Then he felled her to the ground, took off her panty and raped her. Complainant raised an alarm. Meanwhile her companions had gone home to report what was happening to her.

Accused notwithstanding that complainant resisted him and did not consent to the sexual act nonetheless forcefully engaged in that act until he had satisfied his first bout of lust whereupon he followed complainant after she left the spot for her home. Then he caught up with her and felled her once more and raped her again.

In his defence accused does not deny having had sex with complainant. He advanced the view that he was in love with complainant. But he failed to gainsay complainant's assertion that she did not know him before that day. In any case a good many things are done in the name of love but not rape. Accused further failed to rebut complainant's version that he had slapped and belted her in order to induce her submission to his act of rape.

I have no doubt that it was a mere charade and afterthought on accused's part to say he had sex with complainant because he intended marrying her. Even if he cherished such honourable intention it did not justify his brutish ravishing of an unwilling female.

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This view is based on the unfortunate sentiments expressed by Cotran C.J. as he then was in Review case 569/85 Rex vs Willie Thabiso Masoatsa (unreported) where an uncalled-for and therefore wrong assumption as to complainant's age was substituted for the age provided in the admitted facts, and further a wrong approach was followed the effect of which appeared to be that where the statute protects females of certain age against rape it nonetheless stops being rape where the boy and girl do

> "have sexual intercourse with a view to persuading their parents to agree or force their hands to matrimony of the young couple."

This led to the endorsing of an untenable proposition that

> "Many hundreds of such cases in Lesotho do end up in marriage although this one apparently did not."

Whereupon a sentence of 18 months' imprisonment was set aside as excessively harsh and one of six months' imprisonment of which half was suspended was found to be appropriate.

I need hardly emphasise that the present trend in sentencing in cases of rape is a far far cry from the attitude adopted in Masoatsa. See Review Case No. 293/86 Rex vs. Mahlomola Motopi and Another (unreported) at pp. 8 to 10. The trauma and stigma of rape to the victim of such an act is as dehumanising as it is penetrating. In fact no amount of sentencing can parallel its debilitating effect on the victim's psychological well-being. It thoroughly corrodes whatever dignity and self-respect she has.

The present case is aggravated by the repetition of the sordid act and application of physical violence coupled with use of the belt as a weapon to induce submission. It is thus well clear of the category of cases which warrant the recommended 5 years starting

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point.

The mitigating factors raised in the Subordinate Court were repeated before me. I have taken them into consideration. I however and accordingly confirm the verdict but set aside the sentence in whose place is substituted a term of eight years' imprisonment.

JUDGE

13th February, 1989.

For Crown : Mr. Mokhobo
For Defence : In Person.