CRI/REV/245/89

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

SELEPE KAO

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 19th day of September, 1989.

The accused aged 26 was charged before the Subordinate Court, Mokhotlong, with the crime of rape.

The unlawful act is alleged to have been executed on 14th February 1989 at Bafatsana in Mokhotlong. 'Makao Kao was the victim.

The accused pleaded not guilty to the charge. At the end of the day he was convicted and sentenced to a term of five years' imprisonment.

The evidence revealed that the complainant 'Makao knows the accused well as she and he live in the same village. The complainant was six months in the family way at the time of the incident.

It was in the watches of the night and after the complainant had put out the light when she heard dogs barking. In the midst of all this she heard a gentle but persistent knock on the window to her house.

She inquired who was knocking at her window. Being vouch-safed no reply she inquired again and simulteneously opened the door

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and saw a man go past the window. When she advanced on the man she recognised him as the accused.

When asked by the complainant what he wanted the accused remained silent. The complainant suggested that the accused should go to the complainant's in-laws to say to them what he wanted.

There and then the accused grabbed hold of the complainant, dragged her towards the lower ground. The complainant's attempts at freeing herself were thwarted by the accused's firm grip.

In the process the two stumbled and fell to the ground in the forecourt. The pin which the accused was wearing gave way. His blanket consequently fell to the ground. The pin was later produced in court and the complainant identified it. It had been later collected from the scene along with a torch lid fitting the accused's torch.

The trial court heard evidence showing that the pin was peculiar in two respects. First it was man made. Next it was peculiarly large and known to a good number of crown witnesses including the complainant.

A torch battery as well as the complainant's ear ring were also collected from the scene. The complainant didn't know whose torch battery this was.

The accused denied ever having been to the scene prior to the picking up of the items referred to. Assuming the complainant's ear ring was planted at the scene how could the accused's items of property have been placed there without either his knowledge or his having previously been there?

Is it not a startling piece of coincidence that a pin alleged to be his, and a torch lid fitting his torch and a torch battery are all collected from the scene?

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To my mind the court below was correct in deciding that the accused's disavowal of these items of property as his was not only false but was also a vain attempt aimed at dissociating himself from the commission of the alleged crime.

It imports an element of wry humour that a pin which ordinarily serves to bring two ends of a blanket together has in this case served to link the accused with perpetration of the offence. Likewise the parts of the torch whose function is common knowledge, have also helped throw light on the investigation of the crime.

It was argued for the accused that there hasn't been proof of penetration. Further that medical evidence did not even show that the accused was the culprit in that the medical evidence failed to show traces of venereal disease which should have been found in the victim's private parts on account of the fact that the accused was discharging puss from his penis owing to the venereal disease he was suffering from at the time.

This argument is flawed on the ground that the victim did not receive medical attention there and then but after some forty-eight hours had elapsed. By then she had washed herself.

It was further argued that the learned magistrate had not cautioned himself regard being had to the fact that this being a sexual offence it was necessary for him to have done so.

Indeed App. Case No. 56/84 Dicks Vilakati vs Regina - a Swazi decision of the Court of Appeal (unreported) at p. 5 is authority for the view that

> "There is no rule of law requiring corroboration of the complainant's evidence in a case such as the present one but there is a well-established cautionary rule of practice in regard to complainants in

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> sexual cases in terms of which a trial court must warn itself of the dangers in their evidence and accordingly should look for corroboration of all the essential elements of the offence. Thus, in a case of rape, the trial court should look for corroboration of the evidence of intercourse itself, the lack of consent alleged and the identity of the alleged offender. If any or all of these elements are uncorroborated the court must warn itself of the danger of convicting and, in such circumstances, it will only convict if acceptable and reliable evidence exists to show that the complainant is a credible and trustworthy witness."

There is no mistake as to the identity of the accused. The evidence adduced for the crown proved acceptable and reliable. The thrust and tenor of it showed that the complainant was a credible and trustworthy witness. The accused was shown to be a liar beyond all reasonable doubt. Thus his denials of his liability in the commission of the crime came to nothing.

On these facts the "perfectly sound, rational, common sense solution" to be found in the present case is that the accused was responsible for the perpetration of the crime, C/F Mlambo 1957(4) 727 (A) 737D-F and it is quite unrealistic under these circumstances to have regard to the realms of conjecture. C/F e.g. R vs Ndhlovu 1945 AD 369 at 368; R vs Dhlumayo 1948(2) SA 671 (A) at 678; S vs Sauls 1981(3) SA 172 (A) at 182H - 183B.

There are features pointed out in the present case that the accused has, in my view rightly been found to have given untruthful evidence. This is a factor which the trial court or even this court is entitled to take into account as strengthening the inference of guilt of the accused from the facts set out in the record of evidence.

In Broadhurst vs Rex 1964 AC 441 at 457 Lord Devlin

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> "It is very important that the jury should be carefully directed on the effect of a conclusion, if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty and accordingly to convict him without more ado. It is the duty of the judge to make it clear to them that this is not so. Save in one respect a case in which an accused gives untruthful evidence is not different from one in which he gives no evidence at all. In either case the burden remains on the prosecution to prove the guilt of the accused. But if on the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What strength it adds depends of course on all the circumstances and especially on whether there are reasons other than guilt that might account for untruthfulness."

The medical evidence revealed that the complainant's voice had gone hoarse showing that the voice box must have been depressed. She had scratches around the neck - proof enough of the struggle that must have taken place resulting among other things in the victim's ear ring falling off.

Much was made of the fact that the examination was painless. It is doubtful whether this is not to be expected of a woman whose pregnancy was due to come to completion in three months thence.

More over it has time and again been said that unless procured within a very short time medical evidence proves futile in the attempt to determine rape from examination of the woman who has had prior experience of sexual intercourse if such examination takes place after the normal life span of the sperms has elapsed - usually some twenty four hours.

Further regard should be had to the fact that no history of prior intimate relationship existed between

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the accused and the complainant.

There is evidence that the complainant's clothing was soiled. There is also the evidence that she even passed out. There is evidence that villagers came to her aid; drawn towards the donga where she was by her cry.

P.W.2 said when she approached the donga she saw someone go past the donga.

The accused's conduct after the event cannot stand him in any good stead at all. He said he refused to open the door to the chief and messengers accompanying the chief to arrest him because he feared they would assault him. Even though he was innocent? He feared assault by the chief? The question immediately arising is "innocent of what?" When later the following day the messengers were sent there the accused was nowhere to be found. Why? It took the effort of police to run accused to earth and arrest him.

Indeed the record reveals that he remained silent under cross-examination when it was pointed out to him that the features of his pin and its size were such that it could not have been mistaken for any other.

His story that he had lost the lid of his torch at Bafatsana feast amounts to nothing but an afterthought for he never challenged the crown witnesses concerning that when they referred to the fact that it was found at the scene.

The accused did not gainsay P.W.5's testimony that he saw him previously using the pin that was collected from the scene.

The question that the puss or traces of venereal

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disease must have been discharged by the accused into the complainant if he is the one who committed the sexual offence is flawed on the ground that the body mechanism is in constant fight against infection or contamination by foreign bodies. Furthermore even if puss or traces of venereal disease were to be found in the complainant's private parts, such finding would not necessarily rule out the possibility that the complainant herself was suffering from such disease. Argument based on this leg of the accused's case is nothing but speculative if not intended to serve as a red-herring across the trail.

In the present case it is, I think, more productive to withdraw from the quagmire of medico-legal theory to the firmer ground of fact. The magistrate was in no doubt as to the complainant's identification of the accused. I agree with him.

In V vs A 1984 (2) Z1r at p. 140 - a Zimbabwean decision McNally J.A. referring to Mayer vs Williams 1981(3) SA 348 AD at 351 A to 352 D highlighted the principle enunciated by Trengove J.A. in these words

> "In summary, it was there decided that corroboration should not be insisted upon as a matter of law, but that as a matter of practice the court should always warn itself of the inherent danger of acting upon the testimony of the complainant in a (sexual) case."

In his sketchy judgment the learned magistrate seems to have properly considered facts which were consistent with the complainant's story and inconsistent with the innocence of the accused. This in itself serves as a corroborative factor.

In any event Holmes J.A. in S vs. Snyman 1968 (2) SA 582 AD at 585 E set out circumstances in

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which the inherent danger is avoided. They are

1. Corroboration of the complainant in a respect implicating the accused.
2. The absence of gainsaying evidence by him.
3. (A finding as to) his mendacity as a witness.

Demurring application of dicta to facts in a piecemeal and mechanical manner without taking account of the totality of the facts McNally J.A. pointed out that

> "It is the very danger referred to in similar circumstances by Macdonald A.J.P. in R vs J. 1965 RLR 501 at 503, 1966(1) SA 88 (SR. AD) at 90E when he said "the exercise of caution should not be allowed to displace the exercise of common sense.""

See S vs Snyman above at 598H

I am enamoured of McNally J.A.'s statement at p. 143 that:-

> "The proper approach, it seems to me, is to look at the totality of the surrounding circumstances and independently established facts. If it appears that a number of these facts and circumstances point, albeit without overwhelming individual force, in one direction, then the sum of their collective force may be said, in a proper case, to amount to corroboration sufficient to show a balance of probability in that direction."

C.F. Mayer vs Williams above at 352 G.

Although Mayer is a civil case it however has a bearing on Lord Denning's dictum in Miller vs Minister of Pensions (1947) 2 ALL E.R. 372 at 373 where in reference to the criminal standard it was said

> "It need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice.

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> If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it's possible but not in the least probable' the case is proved beyond reasonable doubt ....."

As to the accused's conduct after the offence it would be productive to consider the words of Dunn J. in CRI. Case No. 85/86 The Queen vs Simon Musa Mphofu re: Sentence (unreported) at p. 3 C/F S. vs X 1974 (1) SA 344 at 347H to 348A.

It is the general experience of the courts that various motives may exist for a complainant in a rape case either to concoct an allegation of rape or to substitute the accused for the real culprit. That is the underlying reason for the cautionary rule.

It is unnecessary in this judgment to canvass such motives save to say that one, not infrequently found, is a desire on the part of a woman to conceal or explain evidence of an extra-marital affair. Such evidence may, of of course, consist of a sexually transmitted disease and, while I do not suggest that that was necessarily the position in the present case, the evidence that would show that the complainant was suffering from such a disease would certainly be worthy of consideration in assessing the general credibility of her testimony.

Furthermore there was no suggestion that while the sexual act was engaged in with consent initially, some disturbance or intrusion by a third party prompted the complainant to feign a rape charge against the accused.

Dogs had been barking because of the accused's intrusion into the complainant's premises and the subsequent disturbance caused by the accused dragging the

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the complainant away. Witnesses heard this choral din of barking dogs.

Clearly the pressure that the accused applied to the complainant's throat made it impossible for her to shout. That her voice was still hoarse when she was later examined i.e. more than forty eight hours afterwards is proof that such pressure would suffice to make the victim lose consciousness; and or prevent her from shouting for help. Any subsequent sexual act could not have been indulged in with the complainant's consent.

Reasons for accepting the evidence of the complainant advanced by the learned magistrate who though is relatively a novice on the bench and therefore could not couch his judgment in terms which would bear out the obvious, are enough in my opinion to support the view that the accused was properly convicted as charged.

Hence on the footing that

> "..... If any or all of these elements i.e. (corroboration of the evidence of intercourse the lack of consent and the identity of the offender) are uncorroborated, the court must warn itself of the danger of convicting and, in such circumstances, it will only convict if acceptable and reliable evidence exists to show that the complainant is a credible and trustworthy witness,"

I find that abundant evidence exists to show that indeed the complainant was a credible and trustworthy witness on the basis of whose evidence the learned magistrate cannot be faulted for having secured a conviction. Even though he did not expressly say he had warned himself the reasons he has advanced for believing her exclude the possibility that he convicted when it was not safe to do so on account of the dangers inherent in sexual cases. I must however point out that the learned magistrate erred by treating the

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accused's admission of the offence in mitigation of sentence as proof of the commission thereof.

It is significant in the learned magistrate's judgment that a finding was made that the items of property collected at the scene beside the one belonging to the complainant all connected the accused with the offence and further that the accused "has not indicated that he had lent out these articles to anyone."

It is important indeed to note that in reference to a judgment by an experienced magistrate, the learned Wentzel J.A. in C of A (CRI) No. 5 of 1984 Khethisa Molapo vs Rex (unreportd) at p. 2 said

"It is illuminating to interpose to say the magistrate had written in his judgment that he had treated the complainant's evidence with caution and had warned himself of the dangers of convicting without corroboration."

With regard to sentence it has repeatedly beeen pointed out that a five year prison term is a minimum in respect of a benign rape.

In R vs Billam and Others (1986) 1 ALL E.R. 985 (C.A.) 987 - 988 penalties for rape are reflected and arranged in a sliding scale of seriousness, at the bottom of which is recommended five years while life sentence is at the apex of such scale depending on the presence and the inter-action of aggravating factors. Our statute provides the death sentence.

In the instant case the sordidness of the rape was aggravated by the savage pressure that was applied to the victim 's throat with the result that her voice went hoarse even days after the occurrence. It is not clear whether the complainant lost consciousness due to the rape or to the pressure applied to her throat. But the result in my opinion was all the same because loss

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of consciousness terminated the complainant's resistance.

In considering an appropriate sentence sight should not be lost of the fact that the complainant was even pregnant. Ordinarily in Basotho society it is taboo to have sex with a pregnant woman. But the serious view I take of the offence is that a woman should be subjectd to such vile act during a time in her life when any use of force on her could result in the loss of her baby or her own life.

It is proper for me therefore to confirm the verdict but set aside the five year prison term and in substitution thereof impose one of eight years.

J U D G E.
19th September, 1989.

For Crown : Miss Nku
For Defence : Mr. Peete.