

IN THE HIGH COURT OF LESOTHO

In the matter of:

R E X

v

LEJONE PASCALIS KHETHA

Before the Honourable the Chief Justice Mr Justice
B. P. Cullinan on the 28th day of April 1989

For the Crown : Mr S. P. Sakoane, Crown Counsel

For the Accused : Mr W. C. M. Maqutu

J U D G M E N T

Cases referred to: (1) R v Lebuajoang Rankhebe CRI/S/13/86
(Unreported)
(2) R v Jankie and Others CRI/REV/75 and
81/88 (Unreported)

The accused was charged before the Subordinate Court of the First Class for the Maseru District with the rape of a ten-year-old girl.

The accused pleaded guilty. He agreed with a statement of facts which revealed a clear prima facie case. The accused was a neighbour, on friendly terms with the child's father, so that there is every likelihood that he was aware of the child's age, that is, as being less than 12 years of age, there being a presumption of non-consent at such an age: see the case of R v Lebuajoang Rankhebe (1). In any event, the statement of facts clearly revealed that the little girl did not consent to the gross assault. The

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accused raped the child twice. She was medically examined the following day. The doctor who conducted the medical examination was of the opinion that there was "no strong evidence of the use of force". I must observe that that opinion is completely contrary to the recorded details of the physical examination conducted by the doctor. The statement of facts leaves one in no doubt that force was used.

The learned trial Magistrate delivered a reasoned judgment. Where an accused pleads guilty and agrees with a statement of facts revealing a prima facie case, there is no need for a Magistrate to deliver a reasoned judgment as such, but simply to enter a finding and conviction. I imagine that the learned trial Magistrate delivered the judgment in the present case, in view of the complications in the inter-relationship between the two offences, namely rape and defilement. Having summarized the statement of facts the learned trial Magistrate recorded as follows:

" Legally a girl under sixteen years of age has no consent to sexual intercourse. I have therefore got to the conclusion that the Crown has proved that the accused is guilty of contravening section 3(1) of the Proclamation 14 of 1949, Women and Girls Protection Proclamation.

I considered the provisions of section 187(1)(e) that;

" (1) Any person charged with rape may be found guilty of...(e) the statutory offence of unlawful carnal knowledge of a girl

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of or under a specified age;"

Verdict : Guilty of contravening section 3(1)
of Proclamation 14 of 1949. "Women
and Girls protection Proclamation".

When it came to punishment, however, the learned trial Magistrate observed that the offence of rape attracted a minimum sentence of five years' imprisonment, but that the accused had been "convicted under a more serious offence in that it is unlawful carnal connection with defenceless young girls". The learned trial Magistrate then referred in careful detail to the case R v Jankie and Anor (2) wherein this Court advocated a "starting point" of a punishment of five years' imprisonment in dealing with the offence of rape, and indeed that Magistrates should commit to the High Court for sentence where their sentencing powers were inadequate. The learned trial Magistrate then very properly and carefully set out the reasons for committal thus:

" I am of the opinion that six years' imprisonment is inadequate punishment for the accused, as that is my maximum imprisonment jurisdiction. I took into consideration that the accused was a first offender, a married man with three children; that he is a breadwinner for his family. I therefore ask the High Court with its inherent powers to give this accused a suitable punishment if the conviction is in accordance with real and substantial justice".

There seems to be some confusion here and it proves convenient to refer the learned trial Magistrate to the

Rankhøbe (1) case. Statutory defilement is not more serious than rape. The maximum punishment for the former is six years' imprisonment; for the latter offence it is death. Having convicted the accused of defilement, the maximum punishment therefore was six years' imprisonment. That was within the learned trial Magistrate's jurisdiction and I do not appreciate therefore why the accused was committed to the High Court.

For that matter, I do not understand why the learned trial Magistrate entered a conviction for a lesser offence. The accused was clearly guilty of rape. The question now arises as to whether this Court can substitute a conviction for the offence charged. The learned Counsel for the accused Mr. Maqutu submits that the Court has no such power. The learned Crown Counsel Mr. Sakoane concedes that such is the case. I am inclined to agree. The Court has power, of course, to substitute a conviction for a lesser offence. But I doubt if it can substitute a conviction for a more serious offence, even if the accused was originally charged therewith. The position is, therefore, that the accused stands convicted of the statutory offence of defilement, for which the maximum punishment is one of six years' imprisonment.

Mr. Maqutu submits that the accused was very drunk. The offence was committed not once, but twice and there was a good deal of premeditation in the accused's actions. The learned trial Magistrate fully addressed herself to the question of drunkenness, and I do not see what I can add to what she said. I take into account, however, the fact that

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the accused is a first offender. Nonetheless this is a bad case of defilement, as Mr. Sakoane submits. The child was but ten years of age, intercourse took place not once but twice. The accused was fortunate that he was not convicted of rape. Nonetheless I am confined by the restrictions of section 3 of the Women and Girls Protection Proclamation. I take into account in particular that the accused has been in prison for some five months. In all the circumstances I sentence him to imprisonment for four (4) years with effect from the date of this order.

Delivered at Maseru This 28th day of April, 1989.

(B. P. CULLINAN)
CHIEF JUSTICE