CRI/REV/443/88

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

NGAKA MASUPHA

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 1st day of August, 1989.

This matter came to the High Court on automatic review.

The accused stood charged before the Subordinate Court with the crime of rape.

He pleaded not guilty but was convicted as charged and sentenced to five years' imprisonment.

The reviewing judge was of the opinion that the sentence was manifestly inadequate.

Consequently the accused was given an opportunity to secure services of a legal representative and was given a forewarning to say why, in the event that the conviction was confirmed, the sentence should not be appreciably enhanced.

The facts reveal that a 58 year old 'Matholang Masupha the mother of the accused has a house at Qefata where she and the accused who is her last born stay. They use separate beddings for sleeping.

During the evening of August 8th 1988 the complainant

/'Matholang

'Matholang prepared the bedding for herself after the two had had their evening meal.

The complainant got under her blankets. The accused inquired of her

> "Hey you woman come and prepare the bedding for me."

The complainant astonished by the accused's conduct asked "Since when am I supposed to prepare the bedding for you?" Thereupon the accused uttered the threat that she might find that the time would be too late when she intended complying with the order. He also threatened to scald the complainant with water from a burning primus stove; and said that he wanted to make a record. On being asked about his behaviour the accused said he wanted to make history.

Then the complainant stood up and proceeded to make the bedding as ordered by the accused. The accused poured water on the complainant. She cried. She appealed to him to stop doing so.

The accused took out a knife and said he was going to finish off the complainant. Then he ordered her to come so that they might indulge in sexual intercourse. She hesitated but the accused wrestled with her, tripped her, and as she fell he then forcibly had sex with her. Having sated and slaked his ravenous urge or shall I say his libidinous appetite, he threatened to kill her to ensure that she did not tell other people about this incident.

The complainant finding that there was no way she could escape imminent death decided to truckle to her tormentor's demands; and made an undertaking not to report to anybody. Consequently she and the accused had sex till the following morning. The accused kept her mother a virtual prisoner in the house by fastening the door with wire when he went out.

/It

It was through sheer cryptic communication and secret devices that she gave a sign to a child who happened to be around at the time to come to her. Tactfully applying the same secret method she managed to order this child to call one Letsema to her rescue. Letsema and others went looking for the accused who was brought before the chief; and when questioned about his mother's complaint against him, he asked that he be pardoned. The complainant testified that the accused does not drink beer but smokes dagga.

No evidence of his having smoked dagga that day was adduced.

The form of cross-examination that the accused subjected his mother to was nothing short of adding insult to her injured dignity and personality. For instance :-

"Did I have sexual intercourse with you - ?
Yes.
What is that - ?
That you had sexual intercourse with me.
With what - ?
You undressed me and inserted your penis into my vagina".

In Review Cases 75 and 81 of 1988 Rex vs Jankie and Rex vs Khauta respectively (unreported) reference was made to R vs Billam & Others (1936) ALL E.R. 985 (CA) at 987 et seq namely that

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

Where rape is committed

> "by a person who is in a position of responsibility towards the victim, or by a person who .... holds her captive the starting point should be eight years."

Where

/".....

"........ He represented a more than ordinary danger .... a sentence of 15 years or more may be appropriate."

"Where the defendant's behaviour has manifested perverted .... tendencies or gross personality disorder .... a life sentence will not be inappropriate."

The crime should be treated as aggravated by any of the following factors :

"(1) Violence is used over and above the force necessary to commit rape.

(2) A weapon is used to frighten or wound the victim.

(3) The rape is repeated.

(4) ....

(5) ....

(6) ....

(7) ....

(8) The effect on the victim, whether physical or mental, is of special seriousness."

The accused has raped his mother. He used a knife to frighten her. He applied hot water to her body to cause her alarm and subject her to indignity. He locked her up in the house making her a virtual captive. He had sex with her against her will for a good part of the night. He did not plead guilty; of course he was not obliged not to. But Billam above at p. 988 shows that

"The extra distress which giving evidence can cause to a victim means that a plea of guilty, perhaps more so than in other cases, should normally result in some reduction from what would otherwise be appropriate sentence. The amount of such reduction will of course depend on all circumstances, including the likelihood of a finding of not guilty had the matter been contested."

See also Review Case No. 127/68 R vs Nalana (unreported).

The accused has shorn his mother of all her dignity Apart from the initial trauma suffered during the sexual act, the subsequent process of reporting to the chief and the police added to the victim's distress. But the

/cross-examination

cross-examination in Court by her son about gave the coping-stone to the exposure of her nakedness.

Rape is bad enough when committed by a stranger. It would be worse if committed by a relative; for an element of incest is involved. It becomes more than a thousand fold disgusting and nauseating when committed by a son on his own mother who ordinarily should look up to that self same son for protection against all forms of violence to her. It becomes difficult to express in words the seriousness of this offence when committed by the son on the mother. Suffice it then to say it evokes in one an utmost sense of revulsion.

Why then the learned magistrate treated this type of case as if it is a run of the mill type escapes me.

In CRI/S/10/88 R vs Qhosheka (unreported) p. 3 this Court indicated that the Subordinate Courts are at large to commit for sentence to the High Court cases which fall beyond their sentencing powers. See Section 293(1) of the Criminal Procedure and Evidence Act of 1981.

Mr. Moorosi submitted that the accused's habitual smoking of dagga might have impaired his reason. But I am told by the accused that he is a builder. As such it would seem dangerous for him to negotiate heights to which buildings usually go if dagga smoking can be said to have somehow impaired his mental or even physical being. In any case no evidence of such empairment was adduced. Hence my rejection of this submission.

In Criminal Review Order 10/88 R vs Morie (unreported) at p. 5 it was indicated that magistrates would do well to heed the guidelines set out in Jankie and Khauta above. The last paragraph thereof clearly shows that cases of aggravated rape should be committed for sentence to this Court.

/In

In CRI/REV/572/88 Rex vs Griffith Lehana (unreported) at p. 1, this Court observed that a sentence of five years' imprisonment was imposed persuant to the Revision of Penalties (Amendment) Order of 1988 in respect of which the learned magistrate appeared to have been of the view that no higher than the minimum sentence prescribed can in any circumstances be imposed.

This court in response to this apparent view nonetheless reacted by saying

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

These words in quotations apply with equal force in the instant review case.

For the sake of emphasis I need only point out that at page 2 of Lehana above it was stated that because it is not every magistrate who has sufficient jurisdiction to mete out suitable sentences in the varying degrees of reprehensibility in rape cases the learned Chief Justice in Jankie and Khauta above 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 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)

It is only for the sake of stressing the point that I wish to quote liberally from Lehana at p. 4 that :-

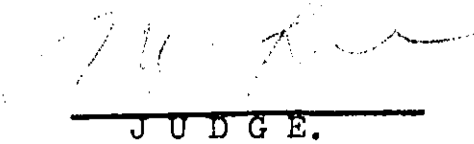
/"The

> "The trauma or 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."

Will the magistrates charged with the responsibility of sentencing rapists once more take note.

The sentence imposed by the court below is set aside. The verdict is confirmed.

The accused is sentenced to 9 years' imprisonment.



JUDGE.

1st August, 1989.

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