CRI/A/36/90

IN THE HIGH COURT OF LESOTHO

In the matter between:-

THABO MOFOKENG Appellant

and

R E X

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 16th day of November, 1990

The appellant appeared before the Subordinate Court for the district of Leribe charged with rape. It was alleged that on the 24th December, 1987 and at Lisemeng the accused unlawfully and intentionally had sexual intercourse with Nyane Thotho without her consent. He pleaded not guilty but at the end of the trial he was convicted and sentenced to five (5) years' imprisonment. He is now appealing to this Court on a number of grounds with which I shall deal at a later stage in this judgment.

The evidence by the Crown is to the effect that on the 24th December, 1987 at about 10.00p.m. the complainant and one

Linake Mokhitli (P.W.6) were returning to their homes from a restaurant in the vicinity of their home. On their way the appellant and another youngman came to them. The appellant and the youngman suddenly attacked the complainant and P.W.6 with sticks and managed to drive them into the Linare Stadium. The appellant and his companion finally caught the complainant and threw her to the ground. They both raped her. The complainant testified that while she was struggling with the appellant she managed to pull off his balaclava hat and saw his face. Although it was at night and dark she saw his face because there were electric lights. While they were raping her P.W.6 ran away and went to the home of the complainant and reported to her mother that two young men were raping her daughter. He had also identified their attackers by the clothes and shoes they were wearing; but he did not see their faces.

Having satisfied their lust the appellant and his companion released the complainant. She went to her home and reported to her mother that she had been raped by two young men. Her mother, accompanied by P.W.6, took her to the charge office. On their way to the charge office they saw the appellant being escorted by P.W.3 Kuena Mokhethi. The complainant immediately identified the appellant as one of the men who had just raped her about two hours ago. P.W.3 is a nightwatchman at Frasers Store and had arrested the appellant for an entirely different matter which had nothing to do with rape. While the complainant was still reporting to the others that the appellant was one of the men who raped her, the police arrived at the scene and arrested him.

Dr. Kokler examined the complainant on the 25th December, 1987 and formed the opinion that sexual intercourse had taken place up to seventy hours back. He also found sperms in the vaginal smear that was taken from the complainant.

At the close of the Crown case the learned magistrate explained the appellant's right to him. The appellant elected to remain silent but he indicated that he had three witnesses, namely Mofota, Makotoko and Putsoa whose surnames he did not know. He told the court that they worked in the mines at Vaal Reefs and that he did not know their addresses. The learned magistrate recorded "Court cannot wait for such witnesses" and closed the case for the defence.

During cross-examination of the complainant the appellant's counsel raised the defence of alibi. He put it to her that at the time she was raped the appellant was at 'Mantsebo's Restaurant at Leribe-Moreneng, a distance of about twenty kilometres away. He indicated that he was in the company of Putsoa, Makatoko and Mofota.

The appellant is appealing to this Court on a number of grounds, but I do not propose to deal with them all because only one ground must dispose of this appeal. I am of the opinion that the learned magistrate committed a very gross irregularity by denying the appellant the right to call his witnesses. He gave the court the names of the people with whom he was when the alleged rape took place. These people worked in the mines in the Republic of South Africa and the appellant indicated that he did not know

their addresses. It is not a uncommon even in this Court to find that after the completion of a preparatory examination prospective witnesses for the defence go to the mines in the Republic of South Africa. This Court has very often given the defence the chance to go to the relatives of such witnesses and to get their addresses in the Republic of South Africa. The appellant knew these people very well and must have known their local addresses/villages. I wish the learned magistrate had been a little bit patient to enable the appellant to call his witnesses because it was not his fault that the witnesses had to go to work. Postponing the case for a few weeks would not have caused any harm, after all this case had been postponed several times before for other reasons which had nothing to do with the appellant.

Section 72 (4) of the Subordinate Courts Order No.9 of 1988 reads as follows:

> "The High Court shall thereupon exercise the powers conferred by section 329 of the Criminal Procedure and Evidence Act, 1981:
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> Provided that, notwithstanding that the High Court is of opinion that any point raised might be decided in favour of the appellant, no conviction or sentence shall be reversed or altered by reason of any irregularity or defect in the record or proceedings unless it appears to the High Court that a failure of justice has in fact resulted therefrom or that the accused has been prejudiced thereby."
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> (see also section 8 (2) of the High Court Act No.5 of 1971

It was gross irregularity which had prejudiced the appellant to deny him the right to call his witnesses. If he had been given a reasonable time to get their addresses from their relatives and had failed to do so, it would have been a different matter. The abrupt decision that the 'court cannot wait for such witnesses' was uncalled for and unjust. In R. v. Vazi, 1954 S.A. 538 it was held that a magistrate had committed gross irregularity which had prejudiced the appellant where he had interfered with the appellant's conduct of his trial by dissuading him from calling witnesses that he had wanted to call, who were eye-witnesses of the occurrence and were present in court when the case was being tried.

The appeal is allowed; the conviction and sentence of the court a quo are set aside. The appeal fee must be refunded to the appellant.

The Crown did not support the conviction.

J.L. KHEOLA
JUDGE

16th November, 1990.

For Appellant - Mr. Mofolo

For Crown - Mr. MOKHOBO.