IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

PHOMOLO KHUTLISI — Appellant

vs

R E X — Respondent

HELD AT MASERU

Coram:

Schutz, P.
Aaron, J.A.
Ackermann, J.A.

JUDGMENT

Ackermann, J.A.

Appellant, a 19 year old young man was, on his plea of guilty, convicted of raping a 78 year old woman by the Subordinate Court of the First Class for the Maseru District on the 31st May, 1988 after the appellant had agreed with an outline of the facts of the case by the Public Prosecutor. The trial Magistrate committed the appellant to the High Court for sentence in terms of s.293 of the Criminal

/Procedure ...

Procedure and Evidence Act, Act No.9 of 1981. Before doing so the trial Magistrate allowed the appellant to address him on mitigation of sentence and also questioned the appellant concerning his state of sobriety at the time of committing the offence as well as his personal circumstances.

Cullinan, C.J. heard the matter in the High Court. The record in this case is, once again, far from satisfactory because it only contains a copy of the Chief Justice's judgment but no record of the proceedings before him. It is clear from the notes in the original file that both the appellant as well as Counsel for the Crown addressed him. The Chief Justice, after satisfying himself from the record of the appellant's guilt, sentenced the appellant to six (6) years' imprisonment.

The appeal was brought on a number of grounds. In dealing with these grounds it is important to bear in mind that, in terms of ss.294(4) read with ss294(3)(1) of the aforesaid Act, the appellant must be deemed to have been tried and convicted for the offence before the High Court.

It was contended that the Magistrate in referring the matter to the High Court for sentence lost sight of the fact that he was dealing with a minor and that both courts overlooked the provision

/of ...

of s.308 of the Criminal Procedure and Evidence Act which gave the court power to impose a sentence of whipping in lieu of any other punishment. There is no merit in this submission. The age of the appellant was stated to be 19 years in the charge sheet and it is unconceivable that the Chief Justice could have overlooked either this fact or the provisions of s.308 of the Act.

It was further contended that the court had no guidance as to the personal circumstances of the appellant. There is likewise no merit in this point. The Chief Justice took into account the fact that the appellant was a first offender and had before him the record of the proceedings before the Subordinate Court from which the personal circumstances of the appellant appear. There is no evidence or suggestion that the Chief Justice did not inform himself of these facts or indeed question the appellant himself as to his personal circumstances.

The argument was advanced that the appellant was a stammerer and that therefore the provisions of ss. 171(2) which provide that "any accused who in the opinion of the court requires the assistance of another person may, with the permission of the court, be so assisted" ought to have been invoked. There is nothing on record to indicate that the appellant is or was a

/stammerer ...

stammerer or that in any other respects he was a person such as is envisaged in the section.

It was submitted that the Court erred in applying the Minimum Sentences Order of 1988. This point is groundless for the simple reason that the Chief Justice did not apply the aforementioned order.

In paragraph 5 of the Notice of Appeal reference is made to the appellant's impediments of speech, his inadequate development and the fact that he did not get a fair trial as he pleaded guilty under duress when he was innocent of the suspected crime. There is absolutely nothing on the record to support these contentions which can therefore not prevail.

In appellant's heads of argument a point was raised for the first time that inasmuch as appellant was legally unrepresented both before the Subordinate Court as well as the High Court and had not been informed of his right to legal representation, he did not have a fair trial. In the context of and on the facts of the present case this is a gound which ought to have been raised in the Notice of Appeal and, having regard to the absence of a full record of the proceedings before the Chief Justice, it ought perhaps more properly to have been brought by way of review. In any event it seems to me that, on the present record and on the facts of this case, the point cannot succeed.

/It is, ...

It is, for reasons which will emerge, not appropriate to deal in any comprehensive manner in this judgment with either:

(a) the right of an accused to be legally represented at his trial;

(b) the right of an accused, who wishes to be legally represented but does not have the means to engage a legal representative himself, to free legal representation from the Crown; or

(c) The right of an accused to be informed at the commencement of a trial of the above rights.

I would emphasise however the importance, in the fair administration of justice, of an accused being informed at the commencement of the trial of his rights in regard to legal representation, a matter which was referred to by Lehohla J. in L. Pulumo v Rex CRI/A/27/88 (unreported) at p.16. The following remarks of Goldstone J. in S. v Radebe, S. v Mbonani 1988(1)SA 19(T) at 196 G-J are instructive and apposite:

/"If there ...

" If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction. Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of this right but they should be encouraged to exercise it. He should also be informed in appropriate cases that he is entitled to apply to the Legal Aid Board of assistance. A failure on the part of the judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice. I should make it clear that I am not suggesting that the

/absence ...

absence of legal representation per se or the absence of the suggested advice to an accused person per se will necessarily result in such an irregularity or an unfair trial and the failure of justice. Each case will depend upon its own facts and peculiar circumstances."

I need hardly add that the question as to when, or under what circumstances, an impecunious accused is entitled to free legal representation might be answered differently in different countries. The duty to provide free legal representation in a wider range of cases may, for a variety of reasons, be greater in the United State of America than in the Republic of South Africa and greater in the latter than in the Kingdom of Lesotho.

It is important, for the proper administration of justice, nonetheless, that an unrepresented accused, at the commencement of his trial, be informed of his legal rights, in regard to legal representation, and, if he is indigent and desirious of legal representation, what avenues are open to him in this regard.

The difficulty facing the appellant in the present case on this issue is the paucity of facts. There is no evidence that the appellant's rights in this regard were not explained to him. There is indeed no evidence that the appellant was anaware of

his rights concerning legal representation nor, if he had been informed of, his rights that he would have wanted legal representation. Consequently I am not satisfied that the appellant has established any procedural irregularity in this regard.

I turn finally to the submission that, considering all the circumstances of the appellant, the sentence imposed was so grossly excessive that it warrants interference with on appeal. The facts of the offence appear from the record. Without any provocation, a young man of 19 raped an old woman of 78 four times in the most brazen, brutal and contemptuous manner. Under these circumstances, and notwithstanding the fact that the appellant is a 19 year old first offender the sentence of six years' imprisonment cannot in any regard be considered inappropriate.

The appeal is accordingly dismissed.

Signed: .....
L.W.H. Ackermann
JUDGE OF APPEAL

I agree:
Signed: .....
W.P. Schutz
PRESIDENT

I agree
Signed: .....
S. Aaron
JUDGE OF APPEAL

Delivered at MASERU this 26th day of January, 1990.