CRI/A/35/89
CIV/APN/22/90

IN THE HIGH COURT OF LESOTHO

In the matter between:

TSIMANE M. BOLIBE — APPLICANT

AND

THE MAGISTRATE (QUTHING) — 1ST RESPONDENT
THE ATTORNEY-GENERAL — 2ND RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS — 3RD RESPONDENT

Before the Honourable the Chief Justice Mr. Justice B.P. Cullinan on the 20th day of May, 1990.

For the Crown : Mr. P. Mokhobo, Crown Counsel
For the Applicant: Mr. Z. Mda

JUDGMENT

Case referred to: (1) R v Sesene CRI/REV/169/89 (Unreported).

The appellant was convicted by the Magistrate's Court for the Quthing District of rape and was sentenced to 5 years' imprisonment.

The charge indicates that the accused was "aged about 18 years". That should have put the learned trial Magistrate on enquiry. Indeed, in mitigation the accused said, "I am a youth of 18 years still attending school at Std.7." Despite all this the learned trial Magistrate conducted no enquiry as to age. I have dealt with this aspect in another review judgment this

morning R v Sesene (1), and I would refer the learned trial Magistrate's attention thereto. As matters stand, there is an affidavit before this Court sworn by the accused's mother, and a baptismal certificate exhbited thereto, which establishes that the acused is 17 years of age and was less than 17 years in the court below. The sentence of imprisonment is therefore invalid. Further, the trial was conducted in the absence of a parent.

It is not disputed that the accused met the 17 year old complainant after Church on a Sunday. She was in the company of another girl and he with a male companion. The two couples separated going in different directions. The complainant testified that the accused asked her "when am I going to accept his proposal as he proposed love to me". She declined. They reached a stream where he pulled her towards a tree: they struggled, the complainant overpowering the accused, until such time as he tripped her and she fell. She shouted, raising the alarm, but no one heard, whereupon the accused divested her of her underclothing and raped her.

She went home and made immediate complaint to her mother. The latter testified that her daughter was crying. She took her for medical examination the next day.

The doctor recorded that he observed "no recent wounds" on the hymen, examination was "painful", and that a vaginal swab

revealed "no spermatozoa seen". He also observed an infection in the vaginal area. In this respect the doctor opined that,

> "I can not state if the person had forced intercourse. Both the infection and hymen indicate that intercourse has taken place before."

The accused testified that the complainant had agreed with him to have intercourse, but he desisted from doing so as he suffered from syphilis. It was the complainant's own evidence that this was not his first time to "propose love" to her. The fact that she was content to walk alone with him, indicates that they were on, at least friendly terms. In his questioning of the complainant he had put it to her that he had desisted, as it was painful - presumably painful for her. It may well be that he did not wish to reveal the syphilis, that is, until the court ruled that there was a case to answer.

In any event the doctor in his evidence testified that while the complainant's hymen and the infection showed that there had been intercourse before, yet he could not say that there had been forced intercourse, or even recent intercourse without force. All that he could say was that "intercourse has taken place before". As to the infection, when asked, "Would it be there for some days?", he replied that he was not in a position to say how long.

The doctor's evidence therefore apparently indicates that the complainant, contrary to her evidence of virginity, had had intercourse before. Again, there were no signs of any forced intercourse, which signs were to be expected if the complainant's evidence was true.

There is the evidence of recent complaint, which does not amount to corroboration, but does tend to establish consistency of the complainant's evidence. The learned Counsel for the accused M. Mda points to the fact that complainant's mother was in bed when the complainant returned, no doubt later than usual, who may well have pretended to have been raped to explain her late arrival. There is little on the record to support this submission. As against that, there is no evidence of the state of the complainant's clothing or underclothing, or whether she bore any signs of a struggle, particularly in view of her evidence of being strong enough to overpower the accused. As I see it, the mother's evidence could on the balance be regarded as neutral.

The doctor's evidence if anything establishes that there was no forcible intercourse. On the contrary however, the learned trial Magistrate seems to have been satisfied, without any medical evidence in support thereof, that the infection suffered by the complainant was that suffered by the accused, indicating

penetration. That I consider was a misdirection.

In the light of all that, corroboration was clearly necessary to a conviction. There was none. Further the learned trial Magistrate never once adverted to corroboration or the cautionary rule in the matter. Indeed he observed as follows:

> "Accused surprising he was again says he was not in love with Complainant as all others have said so, but all the same says Complainant agreed to have sexual intercourse with her this is highly improbable, I therefore accept the victims allegation. I find accused guilty as charged and I accordingly find him guilty of the same."

While a court may, in considering all of the circumstances, address itself to probabilities, such process does not affect the standard of proof upon the prosecution. The above passage indicates that the standard of proof applied by the learned trial Magistrate went no further than the balance of probabilities. The court cannot convict if the accused's evidence might reasonably possibily be true. The court can only convict where, on the whole of the evidence, the accused's guilt is the only reasonable inference.

I am not satisfied that had the learned trial Magistrate

directed himnself as I have indicated above, he would inevitably have convicted the accused. It would be unsafe to allow the conviction to stand. The finding and conviction and sentence in the court below are set aside and the appellant is acquitted.

Delivered at Maseru This 22nd Day of May, 1990.

B.P. CULLINAN

CHIEF JUSTICE