CRI/S/9/89

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

PEETE MAROBA
MAROBA MAROBA

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 6th day of June, 1990.

The accused Peete Maroba was charged jointly with one Maroba Maroba with the rape of Tsokolo Rasoeu. The offence is alleged to have occurred on or around the 9th of March 1989, at Ha Sekoati in the district of Mafeteng.

The accused was convicted at the end of the day as charged, while accused No. 2 was convicted of assault with intent to do grievous bodily harm.

It appears that the learned magistrate must have been influenced by the extent of the injury on the complainant's arm, caused admittedly by accused 2 that he returned the verdict of assault with intent to do grievous bodily harm.

The facts show that at the time the crime charged namely that of rape was committed accused No. 2 was no longer at the scene. I asked Mr Sakoane for the crown as to the propriety of returning the verdict of assault with

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intent to do grievous bodily harm in a case where a rape was charged. He searched his wits and told me, wrongly, that such a verdict could not have been proper at best a verdict of assault, common assault or indecent assault could have been preferred against accused No. 2. The verdict of assault with intent to do grievous bodily harm in respect of accused No. 2 is confirmed. As to the sentence that he received, I have no doubt that the magistrate had no choice once he had found him guilty of assault with intent to do grievous bodily harm but to impose a minimum sentence allowed by the law in that regard. His sentence of five years' imprisonment is accordingly confirmed.

I have taken a grim view of the fact that even though the record shows that it arrived at the High Court for consideration regarding the sentence of the accused on the 25th of October 1989, the case is only being heard today. It cannot be over-emphasised that the disposal of cases should be with expedition. And it becomes even more essential that in a case where a man has already been convicted that minimum delay should be incurred before an appropriate sentence by an appropriate court should be imposed. It is absolutely inexcusable that this form of delay should have occurred.

With regard to the offence with which the accused is charged and in respect of which he was convicted, the magistrate heard the evidence of the crown witnesses including that of the accused. It appears that the complainant was at a stockfair together with the accused and other people including accused No. 2.

At the time when the complainant made to leave he was followed by the accused and his colleague. When they were a good distance away from the house accused 2 assaulted the complainant with a stick, and apparently the complainant had been insulted by one of the accused by her mother's private parts, and the witnesses who heard the complainant

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indicate that it appears that she was insulting back whoever had insulted her before. And this accounts may be for the assaults that accused No. 2 leashed at or meted out to the complainant.

Needless to say the complainant suffered serious injuries on her arm as a result of these. After accused No. 2 had left, accused No.1 seized this opportunity to have sexual relations with a woman who had been maimed by his colleague. The accused was armed with a stick. A merit was made of the fact that he didn't during the commission of the crime use it. But the fact is that the stick by its presence implies that it could be used should she resist. Moreover when accused No. 2 was assaulting the complainant acoused No. 1 was standing by doing nothing. Evidence was also led by the complainant that accused No. 1 belaboured her with a stick. And in the process either the arm got broken because of this accused's or the other accused's acts. It seems that the complainant didn't see any, was not attended by a doctor, but it seems to me that immediately after the act she reported to the accused's relative where she was taken by accused himself virtually as the accused's captive.

It should also be borne in mind that during their walk to the relative's place the accused sought an assurance from the complainant that she was not going to report his act on her. Accordingly the complainant assured him that she was not going to report this crime. So the accused can hardly make a virtue of the fact that the complainant had consented because, or based on the fact that, she asked how - when asked by the accused to have sexual intercourse with him, - she was to do that in the light of the fact that she had been so injured. Mr Putsoane says that the complainant's question and attitude amounted to consent. But a proper reading of the script shows that she was in no way to consent to sexual intercourse. In fact she was putting the onus on the accused to say how in the light of the fact that

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she was in that sort of state she could engage in sexual intercourse with him. In the Appeal case No. 56 of 1984 Dicks Vilakati vs Regina (unreported) at page 5 of Swaziland Court of Appeal the court there stated as follows:

> "There is no rule of law requiring corroboration of the complainant's evidence in a case such as the present one but there is a well-established cautionary rule of practice in regard to complainants in sexual cases in terms of which a trial court must warn itself of the dangers in their evidence and accordingly should look for corroboration of all the essential elements of the offence. Thus, in a case of rape, the trial court should look for corroboration of the evidence of intercourse itself, the lack of consent alleged and the identity of the alleged offender. If any or all of these elements are uncorrobarated the court must warn itself of the danger of convicting and, in such circumstances, it will only convict if acceptable and reliable evidence exists to show that the complainant is a credible and trustworthy witness."

In V. vs A 1984 (Part 2) Zimbabwe Law Reports 139 at page 140 A. McNally J.A. referring to Mayer vs Williams 1981 (3) S.A. 348 A.D. at 351 A to 352 D highlighted the principle enunciated by Trengove J.A. in the following words:

> "In summary, it was there decided that corroboration should not be insisted upon as a matter of law, but that as a matter of practice the court should always warn itself of the inherent danger of acting upon the testimony of the complainant in a (sexual) case."

A summary made by Holmes J.A. in S. vs S. Snyman 1968 (2) SA. 582 A.D. and 585 E set out circumstances in which the inherent danger can be avoided. The inherent danger is avoided by application of the following:

1. Corroboration of the complainant in a respect implicating the accused;

2. The absence of gainsaying evidence by him;

3. A finding as to his mendacity as a witness (by which we mean, a finding that he was a liar).

In the record as it stands I find that there is absolute absence of gainsaying evidence by the accused. There is also corroboration of the complainant in a respect implicating the accused in the sense that the accused said falsely that he was in love with this woman. His evidence on the record was very brief. But I observed that he did not stand the cross-examination well. I do find therefore on the basis of authorities referred to that the accused was rightly convicted by the court below.

Now coming to the question of sentence, I have observed that the accused is a regular customer in the field of crime. He was convicted of rape, as recently as, ... I had said that the complainant was not medically examined but it appears that she was actually examined on the 14th of March 1989. The doctor's findings indicate that the complainant was 36 years old, that her physical condition was fair, her mental state was fair to anxious, and that her sex life was of a married woman therefore active. The doctor observed that the complainant had fracture on her ulna and that she also had an abrasion on the cheek, and that she also had a septic laceration on the forehead, and there was also a small abrasion on the right hand and also an abrasion on the side of the neck, her vestibule was intact but bruised, the hymen was torn, the tear was old, by which I am made to understand that the hymen had been torn a long time before, and the vagina admitted two fingers, and that she had white discharge, and that the examination was painful. She found no sperms inside the vagina, but she saw evidence of assault and struggle indicating forceful sexual intercourse. Her report was made outside 24 hours of the alleged rape but the examination was made within that period on 10.3.89.

To pick up the threads from where I left off before the interrupting discovery I made a few lines back it appears that the accused was, according to the number of the case which is not dated but bearing the year 1988, convicted of a crime of:

1. common assault,

and later he was found guilty of

2. rape,

and the latest crime was that of

3. housebreaking with intent to steal and theft.

The magistrate made a finding in his remarks that the instant crime was committed while the accused was serving a suspended sentence imposed in the previous case. It seems therefore to me clear that the accused is not only a frequent customer in the province of crime but also a very bold one. In the case CRI/S/17/88 Rex vs Tseliso 'Mathabo Bure Chao, this Court observed that and made reference to another case Cash M. Dlamini & Another vs The King (unreported and unnumbered) at page 4 where Maisels P. in agreeing with the main judgment by Isaacs J.A. said at page 4!

> "The facts in this present case really speak for themselves. There is no doubt that the appellant has systematically embarkedon a course of housebreaking, theft and robbery. I can almost say that this has been his business; and that business has to stop. I agree entirely that he should be declared an habitual criminal and given the indeterminate sentence."

In treating of what considerations are to be taken into account in a case similar to the present, Isaacs J.A. said on page 2 - I may just indicate that the learned Judge had had cause to refer to R vs Edwards 1953(3) SA page 168. He had also referred to Maseko vs The King 1977-1978 Swaziland Law Reports at 8 where Smit J.A. also dealt with an appeal against an indeterminate sentence. As I said Isaacs J.A. proceeded -

> "In the case, in the South African Courts it was suggested that before imposing inditerminate sentence the appellant should have been warned of the danger that he might be convicted of such and it was also suggested that it was only cases in the High Court which should be taken into account. In the case in the South African Appeal Courts the facts were very much different from those in the

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> present case; and I do not think that the learned Judges of South African Court of Appeal intended to lay it down as a general principle of law that an accused should always be warned for an indeterminate sentence before being sentenced to such. Of course cases in South African Appeal Courts although not binding on this Court are of very great persuasive value and this Court will always take the opinion of the Judges of the South African Court of Appeal with the greatest respect. Of course if there is conflict between the Appeal Court of South Africa and this Court of Appeal, it is this Court of Appeal which must be followed."

The learned Judge proceeded to extract a passage from the decision by Mr. Justice Smit in the Swaziland Court of Appeal case as follows:

> 'I wish to stress however that it is only fair to an accused who has a record of previous convictions which qualify him for an indeterminate sentence that he should be warned of the danger of being declared an habitual criminal and the consequences thereof. The courts should remember to do it as in most cases the accused are probably ignorant of the danger.'

In the same vein except for differing slightly from this view by Smit J.A., Maisels P., (referring to and relying on R vs Swarts 1953(4) SA. page 461 A.D. at 463, delivered by the then Chief Justice Centlivres) said,

> "I do not wish it to be inferred that it (meaning the indeterminate sentence) should never be imposed where an accused has not previously been convicted before the Supreme Court or when he had not previously been warned of the indeterminate sentence. Each case must be decided on its own facts."

Section 303 of Criminal Procedure and Evidence Act 1981; that is No. 9 of 1981, says if any person has been convicted on more than one occasion of any of the offences mentioned in schedule 2, whether of the same or a different kind, or whether in Lesotho or elsewhere, and that person thereafter is convicted within Lesotho by the High Court of any offence mentioned in schedule 2, that person may be declared by the High Court to be a habitual criminal. Schedule 2 makes reference to the types of previous offences which would warrant a man to be declared a habitual criminal if subsequently he is convicted of any

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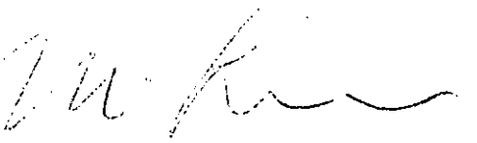
crime. These are rape, robbery, assault, housebreaking or entering any premises with intent to commit an offence; theft either at common law or as defined by statute.

I have already indicated that the accused committed rape previously. He has also previously been convicted of common assault. He has recently been convicted of housebreaking with intent to steal and theft. And as if to cock a snook at the conviction and sentence that he was undergoing while serving the suspended part of sentence which he was undergoing, he committed the instant one. I have no qualms, therefore in finding that the accused, as the magistrate has indicated, is incorrigible. He is therefore declared a habitual criminal and will serve the indeterminate sentence.



J U D G E.

6th June, 1990.

For Crown : Mr. Sakoane
For Defence : Mr. Putsoane.