Much was made about PW1's delay in reporting the incident. It was pointed out that while admittedly her mother was not anywhere in the vicinity her grandmother on the contrary was, not only her but several other tenants living on the premises. It was suggested she was falsely implicating her father in an attempt to further her mother's interests in a divorce matter pending between her parents before Court. While usually there would be some merit on the defence capitalising on a rape victim's delay in reporting the offence at the earliest possible opportunity, sight should not be lost of the impact and trauma that the advent of divorce proceedings between parents of a girl aged 14, have on her. In my view lack of harmony between her parents could easily bar her from reporting the incident to her grand mother in whom it was not shown to what extent she confided. Moreover she had stated under cross-examination that she loved her father. It is not difficult to realise that she was faced with a dilemma of reporting against someone she loved and respected as a parent. Moreover some form of moral pressure had been cunningly exerted by the appellant immediately before the incident to inculcate a feeling of guilt in PW1 for her role in souring relations between the appellant and the Majalles next door.

There is testimony to the effect that PW1 telephoned a confidant of her mother one 'Marethabile about the incident and the latter in turn informed PW3 who took steps to ensure that the matter was properly presented before the law-enforcement authorities.

Much was also made of the fact that although she was

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only 14 years old when the alleged rape took place on her she had had previous sexual relations with someone else. While this argument may go towards discrediting the victim of rape as of low moral character, the law protects even prostitutes against violent crimes of sexual nature.

The Crown summed up the facts and law pertaining to this case as follows :-

that it is common cause

(a) that the complainant was examined by a doctor two days after the alleged rape

(b) that the results of this examination were not conclusive on whether there had been sexual intercourse or rape

(c) that the complainant had had sexual relations prior to the incident

(d) that the Crown relied solely on the complainant's testimony as to the sexual assault

(e) that the complainant was a girl of tender age at the time of the incident. 14 years is given as her age at the time.

The Court was asked to determine whether or not the Court below applied the cautionary rule to the facts of the case as required by the Law. In parenthesis it should be observed that the first ground of appeal is that the Court below erred in convicting on the uncorroborated evidence of the complainant. This Court relying on App. Case No.56/84 Dicks Vilakati vs Regina Swaziland Court of Appeal decision (unreported) at 5 has repeatedly stated that -

> "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

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 uncorroborated 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 or trustworthy witness".

Indeed R. v. W 1949(3) SA 772 at 780(AD) sums up the law crisply as follows :

"In criminal cases of sexual assaults, it is not necessary that the complainant's evidence be corroborated but such evidence requires a special approach of caution and care..... ..... In rape cases, for instance, the established and proper practice is not to require the complainant's evidence to be corroborated before a conviction is competent ..... What is required is that the trier of fact should have clearly in mind that cases of assaults require special treatment, that charges of the kind are generally difficult to disprove, and that various considerations may lead to their being falsely laid".

The Learned Watermeyer C.J. went on to say :-

"The position is not materially different from that created by the cautionary rule applicable in the case of accomplices which was recently dealt with by this court in R. vs Ncanana 1948(4) SA 399".

Learned Counsel for the Crown referred me to

/Malefetsane

Malefetsane Mabope and Others v Rex C. of A.(CRI) No.5 of 1986 (unreported) at 43 to 44 where in approving an extract from S. vs Hlapezula and Others 1965(4) SA it was said :-

> "..... there has grown up a cautionary rule of practice requiring (a) recognition by the trial court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him or his mendacity as a witness or the implication by the accomplice of someone near and dear to him".

The requirement in Vilakati above that there be corroboration of intercourse itself has not been satisfied. But that cannot be the end of the matter for that worthy authority states in the absence of such corroboration the Court having warned itself of inherent dangers of convicting should only do so if reliable and acceptable evidence exists to show that the complainant is a credible and trustworthy witness. It appears that in the learned Magistrate's view this was satisfied. Hence the conviction. But the Crown which had had the benefit of appearing both in the Court below and in this Court represented by Mr. Thetsane felt that despite able and instructive judicial authorities cited by the Crown the learned Magistrate appeared not to have approached the entire evidence with caution and care as required by the law in his judgment.

The Crown further submitted that the learned Magistrate overlooked/time-honoured safeguards outlined in age-old and dependable fund of judicial experience and authority; thus paid scant attention to their message despite the nature of the case before him.

/Learned

Learned Counsel referred me to Lebese vs Rex 1976 LLR 187 at 188 where Cotran C.J. as he then was said :

> "While there is no need for corroboration of complainant's testimony it is incumbent upon the magistrate.....
>
> (a) to look into the evidence to see if there are indices, apart from her statement, that give confidence about the truth of her allegations,
>
> (b) he should warn himself about the dangers inherent in accepting, in sexual offences, the testimony of one witness standing on its own".

The Crown further criticised the learned Magistrate's attitude that the evidence of PW2 and PW3 corroborate the fact that the complainant was in fact raped. Yet there is authority that in sexual cases the complaint made by the victim to the first person she meets after the offence is not corroboration required by the Law. See

1. Seeiso Kao vs. Rex 1980(2) LLR 307
2. Ralinko Matogane vs Rex CRI/A/70/84 (unreported) at 2.

The Crown further assured the Court that it is mindful of the authority in Kalebe Molapo vs Rex CRI/A/27/86 (unreported) at 7 where it was said the appellate court if satisfied that the learned trial magistrate scrutinised the evidence and satisfied himself against any conscious or unconscious fabrication his conviction of the appellant he cannot be faulted by the appellate court. I am at pains however to consider whether this general statement was meant to apply to all criminal appeals including those relating to sexual offences.

However I de e immediate solace from the words

/of

of Lewis A.J.A. in R vs J 1956(1) SA at 90 that :

> "while there is always the need for special caution in scrutinising and weighing the evidence of young children (and) complainants in sexual cases ..... the exercise of caution should not be allowed to displace the exercise of common sense".

Thus in a proper case a judicial officer if satisfied that safe and acceptable evidence proving the guilt has been adduced he should not allow his Judgment to be swayed by fanciful and unrealistic fears. See R. vs J above at 90.

I would readily accept that the fact that medical evidence is not conclusive cannot, does not and should not always exonerate an accused. See Montoeli vs Rex CRI/A/30/84 (unreported).

The Crown submitted that nothing in the Judgment of the Court below shows that there was any exercise of the necessary caution before conviction. The Crown demurred at the fact that the evidence led by the prosecution, though revealing that the complainant was raped would nonetheless be foredoomed by the Magistrate's failure to exercise proper caution and consequently lead to a guilty person being freed.

This Court has had consideration of the fact that proper exercise of caution should not only have been exercised but seen to have been exercised regard being had to the fact that both PW1 and PW2 are children of tender age. See R. vs Manda 1951(3) SA 158 AD.

The Crown has submitted that the body of evidence shows clearly that the complainant was sexually assaulted.

/Adding

Adding my voice to this I would say it would be most imprudent of the accused that because the Magistrate failed to treat the evidence carefully he should regard his daughter's complaint as baseless.

The Court must also note its displeasure that the original manuscript is missing from the Court records. In fact I am made to understand that whatever record has been laid before Court is only thanks to the appellant's counsel. The Crown also supported counsel for the appellant in an observation that some matter appearing on the record was never canvassed before the Court below. This was ascribed in part to writing questions in telegraphic form. But in my experience this may be an effective form of keeping up with the flow of the cross-examiner's questions and has the merit of preventing varying and qualified answers to the same question. But the danger is if the sense of the question is lost in the magistrate's effort to abbreviate it in order to cope with keeping pace with the cross-examiner's speed in putting questions. This indeed requires skill. To acquire skill needs practice. Without practice mistakes can hardly be avoided.

In motivating his objection to things never canvassed in evidence but nonetheless appearing in the Magistrate's Judgment the appellant's Counsel pointed out (and was fully supported by Counsel for the Crown) that at page 3 of the record PW1 said when returning to the sitting room she gave PW2 a report. PW2 confirms this at page 9. But even though the witness never stated what report was given, the learned Magistrate in his Judgment at page 27 of the record has recorded that PW1 told PW2 that

"her father was having sex relations with her".

/The

The record amply shows there is merit in this objection. I may even go further and say although reference has been made in the record to a letter taken by the complainant to Majalle's home written to Majalle by the appellant's servant, the learned Magistrate referred to this servant as Majalle's concubine yet nowhere in the record has it been suggested that this servant was Majalle's concubine. The record merely shows at page 5 as follows :

> "How was it said you were involved in Majalle's quarrel?
>
> I had given a letter from our domestic servant to Mr. Majalle."

The appellant may count himself fortunate that on a mere technicality he should escape liability for his nauseating acts. Appeal upheld.

J U D G E

11th November, 1991

For Appellant : Mr. Matete

For Respondent: Mr. Thetsane

CIV/APN/113/90

IN THE HIGH COURT OF LESOTHO

In the Application of :

LIBENYANE POSHOLI Applicant

v

MOSHOESHOE POSHOLI & 2 ORS Respondents

JUDGMENT

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 11th day of November, 1991

On May 1st, 1990 the applicant filed an application on notice against the respondents for an Order :

1. reviewing and setting aside proceedings in CC 86/89 from the Teyateyaneng Magistrate's Court, particularly the decision by the 2nd respondent dated 24-11-1989;

2. directing the first respondent to pay the costs in any event but so should the 2nd and 3rd respondents in the event of their opposition to the application;

3. granting the applicant any further and/or alternative relief.

The 2nd and 3rd respondents are the TY Magistrate and the Attorney-General respectively.

The applicant who avers that he is an illiterate

/states

states in an affidavit before this Court that CC 86/89 was a case presided over by the 2nd respondent. In that matter the applicant was respondent and the 1st respondent applicant.

The applicant further avers that in November 1989 he received a Notice of Motion together with affidavits in the civil matter marked CC 86/89. In that matter the 1st respondent was applying for a review of proceedings which had emanated from the Local Court and had reached the Central Court stage.

The grounds for review by the 1st respondent were that the proceedings up to that stage were irregular in that it had been clear to the presiding officer that the 1st respondent had no interest in the matter i.e. a disputed field, he being a mere agent of Robert Posholi who had testified that he had the right to plough the field. A further ground of review was that Robert Posholi should have been joined. This in a nut-shell was a matter presented before the Magistrate's Court for review.

The present applicant further avers in an affidavit before this Court that having received the Notice of Motion and on being served with papers marked "AA" he was told by the Court Messenger that he was required to appear in the Magistrate's Court on 23rd November, 1989.

The applicant duly appeared before that Court on that day having felt that the Messenger's information to him warranted the attention that the applicant gave the matter. On the day in question the applicant was informed

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that as the 1st respondent's attorney was engaged elsewhere the matter would not proceed but shouldrather do so the following day i.e. 24th November, 1989.

On this latter day the applicant reported at Court as did the 1st respondent's attorney. The applicant avers at para 10 as follows "My own lawyer however did not turn up".

The applicant avers that when the matter resumed on that day i.e. 24th November, 1989 he indicated to the Court that he had engaged a lawyer who had not yet arrived. He further avers that the Court decided nevertheless to proceed regardless of his lawyer's absence. Thus he complains that he was not afforded an opportunity to even contact his lawyer.

The applicant avers that the 2nd respondent informed him of his decision that the matter brought on review before him was to start de novo at the Local Court. The applicant approached counsel who found it inconceivable that a matter purportedly set down for hearing ex-parte could be followed by a final order on the same day of its being heard without any return date being fixed in order to enable the opposing party if he so wishes, to prepare and file his defence.

The applicant further contends that the reviewing Court below granted the application in error as the grounds advanced by the 1st respondent did not warrant an application for review; but that the issue should rather have been resolved by way of appeal to the Judicial Commissioner's Court as a matter of course.

It is further averred on oath by the applicant that

/the

the Magistrate's Court failed to address its mind to the fact that the applicant had been served with a Notice of Application (Annexure "AA") indicating that the first respondent was going to apply for a Rule Nisi on 23rd November, 1989. Had the Court not so failed, it was contended, then it would not have confirmed the rule as it did. Further that the applicant says he was misled because "AA" did not indicate that 23rd November, 1989 was not just the day when the interim order was to be issued but rather the final one though on the face of it it did not support any presupposition that an interim order had been granted on 23rd June, 1989; more especially that no Court Order accompanied Annexure "AA" at the time the latter was served on the applicant. The applicant avers that he was served with the final order on 5th January 1990 written 1989. The Order is attached to the papers/and is marked "BB". Significantly this last averment by the applicant has not been gainsaid. I have perused the Subordinate Court's record and have discovered that the original Court Order was issued on 29th November 1989 and at the back bears the date 05-01-1990 below which is written and signed the names Libenyane Posholi. In fact two copies of the messenger's returns relating to service of Notice of Application for Review show that such service was effected on 2nd November 1989. None of them refers to the Court Order. The one that refers to the Court Order clearly shows that it was served on 5th January, 1990.

In its terms this Court Order is final. The proper procedure would have required it not only to be interim but that it be served together with the originating papers. The originating papers were misleading and making it appear that the ex-parte application was only going to be moved on

/23rd November

23rd November 1989 for the first time whereas the calender of the case indicates on file cover that the application was moved for the first time on 23-6-89 and postponed several times thereafter.

It does not seem to me that in the face of the fact that originating papers reflected the hand written 23-11-89 as opposed to the struck out 23-6-89 the applicant and his counsel could be faulted for gaining the impression from the Notice of Application that the ex-parte application was due for motion on 23-11-89 in which case an interim order setting out the return dates would follow afterwards.

The two paged incomplete record has not covered the Subordinate Court's minutes. None of the parties is to blame for that. It was the Subordinate Court's business to ensure that a complete record is furnished as ordered by this Court on 7- 3- 91. This Court cannot allow the effect of the incomplete record to prejudice the applicant who relied on it in part.

There are a number of disturbing features in the manner proceedings were conducted in the Magistrate's Court. It seems that scant attention was given to the fact that the applicant though in attendance was a layman who nonetheless had indicated to the Court that he had engaged a lawyer. See page 6 para 11 read with page 24 para 6. I don't think it makes good sense that even though a layman tells the Court that he has engaged a lawyer the Court should adopt the attitude that it does not believe him without giving that layman an opportunity to prove his statement and instead grant and confirm the so called interim order which never, as it should have, accompanied the originating papers for service

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on the party in question. Another disturbing feature is the fact that a major alteration of the date of hearing was effected without any initialling by any officer who effected it. It is also disturbing that service of Court process which should have been effected all at once was instead done piecemeal. It was inexusably wrong that a final order should have been granted without there having been service of an interim order on the party involved. The fact that the Court's minutes may reflect that he was told in broad terms the contents of the interim order is no substitute for effecting service of the interim order on the party concerned. Let alone that no indication exists to show that the applicant was told in broad terms the contents of any interim order or rule nisi.

The applicant is adequately supported in his averments by Mr. Mohau in his affidavit as to the misleading impression created by the 1st respondent's papers before the 2nd respondent's Court and the consequent wrong reaction that this engendered in the applicant and his counsel.

The words of this Court in CIV/APN/198/91 Swissbourgh Diamond Mines & Another vs Lesotho Highlands Development Authority (unreported) at page 24 of my manuscript Judgment may prove productive; to wit :

> "My difficulty as to this entire problem is whether a proceeding which was initiated and proceeded with ex-parte can in the process convert into process moved on notice.....".

With regard to the instant matter it seems to me that one of the major difficulties presented by the procedure adopted would have been averted if the Magistrate's minute dated 23-6-89 when the rule Nisi was granted and the return

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date fixed as 28-9-89, had been expressed in the proper form provided and prescribed in the rules and served on the applicant along with the originating papers. But this was not done.

Finally it does not help to make merit of the fact that the review was properly granted because the Court concerned was of the view that the wrong party was being sued. That same party was entitled to apply to the Local Court to have the proper party jointly sued. As it is the Magistrate rightly discovered that the question of the wrong party being sued was raised for the first time before him. The right approach before the Magistrate though should have been to hold it against the applicant before his Court that wrong suit was not raised at the proper stage. I doubt therefore whether mere refusal to grant the successful party before him costs was enough.

Mr. Hlaoli for the 1st respondent sought to cast doubt on the validity or perhaps even the accuracy and provenance of the two paged record in which on more than two occasions he is recorded as showing that should the applicant oppose the application and the other party win the applicant would have had to pay the costs. Although this is a normal statement when making an application it would seem to me that for a layman who had briefed a lawyer who failed to turn up when such a proposition was made it could very well have discouraged him from raising any opposition if such was so closely linked with payment of costs. But as I have said earlier it was irregular to issue a final order without an interim one having been served. The main point in referring to the attitude adopted by Mr. Hlaoli

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alluded to earlier is that the original manuscript of which the two paged record is a copy is contained in the very file obtained from the Magistrate's Court - the very file in which the minuted record which it was, though not in so many words, suggested should be preferred to the two paged typed record! Indeed Mr. Hlaoli had registered his objection to consideration of the latter or anything that was inconsistent with the minuted record.

It would seem therefore that while it was understandable that Mr. Hlaoli should query the accuracy of statements contained in a record which he considered suspicious, it cannot equally hold that the original manuscript forming part of the record he urged the Court repeatedly to have regard to, should be disregarded.

In the original manuscript the same words appearing in the two paged typed record are reflected to the effect that

> "If the Court gives him chance to oppose and if we succeed he will have to pay the costs".

Furthermore it is recorded in that original manuscript that

> "Even though 1st respondent is present in person but that does not show that he opposes this application because he has not made any Notice to Oppose"

As I have already indicated it would have been premature for the applicant to oppose the application on 23rd or 24th November, 1989 in the absence of an interim order or rule nisi which should have spelt out more forcefully what he should have opposed if he was so intended.

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In the result the application for review by this Court on grounds set out by the applicant is granted with costs.

J U D G E

11th November, 1991

For Applicant : Mr. Mohau

For 1st Respondent : Mr. Hlaoli