CRI/REV/411/90

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

PHAMOTSE MAFETHEMANE

REASONS FOR JUDGMENT

Filed by the Hon. Mr. Justice M.L. Lehohla
on the 25th day of February, 1991.

On 15th February 1991, this Court confirmed the verdict of guilty of rape given by the court below, but altered the sentence by enhancing it from five to eight years' imprisonment. Reasons were to be given later. Here do they now follow.

The accused had pleaded not guilty to a charge of rape preferred against him in the court below where it was alleged that he had raped an eleven year old child named Palesa Tsekane around October 1990. The offence is alleged to have taken place at Mekaling in the Mohale's Hoek district.

P.W.1 the complainant told the court below that she attends school. On 2nd October 1990 she had occasion to attend a ceremony where initiates from a circumcision institution were singing their praises in a nearby village. On her return to her home called Meriting the accused, a man of 31 years of age came to the complainant's home in the absence of elderly people save only an old, blind grandfather, and said he loved the complainant. The complainant remained silent as this remark stunned her.

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The accused pulled her to a donga below the village and engaged in sexual intercourse with the complainant. The complainant was crying. When a little girl of her age came in response to the alarm the accused had completed his sordid act.

A 58 year old lady Mamoliehi Tsikane examined the complainant immediately after the act and noticed that there was a gooey mixture of blood and sperms trickling from the complainant's private parts.

The sexual assault had taken place in broad daylight just after 12 midday.

The accused is well known to all crown witnesses. He was seen on the spot. He admits only engaging in horse play with the complainant at the time and place but says it was in the company of other little girls. There is no mistake as to the accused's identity. There is no doubt that sexual intercourse took place on the complainant.

Mr. Fosa for the accused argued that the crown case is bedevilled by lack of corroboration and absence of any indication that the learned magistrate had cautioned himself.

Mr. Mahluli who gracefully seized controls from Miss Moruthoane for the crown stated 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 complainant in a (sexual) case. See Mayer vs Williams 1981(3) S.A. 348 at 351A to 352D.

In respect of females of the complainant's age there is no need to prove lack of consent in order to establish that rape took place because the law states that they are incapable of giving consent.

As to the proof that inherent danger has been avoided I think it exists in the sense that there has been corroboration of the complainant in a respect implicating the accused.

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He was seen on the spot and at the time. His admitted interference with the complainant made her cry. There is also absence of gainsaying evidence by the accused. A finding was made about his falsehood as a witness. He was indeed lying when he said he only engaged in rough play with the complainant.

It has been 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 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 essential elements of the offence ..."

See App. Case No. 56/84 Dicks Vilakati vs Regina - a Swaziland Appeal Court decision (unreported) at 5. I agree with Mr. Mdhluli's submissions that proof that the magistrate has warned himself need not be supplied by the magistrate's express words when the record otherwise shows that he has in fact warned himself.

In CRI/REV/245/89 Rex vs Selepe Kao (unreported) at 10 this Court had occasion to say

> "Even though he (the magistrate) did not expressly say he had warned himself the reasons he has advanced for believing her exclude the possibility that he convicted when it was not safe to do so on account of the inherent dangers inherent in sexual cases."

I have no doubt in my mind that the record clearly shows that reliable and acceptable evidence existed to show that the complainant was a credible and trustworthy witness on the basis of which fact the trial court could have convicted even if factors such as evidence of intercourse, lack of consent and identity of the offender were uncorroborated.

The above should not be understood as detracting from Wentzel J.A.'s statement in C. of A. (CRI) No. 5 of 1984 Khethisa Molapo vs Rex (unreported) at 2 that

/"It

> "It is illuminating to interpose to say the magistrate had written in his judgment that he had treated the complainant's evidence with caution and had warned himself of the dangers of convicting without corroboration."

Furthermore in V vs A 1984(2) ZLR. at 140 (a Zimbabwean decision) McNally J.A. cited with approaval the words of MacDonald A.J.P. in R vs J. 1965 R.L.R. 501 at 503, 1966(1) S.A. (SR.AD) at 90E when he said

> " the exercise of caution should not be allowed to displace the exercise of common sense."

Having said all this I wish only to point out that a body of authority exists in support of the view that rape committed in circumstances which are aggravated should be met with severe penaltics. The question of the complainant's youthfulness is one such aggravating factor. The trauma of being subjected not only to the act but being made a focal point of amusement in the courts and throughout the period of investigation cannot be overlooked.

I accordingly confirmed the verdict given by the court below and enhanced the sentence to eight years' imprisonment.

J U D G E.

25th February, 1991.

For Crown : Miss Moruthoane/ Mr. Mdhluli

For Defence : Mr. Fosa.