

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v

MAKHULU LUTHANGO

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla  
on the 10th day of April, 1991

The Court attaches great importance to your state of mind at the time of the alleged offence. This is shown by the fact that the Court below asked you "Did you at times go out of your senses?" You answered "Yes" and the Court asked you further "Who is responsible for the situation?" You said "There are many lunatics. I am not the only one".

P.W.1 the complainant said that she knows you to be a dagga smoker and that on that day you were either under the influence of dagga smoking or were intoxicated. All that she observed of you was that you were under the influence of intoxicating stuff. But you did not take her to task about this. You did not say that she was wrong to have said that you were drunk. Your questions were only two in number, namely : Where did I attack you?" She said "At my house" and then you asked her "Did you see me very well or you only identified me somehow?" She answered "Yes I saw you with my own eyes". She said you were intoxicated and you did not put to her that she was lying in saying so yet when the Court asked you "Is it

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not because you smoked dagga that you committed this offence?" You said "No".

Now that answer is not reconcilable with the previous answer, namely, that you took that whoever is responsible for this offence must have been out of his senses. You suggested that it could have been any other lunatic including yourself because you are not the only lunatic. It may well be that the question of the intention to commit the offence was obliterated by the intake of either drink or drugs including dagga. There is nothing to suggest that the complainant - the old lady with whom you were staying and who is your relative - could come and lie about you. In other words I am trying to illustrate that the fact of her having been made a victim of rape is not in question. The question to be asked is the state of mind of the person who perpetrated the offence. There is no question as far as the record shows that the culprit has been clearly identified by the victim. Then as I said the only question remaining is the state of mind of the perpetrator of this offence.

The complainant stated that the perpetrator seemed to be intoxicated. You on the other hand did not deny that you were drunk. All you informed the Court regarding this matter was that you are not the only lunatic and that at times you go out of your mind. This would tend to corroborate the story of the complainant that you were drunk that day or intoxicated. Now ordinarily or according to Common Law if a man's mind has been obliterated by drink then he is not capable of forming an intention. But the legislature alert to the untold harm that would result from such a state of affairs enacted a Proclamation 60 of 1938, namely, the Criminal Liability of Intoxicated Persons; Section 2(2) of which says :

"Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act complained of did not know that such act was wrong or did not know what he was doing and -

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- (a) The state of intoxication was caused without his consent by the malicious act of another person; or
- (b) The person charged was by reason of intoxication insane temporarily or otherwise at the time of such act".

Your Counsel has urged on this Court that it should ignore all those but rather concentrate on subsection (4) of that section 2 -

"Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention specific or otherwise in the absence of which he would not be guilty of the particular offence charged".

It would seem wrong to treat subsections of the statutes in isolation from each other. We have heard evidence which casts the onus on you, namely, to show that your state of intoxication was not self-induced or what you call your lack of recollection of events was not induced by you, or your implicit acceptance of the state of lunacy that you alluded to was not induced by you, because if it was induced by you then the provisions of our Criminal Procedure and Evidence 1981 Act Section 172 would apply. Now you have alluded to the fact that you were in a state of lunacy or utter loss of memory and it is the requirement of the law that you ought to have established on a balance of probabilities that you were out of your mind. On the evidence revealed on the record it is certain that you have failed to do so. I have no difficulty in treating your case in accordance with provisions of Section 172 of the Criminal Procedure and Evidence Act referred to above.

I have taken into account the remarks of the learned Magistrate concerning the reasons why she has committed you for sentence by this Court. Relying on Monanthane, a case referred to by your Counsel and the section in our Criminal Procedure and Evidence i.e. Section 293, it has been urged on me that the provisions

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of that section have not been complied with to the effect that and reading -

"Where on the trial by the Subordinate Court a person whose apparent age exceeds 18 years is convicted of an offence the Court may, if it is of opinion that greater punishment ought to be inflicted for the offence than it has power to inflict, for reasons to be recorded in writing, commit him in custody to the High Court for sentence....."

Your Counsel submitted that no reasons to that effect were recorded in writing. I agree with him on that because I have observed that all that the Magistrate recorded in that regard was that perhaps keeping you in jail for a long time would have a salutary effect on you. But I have also read in her judgment proper where she has referred to judgments of this Court showing in no uncertain terms why she committed you for sentence by this Court, that she has referred on page 2 of her Reasons for Judgment to the case of Rex v Moleleki Morie Review Order No.10 of 1988 - A decision by this very Court - where she quoted the judgment as follows :

"If the appropriate sentence falls above the Magistrate's sentencing powers he should commit the accused involved for sentencing by this Court".

The Learned Magistrate went further to quote the case of Rex v Lehana Criminal Review No. 572 of 1988 (CRI/REV/572/88) where this Court again said

"the trauma of rape to the victim of such an act is as dehumanising as it is penetrating. In fact no amount of sentencing can parallel its debilitating effect on the victim's psychological well-being"

With this I am satisfied that the Magistrate had at the back of her mind the proper reasons why the case has been committed for sentence by this Court. It was just unfortunate that when she had to write or record the proper reasons she put wrong ones.

Having said all this then I find that the

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provisions of Section 172 of our Criminal Procedure and Evidence do apply. I find that the offence was committed. But that for one reason or another, because of intoxicants which you had consumed, there was an element of mental incapacitation about you. Subsection 2 says that if the Court finds this to be the case, then either you are to be committed pending the signification of the King's pleasure or the Court may make any order that it deems fit. I feel that I should rather give you benefit of alternative option or make an alternative order to the main one preceding. ~~You will remain in detention for eight (8) years.~~

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J U D G E

10th April, 1991

For the Crown : Miss Moruthane

~~For the Defence: Mr. Putsoane~~