

IN THE HIGH COURT OF LESOTHO

In the matter of :

R. E X

v

TAMATI MOSEBO

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehahla
on the 17th day of May, 1991

The Magistrate who heard your case felt that - from the nature of the offences outlined in the counts account also being taken of the fact that there is also a previous conviction involving Rape as in fact in these instant counts Rape is a very common factor in all of them except of course count three (3) - you should be committed for sentence by this Court.

I have heard arguments and submissions by your counsel and I do sympathise with him because on account of the sort of indefensible conduct that you manifested in all these it was very difficult to advance anything in your favour. As a result all that remained to be considered was the question of sentence.

I am satisfied in the same way as the Magistrate who tried the case that you committed these offences, and the only thing really to consider is what type of sentence will meet this type of conduct. Your counsel has made an impassioned plea to this Court in your favour that rather than you being given a harsh sentence you should be given

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the sentence which according to the Revision of Penalties Order of 1988 prescribes five (5) years as the minimum and that his submission is based on the fact that in 1987 when you were convicted of a similar offence the legislature or the lawmaker had not prescribed a minimum sentence for this type of offence; and in that is implied, if I understood him well, the fact that when you repeated the offences in 1989 then you were banking on getting the six months that you had received in 1987.

To consider your matter I would have to have reference to CRI/S/9/89 - Rex v. Peete Maroba and Another (unreported) at page 6 - I will quote in extenso the considerations which go into the Court's thinking as far as Rape is concerned. I will start on page five(5). Much the same as was stated in the case just referred to now, your matter seems to involve regularity in the commission of this type of offence. In the case CRI/S/17/88 - Rex v. Tseliso Mathabo Bure Chao - the Court had observed that

"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".

The Court went further to say - this court observed that and made reference to another case Cash M. Dlamini and Another v. 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 embarked on 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 an indeterminate sentence."

In treating of what considerations are to be taken into account in a case similar to the present Isaacs J.A. said at page 2

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"In the case, in the South African courts it was suggested that before imposing indeterminate 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 South African Appeal Courts the facts were very much different from those in the 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 Court 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 Isaacs J.A. proceeded and extracted a passage from a decision by Mr. Justice Smit in the Swaziland Court of Appeal 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".

This Court went further to consider the following passage stated in the same vein as, except for differing slightly from, the view expressed by Smit J.A. where Maisels P. referring to and relying on R. vs Swarts 1953(4) SA 451 at 463 delivered by the 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 should be decided on its own facts".

Section 303 of the Criminal Procedure and Evidence Act of 1981 i.e.No. 9 of 1981, says

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"If any person has been convicted on more than one occasion of any of the offences mentioned in schedule 2 whether of same or different kind or whether in Lesotho or elsewhere, and that person thereafter is convicted in Lesotho by the High Court of the offence mentioned in schedule 2, that person may be declared by the High Court to be an habitual criminal".

Schedule 2 makes reference to the types of previous offences which would warrant a man being declared an habitual criminal if subsequently he is convicted of any 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 been convicted of the crime of Assault with intent to do Grievous bodily harm in the past. I therefore have no qualms in finding that the accused as the Magistrate has indicated deserves a sentence which will indicate to him this time that this game that he is playing is not worth the candle. I therefore have no hesitation in declaring him an habitual criminal and thus ordering that he serve an indeterminate sentence.

J U D G E
17th May, 1991

For Crown : Mr. Lenono

For Defence: Mr. Putsoane