

IN THE HIGH COURT OF LESOTHO

In the Matter of:

R E X

v

1. NSABIMANA SHABANI
2. MINANI GABRIEL
3. KIBAYA JULIEN
4. SAIDI SHABANI
5. NDAY JEAN - CLAUDE
6. SIDABWE CANUT

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai  
on the 28th day of June, 1991.

The six accused are before me on a summary charge of rape. They have all pleaded not guilty to the charge. The facts disclosed by the body of the charge sheet are that on or about 10th March, 1991 and at or near Victoria Hotel in the district of Maseru the accused, acting in concert, did, one or other or all of them unlawfully and intentionally have sexual intercourse with 'Manako Motente without her consent.

It may be mentioned from the word go that at the close of the crown case Mr. Phoofolo who represents the accused in this matter applied for their discharge on the ground that the evidence adduced by the crown had failed to establish a prima facie case for the accused to answer. The application

2/ was oposed .....

was opposed by Mr. Mdhluli counsel for the crown in whose contention the evidence adduced by the crown did establish a prima facie case for the accused persons to answer and it would, therefore, not be proper for the court to discharge them at that juncture.

In my view, two situations have to be distinguished viz. the situation where an application for the discharge of an accused person is made at the close of the crown case and the situation where after the defence has closed its case the court is asked to determine whether or not the accused is guilty of the offence against which he stands charged.

I am not aware of any law that compels a court of law to deal with the question of credibility of evidence in the first situation unless of course it could be said that the evidence adduced by the crown was so hopeless that to decline to do so and turn down the application would be tantamount to asking the accused to help build a case which the crown itself had failed to establish. The test to be applied in the first situation viz. where an application for the discharge of an accused person is made at the close of the crown case is that of prima facie case. All that a court of law is expected to do in this situation is to consider the evidence adduced by the crown and ask itself the question whether or not, on the face of it, such evidence establishes a case for the accused person to answer.

3/ If the .....

If the answer were in the negative the court would properly allow the application for the discharge of the accused person. If, however, the answer were in the affirmative the court would be entitled to reserve the question of credibility of evidence to the end when the defence would have closed its case and refuse the application for the discharge of the accused person.

I must, however, hasten to point out that where at the close of the crown case the court turns down his application for discharge the accused person is not bound to go into the witness box or call any witnesses to testify in his defence. He is entitled to tell the court that he is closing his case without leading any evidence at all. In that eventuality the court would be bound to deal with the question of credibility of evidence and apply the more stringent test of proof beyond a reasonable doubt to determine whether or not the accused person has committed the offence against which he stands charged.

In the instant case there was evidence, adduced by the crown, to the effect that on the night of the day in question, 10th March, 1991, the complainant was sexually assaulted by six men in a certain room at Victoria hotel. The six accused were identified as the persons who had sexually assaulted the complainant.

I considered the evidence and came to the conclusion that, on the face of it i.e. without going

4/ into the .....

into the question of its credibility such evidence did establish a prima facie case for the accused to answer. That being so, the application for their discharge, at the close of the Crown case, could not be properly allowed. I accordingly dismissed it.

As it was perfectly entitled to do, the defence told the court that in that event Nos. 1, 2, 3 and 6 accused would remain silent and close their case without testifying from the witness box. Nos. 4 and 5 accused would, however, go into the witness box and testify in their defence. Five (5) other witnesses were also called to testify in support of the defence case.

The defence having closed its case, I shall now proceed to deal with the question of credibility to determine whether or not it has been proved beyond a reasonable doubt that the accused persons have committed the offence against which they stand charged. It is common cause that the accused are members of a football team that arrived in Lesotho from Burundi on Saturday, 2nd March, 1991 to play a soccer match against Arsenal football team of Lesotho. On their arrival in Lesotho the members of the Burundi team were accommodated at Victoria hotel here in Maseru. The soccer match itself was played on the afternoon of Sunday 10th March, 1991 i.e. after the accused and their team mates had been staying at Victoria hotel for 8 days.

5/ It is .....

It is further common cause that following their soccer game the visitors from Burundi were, on the evening of 10th March, 1991, entertained to a cocktail party at Sechaba hall of Victoria hotel by their host, Arsenal football team of Lesotho. It is also not disputed that P.W.2 'Manako Motente, the complainant in this case, is employed as a cleaner in the house-keeping department of Victoria hotel. As such her duties include, inter alia, providing room service and the general cleaning, if and when required in the hotel. At the material time she reported for duty from 3 p.m. up to 11 p.m.

In her evidence P.W.2 told the court that she was married and had four (4) children whose ages ranged from 15 to 3 years. Her husband worked at the mines of the Republic of South Africa. He was last in Lesotho in January 1991. P.W.2 assured the court that she did not at all partake of intoxicating beverages. She was, therefore, quite sober on the night of the day in question, 10th March, 1991.

P.W.2 testified that following the cocktails party that was held in Sechaba hall in honour of the visitors from Burundi she went to clean in the toilets next to the restaurant of the hotel. She was wearing inter alia, her blue uniform overall, a panty and push-in shoes. As she was leaving the toilets she was approached by A5 who requested her, in the English language, to provide clean towels in his room.

6/ According .....

According to the room-key which he showed to her A.5's room was Number 153.

After he had told her to provide towels in his room A.5 parted with P.W.2 who then carried the tools she had been using to clean in the toilets, to the laundry room. From the laundry room she went to the reception area where she left the key to the laundry room with the Security Manager, one Thabane Mokeki, before proceeding to room 153 on the first floor of the hotel building to collect the dirty towels. When she came to room 153, P.W.2 knocked at the door and someone replied from inside: "come in" She opened the door and entered into the room. Inside the room there was electric light and she clearly saw A5 seated alone on one of the two beds. She proceeded into the bathroom, collected wet towels and went out of room 153. She got into the elevator that carried her down to the reception area where she took the key to the laundry room from the Security Manager. She went to the laundry room, deposited the dirty towels into one of the washing machines and collected clean towels. She returned to the reception area, left the key to the laundry room with the security manager and proceeded back to room 153.

It is, perhaps, necessary to mention, at this juncture, that according to the evidence adduced before this court a burglary had taken place in the

7/ laundry room ...

laundry room of the hotel on the night in question. The security officers had arrested the suspect and sent for the police. It was important, therefore, that as soon as the police had arrived the security manager should be able to open the laundry room so that they could attend to the scene of crime. That explains the reason why P.W.2 had to leave the key to the laundry room with the security manager every time she had to be away from the reception area.

P.W.2 went on to testify that when she came to room 153 carrying clean towels she again knocked at the door and a voice from inside replied: "come in" When she opened the door P.W.2 found the room still clearly illuminated with electric lights. She was, however, taken aback by finding A5 no longer alone in the room. He was in the company of five (5) other men. Two of them were seated on a bench-like structure which was fixed to the wall between the two beds in that room, three on a double bed and one on a single bed.

It has already been stated that the Burundi guests arrived at Victoria hotel on 2nd March, 1991. They stayed there until the night of 10th March, 1991. According to P.W.2 the Burundi guests used to assemble at the foyer next to the reception of the hotel before proceeding, in a group to the restaurant for

8/ their .....

their meals. They were also moving freely in the hotel. She, therefore, met them frequently as she was going about her duties within the hotel premises so that by the 10th March 1991 their faces were quite familiar to her. P.W.2 told the court that as they sat in room 153 in the manner she had described A5 and his companions were all facing in her direction. In the circumstances she had no difficulty in seeing their faces and identifying them as the six (6) accused now before court. She further told the court that after she had identified the accused she proceeded to the bathroom which was also illuminated by electric light.

Whilst she was placing the large towels on the rails P.W.2 had the occasion to look in the direction of the main room when she noticed that the lights therein had gone out. She, however continued placing the other towels on the rail. As she was doing so, the light in the bathroom suddenly went out. She got a fright and hurried out of the bathroom.

According to P.W.2 room 153 did not become pitch dark when all its lights therein went off. The curtains were not drawn and some illumination was provided by Kingsway street lights. The illumination was, however, not sufficient to enable one to see clearly in the room. One could only see figures with the aid of such illumination.

9/ As she was .....



As she was hurrying out of room 153 P.W.2 found one of the accused locking the door thereof. She tried to unlock it open but the accused caught hold of and strangled her by the collar of her uniform overall. Whilst she was struggling to free herself the other accused came and held her by the arms and legs. She was violently carried into the main room where she was thrown on to the bed. Due to poor illumination in the room she could not identify who of the accused was holding her on the neck, arms and legs. After she had been thrown on to the bed, P.W.2 felt a person rolling up her peticoat and violently pulling out her panty whose elastic band broke in the process. One of the accused then got on top of her and inserted his penis into her vagina. He had full sexual intercourse with her.

When he had satisfied his lust, the first accused to have sex with her got off P.W.2 and the other five accused then took turns on her. They, each of them, had full sexual intercourse with her. According to her, P.W.2 was spread eangled on the bed all the time the accused were, in turn, having sexual intercourse with her in room 153. Whilst the accused were thus sexually assaulting her, she was being strangled and, therefore, unable to scream loudly. She could not feel any of the first five accused to have sex with her ejaculating. She assumed, therefore, that

10/ the accused .....

the accused were wearing condoms. However, whilst the sixth accused to have sex with her was doing so, there was a time when his penis slipped out of the vagina. After he had re-inserted it she could feel him ejaculating. P.W.2 assumed, therefore, that when he re-inserted his penis into her vagina the accused was no longer wearing a condom.

After the last accused to have sex with her had re-inserted his penis into her vagina the other accused persons who had been pinning her down, on the bed, by the neck, arms and legs let go of her and stood on the side of the bed. She was then able to struggle with, and tell, the last accused to have sex with her that she would report the incident to the police. That accused eventually let her free and went to stand with the other accused.

According to her, as she tried to get up from the bed P.W.2 felt pain on the neck, arms, waist, womb and vagina. She looked for her shoes and panty which she found on the floor next to the bed. She tried to put it on but could not as the panty's elastic band was broken. She then used the panty to wipe her vagina before putting it into one of the pocket of her uniform overall. After that she put on her push-in shoes and, with some difficulty, walked out of room 153. She was weeping as she left that room which still had no lights on.

In her evidence, P.W.2 further told the court that from room 153 she got into the elevator

11/ which carried .....

which carried her down to the reception area of the hotel. When she got out of the elevator she was, as a result of the assault that had been perpetrated on her in room 153, still weeping. Her uniform overall was torn at the neck and all over. She had also sustained a scratch on the right side of the neck.

The first person she met on arrival at the reception area was the security manager, Thabane Mokeki, who immediately asked her what the matter was. She explained to him what she has already told the court. At the request of Thabane Mokeki, P.W.2 proceeded to a nearby office whilst the former went to look for Joseph Nkabani, the duty manager of the hotel.

In the office P.W.2 found two police officers. She had hardly entered into the office when Nkabani and Mokeki came in. In the presence of the two police officers and Mokeki, Nkabani asked what it was that had allegedly happened to her. She told him what she had already reported to Mokeki and repeated before this court. The police officers then suggested that the officials of the Burundi football team should be sent for. Nkabani immediately left to fetch them. P.W.2 remained in the office with the two police officers and Mokeki.

According to P.W.2 whilst they were waiting in the office for the arrival of the Burundi officials and Nkabani there was a time when Mokeki asked her to go and empty a dust bin. She took the dust bin and with

some difficulty, walked to the foyer next to the hotel reception where she was to empty it into a bigger dust bin. When she came to the foyer P.W.2 noticed five (5) of the guests from Burundi standing there. Amongst them she definitely recognised four (4) as some of the people who had sexually assaulted her in room 153. They were accused Nos. 1,3,5 and 6. She emptied the dust bin and immediately returned to the office where she found Nkabani already present. There were, however, no Burundi officials. In the presence of the two police officers, Mokeki and Nkabani she reported that she had just seen four (4) of her assailants in the foyer next to the hotel reception.

They all proceeded to the foyer where they found the five Burundi guests still there. It could have been 1.00 a.m. She pointed out Nos. 1,3,5 and 6 accused as some of the people who had sexually assaulted her in room 153 and explained that the fifth Burundi guest with them was not amongst her assailants. According to P.W.2 when she pointed them out at the foyer the four accused clearly became furious. They pointed at themselves and threw about their hands uttering words she could not understand. No.1 accused even ran away and went up stairs in the direction towards the hotel rooms.

As she was in pains P.W.2 went to sit in the office leaving the two police officers, Mokeki and Nkabani at the foyer. Later on W/O Raselo came and conveyed

13/ her in a .....

her in a police van, first to Maseru Central police station and then to Queen Elizabeth II hospital where she was examined by a medical doctor. The examination was painful. After examining her at the casualty department of the hospital the doctor sent P.W.2 in the company of a certain man, who apparently worked at the hospital, to the main block of the hospital. At the main block of the hospital they found two ladies. The man who had been accompanying her handed something to them. The two ladies examined it under a machine. P.W.2 and her companion then returned to the casualty department of the hospital. On arrival some papers were handed to the doctor by the man who had been accompanying her (P.W.2). Then another doctor came in. He took some documents from the doctor who had examined P.W.2, scribbled something thereon before handing them to the hotel managers viz. Mokeki, Nkabani and a certain Matsau who had apparently also arrived at the hospital. According to her, P.W.2 returned with the managers to Victoria hotel. At the hotel they found W/O Raselo to whom the managers handed the documents from the hospital.

As she was still feeling pains P.W.2 went to sit in the office. She emphatically denied to have met the doctor who was allegedly accompanying the Burundi football team, on the night in question. She denied that during their stay at the hotel there was any love affair between herself and the guests from Burundi.

She denied that any of them ever offered her Burundi money as a reward for sexual entertainment she had allegedly rendered to him. She told the court that she did not even know the burundi currency or its value as compared to the local currency. She denied to have ever gone to a room occupied by any of the Burundi guests other than in the course of her duties. I shall return to the evidence of P.W.3 later in this judgment.

P.W.3, Thebano Mokeki, corroborated the evidence of P.W.2 in material respects. He told the court that on the night of 10 March, 1991 a burglary had taken place in the laundry room of the hotel. He and the other security officers, of whom he was the manager, had arrested the suspect and sent for the police. In order that he might open the laundry room as soon as the police had arrived to attend to the scene of crime he asked P.W.2 to leave the key with him whilst she was going about her duties in the hotel. He remembered that there was a time when P.W.2 came to him and asked for the key to the laundry room so that she might provide clean towels in one of the rooms occupied by the Burundi guests. He gave her the key which she returned shortly thereafter. P.W.2 was quite normal at the time.

After P.W.3 had parted with P.W.2 two police officers arrived at the hotel. He took them to the laundry room where they attended to the scene of crime. Thereafter P.W.3 took the police officers to the office whilst he

15/ himself.....

himself returned to his duty post at the foyer next to the reception of the hotel.

He confirmed that at about 11.50 p.m. he was standing at the foyer when he noticed P.W.2 emerging from the elevator clearly in distress as she was weeping hysterically unable to walk properly and her uniform overall torn on the right side of the collar. He immediately took P.W.2 aside and inquired what the matter was. P.W.2 told him that she had been raped by some of the Burundi guests at the time she was taking towels to their room. He then left to report the matter to Joseph Nkabani, the duty manager at Victoria hotel. He denied, however, the evidence of P.W.2 that when he went to look for Joseph Nkabani he had requested her to go to the office.

Be that as it may, P.W.3 told the court that after reporting to Nkabani he went to the office and reported to the two police officers who were in there. According to P.W.3 it was whilst he was still reporting to the police officers that P.W.2 came into the office. He told the police officers that P.W.2 was the woman who alleged to have been raped and she too confirmed it.

Whilst P.W.2 was still telling the police officers what had happened to her Nkabani came into the office and inquired from her whether it was true that she had been raped. She replied in the affirmative. Nkabani then suggested that the matter should be suppressed as it affected visitors of this country.

According to P.W.3 when she came into the office P.W.2 was no longer wearing her uniform. She was then wearing her own private dress. When he asked her why she had changed clothes P.W.2 replied that she did not know that she was not supposed to do so. In the observation of P.W.3 Nkabani was not aware that P.W.2 had difficulty in walking. In order to draw the attention of Nkabani to that fact he asked P.W.2 to go and empty a paper basket. She complied.

When she returned to the office P.W.2 reported that some of her assailants were at the reception area of the hotel. P.W.3, Nkabane and the two police officers immediately went with P.W.2 to the reception area so that she might show them those people.

P.W.3 confirmed the evidence of P.W.2 that on arrival at the reception area they found five of the Burundi guests. Out of the five P.W.2 pointed Nos 1,3,5 and 6 accused as some of the people who had raped her in room 153. When she pointed them out the four accused became furious, touched their shirts and uttered some words he could not follow. One of them even ran away and went up stairs. According to P.W.3 the accused who ran up stairs was however, No6 and not No.1 accused as P.W.2 had testified.

P.W.3 went on to testify that as the two police officers tried to talk to them the accused who had been pointed out by P.W.2 were angry and clearly in a fighting mood. He decided to go to the office

17/ and telephone ...



and telephone the charge office after which he returned to the reception area. When he arrived there the accused left the two police officers and went in the direction towards their rooms. The two police officers, Nkabani and P.W.3 himself returned to the office where P.W.3 suggested that the officials of the Burundi team should be sent for.

According to P.W.3 Nkabani went to look for them. When the officials came the police officers explained to them that some of their players had allegedly raped a woman. One of the officials who described himself as a medical doctor asked where the woman alleged to have been raped was so that he could examine her. He was, however, told that he would not be allowed to examine the woman. A quarrel then ensued over the issue and in the course of that quarrel one of the police officers by the name of Polihali suggested that it would be better to phone his senior officer. P.W.3 took Polihali to the office where he made a phone call. Shortly thereafter W/O Raselo arrived at the hotel in the company of another police officer by the name of Koma. After he had talked to Polihali W/O Raselo also talked to the Burundi doctor who insisted on being allowed to examine the woman alleged to have been raped. He was still not allowed to do so.

Thereafter W/O Raselo and Policeman Koma conveyed P.W.2 in a police van to the hospital for medical examination. P.W.3 also got on to the

18/ vehicle .....

vehicle which drove to Maseru Central charge office. When the vehicle left the central charge office for the hospital P.W.3 himself remained at the central charge office giving a statement in connection with the burglary that had occurred at the hotel. Having made the statement P.W.3 returned to the hotel. Later on, he and Nkabani went to the hospital. They were in the company of the doctor from Burundi who insisted on seeing P.W.2. At the hospital they went to the casualty department where they found a female doctor. The doctor from Burundi told the local doctor that he too was a medical doctor and wanted to have a private talk with her. According to P.W.3 he objected to the two doctors having a private talk over a matter that concerned an employee of his hotel. There was again an argument over the issue as the doctor from Burundi was demanding a private talk with the local doctor who was not prepared to accede to the demand and P.W.3 was also insisting that it would not do for the two doctors to hold a private talk over an issue that affected an employee of his hotel. In the course of the argument W/O Raselo came in and asked what it was that the doctor from Burundi wanted at the casualty department. When the latter insisted on examining P.W.2 W/O Raselo ordered him back to his hotel. The doctor from Burundi complied although clearly dissatisfied for he complained that the matter was a scandal. After they had returned to the hotel W/O Raselo also came there. He met the general

manager, Garry Webbestock, with whom they went into the office whilst P.W.3 remained outside. Shortly thereafter the general manager called and instructed him (P.W.3) to take W/O Raselo to room 153 as the latter wanted to see the occupants thereof. P.W.3, P.W.3, W/O Raselo, the general manager and the doctor from Burundi then proceeded to room 153.

It is not clear from the evidence of P.W.3 when the doctor from Burundi came in. In any event P.W.3 went on to tell the court that when they came to room 153 the doctor from Burundi knocked at the door, woke up the occupants thereof and told them to come to the reception area where they were wanted. Nos. 4 and 5 accused were the people who came out of room 153. They came down to the reception area from where they proceeded to the office. P.W.3 himself did not go into the office.

P.W.3 further told the court that after she had returned from the hospital P.W.2 went with him and W/O Raselo to the laundry room where she showed them her blue uniform overall and the panty which was in one of the pockets. W/O Raselo took possession of both the uniform overall and the panty.

The duty manager, Joseph Nkabani, gave evidence as P.W.10 and corroborated the story of both P.W.3 and P.W.2 except in the following material respects. On the night in question he was in the restaurant of the hotel where he received a

20/ certain report .....

certain report from one of the security officers and not P.W.3 as the latter wanted to impress the court. He also denied the evidence of P.W.3 that after P.W.2 had reported to him what had happened to her in room 153, or at any time for that matter, he ever suggested that the matter should be suppressed as it would scandalize the visitors of this country.

According to P.W.10 when they were pointed out by P.W.2 at the reception area, besides throwing about their hands the four accused also uttered the words: "me, no! me, no! " When he went to look for, and failed to find, the officials of the Burundi team he was in the company of a certain member of Arsenal football team by the name of Tom who has not, however, testified in this trial. At the time the Burundi doctor eventually came to the reception P.W.10 was standing with Tom, the two police officers, P.W.3 and P.W.2. He denied, therefore, the suggestion that P.W.2 was not present.

According to P.W.10 when he came to the reception the doctor from Burundi was angry and before anything could be said to him by anyone he started inquiring about the allegation that his players had raped a woman. P.W.10 denied, therefore, the evidence of P.W.3 that before the doctor made the

In his evidence P.W.4, Tpr Polihali, told the court that he had been in the police force for only two years. At about 10.40 p.m. on 10th March 1991 he was on duty at Maseru Central Charge Office. He received a certain report following which he proceeded to Victoria Hotel. He was in the company of Tpr Maluke who has, however not been called as a witness in this trial. At the hotel they met P.W.3 who handed to them a person alleged to have been arrested by the security officers for committing burglary. P.W.3 then left them in his office for some time. When he returned P.W.3 reported that a woman had allegedly been raped in one of the hotel rooms.

Immediately after P.W.3 had made the report P.W.2 entered into the office. She was wearing private clothes i.e. a floral dress and not a uniform overall. When P.W.3 asked her whether she had already changed the uniform P.W.2 replied in the affirmative. As she entered into the office P.W.2 was weeping and obviously walking with some difficulty. She reported to him (P.W.4) and his companion that she had been raped by some of the Burundi players. At that stage P.W.3 left the office saying he was going to call another manager, presumably P.W.10.

It is to be remembered that the evidence of P.W.2 confirmed by that of P.W.3 was that the latter went to look for P.W.10 at the time P.W.2 and P.W.3 met at the reception area and according to P.W.3

22/ before ....

before he went to report to the police officers in the office. I am prepared to accept as the truth the evidence of P.W.2 corroborated by P.W.3 on this point. That being so, it seems P.W.4 cannot be correct in his evidence that after P.W.2 had come into the office P.W.3 left saying he was going to call P.W.10. I reject his story as false on this point.

In any event P.W.4 went on to tell the court that whilst P.W.2 remained with him in the office he noticed that she had a fresh scratch on her neck. She said she had sustained the scratch whilst she was being sexually assaulted by her assailants.

When he returned to the office P.W.3 was in the company of P.W.10. On arrival P.W.10 immediately asked P.W.2 whether it was true that she had been raped. She replied in the affirmative and broke into hysterical weeping. According to P.W.4, P.W.10 then pleaded with him and his companion not to arrest the people who had raped P.W.2 as that would scandalize the Burundi country. P.W.4, however, replied that since the matter had already been reported to him and his companion as police officers legal steps had to be taken.

Although P.W.10 denied that he ever suggested to anybody that the rape affair should be suppressed the evidence seems to be overwhelming against him. I am inclined to believe that he did and in his denial

23/ he was .....

he was not being honest with the court.

P.W.4 confirmed the evidence that whilst P.W.10, P.W.2 and P.W.3 were in the office, P.W.2 went to empty a paper basket at the request of P.W.3. It may be mentioned that in his evidence P.W.10 denied this. I find it reasonable to accept as the truth the evidence of P.W.3 corroborated by that of P.W.2 and reject as false P.W.10's uncorroborated version on this point.

P.W.4 further confirmed that when she returned into the office P.W.2 reported that four of her assailants were in the foyer next to the hotel reception. P.W.10, P.W.3, P.W.2, P.W.4 and his companion then immediately proceeded to the reception area where they found five (5) men. Out of the five P.W.2 pointed out four as being some of her assailants. He could no longer identify them as that was the only occasion he saw the four men.

However, P.W.4 confirmed that as they were being pointed out by P.W.2 the four men threw about their hands, held their shirts and even shook their heads. When he himself showed them his police card telling them he was a police officer and they should come with him the four men threw about their hands as a gesture that they were not prepared to go with him. One of them in fact left and went up the stairs. He however, returned on the way before he could get out of his view. He was then wearing a different shirt

24/ and .....

and holding in his hand the shirt he had been wearing before running up the stairs.

The evidence of P.W.4 that one of the men pointed out by P.W.2 returned on the way up the stairs is, however, not corroborated by any other witness. He is most probably making a mistake. To that extent I am not prepared to accept his story as the truth.

Be that as it may P.W.4 went on to tell the court that when the four men pointed out by P.W.2 refused to obey his order that they should come with him and his companion he refrained from using force to arrest them. To use force in the circumstances would, in the opinion of P.W.4, have caused commotion resulting in the injury of the police, the men themselves or even some innocent guests at the hotel. Rather than use force, in the circumstances, P.W.4 and his companion returned to the office together with P.W.10, P.W.3 and P.W.2 herself. In the office P.W.4 telephoned his senior officer, W/O Raselo requesting him to come to the hotel as there was another case besides the one of burglary.

P.W.4 confirmed that after they had returned into the office P.W.10 went out of the office saying he was going to look for the officials of the Burundi team. After P.W.10 had gone out P.W.3, P.W.4 and his companion went back to the reception area leaving P.W.2 in the office. Whilst they were in the foyer

25/ next to .....



next to the hotel reception P.W.10 came and reported that he had been unable to find the officials of the Burundi team. Shortly thereafter a group of men emerged from the elevator. Before anybody could say anything to them one of those men, presumably the doctor from Burundi, approached P.W.4 and his companion. He asked them to bring to him the woman alleged to have been raped so that he could examine her. In reply P.W.4 told the Burundi doctor that he could not be allowed to examine the woman.

In my view there can be no doubt from the evidence of P.W.4 that at the time the Burundi doctor talked to him at the foyer next to the hotel reception P.W.2 was not there. She had remained in the office. His evidence is, therefore, ad idem with that of P.W.3. Although P.W.10 has told the court that P.W.2 was, at the time, present his evidence is not supported by the evidence of P.W.3 and P.W.4.

It is also to be remembered that in his evidence P.W.3 told the court that when they came to the reception area the officials of the Burundi team approached P.W.4 and his companion who explained to them that some of their players had allegedly raped a woman. It was only then that one of them viz. the doctor from Burundi, started asking for the whereabouts of the woman so that he could examine her. The evidence of P.W.3 is, therefore, corroborative of

P.W.4's version on this point. Their evidence is however, contradicted by P.W.10 who, as it has been stated earlier, told the court that on arrival at the reception area and before anybody had said anything to him the doctor from Burundi angrily inquired where the woman, alleged to have been raped by some of his players, was so that he could examine her.

Be that as it may, P.W.4 testified that whilst he and his party were still at the reception area with the officials of the Burundi team W/O Raselo and Sgt. Koma arrived. He explained to them what had happened. W/O Raselo then talked to the doctor from Burundi after which all the police officers returned to Maseru Central charge office. They took with them P.W.2 and the person who had been arrested for burglary in the laundry room of the hotel.

At the charge office W/O Raselo issued a medical form to P.W.2 and conveyed her to the hospital. P.W.4 himself remained at the charge office. However, when W/O Raselo later came back to the charge office P.W.4 returned with him to the hotel where they met P.W.3, the doctor from Burundi and the general manager (Garry Webbstock). W/O Raselo demanded to see the occupants of the room in which P.W.2 had allegedly been raped. According to P.W.4 whilst P.W.3, the general manager and the doctor from Burundi went to fetch the occupants of the room in which P.W.2 had allegedly been raped he himself and W/O Raselo remained in the office of P.W.3.

27/ This is, .....

This is, however, slightly different from what P.W.3 told the court in as much as the latter included W/O Raselo amongst the people who went to fetch the occupants of the room in which P.W.3 was alleged to have been raped.

When they returned P.W.3, the general manager and the doctor from Burundi brought two people to the office. The doctor from Burundi wrote down the names of the two people on a small piece of paper and put his rubber stamp impression thereon. He handed the piece of paper to W/O Raselo after which P.W.4 and the Warrant Officer returned to the charge office.

In his testimony P.W.1, W/O Raselo told the court that he was stationed at the Maseru Central Charge Office. He confirmed that between 12 midnight and 1.00 a.m. on the night of 10th March, 1991 he received a telephone report as a result of which he proceeded to Victoria hotel. He was in the company of Sgt. Koma and Tpr Chochane who was, however, not called as a witness in this trial. They were travelling in a police van.

On arrival at the reception area of the hotel, P.W.1 found P.W.3, P.W.4, Tpr Maluke and about three other men alleged to be the officials of the Burundi Football Team. He was also shown P.W.2, the complainant in this case. She was wearing a floral dress and clearly in distress as she was weeping. When he and the Burundi officials introduced each other, one of them

28/ was said .....

was said to be a medical doctor. The medical doctor wanted to examine P.W.2. P.W.1 did not, however, allow him to do so because in his experience that had to be done by the local doctors.

Consequently P.W.1 conveyed P.W.2 to the hospital here in Maseru for medical examination. As P.W.2 proceeded to the police vehicle P.W.1 noticed that she was unable to walk properly. They first went to the charge office where P.W.1 issued P.W.1 with a medical form before taking her to the casualty department of Queen Elizabeth II hospital. He handed her to the nurses and then returned to the charge office.

P.W.11, D/Sgt Koma, confirmed that he was in the company of P.W.1 when the latter went to Hotel Victoria. It was whilst he and P.W.1 were at the hotel that he learned that the accused had committed rape. He did not see the accused themselves at the hotel. However, in the morning of 11th March, 1991 at about 8.30 a.m. he was next to the building for Criminal Investigations at Maseru Central Charge Office when W/O Hlalele handed to him the six accused, now before court, with an explanation that they had been pointed out by P.W.2 at an identification parade as the people who had raped her at the hotel. He himself had not seen the identification parade and he saw the accused persons for the first time at that stage.

29/ According .....

According to P.W.11, he then told the six accused to enter into the nearby office. Shortly thereafter a certain gentleman from Burundi came into the office and advised P.W.11 that the accused persons did not understand the English language. He therefore, offered to interpret what he (P.W.11) was going to say to the accused. He was positive that the gentleman was not the man who had earlier introduced himself to him and P.W.1 at Victoria hotel as a medical doctor.

P.W.11 accepted the offer and through the interpretation of that gentleman told the accused persons that he was arresting them on a suspicion of having committed a crime of rape. The accused immediately protested their innocence. He however, proceeded to administer the warning. It was duly interpreted to the accused who then declined to say anything.

In his evidence P.W.11 told the court that he then took the accused persons to the scene of crime at Victoria hotel. They were still in the company of the gentleman who had offered to interpret for them. At the hotel a certain lady was detailed to take them to room 153. P.W.11 carried out a search in the room but found nothing of interest. They then went down to the reception area from where P. W. 11, three of the accused persons and the gentleman who was acting as the interpreter proceeded to the balcony. In the balcony outside the window of room 153 P.W.11 and his party found a used condom. When he

30/ requested them .....

requested them to come and see the condom the accused who had remained at the reception area refused and argued that they could not be responsible for what was found outside the hotel.

P.W.11 took possession of the condom and returned to the charge office together with the accused. The condom was handed in as Exh 3 and part of his evidence in this trial. He told the court that he had subsequently handed Exh 3 to L/Sgt Mohale who took it to Forensic Science Laboratory at Makoanyane for examination. He conceded, however, that as room 153 was on the first floor of an eight story building there were many windows of other rooms above the room outside whose window Exh 3 was found.

Returning to his evidence P.W.1 told the court that after a while he went back to the casualty department to check on how the examination of P.W.2 was progressing. Shortly after he had come to the casualty department P.W.1 noticed the doctor from Burundi and P.W.10 also arriving in a combi belonging to Victoria hotel.

According to P.W.1 both P.W.10 and the doctor from Burundi came to him and said they had been to the charge office looking for him. They then requested him that the rape affair should be settled or dropped as it might scandalize the Burundi country. The doctor from Burundi even expressed the wish to discuss

31/ the matter .....

the matter with P.W.2 herself. However, P.W.1 turned down the request made by P.W.10 and the doctor from Burundi. He warned the doctor from Burundi against interfering with P.W.2. Thereafter they all left the casualty department. P.W.1 returned to the central charge office whilst the combi in which P.W.10 and the doctor from Burundi were travelling took the direction towards Victoria hotel.

After some time P.W.1 again returned to the casualty department to check on the progress of P.W.2. On arrival he found that the Victoria hotel combi was parked outside the casualty department. When he entered into the casualty department P.W.1 found the doctor from Burundi, P.W.10 and P.W.3. There was an altercation between the doctor from Burundi and one of the nurses, Mrs. Putsoane who has, however, not been called to testify in this trial. Whilst the doctor from Burundi was insisting to have a private talk with the local doctor who had examined P.W.2 the nurse was refusing him permission to do so. P.W.1 intervened by telling the doctor from Burundi that he was exceeding his limits and ordered him to leave the place.

According to P.W.1 after she had been examined at the casualty department he conveyed P.W.2 back to the hotel. This is, however, contradicted by the evidence of P.W.2 who, as it has been stated earlier, told the court that from the casualty department of the

32/ hospital she ....

hospital she returned to Victoria hotel with the hotel managers. She was in a way corroborated by P.W.4 according to whom after he had taken P.W.2 to the hospital P.W.1 returned alone to the charge office from where he accompanied him to the hotel.

In his evidence P.W.1 told the court that when he returned to the hotel he met P.W.3. They were taken to the laundry room by P.W.2 who showed them a blue overall and a panty as the clothes she had been wearing at the time she was sexually assaulted in room 153. P.W.1 noticed that the overall was torn on the right side of its collar, under the left armpit and had some whitish blots on the lower portion of its back. The panty had some sticky substance and its elastic band was broken.

P.W.1 took possession of both the overall and the panty. After they had subsequently been sent to Forensic Science Laboratory at Makoanyane for examination he kept them in the police custody. The overall and the panty were handed in as exhibits 1 and 2, respectively. I shall return to the evidence of P.W.1 in a moment.

Briefly stated, the evidence of P.W.7, Lt. Bulara Khomohaka, was that he was a member of the R.L.M.P. and a qualified Forensic Biologist, attached to the Forensic Science Laboratory Department of the force at Makoanyane. On 13th and 14th March, 1991 a condom and a vaginal swab were referred to him for

33/ examination .....



examination by L/Sgt Mohale and Tper Maime, respectively. On 27th March 1991 P.W.1 also referred to him Exh 1 and Exb 2.

It is significant that Tpr Maime has not been called to testify in this trial. Consequently it remains unclear where the vaginal swab he referred to P.W.7 came from. However, as it has already been pointed in this judgment the condom that Tper Mohale referred to P.W.7 came from P.W.11, Sgt. Koma.

Be that as it may, P.W.7 told the court that all the items he had received from the police officers were tested for human sperm cells. At the time of the examination he made notes on the basis of which he prepared a report which he handed in as Exh. C and part of his evidence in this trial. According to Exh C the examination of the specimens taken from Exh I, Exh 2 and the condom revealed the existence of human sperm cells. The examination of the vaginal swab was, however, negative.

Returning to his evidence, P.W.1 confirmed that when he and P.W.4 returned to Victoria hotel he also met the general manager. Garry Webbstock, and the doctor from Burundi. He demanded to interrogate the occupants of room 153 in which P.W.2 had allegedly been raped. No.4 accused and another person he no longer remember were brought to him in the office of the general manager. He wrote down the names of No.4 accused and his companion in his diary which he had,

34/ however, .....

however, misplaced. As he regarded No.4 accused and his companion as suspects P.W.1 administered the usual warning to, and started interrogating them. The doctor from Burundi was acting as interpreter from English to accused's language and vice versa. However, P.W.1 had a feeling that the doctor was not correctly interpreting and he had to stop the interrogation. As he did not consider it necessary to arrest No.4 accused and his companion at that stage P.W.1 and P.W.4 returned to the central charge office.

P.W.8, Dr. Siddique testified that she was a registered medical practitioner in Lesotho. On 10th March, 1991 she was serving internship which she completed in April 1991 at Queen Elizabeth II hospital here in Maseru. During the period of her internship she had examined many patients and compiled several medical reports including those of rape cases.

P.W.8 remembered that at about 2 a.m. on the night of 10 March, 1991 she was on duty at the casualty department of the hospital when she was called upon to examine a patient who was a Mosotho lady by the name of 'Manako Motente (P.W.2). As she spoke English and could not understand Sesotho, the language used by P.W.2, the doctor communicated with her through the assistance of one of the nursing sisters who was interpreting from the English to the Sesotho language and vice versa.

35/ At the time .....

At the time of examination P.W.8 compiled a written report. She learned from P.W.2 that the latter was an employee of Victoria hotel. She was married and had given birth to four (4 children) Her husband was, at the time, living with her here in Maseru. She had been raped by six men whilst on duty at the hotel.

It is to be remembered that P.W.2 herself testified in this trial and told the court, on oath, that her husband was, at the material time, not at home. He had returned to his place of work at the mines of the Republic of South Africa. As P.W.8 was communication with P.W.2 through the assistance of a nursing sister who did not testify before this court, the possibility that what P.W.2 said to the doctor regarding the whereabouts of her husband was not correctly interpreted cannot be ruled out.

Be that as it may, P.W.8 went on to testify that during the examination of P.W.2 she noticed a fresh bruised scratch on the right side of her neck. According to P.W.2 she had sustained the injury whilst she was being assaulted by her assailants.

She (P.W.8) assured the court that apart from the injury on her neck the examination revealed that the physical and mental conditions of P.W.2 were quite normal. From the physical examination of her patient P.W.8 could not, therefore, determine

36/ or not .....

determine whether or not sexual assault had taken place. She, however, took P.W.2's vaginal swab and requested her to take it to the hospital laboratory for testing.

It was whilst P.W.8 was waiting for the laboratory results that some men who claimed to be the managers from Victoria hotel came to the casualty department of the hospital. They were in the company of another man who introduced himself to her as a medical doctor for the Burundi football team. P.W.8 confirmed that the doctor from Burundi requested her to discuss privately with him the results of P.W.2's examination. One of the hotel managers immediately objected to that.

According to P.W.8 the results of her patient's examination was a confidential matter which could not properly be disclosed to other people. She had no knowledge that the medical doctor from Burundi was lawfully authorised to practise as such in Lesotho. In the circumstances, she did not accede to the request made by the doctor.

When the doctor from Burundi insisted on discussing with her the results of her patient P.W.8 had to sent for the intervention of the hospital matron who has, however, not been called as a witness, in this trial. There was then a row as the Burundi doctor still insisted on his request. Eventually the police arrived

37/ and ordered ....

and ordered the Burundi doctor away from the casualty department. In the contention of P.W.8 the request made to her by the doctor from Burundi was, not only unreasonable but, medically unethical as well. I shall return to the evidence of P.W.8 in a moment.

P.W.6, Maqhobela ~~Majara~~ testified to the effect that she was the Senior Laboratory Assistant at Queen Elizabeth II hospital. She confirmed that on the night in question she was on duty when a vaginal swab taken from a patient by the name of 'Manako Motente (P.W.2) was referred to her laboratory for examination. The swab was accompanied by a Microbiology Request Form of which the first part was completed and signed by P.W.8. She submitted the swab for examination which revealed the existence of spermatozoa.

P.W.6 completed the second part of the Microbiology Request Form at the time of examination after which she returned the Form to P.W.8. She handed in the completed Microbiology Request Form as Exh. "B" and part of her evidence.

Returning to her evidence P.W.8 confirmed that after she had sent P.W.2 to the hospital laboratory with the specimen of her vaginal swab she received back Exh "B" according to which the result of the examination of the swab she had referred to the laboratory for testing revealed the existence of spermatozoa. Consequently she concluded that P.W.2

38? had had .....

had had sexual intercourse. Considering the contents of Exh "B" in conjunction with what P.W.2 had told her P.W.8 formed the opinion that sexual assault could not be excluded.

Because of the row that had taken place at the casualty department P.W.8 suspected that a complaint might be lodged concerning her examination of P.W.2. As an intern she deemed it prudent, therefore, to show the report she had compiled to Dr. Shayo who was, at the time, the senior medical doctor in-charge at the hospital. After reading it the latter assured her that according to the report there was nothing wrong in the manner she had performed the examination. He attached his signature to the report as approval thereof. That, in my view, confirms the evidence of P.W.2 who as it has been stated earlier, told the court that she had observed P.W.8 handing some papers to another doctor who then scribbled something thereon.

According to her, after Dr. Shayo had seen the report, P.W.8 handed it over to P.W.2. She was, however, later called to the office of the hospital Superintendent and told that only her signature as the medical doctor who had examined P.W.2 ought to have appeared on the report. It was improper, therefore, that the signature of Dr. shayo who did not actually examine the patient also appeared on the report. She was instructed to re-write the report so that only her signature appeared thereon. P.W.8 complied and

39/ copied the .....

copied the report verbatim on another paper leaving out only the signature of Dr. Shayo. She assured the court that the copy was the one she handed in as Exh D. and part of her evidence in this case.

P.W.9, Dr. Makhetha Mosotho, testified on oath and told the court that he was the Medical Superintendent at Queen Elizabeth II hospital. He recalled that some time in March this year two police officers came to his office carrying a medical report written entirely in the handwriting of P.W.8 who was serving her internship at the time. He read through the report and noticed that it bore signatures of two medical doctors viz. P.W.8 and Dr. Shayo, a most senior doctor short of a specialist at the hospital. When he enquired from the two doctor he found that the patient referred to in the report had been examined only by P.W.8 i.e. not by Dr. Shayo who had allegedly attached his signature thereto merely because he was the senior doctor on call with P.W.8.

From the administrative point of view P.W.9 considered it unacceptable for Dr. Shayo, who admittedly had not examined the patient, to have signed the report. Whereupon he summoned P.W.8 to his office and instructed her to re-write the report so that only her signature as the medical doctor who had examined the patient appeared in the report. P.W.9 told the court that after P.W.8 had complied with his instructions he personally checked the copy against the original to

40 ensure that .....

ensure that no alterations had been made. He then destroyed the original and gave the copy to the police. That copy was Exh D. before the court.

P.W.9 further assured the court that notwithstanding the fact that she was an intern P.W.8 was qualified to examine the complainant in this case and judging from her report (Exh. D) she did so to the best of her ability. The only irregularity in the report was that the medical doctor who had not examined the patient had appended his signature thereto.

In the opinion of P.W.9 it was not permissible for a person in the position of the medical doctor from Burundi, who was not registered as such in Lesotho, to perform medical functions in this country beyond those of looking after the welfare of the members of his football team. If the doctor wanted to discuss with P.W.8 the patient the latter had examined it would have been *inappropriate as a breach of professional ethics.*

It is perhaps, convenient to mention, at this juncture that the defence also called D.W.7, Dr. Maiten, a medical practitioner and specialist of many years experience in this country. He told the court that judging from his reading of Exh D, P.W.8's inquiry on the history of her patient was rather superficial. She apparently did not examine the clothes which her patient was wearing at the time of the alleged sexual assault. Apart from these and other



minor points of criticism D.W.7 told the court that, by and large, the conclusion arrived at by P.W.8 could not be faulted and he therefore agreed with it. He confirmed that for the reasons already given by P.W.9 it would have been a breach of medical confidentiality for P.W.8 to discuss her patient with the doctor from Burundi.

In their defence Nos. 5 and 4 accused gave evidence as D.W.1 and D.W.2, respectively. D.W.1 conceded that during his stay at Victoria hotel, he occupied room 153. He shared the room with one of his team mate by the name of Hilali Shabani. Following the cocktail party that was held at Sechaba hall he and his compatriots took some beers to their rooms intending to carry them home as the type of beer was not available in their country. They then proceeded to the restaurant for dinner after which they were told to go for a meeting at the pent house on the eighth floor of the hotel building. All the players who had participated in the football game on the afternoon of 10th March, 1991 attended the meeting. According to him, D.W. 1 had participated in the game and he, therefore, attended the meeting at which the match of the day was discussed and analysed. They were also advised that on their way home, the following day, they were due to play another game in Nairobi - Kenya. In preparation for the game they

42/ should therefore.....

should, therefore, retire to bed and get a rest. As he was feeling very tired he immediately proceeded to his room to sleep.

D.W.1 denied, therefore, the evidence that he ever met P.W.2 outside the toilets next to the restaurant of the hotel and the latter took towels to room 153 at his request.

As it has been stated earlier the evidence of P.W.2 that she did take towels from the laundry and proceeded to the rooms occupied by the Burundi guests was, however, corroborated by P.W.3. I am inclined to believe that P.W.2 corroborated by P.W.3 were testifying to the truth and in his denial D.W.1 was not being honest with the court.

Be that as it may, D.W.1 went on to testify that as he approached his room 153 on the way from the pent house he noticed two women in white uniform dresses leaving the room. When he entered into the room he found P.W. 2, his room-mate Hilali and another of his compatriots by the name of Selemani Ismaili who shared room 151 with Alimasi Shabani. Hilali was seated alone on the single bed whilst P.W.2 and Selemani were seated very close to each other on the double bed.. They were drinking Armstel beers and watching T.V.

Realising that Hilali and Selemani had a female visitor D.W.1 decided to go and sleep in the latter's room 151 so as not to disturb them.

43/ It must be .....

It must be borne in mind that in her evidence P.W.2 told the court that she did not take intoxicating beverages. That being so, it seems unlikely that she could have been found drinking beer in room 153 as alleged by D.W.1. It is also worth mentioning that under her cross-examination it was put to P.W.2 that evidence would be adduced to show that on the night of 10th March, 1991 she was seen going to the pent house bar and asking for wine with which to mix beer. As a follow up, the defence called D.W.5, Agnes Maime, who testified that she was employed as a bar lady in the pent house bar of the hotel Victoria. At about 11.15 p.m. on the night in question she was on duty when P.W.2 came to the pent house bar and asked for a glass of wine. She (D.W.5) gave her an empty glass. Before D.W.5 could say anything to her P.W.2 started telling her that she had been to Sechaba hall hoping to find some left overs but had not succeeded. She had, therefore, come to the pent house bar so that she (D.W.5) could quench her thirst.

According to her, D.W.5 had no personal knowledge that P.W.2 partook of intoxicating beverages. She categorically told the court that, at the time P.W.2 came to the pent house bar, she did not serve her with wine or, for that matter, any intoxicating beverages because P.W. 2 had no money with which to pay.

'Malerato Monyane was also called as D.W.4.

In a nut shell she told the court that she was one of the security officers under the supervision of P.W.3 at hotel Victoria. At about 11 p.m. on the night in question she was at the foyer next to the hotel reception when she noticed three members of the kitchen staff viz. Maphale, 'Matsielo and Kekeletso trying to go up the stairs that led to the rooms.

As Kitchen staff, the three women were not permitted to go to the hotel rooms. D.W.4, therefore, ordered them back and they complied. She was definite that P.W.2 was not amongst those three women. According to D.W.4 she had never seen P.W.2 drinking intoxicating beverages and had no personal knowledge that she did so.

It may be mentioned that whilst D.W.4 was testifying in chief the court was asked by the defence counsel to declare her a hostile witness. In my observation the witness had been answering questions that were put to her in a straightforward manner and showed no hostility at all. It may well be that D.W.4 was not giving the answers that the defence counsel expected from her. That was, however, no valid reason to declare D.W. 4 a hostile witness. I accordingly turned down the request made by the defence counsel.

In my opinion the evidence of D.W.5 and 4 have failed to elicit the support they were sought

45/to render .....

to render to D.W.1's story that P.W.2 was found drinking beer in room 153 and her claim that she did not partake of intoxicating beverages could not, therefore, be correct. That being so, I am prepared to accept as the truth the story of P.W.2 corroborated by P.W.3 and P.W.10, and reject as false D.W.1's uncorroborated version on this point.

Continuing with his evidence, D.W.1 told the court that whilst he was sleeping in room 151 he heard a knock at the door. When he opened the door he found it was Selemani who had come to sleep in his room. D.W.1, therefore, returned to his room 153. As he approached it he noticed P.W.2 outside room 153. she was then writing the number of the room on a piece of paper. When P.W.2 left the door of room 153 D.W.1 heard her uttering the word "police". D.W.1 entered into the room and found Hilali alone. He asked him why P.W.2 was writing down the number of their room and uttering the word "police" as she left the door thereof. Hilali then explained that Salemani had had sexual intercourse with P.W.2 in room 153 and paid her 200 Burundi Francs. He (Hilali) then had sexual intercourse with her after which P.W.2 demanded another 200 francs. He refused to pay and told P.W.2 that the money she had been paid by Selemani was enough for the service she had rendered to both of them. P.W.2 then angrily stormed out of the room.

46/ It is clear .....

It is clear from his evidence that the impression D.W.1 wants to create to this court is that P.W.2 is a woman of loose morals who goes about having sexual intercourse with men for money. She had, therefore, consented to have sexual intercourse with both Selemani and Hilali in room 153 for payment. That being so, I must say I find it quite strange, if not incredible, that P.W.2 could have accepted or demanded her payment in the Burundi currency whose value was, for obvious reasons, unknown to her and, in all probabilities, she would find it difficult, if not impossible to change into the local currency. Indeed, the doctor from Burundi testified, on behalf of the defence, and told the court that 200 Burundi Francs was so small an amount that it would serve as nothing but a souvenir to P.W.2. There is no hesitation in my mind that the impression D.W.1 is trying to create to this court is a falsehood calculated merely to deceive this court into believing that P.W.2 had had sexual intercourse with Selemani and Hilali.

It is also worth mentioning that in the course of this trial the court was told from the bar that the defence wished to call as witnesses Selemani and Hilali who had since returned to Burundi. Intimidation was, however, being made to bear on the two would be defence witnesses that the moment they set their feet in this country they would be arrested. The court was for that reason requested to consider making an order authorising

47/ the evidence ...

the evidence of both Selemani and Hilali to be taken on commission.

In the first place what the court is told from the bar cannot be regarded as evidence. Secondly there seems to be no basis for the intimidation that if they were to return to Lesotho to give evidence before this court, Selemani and Hilali would be arrested.

If they were called as defence witnesses in this case Selemani and Hilali would either confirm the story that D.W.1 has already told the court viz. that they had had sex with P.W.2 for a reward or deny that they ever had sexual intercourse with her. If it were assumed that Selemani and Hilali would confirm D.W.1's evidence that they had had sexual intercourse with P.W.2 for payment the implication would, in my view, be that the latter had consented to sexual intercourse. They would, therefore, have committed no criminal offence to warrant their arrest. If it were assumed that they would testify against D.W.1's evidence i.e. deny to have had sexual intercourse with P.W.2, Selemani and Hilali would likewise have committed no criminal offence to warrant their arrest.

There was no suggestion that Selemani and Hilali were, for health reasons or want of funds, unable to come and give evidence before this court.

48/ A fortiori .....

A fortiori no valid ground for the order that their evidence be taken on commission. That being so, I had no alternative but to turn down the request for such an order. At the close of the defence case Selemani and Hilali had not been called as witnesses. Whatever they were alleged to have done or said in connection with this case remained therefore, hearsay and of no evidential value.

According to D.W.1, after he had told him how P.W.2 had left room 153 Hilali requested that they should go to the reception area to verify whether she was in fact calling the police. He, therefore, accompanied Hilali to the reception area where they found some of their compatriots and P.W.2 who was talking to P.W.3. Whilst D.W.1 was talking to his compatriots P.W.2 who was then in the company of two police officers approached them. None of the co-accused were present at that time. He noticed P.W.2 pointing at Hilali who immediately ran up the stairs. According to D.W.1 she did not point him out but when he saw the two police officers approaching him he believed they were going to arrest him. By using gestures or sign language he asked P.W.2 whether he too was the one. She also used sign language and denied it. D.W.1 then left for his room in which he found Hilali already in bed.

He denied, therefore, the evidence of P.W.2 that she had pointed him and three of his co-accused as some of the people who had raped her in room 153. The



evidence of P.W.2 that she did point out four of the accused persons at the reception area was, however, corroborated by P.W.3, P.W.4 and P.W.10. In my view, the evidence is simply overwhelming against D.W.1 and in his denial that P.W.2 pointed him and three of the co-accused at the reception area he is not being honest with this court.

According to D.W.1 after he and Hilali had returned to room 153 they were sleeping when their team doctor came and woke them up. The doctor was in the company of P.W.1 and the General Manager, P.W.3 was not there. They went to an office next to the reception area where he and Hilali were interrogated by P.W.1. Thereafter they returned to their room and slept.

The evidence of D.W.1 that when he and his room mate were fetched from room 153 on the night in question the doctor from Burundi was in the company of the general manager and P.W.1 but not P.W.3 was confirmed by the general manager, Garry Webbstock, who testified as D.W.3 in this trial. He was positive that he and P.W.1 first went to the room of the doctor from Burundi who then accompanied them to room 153.

According to D.W.3 when he first met the doctor from Burundi in the foyer of the hotel on the night in question the latter was having a row with P.W.10. Whilst P.W.10 was complaining that one of the hotel employees had been raped by some of the people

from Burundi the doctor was unhappy with the accusation of rape being falsely levelled against his people. D.W.3 told the court that he succeeded in pacifying the two men. The doctor then requested to go to the hospital so that he could examine the complainant as he was an International doctor. Since the doctor was a guest of the hotel D.W.3 acceded to his request and authorised a vehicle belonging to the hotel to transport him to the hospital. The doctor from Burundi gave evidence as D.W.6 and confirmed the evidence of D.W.1 and D.W.3 that P.W.1 was in the party that went to fetch the occupants of room 153.

It is to be remembered that according to the evidence of P.W.3 and P.W.4 the party that went to fetch the occupants of room 153 did not include P.W.1 who had remained in the office. Indeed, that was confirmed by P.W.1 himself. There was, therefore, the evidence of three against three witnesses.

I must, however, point out that I find it quite incredible that both P.W.1 and P.W.4, the only police officers at the hotel at the time, could have remained in the office while other people, who were not police officers, went for the occupants of a room in which a crime, as serious as rape, had allegedly been committed. In my view, the evidence of D.W.1, D.W.3 and D.W.6 that P.W.1 was in the party that went to fetch the occupants of room 153 is, in the circumstances, more senseable than the evidence of P.W.4, P.W.3 and P.W.1 that he

was not. I, therefore, accept as the truth the story of D.W.1, 3 and 6 and reject as false the version of P.W.1, 3 and 4 on this point.

The evidence of D.W.1 that the person with whom he was fetched from room 153 was Hilali was corroborated by D.W.6 who told the court that the Burundi players were so much disciplined that they could not have changed, without permission, the rooms to which they had been allocated at the hotel. He dismissed, therefore the suggestion that Hilali could have changed his room with No.4 accused.

Well, in his own mouth D.W.1 who is admittedly one of the Burundi players told the court that on the night in question he went to sleep in room 151 which was allocated to Selemani and not to him. I do not believe that he did so with the permission of any of the officials of the Burundi team. Again if the evidence of D.W.1 were to be believed Semelani and Hilali who were also Burundi players had had sex with P.W.2 for money in room 153. That, in my view does not depict them as such disciplined members of the Burundi football team as D.W.6 wants this court to believe.

D.W.2 Saidi Shabani, confirmed the evidence of D.W.1 in material respects as to what happened after the party that was held in Sechaba hall. He told the court that when they left the meeting at the pent house he went straight to his room 453 and slept. He was never in room 153 on the night in question.

It was only after he had been sent to prison that he learned from D.W.1 that Selemani and Hilali had had sexual intercourse with P.W.2. He denied, therefore the evidence of P.W.2 that he was one of the people who had sexually assaulted her in room 153. He also denied that he was one of the two people who were fetched from room 153 as suggested by P.W.1 and P.W.3.

As far as it is relevant the evidence of D.W.6 was to the effect that in March this year, he was assigned by the Burundi Government to travel to Lesotho with his football team. On the night in question he was sleeping in room 354 at Victoria hotel when P.W.10 woke him up. It could have been between 12 midnight and 1.00 a.m. He and P.W.10 then proceeded to the reception area where they found P.W.2, P.W.3 and two police officers, presumably P.W.4 and Tper Maluke. The police officers told him that some of his people had raped a woman. He then asked the police officers for permission to speak to the woman so that he could find out from her by whom she had been raped. The police officers did not, however, grant him the permission to speak to the woman.

D.W.6 denied that he ever wanted to examine the woman. He could not have wanted to do so because he knew that he was not registered as a medical practitioner in Lesotho. Moreover, there were no gynecological clinic and the necessary equipment at Victoria hotel.

As it has been stated earlier, P.W.10 told the court that he looked for but could not find D.W.6 or any of the officials of the Burundi team. He denied, therefore, the evidence of D.W.6 that he woke him where he was sleeping in his room. The evidence of D.W.6 that when he came to the reception area he learned from the police officers that his people had raped a woman is supported by P.W.3 and P.W.4. If it were true that P.W.10 woke up D.W.6 from his room, it seems to me likely that he would have informed him then about the alleged rape. The fact that, in his evidence, D.W.6 learned about the rape only when he came to the police officers at the reception area is, in my view, corroborative of P.W.10's evidence that he and D.W.6 had not met before. D.W.6 must, therefore be making an error in his suggestion that before he came to the reception area P.W.10 had been to his room

The evidence of P.W.3, 4 and 10 that after he had come to the reception area D.W.6 did say he wanted to examine the woman alleged to have been raped is, in a way confirmed by D.W.-3 who told the court that when he later met him D.W.6 was still insisting that he had a right to examine the woman. It seems to me, therefore, that P.W.3, 4 and 10, in a way corroborated by D.W.3 were testifying to the truth when they told the court that after he had come to the reception area D.W.6 demanded to examine the woman alleged to have been raped and in his denial that he did the latter was

54/ not being ...

not being honest with the court.

In his evidence that when he came to the reception area he found P.W.2 amongst the people who were standing there D.W.6 was supported by P.W.10. However, their evidence was contradicted by P.W.3, P.W.4 and, indeed, P.W.2 herself all of whom told the court that she (P.W.2) was, at the time, sitting in the office. Indeed P.W.2 told the court that she never set her eyes on D.W.6 on the night of 10th March, 1991. Bearing in mind that in her evidence P.W.2 testified that she was, on the night in question, feeling pains as a result of what had happened to her in room 153 it seems to me sensible that she was sitting in the office whilst those men were standing at the reception area.

D.W.6 further testified that when the police officers did not allow him to speak to the woman alleged to have been raped he was somewhat angry as he felt something was being hidden from him. After the police had left with the woman for the hospital he remained at the foyer with P.W.10 and P.W.3. He confirmed that whilst they were standing there D.W.3 arrived. He reported to D.W.3 what had happened and the latter authorised a vehicle belonging to the hotel to transport him to the hospital.

D.W.6's version of what happened at the casualty department of the hospital is that he found P.W.8 and after introducing himself to her as a medical doctor

55/ the latter .....

the latter told him that she was the doctor who had examined P.W.2. He then asked to speak to P.W.8 about the report she had made concerning her examination of P.W.2. P.W.8 was agreeable but pointed out that she would not do so in public. At that time P.W.3 intervened by telling P.W.8 that nothing could be said in private since the matter was already in the police hands. He in fact went to call P.W.1.

I must say I find it unbelievable that P.W.3 who did not want P.W.8 to speak privately to D.W.6 could have went to call P.W.1 who was apparently not in the casualty department. That, in my view, would have afforded P.W.8 the opportunity to speak to D.W.6 in his absence. That seems to be exactly what P.W.3 did not want to occur.

In any event D.W.6 told the court that as he did not understand how P.W.3 who was not a medical doctor could prevent him from speaking to another doctor he continued asking P.W.8 for a private talk about the report she had made. It was then that P.W.1 came in and wanted to beat him up with his police baton. D.W.6 confirmed that he left the casualty department and returned to the hotel. He denied the evidence that he was rowdy or in any manner rude when he spoke to P.W.8 at the casualty department.

If D.W.6 did not make a row and insist on discussing with P.W.8 the results of the examination she had performed on her patient as the former wants this

this court to believe, I find it strange that P.W.1 who is a police officer, P.W.8 a medical practitioner, P.W.3 and P.W.10 the hotel managers could have teamed up and said he did. I have no doubt in my mind that P.W.3, 8 and 10 were testifying to the truth and P.W.6 was not telling the truth on this point.

Now, coming back to her evidence P.W.2 told the court that at about 6.00 a.m. on 11th March, 1991 she was told that she and the Burundi people would have to go to the central charge office. P.W.1 then took her to an office at Maseru Central Charge Office where she was handed to a certain police woman. The police woman told her that an identification parade was to be arranged and she would be required to go and point out her assailants if any of them were in the parade. The police woman then went out leaving P.W.2 alone in the office. According to her, P.W.2 had not seen any of the Burundi people arriving at the central charge office.

However, after the police woman had gone out a policeman came and called her out of the office. Outside the office P.W.2 noticed a number of people in a line up. At the request of the policeman she went to the line up and found that it consisted of the people from Burundi. The police woman who had been interviewing her in the office was standing in front of them.

57/ She (the .....



She (the policewoman) told her to look at the people in the line up and if any of her assailants were amongst them she should identify them by touching. According to her, P.W.2 did look at the people in the line up and proceeded to point out those she recognised as the ones who had sexually assaulted her in room 153 at hotel Victoria. She recognised them by their heights and faces which were as she had already told the court familiar to her. As she walked along the line up she pointed out five(5) of the accused. When she returned from the end of the line up she went to point another one. She no longer remembered the order in which she pointed out the six accused except that No. 5 accused was the one she pointed out first. In any event as she was pointing them out the policewoman was writing on a piece of paper.

P.W.5, W/O Hialele, told the court that she had been in the police force for 19 years. She had in the course of her career as a police officer conducted several identification parades

In the morning of 11th March, 1991 she was on duty at the Maseru Central Charge Office when P.W.1 instructed her to conduct an identification parade of people from Burundi as there was an allegation that some of them had raped P.W.2 at Hotel Victoria. She herself had not seen either P.W.2 or any of the people from Burundi.

P.W.2 was subsequently brought to her office and she was the policewoman who talked to her in the office. When she asked her whether she could identify her assailants P.W.2 replied in the affirmative. P.W.5 then told P.W.2 that an identification was going to be arranged and she would be required to point out her assailants if any of them were amongst the people in the parade.

P.W.5 confirmed that she then went outside leaving P.W.2 in the office. When she came out of the office she found that the people from Burundi had arrived. From her office she and P.W.2 could not have seen the Burundi people. After observing their heights complexions and attire P.W.5 went to look for some of the C.I.D. members who had more or less the same heights complexion and attire as the people from Burundi. She joined them with the Burundi people and asked them to form a line up. After she had explained to the people in the line up that a woman who alleged to have been raped by some of the people from Burundi at the hotel would be called to identify her assailants P.W.5 asked whether there was any objection to her using the English language. There was no, reply. She, however, asked whether they had all followed what she had been saying. Some of the Burundi people in the line up said "No". Then D.W.6 went to talk to those people after which he told her that he had explained to them in their language what she had been saying and they were satisfied. He told

59/ P.W. 5 that .....

P.W.5 that she could then proceed with the identification parade. When she asked whether they were satisfied with their positions in the line up some of the people from Burundi changed their positions. P.W.5 then asked all the people in the line up to write their names on a piece of paper on the basis of which she completed the Identification Parade Form S.A.P. 329 which was the official form used for Identification Parades. She adhered to the contents thereof and handed in the Identification Parade Form S.A.P. 329 as Exh. "A" and part of her evidence in this trial.

After all the people in the line up had written their names on the peice of paper, P.W.5 sent for P.W.2. When P.W.2 came to the identification parade P.W.5 again told her to look at the people in the line up and if she recognised any of her assailants amongst them she should identify them by touching. P.W.2 took her time to look at the people in the line up before proceeding to point out. She started from the left and proceeded to the right. She confirmed that she was writing down the accused as P.W.2 pointed them in the following order.:

- A. 1 who was in position 5 in the line up.
- A. 2 in position 8
- A. 3 in poosition 15
- A. 5 in position 16/
- A. 6 in position 20

60/ After.....

After she had come to the end of the line up P.W.2 went back and pointed out A4 who was in position 12.

It is significant that according to P.W.5 when A4 was pointed out by P.W.2 some of the Burundi people made a noise of disapproval "Aa! Aa! NX! NX!"

P.W.5 told the court that in her observation P.W.2 was not hesitant in pointing out the accused in the line up. She did not consider it necessary to hold another identification parade. None of the people from Burundi expressed a desire for another identification parade. Nor did any one of them object to the manner in which she had conducted the identification parade. After P.W.2 had identified the six accused, now before court, P.W.5 considered them as suspects. She therefore, handed them over to P.W.1.

In their testimony D.W.1, D.W.2 and D.W.6 told the court that on the morning of 11th March, 1991 they and their compatriots boarded a bus ready to go to the airport on their way home. Instead of taking them to the airport the bus, however, went to Maseru Central Charge Office. Nobody had told them that they were going to attend an identification parade at the charge office.

Regard being had to the fact that P.W.2 had at the reception area of hotel Victoria, pointed some people as being only four of six Burundi people who had sexually assaulted her in room 153 it stands to reason that two of her assailants had not yet been identified. It seems to me likely that the Burundi people must have been told that they would have to go

for identification parade to enable the complainant to identify the remaining two of her assailants.

By and large, D.W.1 D.W.2 and D.W.6 confirmed the evidence of P.W.2 and P.W.5 as regards the identification parade that was held at the Central charge office. Although they told the court that they were just ordered to stand in the line up D.W.1, D.W.2 and D.W.6 conceded that thereafter P.W.5 did explain that the reason for the line up was to enable the complainant to come and identify the people who had sexually assaulted her at Victoria hotel. None of them raised any objection to his taking part in the identification parade.

According to the testimony of D.W.1, D.W.2 and D.W.6 as she pointed out the six accused at the identification parade, P.W.2 was doing so at random i.e. without first looking carefully at all the people in the parade. That was, however, in conflict with the evidence of P.W.5 and P.W.2 according to whom the latter did take time to look at the people in the line up before proceeding to identify the accused by touching each of them.

It must be borne in mind that the accused and D.W. 6 were not standing together in the line up which according to Exh "A", consisted of 28 people. That being so, I do not believe that D.W.1, D.W.2 and D.W.6 could have been able to see P.W.2 clearly as she pointed out each of the six accused. They are not, therefore, in a position to tell the court with certainty

62/ that .....

that she pointed out the accused at random. I am inclined to believe the evidence of P.W.5, who was admittedly standing in front of the line up and, therefore, in a better position to observe her as she did the pointing out that P.W.2 had carefully looked at all the people in the line up before proceeding to identify each of the six accused by touching him.

In their evidence D.W. 1, D.W.2 and D.W.6 further testified that after she had pointed out the accused P.W.2 left. The people in the line up were then told by P.W.5 that another identification parade was going to be conducted and they were free to change their position and clothes. Some of the people from Burundi did so but P.W.2 never came back. That was, however, denied by P.W.5 who unequivocally told the court that after P.W.2 had identified the six accused she (P.W.5) was satisfied that the parade had been properly conducted and there was no need to hold another one. She therefore, dismissed the parade.

I am unable to see what could have prevented P.W.5 from conducting another parade if she wanted P.W.2 to make another pointing out as the defence witnesses clearly wish this court to believe. The people with whom the parade was to be held were still available and P.W.2 herself could not have gone far. I am convinced that D.W.1, D.W.2 and D.W.6 were not testifying to the truth in their story that P.W.5

63/ had told them ...

had told them and the other people in the line up that she was going to conduct another identification parade after she had conducted the first one.

It is common cause that after P.W.2 had pointed out the six accused the latter were handed over to the police and escorted to P.W.11's office. According to them P.W.11 neither gave a charge or said anything to D.W.1, D.W.2 and the other four accused. As it has been stated earlier this was denied by P.W.11 in whose evidence he told the court that in the office he did give the charge of rape and administered the warning to the accused after which they declined to make any statement, as they were, indeed, entitled to do. In my view the story of P.W.11 is more sensible than that given by D.W.1, D.W.2 and D.W.6. I am prepared to accept it as the truth and reject as false the version given by D.W.1, D.W.2 and D.W.6 on this point.

Now, as it has already been pointed out earlier, the six accused persons are charged with the crime of rape which, as Cotran C.J. once put it in Rex v. Simon Seala 1976 L.L.R. 241.

"... consists of intentional unlawful intercourse with a woman or a girl without her consent."

The essentials to be proved beyond a reasonable doubt in the present case, are, therefore, that P.W.2

64/ had ....

had had sexual intercourse and had not consented thereto. It is trite law that a court of law, properly advising itself, must always approach the evidence of complainants in sexual cases with utmost care. The reasons behind the need for this cautionary rule have succinctly been stated by Hoffmann in his invaluable work The South African Law of Evidence where at p. 415 the learned author has this to say on the issue:

"The bringing of the charge may have been motivated by spite, sexual frustration or other emotional cases."

In the instant case the evidence of P.W.2 that on the night of the day in question she had had sexual intercourse is corroborated by P.W.8 and P.W.6 who respectively, examined her and submitted to a test a swab extracted from her vagina. The examination carried out by P.W.8 considered together with the test made by P.W.6 left no doubt that P.W.2 had had sexual intercourse. The conclusion arrived at by the two witnesses was indeed, confirmed by D.W.7.

The evidence of P.W.7 who examined the uniform overall and the panty that P.W.2 had admittedly been wearing at the time of the alleged sexual intercourse is also corroborative of the latter's story that she had had sexual intercourse in that sperm cells were found on the overall and the panty. Indeed the evidence of P.W.2 that she had had sexual intercourse in



room 153 was not disputed by the defence. On the evidence there can be no doubt, therefore, that sexual intercourse with P.W.2 did take place in room 153.

The next question for consideration of the court is whether or not the sexual intercourse took place with the consent of P.W.2. That was denied by P.W.2 whilst the defence contended that she had consented to sexual intercourse with Selemani and Hilali for payment.

I have, in the course of this judgment dealt with the defence contention and in my view, there was no admissible evidence to support it. I was fortified in that view by the fact that when she returned from room 153 where she had had sexual intercourse P.W.2 was weeping, her clothes were torn and she had sustained a fresh bruised scratch on the neck. All that evidence was, in my opinion, consistent with P.W.2's story that she had not consented to the sexual intercourse.

There is no suggestion that whoever had sexual intercourse with P.W.2 in room 153 was her husband and therefore entitled to have sex with her. Nor is there a suggestion that the person who had sexual intercourse with P.W.2 was in any way forced to do so. That granted, it must be accepted that the sexual intercourse was intentional and unlawful.

Finally the salient question is whether or

66/ whether ....

whether or not the accused are the persons who had sexual intercourse with P.W.2 without her consent in room 153. This, in my view, pivots on the question of identification. It is trite law that a witness may genuinely believe she/he is identifying a person when she/he is, in fact, making a mistake. In approaching the question of identification caution must, therefore, be taken so that the danger of mistaken identity is reduced.

In her evidence P.W.2 told the court that she had been seeing the accused persons daily at hotel Victoria from 2nd to 10th March, 1991 i.e. for 8 days. Their faces were, therefore familiar to her. I have accepted her evidence that on the night of the day in question, P.W.2 saw No.5 accused when the latter came to her, next to the toilets and asked to be provided with clean towels in room 153; She again saw No. 5 accused when she went to room 153 to collect wet towels and found him seated alone in the room; After taking away the wet towels she returned to room 153 carrying clean towels and found No.5 and his co-accused in the room which was brightly illuminated with electric lights and shortly after she had been assaulted in the manner she described P.W.2 saw and pointed out Nos 5,6,3 and 1 at the reception area of the hotel Victoria. Later on the same morning P.W.2 was called to an identification parade at the Central Charge Office where she again pointed out, from the parade consisting of 25 people from Burundi

67/ and .....

and 3 people from Lesotho, Nos. 1, 3, 5 and 6 accused together with Nos. 2 and 4 accused as the people who had sexually assaulted her in room 153.

In my view, P.W.2 had seen and consistently pointed out Nos. 1,3,5 and 6 so many times that the danger of a mistaken identity is greatly reduced. Her identification of the accused had been criticised on the ground that it was based on their facial appearances and nothing more. I have, however, looked at the accused as they sat in the dock for several days. I observed nothing peculiar about them. There is nothing unreasonable in P.W.2 identifying the accused by their facial appearances if she had been seeing them daily for 8 days as she claimed. There is no doubt in my mind that P.W.2 correctly identified No. 1,3,5 and 6 accused as some of the people who had sexually assaulted her in room 153 on the night of the day in question, 10th March, 1991.

As regards Nos. 2 and 4 I have taken into consideration that apart from seeing them daily at the hotel and the occasion when she saw them in room 153 in the company of the other accused P.W.2 identified them for the first time at the identification parade held at the Central Charge Office. She was in fact hesitant about the identity of No. 4 accused whom she admittedly passed and only pointed out when she returned from the end of line up. Indeed, according to the evidence of P.W.5 herself there was an outcry of disapproval from some of the

Burundi people in the line up when P.W.2 pointed out No. 4 accused as also being one of the people who had sexually assaulted her.

Without saying she was an outright liar it seems to me there is a real possibility that P.W.2 may have been mistaken by pointing No.4 accused as one of her assailants in room 153. Likewise I am not convinced that the danger of a mistaken identity has been sufficiently reduced in respect of No. 2 accused, whom P.W.2 pointed out, for the first time as one of the people who had sexually assaulted her in room 153, at the identification parade.

In the circumstances, the question I have posed viz. whether or not the accused are the persons who have sexually assaulted P.W.2 in room 153 must properly be answered in the affirmative in respect of Nos. 1,3, 5 and 6. I accordingly find them guilty as charged. I have, however, a doubt as regards Nos. 2 and 4 accused. They are given the benefit of this doubt, acquitted and discharged.

Both assessors agree

B.K. MOLAI

JUDGE

28th June, 1991.

For Crown : Mr. Mdhuli and  
Mr. Thetsane  
For Defendents : Mr. Phoofolo

S E N T E N C E

The four accused having been convicted of rape it now remains for the court to decide what sentence will be appropriate in the circumstances of this case.

In mitigation of the sentence the court has been invited to consider a number of factors. They have been so eloquently enumerated by the defence counsel that it is unnecessary for me to go over them again, suffice it to say they have all been taken into account. The court has also been told that all the accused have no record of previous convictions. They are, therefore, first offenders who cannot be dealt with as though they were hard heartened criminals.

Having considered all the factors raised in mitigation of the accused's sentence it must, however, be pointed out that the court cannot turn a blind eye to the seriousness of the offence with which the accused persons have been convicted. Rape is a serious crime the commission of which calls for a commensurately serious punishment. It deprives our women folk of one of the human rights viz. freedom of choice. Women like any other rational being in a civilised society have a right to choose with whom to have sexual intercourse.

By having sexual intercourse with her

70/ without ....

without her consent the accused have denied the complainant, in this case, her fundamental right. They have, in fact, degraded her to the status of irrational animals.

To bring it home to the accused persons that the courts of law will not encourage the kind of treatment they have meted out to the complainant, there is a need for a sentence that will deter them and people of their mind from a repetition of this sort of a thing.

I have been told that the Revision of Penalties (Amendment) Order, 1988 no longer applies as it has been repealed by the Revision of Penalties (Repeal) Order, 1991 of 11th May, 1991 which provides, in part:

"2 (1) The Revision of Penalties Procl. 1952 is repealed.

(2) Notwithstanding subsection (1):

(a) any legal proceedings pending prior to the commencement of this order may be instituted, ~~continued~~ or enforced.

(b) any penalty or punishment pending prior to the commencement of this order may be imposed, as if this order has not been passed".

(My underlinings)

I have underscored the word "may" in the above cited section of the Revision of Penalties (Repeal) Order 1991

71/ to indicate ...

to indicate my view that the provisions thereof empower the court with a discretion whether or not to impose the penalty which was prescribed by the now repealed Revision of Penalties Proclamation, 1952 i.e. following a conviction the court is no longer bound to impose the minimum punishment but where the circumstances warrant it the minimum punishment can still be imposed in proceedings that commenced prior to the coming into operation of the Revision of Penalties (Repeal) Order, 1991.

In sentencing the accused I do not propose to base myself on the provisions of the now repealed Revision of Penalties (Amendment) Order, 1988. I however, take into consideration that rape is, in my view, a very serious offence calling for a commensurately serious punishment. In the present case it was even aggravated by the fact that the complainant was raped not by one but several persons. I am supported in the view that rape is a serious offence calling for equally serious punishment by the fact that following a conviction of rape this court is empowered, by the provisions of section 297 (1) of the Criminal Procedure and Evidence Act 1981, with a discretion to impose the ultimate penalty of death. The section reads, in part:

"297(1) Subject to sub-section (2) or (3) sentence of death by hanging  
 (a) .....  
 (b) may be passed by the High Court upon an accused convicted before or by it of treason or rape."

72/ In the .....

I have also been reminded of the words of the famous English writer, Shakespear that justice is tempered with mercy. This court must, however, bear in mind that it is a court of law and not mercy., As such its primary objective is to administer justice to all people alike, without fear, favour or prejudice. Where the circumstances warrant it the court must never hesitate to impose a sentence that is appropriate to the seriousness of the offence against which the accused person has been convicted.

In the circumstances of this case I consider a sentence of five (5) years imprisonment appropriate. Each of the four (4) accused is accordingly sentenced to serve a term of 5 years imprisonment.

B.K. MOLAI

JUDGE

2nd July, 1991.

For Crown : Mr. Mdhluli and  
Mr. Thetsane.

For Defendant : Mr. Phoofolo.