CRI/A/26/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

MORAMANG MAKEKA	1ST APPELLANT
MATOBAKO NTHAKHA	2ND APPELLANT
NTABEJANE MOTHEBE	3RD APPELLANT
vs	
REX	RESPONDENT

JUDGMENT

Delivered by the Honourable Acting Justice Mrs. J.K. Guni
On the 25th day of September, 1995

The three appellants were charged in the Subordinate Court sitting in Leribe, with a crime of House Breaking with intent to RAPE and RAPE.

It was alleged, that on the 24th April, 1993, the three appellants knocked at the door of the house of one 'MAMOTS'ELISI MAKHAKHE a female adult person of 25 years of age. It was at midnight. 'MAMOTS'ELISI was asleep in her house with her two young children aged 5 years and 2 years respectively.

When 'MAMOTS'ELISI heard the knock at her door she

enquired as to who it was, that was knocking at the door. The response to her enquiry was an order that she should not ask questions and that she should just open the door. She did not open the door of her house. The intruders forced it open. The two appellants came in while the 3rd appellant remained at the doorway. While this was happening 'MAMOTS'ELISI had put on the light. 'MAMOTS'ELISI was attacked and strangled by the 1st appellant. The 2nd appellant joined in the attack. He removed 'MAMOTS'ELISI's pants and fell her to the floor. The two appellants had sexual intercourse with 'MAMOTS'ELISI in turns. 3rd appellant did not take turn to have sexual relations with 'MAMOTS'ELISI, 3rd appellant appeared to have played the part of their watchman while the two appellants carried on violating this young lady.

The medical report did not assist the crown case as it was inconclusive. On the evidence of the victim supported in some respects by that of PW2, to whom an immediate report of the midnight attack was made by the victim, the three attackers were convicted of House Breaking with intent to commit Indecent Assault. They were sentenced to five (5) years imprisonment. They have appealed against this conviction and Sentence on the following grounds:

1. "The learned magistrate misdirects himself by convicting the appellants against the weight of evidence specifically in the following aspects:

i) There was no satisfactory evidence of identification.

ii) There was no coroboration of complainants evidence which in fact was unsatisfactory.

iii) The learned magistrate misdirected himself in law by saying that the accussed should have proved their alibi while the onus to negate was with the crown.

iv) The learned magistrate misdirected himself by convicting the accused, with house breaking with intent to commit indecent assault while there was no evidence to support.

2. The learned magistrate misdirected himself by imposing a heavy sentence without taking personal circumstances of the accused."

It appeared from the evidence of the victim that she knew the appellants, although not by their names. She had seen them before on previous occassions as they live in the same village. She was not seeing them for the very first time on that night when they attacked her. When they entered in the sequence she described in her room she had put on the light. She was attacked and strangled by the 1st appellant while the light was still on. It was thereafter that the 2nd appellant put off the light and joined the 1st appellant in the attack upon the person of their victim.

At the time the attack was commenced upon 'MAMOTS'ELISI she was already awake. Evidence shows that she had even stood

up as the 2nd appellant removed her pants while she was standing although being strangled by the 1st appellant. 2nd appellant had to fall her down.

There seemed to have been no impediments or obstructions of any kind for her to have been able to make the observations she made prior to the light being put off.

On the question of corroboration; evidence of PW1 is supported in some aspects by that of PW2. It was still in the middle of the night while PW2 and her husband were awakened from their slumber by PW1 who was crying outside their door. They opened for her. Still in tears PW1 made her report at the earliest available opportunity to PW2 and her husband who rendered whatever assistance he could in the circumstances. PW2 made some observations at PW1's house the next morning. The broken door indicated that it was forced open.

The appellant's defence of Alibi amounted to no more than bare denial that at the material time they were at the scene of the crime. The impressions made upon the trial Court by both the appellants and the complainant, as witnesses assisted the trial Court to determine which of the two stories to accept. The positive identification of the appellants by the complainant put them on the spot. The trial Court could not reject a firmly positive crown case without putting something reasonably tangible in its place.

While the legal position still maintains that there is no onus on the accused persons to establish the defence of alibi, the overwhelming weight of competent and acceptable evidence of the crown witness, cannot be disregarded merely because an accused person has raised a defence of alibi. R.V. Hlongoane 1959 (3) S.A. 337. The appellant's alibi was not considered in isolation. Those other factors such as the identification of the appellants, had to be taken into consideration.

The crime of which the three appellants have been convicted: house breaking with intent to commit indecent assault; is a competent verdict on a charge of house breaking with intent to commit Rape and Rape which is the crime with which the three appellants stood charged before that Court. (Section 190 C P and E Act No.9 of 1981. There was ample proof that the complainant's door had been broken. Complainant's story that the three appellants forced open the door, was supported by that of PW2 who inspected the door the next day and observed that it was broken. The three appellants removed the complainant's pants. She was fallen down to the floor from where two of these appellants had sexual intercouse with her according to the evidence of PW1. Because of the inconclusiveness of the medical report, the trial Court appeared to have relied on the removal of the complainant's pants by the appellants as sufficient proof of indecency and correctly so too.

On the question of Sentence; there are too many

aggravating features. First of all the choice of a victim. The almost lonely young woman of 25 years of age, sleeping in the company of very young children of between two (2) and five (5) years old, was a soft target. In the second place, the attack was mounted at midnight, when it can safely be presumed that everybody is fast asleep. This was to ensure that their plan would be carried out successfully without any possibility of disruption. Thirdly, the three appellants used a night cover to perpetrate their evil action. While the darkness provided them with that cover, they took advantage to disturb the complainant's peace. They disrupted her rest of that night. They violated her privacy and security. In her mind they have created permanent fear for her safety and security. There must be those who leave alone like her in that village. What has happened to this lady should not be given an opportunity to happen to anyone in that village. The type of sentence called for in this case was the one to deter these appellants and those with like minds never to repeat this sort of behaviour. In this era of respect for human rights, great emphasis must be placed on measures that are intended to enhance respect of such rights. These appellants demonstrated utter disregard for the respect of other people's rights. The Sentence meted out to them is the most appropriate in those circumstances.

This appeal is dismissed.

K.J. GUNI

ACTING JUDGE

For the Appellants: Mr. Fantsi

For the Respondent: Mr. Lenono

CRI/A/7/95

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

LEKHOTLA MONETHI

v

R E X

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 21st day of September, 1995

The Appellant (accused) pleaded (terms of section 240(b) of the Criminal Procedure and Evidence Act 1981, to a charge of Assault Common and was sentenced to a period of fifteen months imprisonment without an option of a fine. This was after the Public Prosecutor had outlined the facts to which the Appellant agreed before the Court a quo. The conviction itself was proper and was not queried in anyway.

The appeal is against sentence only. It is trite law that sentence is pre-eminently a matter of discretion of the trial court (see S v Anderson 1963(3) SA 494 at 495). An appellate Court will after careful consideration of all relevant circumstances at to the

nature of the offence committed and the person of the accused determine what it thinks is the proper sentence. (See also S v Rabbie 1974 SA 855). The learned magistrate did take into account all the relevant circumstances before passing sentence. This is clearly shown at page 2 of the record. Amongst others, the assault had been degradng and uncalled for. The accused was arrogant before the Court a quo and did not show any remorse. The crime is prevalent in the area.

Those personal and other circumstances bearing on the accused are to be weighed against other factors. Amongst others : His individual interest must be weighed against, for example, the nature of the offence, protection of the public and prevalence of the crime of which he has been convicted. (see MATIA MATIA & ANO vs REX 1979 (1) LLR 139 at 144-6). The learned magistrate demonstrated a particular awareness of the importance of the above proposition. This is shown in page 2 of the proceedings.

In the final analysis : "It should be stressed that no matter what the appeal Court's views are, the real question is whether it can be said that Magistrate who had the discretion ..... exercised that discretion wrongly". (See S v Barber 1979(4) SA 218. Unless a clear misdirection in the exercise of his discretionary powers by the learned Resident Magistrate would be shown, this Court ought not to interfere.

I agree with Mr. Lenono's submissions. This appeal has no merit and it is dismissed.

T. MONAPATHI
JUDGE

21st September, 1995

For the Appellant : No Appearance

For the Crown : Mr. Lenono