CRI/APN/553/94

IN THE HIGH COURT OF LESOTHO

In the matter between:

POPO LEKHOOA NTABANYANE

V

DIRECTOR OF PUBLIC PROSECUTIONS

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu, on the 23rd day of January, 1995.

On the 11th January, 1995 I upheld the appeal and quashed both the conviction and sentence of the Appellant. The result of this is that Appellant who had been in prison since the 4th August, 1994 had to be released and I promised to file my reasons later.

In this case the complainant P.W.1 says she was from a shop between 7 and 8 p.m. when Accused came and pulled

/...

her. She tried to scream but Appellant put his hand on her mouth consequently she could not scream. She further adds there was rain and people could not have heard her. Appellant raped her and all her clothes were soiled with mud while she was struggling and Appellant threw her to the ground.

After that P.W.1 went into the house where she gave a report to her sick mother and to her sister Manako Mafitoe. They proceeded with Manako Mafitoe to Thaba's place in the village. They were looking for the Appellant and indeed found him. They tried to talk to Appellant but the people who were drinking wanted to assault them and therefore they returned home.

The police at Maputsoe to whom they reported had no medical forms. She showed the police her clothing and the police allowed her to wash those clothes which she did. She subsequently went to Hlotse police who supplied her with medical forms and she went to Leribe hospital where she was medically examined.

She had known Appellant before that day but they had no love affair. She returned her medical form to the

/...

police.

P.W.2 says P.W.1 came crying and her clothes were soiled with mud. P.W.1 claimed she had been raped "in the yard there". When P.W.2 asked where this happened P.W.1 told her "that she felt Appellant hold her in the yard where I live". P.W.2 says she went to a place where Appellant normally drinks which is a beer-hall. P.W.2 found Appellant with some boys. P.W.2 then says, "when I tried to talk to him, these boys wanted me and I walked out with P.W.1 and returned home."

Cases of rape are emotional occasions. The abuse of women is something no society can tolerate. Rape in Lesotho remains a capital office although in Lesotho, courts in living memory have not sentenced any one to death for rape. Rape nevertheless remains a very serious offence.

Rape is often committed in private except on rare occasions where an armed gang goes on rampage sowing destruction and rapine. That being the case, therefore the woman who is the victim of rape is often the sole

witness. Section 238 of the *Criminal Procedure and Evidence Act* of 1981 provides that

> "any court may convict any person of any alleged offence against him in the charge on the single evidence of any competent and credible witness."

In Scotland according to the country's Common Law it is not possible to convict on the uncorroborated evidence of a single witness. As T.B. Smith in his *Short Commentary on the Law of Scotland* page 235 put it:

> "It is a general rule in Scots law...that the material elements in the prosecutors case which identify the accused with the commission of a crime must be established by the testimony of two credible witnesses."

In our law as more fully appears in Section 238 of the *Criminal Procedure and Evidence Act* of 1981 credibility of witnesses (even a single one) is a matter for:

> "a trier of fact, who will be influenced by the witness's demeanour and personality in the light of the atmosphere of the trial, his conduct, the internal consistency and objective probabilities of his testimony, and any interest he may have to misrepresent."— Lansdown and Campbell *South African Criminal Law and Procedure* Volume V at

/...

page 922.

De Villiers J.P. in *R v Mokoena* 1932 OPD at page 80 made the following suggestion:

> "in my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect. Thus this section ought not to be invoked where, for instance, the witness has an interest or bias adverse to the accused, where he made a previous inconsistent statement, where he contradicts himself in the witness-box..."

These remarks have received endorsement by the Appellate Division of the Republic of South Africa and Lesotho so that they are now styled as the "cautionary rule". They are not exhaustive nor do they require that the testimony of a single evidence be found to be flawless, so long as the faults are minor.

The factors specified in *R v Mokoena* (supra) can all be present in a particular case, yet the trial court can still justifiably convict the accused, so long as it is alive to the danger involved in that evidence. All the court (in approaching the evidence) is expected to do is

to try and show by its approach that it is avoiding, as much as it can, convicting an innocent person. Diemont JA in *S v Sauls & Others* 1981 (3) SA 172 AD at 180 FG summarised the position as follows:-

> "The cautionary rule referred to by De Villiers JP in 1932 (the first *Mokoena* case) may be a guide to a right decision but it does not mean
>
> > 'that the appeal must succeed if any criticism, however slender, of the witness's evidence were well founded' per Schreiner JA in *R v Nhlapo* AD 10 November 1952 in *R v Bellingham* 1955 (2) SA 566 at 569.
>
> It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

All what has been said above only goes to show that this Court (in dealing with this appeal) must be satisfied that the trial court did exercise the requisite caution in evaluating the evidence of a single witness. Paying lip-service to the danger of convicting on the evidence of a single witness is not enough. What we have to determine is whether there was caution in evaluating that evidence.

The evidence of P.W.1 has to be carefully scrutinised

/...

because she is a single witness. I note with some concern that P.W.1 did not specify before the trial court that she was raped inside her parents yard. She only says she was from a shop when she was pulled by Appellant and raped. According to her sister P.W.2, P.W.1 pointed a place two metres from their parents' house, as the place where she was raped. This piece of evidence does not seem to have made any impression on the magistrate.

What is even more surprising is the fact that the way the rape occurred is not described with sufficient detail. It was the duty of the Crown to put on record sufficient facts as to how the rape occurred.

Rape is by no means an easy and straight forward crime to prove. If force is alleged (as in this case) it has to be proved beyond reasonable doubt that the victim did not consent. Among factors that support lack of consent, is spirited resistance of the victim. Resistance is one of the important evidenciary facts that is circumstantial proof of lack of consent. In *R v Swiggelaar* 1949 (4) SA 236 at 237 to 238 the accused was found guilty of rape;

> "where it appeared that the circumstances constituted an intimidation by the accused which led to an unwilling submission without resistance by the complainant, there being nothing in her conduct from which an inference of consent could be drawn or which could have led to a reasonable conclusion that she was a willing party."

It will be observed from the above that in rape cases physical resistance is not always present or possible. It is therefore important that evidence of all the surrounding circumstances be led to enable the court to reach the right conclusion on the facts of a particular case.

P.W.1 was a girl of 16 years of age while the Accused was a boy 19 years old. It must be a difficult job to extract enough evidence to establish that the carnal knowledge was by force or threat of force. Yet courts are obliged to act on evidence, therefore the Crown ought not to make a skeletal case.

Cases of rape are never free from controversy. Gardiner & Landsdown *South African Criminal Law and Procedure* 6th Edition Volume II at page 1624 have put

absence of consent in rape in the following words:-

> "To constitute rape, consent must be absent at the time when the act is perpetrated. If a woman at first resists, but eventually, through sexual passion or for some other reason, not merely submits but consents, the man cannot be convicted of rape."

The problem that arises is that it is difficult to know or determine after the fact, whether the woman submitted because of sexual passion. It is all the more difficult because it is not often that a woman actually consents in words by saying yes. It seems to be accepted that a woman may "at first resist, but eventually, through sexual passion" submit. Submission "through sexual passion" is interpreted as consent, because the court adopts a robust approach in such matters. It is not unusual for women who eventually submitted without any sexual passion to be interpreted as having consented.

Appellant was claiming that sexual intercourse had been by consent. Cross-examination followed, whose purpose was to show that rape could not have been as easy as P.W.1 alleged. She was asked to demonstrate how

Appellant was able to remove her panty while his left hand was on P.W.1's mouth. The answer was that Appellant was using his right hand. It appeared P.W.1 was wearing a trousers. Appellant (according to P.W.1) managed to pull down the trousers with that free hand. P.W.1 said appellant's hand was in her mouth and Appellant's hand had gone as far as her throat. When asked how deeply Appellant's hand had gone in her mouth, P.W.1 said Appellant's hand had gone in her mouth as far as the wrist. P.W.1 had to concede she was not telling the court the truth about the hand being in her mouth.

It turned out during cross-examination that the Appellant was of small physical built compared to P.W.1. Despite this according to P.W.1, Appellant had succeeded to pull down her trousers and panty without P.W.1 having an opportunity to scream throughout the process of the execution of the rape.

It also emerges that P.W.1 was of stronger built than the Appellant. This was from the re-examination of P.W.1 by the Public Prosecutor who asked the question:-

" Does the fact that you are physically better built than accused made him not able to overpower you?

Answer: I deny that."

In my view this question puts it beyond doubt that P.W.1 must have visibly been strongly-built when compared to the Appellant. That being the case P.W.1 could not have failed to scream or call for help (if she really wanted to). It is most unlikely that Appellant's hand (as she claims) was on her mouth throughout the struggle that preceded the rape. She is therefore being untruthful on this point. There must be some other reason for her failure to shout for help or scream. If that is so, she was obliged to disclose it.

In cases of rape it becomes difficult to accept that a victim could fail to scream being only two metres from her parents house. P.W.1 does not suggest paralysis brought about by fear. Indeed no where does she allege any fear. The fact that help was only two metres away ought to have induced her to shout for help.

/...

P.W.1 says that the police gave them leave to wash the muddy clothes which P.W.1 was wearing that day. These clothes might have been an exhibit or probably could have been of assistance as circumstantial evidence. The police do not often allow potential evidence to be eliminated in this way. The police normally preserve for the court all the evidence they could find.

There was no medical evidence that was produced before court. Normally in all cases of this kind medical evidence is produced to prove penetration. From this medical evidence, injuries of the complainant consistent with struggle preceding the rape are sometimes found. Inasmuch as P.W.1 was even bigger than Appellant, Appellant was most likely to injure P.W.1 during the struggle that must have taken place before Appellant overcame the resistance of P.W.1.

There is no suggestion from the evidence that P.W.1 was not already sexually active. Appellant alleges P.W.1 made sexual advances toward him that led him to take P.W.1 home. They would have had sex inside P.W.1's home, but he chose that they should go outside. According to Appellant

he and P.W.1 had been drinking together at the very beer-hall where P.W.1 and P.W.2 later came. It is a known fact that imbibing intoxicating beverages makes people do stupid things. That being the case, Appellant's story could possibly be true that he had sexual intercourse with P.W.1 although they were not lovers.

The magistrate did not caution himself or approach the evidence of P.W.1 with caution although she was a single witness. Indeed among strange things that occurred is that the magistrate wrongly states that it was common cause that the clothes of P.W.1 were soiled with mud. The fact is, the accused had denied this and the Magistrate confirms that under cross-examination accused denied that P.W.1's clothing was soiled with mud.

In the summary of the evidence, the magistrate does not seem to have even noticed that all the facts taken together did not show any evidence that P.W.1 struggled or resisted when Appellant had sexual intercourse with her. She never screamed or asked for help although she was only two metres from her parents' home.

It is accepted that a woman who claims to have been raped must be able to persuade people that she has in fact been raped. This in general happens if there are clear indications that she resisted until she was overcome by force or fear or exhaustion. In *Rex v M* 1953 (4) SA 393 at page 398 A Van Den Heever JA succinctly put the law on rape as follows:-

> "In our law rape is a sub-species of *vis* (D 48·5·30). It is essential that the victims resistance be overcome by fear, force or fraud. When it is overcome by the prompting of her own passions, to the stimulation of which she consented, there is no question of rape."

There is no suggestion that the force that Appellant exhibited was such that the woman was so intimidated or at any rate realised any display of resistance would be useless. As we have seen P.W.1 the complainant was bigger or at any rate better built than Appellant. Therefore rape cannot be inferred on the basis of *R v Swigglaar* 1950 (1) P.H.H.61 and *S v S* 1971 (2) SA 591.

The trial court in convicting the Appellant relied on the fact that Appellant did not know the reason why the

complainant told her sister and mother that the Appellant had raped her. To the Magistrate the reason is obvious, and it is that the complainant did not consent. To me the reason is not that obvious. According to P.W.2 she saw the complainant crying as she entered the house and observed her clothes were soiled with mud. When P.W.2 asked her what had happened P.W.1 told her that accused had raped her. If the clothes of P.W.1 were dishevelled and even if not muddy, it is not inconceivable that P.W.1 would cry and claim she has been raped by the Appellant merely because she had been found out by her mother and elder sister. It is now a fixed rule that in cases such as this one courts must approach such evidence with caution similar to that which applies to accomplice evidence. The reason based on a series of cases is summarised by Landsdown and Campbell *South African Law and Procedure* Volume V at page 934 as follows:

> "The reasons for this rule are the fact that charges of indecent offences are easy to formulate and particularly hard to refute; that jealousy, the desire for revenge, and emotional disturbance, or fear-induced hysteria find their most obvious outlet in the invention or exaggeration of such offences."

/...

It is therefore also possible that this discovery by her sister coupled with the non-existence of even a love-affair to fall back on might have induced P.W.1 to claim she was raped by Appellant when P.W.2 asked her. It is therefore all the more reason that the cautionary rule had to apply to this case. The learned Magistrate did not (in my view) approach the evidence with the caution and critical mind that the law enjoined him to. That being the reason his assessment of the evidence was greatly flawed. This must have caused Appellant such prejudice that this Court was obliged to quash the conviction of the Appellant and uphold the appeal.

These are the reasons for quashing both conviction and the sentence on Appellant.

Appellant's appeal deposit is to be refunded.

W.C.M. MAQUTU
JUDGE

For the Appellant : Mr. *Makotoko*
For the Crown : Mr. *Ramafole*