CRI\A\19\94

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MATHIBELI LEKHOOANA — Appellant

v

R E X — Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 9th day of February, 1995

The appellant Mathibeli Lekhooana lodged an appeal to this Court against conviction. The charge sheet indicated that he was charged with having unlawfully and wrongfully had sexual intercourse with 'Mampota Ntloloane a minor female who is about 15 years of age without her consent. He pleaded guilty to the charge.

If I may make an observation concerning the charge itself. I think it was rather superfluous to add to the charge that the offence was committed "without her consent" because the relevant statute on Protection of certain categories of women and female minors it is not necessary to prove consent to sexual intercourse because the statute itself excludes consent in respect of such

females in circumstances where rape is not charged under the Common Law.

But however it appears at the same time that the charge is largely based on the Common Law. Thus in such circumstances it cannot be wrong to specify that she was a minor of below 15 years of age as indicated in the charge sheet.

As stated by MR. SAKOANE there is no need to pursue the matter in terms of the statute but rather in terms of the Common Law. However, it was argued in the well set-out heads submitted by Counsel for the appellant that the learned Magistrate found the appellant guilty and sentenced him to five years' imprisonment without an option of a fine. A minimum of five years' imprisonment in terms of the law existing then, was mandatory. Submissions were made and I relied on the Heads of Argument.

Counsel for the appellant submitted that the fact that the appellant pleaded guilty did not *per se* entitle the Court to return a verdict of guilty.

It was submitted by reference to *S vs Dhlamini* 1973(3) SA at page 800 where the head-note reads as follows; that :

> "where an accused pleads guilty and at the same time expressly admits every element of the offence charged the state is not relieved of the burden of proving by evidence *aliunde* the commission of the offence. The state is likewise not assisted if the express admissions

accompanying a plea of guilty cover only some of the elements of the offence".

I think it will be profitable at this stage to indicate that having pleaded guilty accused's or the appellant's plea having been accepted by the public prosecutor the latter proceeded to outline the facts of the case which indicate that the complainant is 15 years and attends school and that on the 5-3-90 while coming from school along the way she met the accused. The two walked together for some distance in the course of which the accused proposed to or rather expressed the desire to the complainant that he would like to have sexual intercourse with her. It is clearly stated from the record that the complainant objected and the two proceeded along the way together and that at second stage when the pair had reached the stage in the road where they couldn't be seen, the accused fell the complainant (I supposed to the ground) took out her panty and got on her and had sexual intercourse with her. Immediately following on this text as stated in the outline it is shown that the complainant was crying and that when the accused had finished, he left her there.

While on the one hand these two vital points included in the evidence up to this stage appear to have been admitted, the accused at the end of the day stood up as he was entitled to do, and denied that he was holding the complainant by the neck which is the matter which was alleged of course in the outline of the case. He also

denied that he pulled the complainant outside the road which is a matter which was not set out in the outline of the case. It may legitimately be questioned what the relevance of these two events is to the case. However learned Counsel for the appellant went on of course to draw attention of the Court to the case of *S vs Nacobo* 1960(2) SA 335 at 336 where Caney J is said to have said .

> "The admissions made by the accused take the case no further, because they are merely repetitions of the admissions contained in her plea of guilty"

(Further reference was made to *R vs Phillips* 1960(1) PHH 20).

It was argued that appellant pleaded guilty but denied that he held complainant by the neck or that he pulled her out of the road. Learned Counsel submitted that properly constructed these denials affected the elements and are inseparable parts of the whole issue of consent. He submitted that the complainant could only be pulled outside the road and held by the neck to induce submission.

The Court was also referred to section 240(1) which says it a person, that is an accused, admits the facts then a verdict may be returned without hearing evidence.

It was found significant by learned Counsel to submit that it does not say that if a person admits some of the facts and the court is of the view that a verdict is competent then it may return it without hearing evidence. Learned Counsel went further to state

that quite apart from the fact that the denial in the present proceedings touched the very core of the offence at common law, section 240(1)(b) does not confer a discretion on the magistrate to return a verdict despite a denial without hearing evidence.

Learned Counsel drew a distinction between our situation and that of South Africa where in terms of their section 173 of Act 51 of 1977, it is stated that

> "If the court at any stage is in no doubt whether the accused is in law guilty of the offence to which he has pleaded guilty or is satisfied that accused does not admit an allegation in the charge then the court shall record a plea of Not Guilty".

Reference was also made to *S vs Mbhele* 1980(1) SA 295 where application of this section was raised. Learned Counsel, that is MR TEELE, submitted that to construe section 240(1)(b) as giving a discretion to the magistrate is to read into the law what the legislature has not enacted. He submitted further that where the appellant had denied the facts or some of them he was still entitled to presumption of innocence until the allegations he denies are proved in a full trial.

Reliance was reposed on Claassen J's *dictum* in *S vs Britz* 1963(1) SA 394 at 397 that :

> "The onus of proof lies on the prosecutor. The presumption of innocence continues up to the verdict even in cases where the accused has pleaded guilty".

Learned Counsel sought to draw to the attention of the Court the significance of the appellant not being represented in the trial and indicated that while section 187(1)(e) makes possible for a verdict to be returned pursuant to it on a charge of Rape it is significant to note that -

(a) It was not alleged in the statement of fact that appellant was aware that complainant was 15 years of age.

and

(b) that it is a complete defence to the charge under the Women and Girls Protection Proclamation 14 of 1949 that an accused was led to believe that the girl is over 18 years of age.

Learned Counsel further pointed out that the public prosecutor did not state to the Court when the complainant was born, and submitted therefore that the statement that the complainant is 15 years of age is a mere statement or conclusion not fact.

He indicated that the verdict in that regard wouldn't be competent.

Learned Counsel properly submitted that the accused unrepresented as he was, it was never mentioned to him that there is a presumption created by statute that a 15 year old girl is not capable of consenting to sexual intercourse. But as I have stated earlier the question of offences and verdicts under the statute in this context or this case are not entirely relevant because the

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case and the charge revolve on common law charge of Rape. Moreover learned Counsel for the Crown indicated that he was not going to present any argument concerning the statutory offence of Rape under protection of Women and Girls Protection Act. So the court likewise is going to confine itself in considering this matter to the charge under the common law. So in response to the arguments advanced on behalf of the appellant MR. SAKOANE for the Crown indicated that it is common cause that the complainant objected to the proposition of the accused inviting her to have sexual intercourse with him. He also indicated that it is also common cause that at an obscure spot the appellant fell her to the ground, took out her panty and had sexual intercourse with her; and that she was crying and further that the appellant left her at that spot. He submitted therefore that these factors indicate when taken together that Rape did in fact take place.

Counsel indicated that the fact that the accused or the appellant later rose in court to deny certain things namely that he pulled her out of the road or that he held her by the neck proved, the *actus reus*. The fact being that the *mens rea* was projected by the fact that the girl or the complainant was crying and that therefore this indicated further that there was objection by her to sexual intercourse taking place.

In reply MR. TEELE reiterated factors which he had argued at the opening stage of these proceedings on appeal and he went

further to clarify his argument concerning question of tears which are generally shed by women that such could well have taken place even after consent had been given but withdrawn during sexual intercourse itself.

Well, this in brief is the compass of the case with which I am faced. Having heard the benefit of arguments and perused Heads of Argument from one of the parties' counsel on the matter I find that the resolution of this matter can best be achieved by resort to provisions of our Criminal Procedure and Evidence Act No.9 of 1981 that: notwithstanding that some irregularity existed in the proceedings before the court below and that if such irregularity didn't amount to failure or miscarriage of justice then the court on appeal is perfectly entitled to confirm the verdict of the court below. And this in fact is a conclusion to which I come.

The dissatisfaction with aspects of the proceedings in the court below can be summed up as showing irregularity. But such irregularity doesn't qualify the case to enter into that province where it could be said such irregularity has in fact amounted to failure of justice.

The appeal is dismissed.

J U D G E
9th February, 1995

For Appellant : Mr. Teele
For Respondent: Mr. Sakoane