CRI/A/30/93

IN THE HIGH COURT OF LESOTHO

In the matter between:

'MEBE 'MEBE	1ST APPELLANT
TEBOHO NAUOE	2ND APPELLANT
VS	
REX	RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu, on the 13th day of February, 1995.

This is an appeal by the two Appellants from the Magistrate's Court against conviction for the crime of rape for which each of the Appellants was sentenced to five years' imprisonment.

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The two accused were not represented by a legal practitioner at their trial. They obtained the services of a legal practitioner after conviction and were on the 17th August, 1992 granted bail pending appeal.

There are two complainants involved namely Matumelo a married woman aged 27 years and Nthabiseng Majalle an unmarried woman aged 22 years of age.

On the 11th November, 1991 at about 2.30 a.m. at night, the two complainants were sleeping in one room with Mamosenyehi a girl aged 10 years and Matumelo Majalle's small baby. They were sleeping but they had not put out the light. Suddenly two men entered the house.

Matumelo P.W.1 says cloths were hanging on their faces. She nevertheless identified these two men Mebe First Appellant and Teboho, Second Appellant. It was the first time she saw cloths hanging on their faces. She then describes their clothes. Nthabiseng P.W.2 says the Appellants had covered their faces with frills.

Matumelo P.W.1 says Second Appellant said he wanted

vagina and struck her with a stone. Nthabiseng P.W.2 said when P.W.1 asked them what they wanted, Second Appellant said they wanted "mosono" which literally means hole. It can be inferred that "mosono" means vagina. According to P.W.2, P.W.1 asked Second Appellant what "mosono" means, Second Appellant hit P.W.1 with a stone which also hit the child. P.W.1 in her evidence-in-chief confirms she was hit with a stone and that the stone hit her baby. Soon thereafter the light in the room was extinguished with a stone.

According to Matumelo P.W.1 when Second Appellant hit her with a stone, he said she should not think that he was his brother whom P.W.1 caused to be arrested. P.W.2 does not mention the fact that Second Appellant said P.W.1 was the cause of the arrest of his brother.

According to P.W.1 Second Appellant then demanded money from her and lit her face with a torch and struck her with a stick on the head thrice. P.W.1 instructed P.W.2 to look for the money as her child was crying. P.W.2 did so but could not find the money. They were

ordered by Second Appellant to climb on the bed and cover themselves with blankets. The two Appellants then looked for the money. All along the First Appellant was quiet. P.W.2 corroborates P.W.1 on these points. P.W.1 says they found her M50.00. P.W.2 does not know if they did.

Second Appellant then asked the two women to expose their private parts which he examined using a torch for light. He chose Nthabiseng whom he raped. First appellant came and raped her (meaning P.W.1). When Second Appellant had finished he told the two women P.W.1 and P.W.2 to have sex with each other. The two women slept on top of each other. The versions of the two women corresponds on this point.

P.W.1 says at this point Second Appellant asked her where her cassettes were and she told him. Second Appellant took them away. P.W.2 does not say this. P.W.2 says they noticed the radio was missing after the Appellants were gone.

The two Appellants left while they were lying on top of each other leaving the door open. When P.W.1 and P.W.2

noticed they had left, they ran out of their house shouting. They went to Matieho's house naked. Matieho is P.W.3. They told her what had happened.

The matter was referred to the chief at that time of the night. As an alarm had been raised villagers had gathered. The chief Rakepa gave evidence as P.W.4.

P.W.1 and P.W.2 say among the people who came was Second Appellant. Second appellant was still wearing the same clothes except that his head was no more covered with frills. First Appellant was not there at the time. Second appellant angrily denied their accusation and threatened to kill them so that he could go to prison for something. P.W.3 confirms this. Second Appellant claimed he had been herding his animals when he heard the alarm that had been raised. It seems a rather awkward hour to herd animals.

The learned magistrate correctly held that the case rested on the question of identity of the people who raped the two complainants. The two appellants say they never went to the house of Matumelo P.W.1 at 2.30 a.m. nor did

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they have sexual intercourse with them without their consent.

In *S v Mtetwa* 1975 (3) SA 766 Holmes JA at page 768 observed:

> "Because of the fallibility of human observation, evidence of identification is approached with caution.... This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, gait and dress; ..."

In this case the fact that two complainants are giving evidence does not necessarily help much. They cannot be said to corroborate each other. The reason being the problem of suggestibility and the fact that the witnesses may have exchanged information immediately after the rape. P.W.2 does not even know how the Appellants entered the house. She might have been in a deeper sleep that P.W.1 who was woken by the hitting of the door with a stone. As the lamp was soon thereafter put out, her opportunity of observation was shorter than P.W.1's. Observing attackers in a trance brought about by a sudden awakening from a

deep sleep can hardly be reliable evidence. Consequently Williamson JA in *S v Mehlape* 1963(2) SA 29 at page 32 F and H warned trial courts in the following words:

> "The often patent honesty, sincerity and conviction of an identifying witness remain, however, ever snares to the judicial officer who does not constantly remind himself of the necessity of dissipating the danger of error in such evidence... The manner of removing any reasonable possibility of error in any given case is a matter entirely governed by the circumstances of the case."

I must say the public prosecutor did not elicit some of the details he was obliged to put on record in the case of rape. From the evidence-in-chief, the court is left to infer far too much. For an example, if the two complaints were sleeping at 2.30 a.m., how did they wake up? Were they awake when the accused came into the house all of a sudden? If P.W.1 in cross-examination had not said she was woken by the hitting of the door with a stone, we would never know that she had been asleep. Do they always sleep with a light on? Could the baby have probably disturbed their sleep? Was the door locked? Do they normally sleep with an unbolted door? We are not even sure that the door had been bolted or locked.

The two women must have been frightened when the two men suddenly got into their house at that time of the night. Nevertheless it is always the prosecutor's duty to put this on record. The obvious is not always that obvious. The Court should be given evidence if that is possible. It should only act on inferences if evidence is not available.

The two complainants do not say how they identified the Appellants. The learned Magistrate says:-

> "It is not disputed that the accused and both complainants are well known to each other. This reduces the risk of mistaken identity. When the assailants entered the house where the complainants were in, it was still lit, enabling them to identify them through that light. It is true their faces were partially covered with frills hanging from their hats but the complainants did not completely cover their faces so that they were able to see them."

I have already said the record of the evidence-in-chief shows both P.W.1 and P.W.2 were sleeping. People do not see in their sleep. The record is vague on this point. If P.W.1 had not been cross-examined, we would never know how she woke up. The public prosecutor should have clarified this. We are left to infer that P.W.1 and P.W.2

must have been lying on their beds although they were not asleep. This might be no necessarily be correct.

Under Second Appellant's cross-examination (which the trial court has mistakenly recorded as that of First appellant) it emerges that P.W.1 was actually asleep. P.W.1 says Second Appellant woke her by hitting the door with a stone. All this was not mentioned by P.W.1 in her evidence-in-chief.

It did not help the Crown case to find Matumelo P.W.1 saying Accused 2 who lives near her did not live near her. Cross-examination showed their sites were adjacent to each other. It also turned out P.W.1 had been attacked before and she had to concede under cross-examination that on these occasions, she had falsely blamed that on Second Appellant. She later said she had heard it being said that it was the brother of Second Appellant who had attacked her. This left me with a feeling that P.W.1 had some motive to falsely give evidence against Second Appellant. Alternatively Second Appellant does look like his brother who was alleged to have attacked her on previous occasions. The trial court seems not to have

attached any importance to this portion of cross-examination.

What type of light was there in the room at the material time? Was it a candle or a paraffin lamp? If so, what was the amount of light? I have already said it is not clear whether the complainants were woken by the entry of their assailants or whether they were already awake. If they were woken by the entry of their assailants (as P.W.1 under cross-examination says they were) the eyes of P.W.1 might not have operated efficiently. P.W.2 does not even mention that the door was struck by anything. She must have been in an even deeper sleep than P.W.1. If there was poor lighting then the chances of proper identification of the intruders is further diminished. The trial magistrate assumed that, in the circumstances, the two complainants had no problem in identifying the Appellants. The view I take is that the magistrate did not scrutinise the evidence sufficiently. He took too much for granted. The Crown did not lay sufficient evidenciary ground work to clarify issues.

In her evidence-in-chief P.W.2 said that the

Appellants had covered their faces with frills. Towards the end of her evidence-in-chief P.W.2 said they could easily see the faces of the Appellants although they had covered their faces partly with frills. This contradicts what she had earlier said. P.W.1 says Appellants had cloths hanging on their faces. Later P.W.1 says the cloths did not cover their faces. How do cloths hang down a face and not cover it. More details should have been put on record.

The onus of proof is on the Crown. It was for the Crown to prove on cogent evidence the degree of light and that the Appellants could clearly be identified. It is not enough to say these people lived in the same village, there could be no mistake because they knew them well. Where opportunity for proper identification exist, the learned magistrate would be correct. In a case such as this one where it was at night, the light uncertain and the suspects had put on a disguise the magistrate should have taken greater care than he in fact did.

The Magistrate went on to say there was no suggestion that the voices of the Appellants were disguised,

therefore the complainants must have identified them by their voices. P.W.1 and P.W.2 in their evidence never referred to the voices of the Appellants. For the Magistrate to have inferred that the Appellants were all identified by their voices, was to go beyond what the record disclosed. If the complainants had identified their assailants through their voices they would have said so. First Appellant (according to both P.W.1 and P.W.2) never said a word. He only raped P.W.1 when Second Appellant raped P.W.2. There is therefore no evidence on which the learned Magistrate could have inferred that First Appellant was identified by voice. May in *South African cases and Statutes on Evidence* 4th Edition paragraph 334 at page 182 cautions triers of fact in the following words:

> "Identity is often taken for granted, and there is a general impression that identification is one of the easiest parts of a judicial proceedings. But there are numerous cases which show how often the most dogmatic of witnesses have been mistaken and innocent persons sentenced for crimes they did not commit."

The Appellants were not represented consequently they could not cross-examine crown witnesses properly. They

could not put their case to Crown witnesses. Magistrates are obliged to guide and help unrepresented accused persons to put their case or defence to witnesses. This is a tradition of long standing which has ensured that justice is done. In this case the Crown witnesses themselves in their evidence-in-chief put the case of the Appellants on record. The Crown cannot say it did not know the Appellants' defence until they went into the witness box. The accused gave evidence and brought witnesses to show they could not have raped the complainants. Second Appellant even brought several witnesses to show where he was at the time of the rape. The trial Court rejected this evidence.

It has to be taken into account that the accused need not prove his innocence. It is the Crown that must prove him guilty beyond a reasonable doubt. While due deference should be given to the trial courts findings on fact, that depends on the way it approached the evidence before it. If there are no factual and legal misdirections, the appellate Court ought not to interfere because credibility of witnesses among other facts is gathered from their demeanour. See *Lewis v Elske* 1921 AD 36. Since an

appellate Court cannot see witnesses it is at a disadvantage when issues of credibility arise. I am satisfied that since the trial Court convicted largely on inferences (where evidence which might have been given was with-held) these amounted to factual misdirections.

In *R v Dhlumayo* 1948(2) SA 677 at 706 Davies AJA said:

> "There may be a misdirection on fact by a trial judge where the reasons either on their face are unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities."

I am satisfied this passage of *R v Dhlumayo* applies to this case. That being the case the Appellants should have been given the benefit of the doubt and been acquitted.

I therefore set aside the Appellants' conviction and sentence. Their appeal deposits should be refunded.

W.C.M. MAQUTU
JUDGE

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For the Appellant : Mr. T. Hlaoli
For the Crown :