C.OF A.(CRI) NO.2 OF 1996

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

R E X Appellant

vs

LETLAMA RAMAISA Respondent

HELD AT MASERU

CORAM:

STEYN, A.P.
BROWDE, J.A.
KOTZE', J.A.

For Appellant : Mr Ramafole
For Respondent: Ms Matshikiza

J U D G M E N T

BROWDE, J.A.

The respondent was charged on one count of rape and one of murder. The rape charge related to an incident on the 6th January, 1991 at or near Peka in the district of Leribe during which the respondent is alleged to have had sexual intercourse with 'Malibuseng Lepetelo without her consent. The second count is based on the allegation that on the 6th of January, that is the same day of the rape and at the same place, the respondent murdered the said 'Malibuseng Lepetelo. To both these charges the respondent pleaded not guilty and at the end of the trial the presiding judge, Chief Justice J.L. Kheola, found the respondent not guilty on both counts and discharged him.

The facts which were led in evidence were fully set out in the judgment of the Court a quo and it is unnecessary for the purposes of this judgment to repeat them. Suffice it to say, that when the deceased's body was discovered her shoes were missing. The main basis of the Crown case against the respondent appears to lie in the fact that the investigating officer said that after the respondent's arrest and on the 8th of November, 1991 the respondent :

> "freely and voluntarily told (the investigating officer) that he knew where the shoes of the deceased were because he had hidden them there".

There followed evidence which was disputed by the respondent that the respondent led the police to the spot where the shoes were found.

This Court has said before but it bears repetition that before a pointing out can be admitted in evidence against an accused person it must be proved by the Crown that the pointing out was freely and voluntarily carried out.

In his evidence not only did the respondent allege that he had been severely tortured in order to force him to admit that he was involved in the murder of the deceased, but he gave a circumstantial account of what the torture consisted of. He stated inter alia that he was stabbed with a red hot screw-driver on the buttock and also with a knife. He even invited the Crown respresentatives and the Court to see the scars on his buttocks caused by the screw-driver and the knife. But this invitation

was turned down by the Crown, for as it was put by the learned Judge in his Judgment with reference to the attitude of the Crown, :

> "The simple reason that even if there were scars they would not know where they got them from neither would they be in a position to identify them as having been caused by the screw-driver and the knife".

It is no wonder, therefore, that Kheola C.J. after finding that the respondent was a witness who gave his evidence very well and in a straightforward manner, said that it was difficult in the face of the Crown's attitude regarding the alleged stab wounds to reject the story of the respondent, as he put it,"outright".

If that finding cannot be faulted, as I do not think that it can be, then the Crown did not prove that the pointing out was freely and voluntarily made.

In argument before us Mr Ramafole on behalf of the Crown submitted that, even on the version of the respondent, when he was assaulted the police did not know about the shoes. So his assailants could not have had in mind, so the argument went, getting him to point out the shoes. But, on the probabilities, it seems to me that the respondent would not have pointed out the shoes (if he did) unless he had reason to, and the assault would much sooner have pursuaded the respondent to point this out, I think, then would the desire to convince the police that he had committed the offence, as Mr Ramafole was driven to suggest.

Mr Ramafole also pointed out that the cross-examination of the witness that is PW2, regarding the assaults was superficial, as indeed it was. And he argued on the strength of State vs P 1974(1) SA 581 that all material detail should be put to the witness. However, the case mentioned by Mr Ramafole which was heard in the Appellate Division of Rhodesia, as it then was, went no further than this. The learned Judge President said at p.582 -

> "It would be difficult to over-emphasise the importance of putting the defence case to prosecution witnesses, and it is certainly not a reason for not doing so that the answer would almost certainly be a denial. The court was entitled to see and hear the reaction of the witnesses to the vitally important allegation that the appellant was not even in possession of red sandals on the two occasions he was alleged to have worn them at the river. Quite apart from the necessity to put this specific allegation, there was, in my opinion, a duty to put the general allegation that there had been a conspiracy to fabricate evidence. It is illogical for counsel to argue that there is a sufficient foundation in fact for a submission that the possible existence of such a conspiracy is such as to cast doubt on the whole of the State case but insufficient fact on which to cross-examine the principal State witnesses.
>
> The trial court was entitled to see and hear the reaction to an allegation that they had conspired with the persons and for the reasons mentioned in the course of the trial. They may have been able to satisfy the court that an opportunity to enter into such conspiracy never existed".

I do not understand that case to mean that every detail must be put to each witness that is being cross-examined. In fact if one looks at the record in this case the important and vital matter that should have been put to the witness was in fact put. An example of this reads :- "What I am trying to say to you is you were assaulting him", the answer was "No". During

this short stay with you were you exerting some form of pressure on him"; the answer is "No". It is clear from that, and I must immediately say that it could have been put in more detail and perhaps more effectively, it is sufficient in my view, to indicate to the Crown that what was being alleged was that the accused was complaining that he had been assaulted and that pressure had been exerted on him while he was in interrogation. And that, in my view, is sufficient, if only just sufficient, to meet the test laid down in the case cited to us by Mr Ramafole.

The right of the Crown to appeal against an order of acquittal in a criminal case stems from the terms of s.7(2) of Court of Appeal Act 1978. The section provides that :

> "if the Director of Public Prosecutions is dissatisfied with the Judgment of the High Court upon any matter of fact or law in the exercise of its original jurisdiction he may appeal against such judgment to the Court of Appeal".

This Court has said before that this right of the Crown should only be exercised in cases where the trier of fact has manifestly erred on material questions which influenced the conclusion at which the court arrived. This court cannot concern itself with cases where there can be differences of opinion on the facts since then it is solely the function of the High Court to come to a conclusion after seeing and hearing the witnesses.

Nor can this right of appeal apply to a case in which the court finds that the accused made a good impression on it during his evidence and when all the Crown can do is to point to

several matters which in its view should have led the court to a finding that the accused was unimpressive. The assessment of the witnesses must be left to the trial court, since in the words of Greenberg J.A. in Rex vs Dhlumayo and Another 1948(2) SA (AD) :

> "The trial judge has advantages which the appellate court cannot have in seeing and hearing the witnesses and being steeped in the atmosphere of the trial. Not only has he the opportunity of observing their demeanour but also their appearance and whole personality. This should never be overlooked".

It is not sufficient, therefore, for the Crown to point to several places in the record where the respondent may justifiably be criticised for the way in which he answered the questions or for the content of the answer itself. Nor do I think that it is decisive in a matter of this nature that some of the important evidence led by the crown went untested fully in cross-examination. The learned Judge correctly, in my view, adopted the view that although he could not establish a reason why the defence counsel did not put the defence case fully to the crown witnesses the court was nevertheless obliged to give the respondent's evidence proper consideration and, as he put it, "the weight it deserves".

Having come to the conclusion, as I have already said, that the respondent was a witness who impressed the court as a truthful one albeit with some qualification, the court a quo certainly did not manifestly err, in my opinion, in acquitting the respondent. I would therefore dismiss the appeal.

Acting President: I agree. Mr Ramafole I would like to add , as I indicated to you during the course of argument, that we would like the prosecuting authorities to bear in mind that whilst this is a right which the Crown has in terms of the statute, that right should be exercised only in the circumstances which has been explained and set out by my brother Browde. This is the more so in view of the fact that in a case which was heard, I suspect, some two years ago, this Court upheld an appeal by the Crown on fact and indicated to the prosecution that the accused should be re-tried. No such re-trial has as yet taken place. In these circumstances - and if this is the attitude of the Crown - it is particularly important that the Crown should clearly understand that this Court will only adjudicate appeals on fact prosecuted by the Crown against High Court decisions in criminal matters where there has been a decision which is manifestly wrong and a clear miscarriage of justice has occurred.

Signed :.....
J. BROWDE
Judge of Appeal

I concur Signed: .....
J.H. STEYN
Acting President

I concur Signed: .....
G.P.C. KOTZE'
Judge of Appeal

Delivered this 24th day of June, 1996.