CRI/REV/51/2000

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

vs

TŠELISO PHATŠOANE

J U D G M E N T

Delivered by the Hon. Mr Justice M.L. Lehohla on the 22nd day of November, 2000

It is necessary to indicate that on 22-05-2000 when the review file reached my desk the Court ordered the Registrar to warn the accused to come prepared when this matter eventually appears on the roll to argue through his counsel or in person, why in the event of the conviction being confirmed the sentence should not be appreciably enhanced.

The Court listened with care to the submissions made by the accused in this

matter. He stood charged in the court below with rape of a girl 'Matšieame Nkuebe, it being alleged that on or about 9th January 1999, and at or near Qomoqomong in the district of Quthing the accused did unlawfully and intentionally have unlawful sexual intercourse with her, without her consent, (a fourteen (14) year old girl) thereby committed the offence charged. Alternatively the accused is charged with contravention of Proclamation 14 of 1949 : (Women and Girls' Protection) Proclamation in that he did have unlawful sexual intercourse with 'Matšieame Nkuebe, a female minor aged fourteen years.

The Court below heard the evidence of the complainant herself, and her story was in fact that she had attended a concert with the permission of her grandfather Moeketsane; and that while she and others were there she felt like going to relieve her bladder. She asked one Bokang to escort her to the toilet. Bokang obliged. When they came back from the toilet and were near the church door the accused pulled the complainant. She called out Bokang to see what the accused was doing, and Bokang challenged the accused about what he was doing. The accused pulled out a sword or a knife, - a sharp instrument - and made as if to hit Bokang with it.

When Bokang went into the church house the accused pulled the victim away,

the complainant away. She was screaming and trying to free herself but was overpowered by the accused who dragged her until they were about 300 metres away from the church. Then he fell her by letting her trip, took out her panty, twisted her arm and having gone on top of her inserted his penis into her front passage. The complainant says she was crying all this while, and that one Tsela did come together with a chap called Mosotho; and this Mosotho asked the accused what he was doing to the complainant. Mosotho did assist the complainant to get up, and then Mosotho took away the sword which was on the ground. The complainant had seen it being put there by the accused.

All these things happened at night before dawn, and there was no moonlight as the night was even cloudy, affording a perfect cover for anybody who intended doing the sort of thing that is complained of in this instance.

The accused gave his evidence and argued before me in this Court as to why a girl whom he has sworn he is intimately known to him could falsely incriminate him - he had a chance to give evidence to that effect but did not do so in the court below or rather challenge/put that evidence in the form of questions to PW1 the complainant but he did not do so, - namely that the complainant is only incriminating

him falsely because the accused had had differences with the complainant's father concerning a vehicle which was parked where the accused didn't want it to be parked by the complainant's father. This as I said, was never put to the complainant, so the court below was not alerted to it, or to whatever significance it had. But because the accused reposes a lot of importance to it, then if he failed to advance that important aspect of his case, he thereby cooked his own goose. In other words he was responsible for his own undoing.

So I find nothing wrong with the way the court below has treated this matter. The complainant knows the accused well. There is an element of lying that was done by the accused both in that court and in this Court, trying to deny that he had this sword and instead attributing the handling of this sword to the complainant's grandfather. That is a factor which courts of law are bound to take into account in cases such as this. What I am trying to say is that if an accused person lies and gives a version that is inconsistent with innocence then this attitude of his has a way of strengthening an inference of guilt. There is also an element of corroboration. It has time and again been indicated that there is no rule that corroboration is required in a case such as this, but where the court finds that the complainant in her evidence is reliable and trustworthy then the court is entitled to accept her version as an important

factor towards establishing the guilt of an accused person.

Having said this, I have no hesitation in rejecting the accused's story and confirming the Magistrate's conviction of the accused.

Now I want to know for purposes of sentence. What do you do for a living :

Accused : I am attending school

H.L.: Where?

Accused : Mopholosi High School

H.L.: Doing what?

Accused : I am doing Form five

H.L.: Yes, but you see rape is, as the Magistrate has explained it, a dehumanising offence.

I wish to illustrate the above comments by reference to a judgment of this Court, that was in CRI/REV/132/97 : ***Rex vs Teboho Melamu,*** it's an unreported decision. At page 7 of that judgment, this Court stated as follows : That relevant factors attendant on the case have to be taken into account, the court has to have regard to the fact that there is no rule of law that a first offender is entitled, as of right,

to special privileges. The condition of being a first offender on the part of the accused is merely one among factors that the court ought to take into account. His individual interest must be weighed against factors such as the nature of the offence, protection of the public and prevalence of the kind of crime his conviction has been secured in respect of. In dealing with offences of particularly serious nature such as where violence is an element, it would not be wrong that the natural indignation of interested persons and of the community at large should receive the same recognition in sentences imposed by courts, and that it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands.

In ***Regina vs Mabusa and Another*** 1955 HCTLR pg 16 to 18 it was stated that all factors should be taken into consideration by the Subordinate Courts, and material circumstances of the offence in arriving at the proper sentence. It seems to me that such views were not given adequate consideration or due weight. And that in any event, in the light of the circumstances of the commission of the offence the said sentences imposed are wholly, wholly inadequate, thus even on a most lenient view of the said circumstances the sentence should be substantially increased.

In that judgment again this Court had this to say with regard to rape cases where force has been used. This includes where violence is applied such as where a young girl's arm is twisted and a sword is used to frighten her.

This Court said

> "......it is gratifying to note that last week the Chief Justice of South Africa, the honourable Ishmael Mahomed, till recently the President of our Court of Appeal, imposed a sentence that gave a clear warning to rapists that they would be warehoused for a long time if they persist in indulging their unwholesome lust against the will of women and girls in that country."

In an endeavour to bring into line sentences imposed by various courts in this country, Cullinan C.J. as he then was borrowed from Lord Lane in ***R. vs Billam and Ors*** (1986) 1 WLR at 349, the following :

> "Rape involves a severe degree of emotional and psychological trauma; it may be described as a violation which in effect obliterates the personality of the victim. Its physical consequences equally are severe: the actual physical harm occasioned by the act of intercourse, associated violence or force and in some cases degradation; after the event, quite apart from the woman's continuing insecurity, the fear of venereal disease (one can add and include AIDS lately) or pregnancy. We do not believe this latter fear should be underestimated because abortion would usually be available. This is not a choice open to all women and it is not a welcome consequence for any. Rape is particularly unpleasant because it involves such intimate proximity between the offender and the victim.

> We also attach importance to the point that the crime of rape involves abuse of an act to which society attaches considerable value".

See these remarks in the cases decided by Cullinan in Review Cases 71 and 81 of 1988 ***Rex vs Neo Janki*** and ***Rex vs Rantjana Khauta*** (unreported). I said guidelines were proposed in those cases. I could do no more than implore those charged with the administration of criminal justice to keep those guidelines in mind when contemplating imposition of suitable sentences in cases involving rape or sexual offences.

Suffice it to say in none of the various categories considered ranging between the mildest form of rape to the most severe was there an occasion where it was shown that anything less than 5 years' imprisonment would be adequate. In other words, it was proposed that if the form of rape that is charged is the mildest one then the minimum amount of sentence should be five years, but the instant case does not fit this type of bill. It is not the mildest form of rape. It is rape against a female of tender years. That is an aggravating factor. It is a rape where more force than necessary for sex was employed i.e. violence beyond force necessary for rape was employed in the form of twisting the victim's arm. There was also this constant fear inspired in her by the presence of this sword.

So, quite plainly it was wrong that the learned Magistrate imposed the minimum sentence suggested in the guidelines. I am not unmindful of Lord Lane's observation that the variable factors in cases of rape are so numerous that it is difficult to lay down guidelines as to proper length of sentences in terms of years and I would say consistently with the view that I entertain in contrast with the sentences which used to be imposed by courts in this country till the recent past; it is stimulating to observe that on 30th March 1988 Cullinan C.J. as he then was rose to the occasion on review of five years' imprisonment from one of eighteen months imposed by a Magistrate Class I at Butha Buthe in respect not of rape but **attempted rape**. So just for attempt and not for rape proper the learned Chief Justice found that the minimum sentence he could give was five years. This was the case in REV/127/88 ***Rex vs Khotso Nalana*** (unreported).

Now where rape has actually taken place, it stands to reason that an appreciably high sentence, or long term of years would be called for.

I have indicated but I was talking from memory that there is no rule of law requiring corroboration of the complainant's evidence in a case such as the present one. These words appear in the case ***Dicks Maxelala Velakathi vs Regina*** - a Swazi Appeal

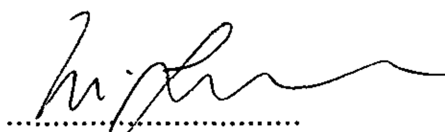
Court decision in Appeal 56/1984 (unreported). And they go further to state

> "....... but there is a well established cautionary rule of practice in regard to complainants in sexual cases in terms of which a trial court must warn itself of the dangers inherent in their evidence, and accordingly should look for corroboration of all essential elements of the offence. Thus in the case of rape the trial court should look for corroboration of the evidence of intercourse itself, the lack of consent alleged, and the identity of the alleged offender. If any or all of these elements are uncorroborated the court must warn itself of the danger of convicting, and in such circumstances it will only convict if acceptable and reliable evidence exists to show that the complainant is a credible and trustworthy witness."

I have no doubt reading from the record that the Magistrate was obliged to regard the complainant in this case as a reliable and trustworthy witness.

The other elements are satisfied in the sense that there is no mistake as to the identity of the accused. The complainant knew the accused very well as they are more or less co-villagers and then the corroboration of intercourse itself is supplied by the examiner, a lady who immediately examined the complainant after the loathsome act. As to the lack of consent that one is irrelevant because a girl of that age is incapable of giving any.

Now in setting aside therefore the five years' imprisonment I will substitute eight years in place thereof. Of course the term of imprisonment will be running from when the accused was convicted in the court below.



JUDGE
22nd November, 2000

For Crown : Ms Mokitimi
For Defence : In Person