IN THE HIGH COURT OF LESOTHO

In the matter between

REX

and

TUMELO SEBOTSA

ORDER ON REVIEW

Review Case No.1/2000 CR 4/2000

Review Order No.1/2000 In Quthing District

The accused a mosotho adult aged about 25 years of Sixondo in the Quthing district was charged with the crime of rape in that on the 1st day of January 2000 at Patise Sixondo in the Quthing district he did unlawfully and intentionally have sexual intercourse with Kelly Nelisa Mtabane a mosotho female aged about eight years and thus incapable in law of consenting thereto and on the alternative that he had contravened the provisions of Section 3 (1) of Women and Girls' Protection Proclamation No.14 of 1949 in that at the aforementioned place and date he did

unlawfully and intentionally have sexual intercourse with Kelly Nelisa Mtabane, a minor female aged about 8 years.

To this charge the accused pleaded guilty and after the prosecution had outlined the facts under Section 240 of the Criminal Procedure and Evidence Act of 1981, he was found guilty under the alternative charge, and was sentenced to five years imprisonment.

It is what the facts as outlined revealed which has caused me concern. For a conviction under Section 3 of the Proclamation sexual intercourse must be proved as penile penetration into the vagina. In the medical report that was handed in the medical officer of Quthing who examined the complainant on the 4th January 2000 made following remarks:-

> "Abrasions around the anus and the vestibule."
> "There is physical evidence that she was sodomised."
> "Patient was sodomised"
> "Vagina : normal"

Under our common law on unnatural sexual offences, sexual relations between a male and a female **per anum** do not constitute an offence (**Snyman - Criminal Law** 3 Ed p.341; **J Van der Linden 2.7.7.** If the woman is not a consenting party, intercourse with her **per anum** constitutes indecent assault.. **R v. M** (2) SA 406 - (where a verdict of indecent assault was substituted).

The facts outlined point that the complainant along with other children had been sent to buy a case of beer and that on their way back, the accused had intercepted her and taken her to a valley where he molested her sexually.

I am of the view that the evidence or findings of the medical doctor must be relied on and to do so necessarily means that the alternative verdict cannot stand because sexual intercourse or vaginal penetration has not been proved. What facts point to is anal penetration. Section 187 of the Criminal Procedure and Evidence Act of 1981 reads-

> "(1) Any person charged with rape may be found guilty of-
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> (a) assault with intent to commit rape; or
>
> (b) indecent assault;
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> (c) assault with intent to do grievous bodily harm; or
>
> (d) assault;
>
> (e) the statutory offence of unlawful carnal knowledge of, or committing any immoral or indecent act with a girl of or under a specified age; or
>
> (f) .....
>
> (g) .....
>
> if such be the facts proved.

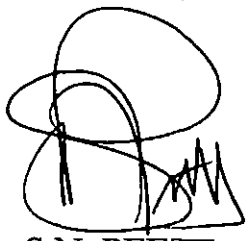
The facts of this case do not indicate rape (or vaginal penetration) but sodomy. It is competent for this court to substitute a verdict correct in law, namely, that of indecent assault because sodomy cannot be committed by a man upon a woman. **S. v. M** 1979 (2) SA 406 (R, AD). This may appear to be an anatomical mystery to an ordinary

man on the street!

In the circumstances of this case, justice requires that the conviction of rape be set aside because the facts do not prove vaginal penetration but an anal one. The only competent verdict is one of indecent assault as neither rape or sodomy can be sustained.

It is ordered therefore that the verdict of rape be aside and substituted with one of indecent assault. (**S v M** 1984 (4) SA. 111 **R v Abrahams**, 1918 CPD at 593).

As regards sentence, there is no reason to interfere with sentence despite the substitution of verdicts. Sentence is therefore confirmed.



S.N. PEETE

JUDGE