CRI/A/1/2000

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MOSHE MONTSUOE **Appellant**

vs

R E X **Respondent**

J U D G M E N T

Delivered by the Hon. Mr Justice M L Lehohla on the 16th day of May, 2000

The appellant had initially appealed to this Court only against sentence of five years' imprisonment imposed by the learned Magistrate in the Subordinate Court Maseru.

When the record was placed before the High Court I gave the following directives on 20-03-2000 :

Registrar : Please place on roll as well as doing the following :

1. *Please inform the appellant to come prepared to argue either in person or*

through his counsel why in the event of the conviction being confirmed, sentence should not be appreciably enhanced. Copy this information to the Crown.

2. *I see that the typed scripts contain neither the notice of appeal nor grounds thereof.*

Will you therefore speedily photo-copy those and have them attached to all copies (and to judge's too) which will be used by all parties before dispatching records to them.

3. *Will you inquire from the Registry and report to me why there was the delay between the arrival of this record on 19-01-2000 at the High Court and its eventual placement before me on 17-03-2000.*

The unacceptable and intolerable situation to be gathered and read from the difference between the two dates immediately above i.e. 19-01-2000 and 17-03-2000 is that in the event that the appellant who is now serving term and is not on bail be acquitted he has been held and detained unlawfully by the bureaucracy for no less than two months - a period sanctioned by *no judicial* officer!

This Court has previously pointed at the importance of observing provisions of sections 327 and 329(1) of the Criminal Procedure and Evidence Act 7 of 1981 and the practical implications of these sections as given effect to in ***Seholoholo vs R*** 1985-

1989 LAC 21 at p.28.

Section 327 indicates that a judge is at large to dismiss an appeal summarily if he considers that it has no merits. This presupposes that he would have had consideration of the matter at hand before it could even be set down for hearing. This in turn presupposes that should the matter be set down for hearing it surely should be at the behest and direction of the judge before whom the record would have been placed not for purposes of the matter being heard in open court at that stage but for purposes of the judge's determination whether the matter is to be summarily dismissed or set down for hearing in due course.

Section 329(1) as a development on what factors may have ensued in applying provisions of section 327 provides that :

> "In case of any appeal against conviction or sentence, which has not been *dismissed summarily* under section 327, the High Court in its appellate jurisdiction, without prejudice to the exercise by the High Court of its power under section 73 of the Subordinate Courts Proclamation 1938 or under section 8 of the High Court Act 1978 -
>
> [may]
>
> (a) confirm the Judgment of the Court below.....
>
> (b) order the judgment to be set aside.....

(c) give such judgment as ought to have *been given at the trial, or impose such punishment (whether more or less severe than or of a different nature from the punishment imposed at the trial); or*

(d) make such order as justice requires".

The Appeal Court in ***Seholoholo*** at p.28 said :

> "It was conceded by counsel for the Crown, and correctly so, that the Judge *a quo* had erred in increasing the sentence from 12 months to 2 years without first warning the appellant of his intention so to do, and without affording him an opportunity of addressing argument on the point whether it should be so increased".

I may interpose here and say such opportunity would scarcely be afforded if the record is placed before the judge for purposes of hearing the matter that is already set down for hearing within a week or so, thus denying the judge the opportunity to exercise his powers provided in terms of section 327 above. It is therefore wrong to place the appeal record before a judge for hearing instead of placing it for exercise of his power to determine whether to summarily dismiss the appeal, without involving parties to the litigation, or to order matter to be placed on the roll with such directives as he feels justice requires, such as for instance that the appellant be warned of possible increase of sentence etc.

To come back to the salutary remarks of the Court of Appeal at p.28 : Aaron J.A. proceeded as follows :

> "Strictly speaking, therefore, the increase of sentence by the Judge *a quo* must be set aside. However, at the outset of the argument in this Court, the appellant's counsel was advised that this Court also considered the sentence imposed by the Magistrate as being too light, and invited him to address argument as to why sentence should not be increased by this Court".

In the result the Court of Appeal in dismissing the appeal against conviction said

> ".....The order made by Molai J on 15th June, 1984, in which he increased the sentence, is set aside, but this Court sets aside the sentence of 12 months' imprisonment imposed by the Magistrate, and increases it to 2 years' imprisonment".

Thus the Court of Appeal highlighted the importance of forewarning the appellant in terms of section 327 should the High Court contemplate increasing sentence. This I, stress, the High Court can only properly achieve while in Chambers, by issuing appropriate directives to the Registrar.

So much then for the foregoing; and to return to the charge.

The appellant was convicted of rape and sentenced to five years' imprisonment. He had pleaded not guilty to a charge which stated that

"The accused is charged with the offence of rape in that on or about 13th May, 1997 and at or near Lithoteng in the Maseru district he did unlawfully and intentionally have sexual intercourse with one Likeleli Rasethuntša a female adult aged 45 years without her consent".

The appellant in the instant appeal sought leave to amend his notice and include appeal against conviction in his notice of appeal which had originally consisted of appeal against sentence only. There being no objection by the Crown leave was granted.

In his amended Notice of Appeal the appellant says he appeals against both conviction and sentence on the following grounds :

(1) The learned Magistrate misdirected herself by failing to ventilate equally the circumstances surrounding the coercion on the complainant.

(2) The learned Magistrate erred and misdirected herself by failing to evaluate evidence so as to exclude any possible inference of consent on the part of the complainant.

(3) The learned Magistrate erred and misdirected herself by failing to apply equal consideration to the evidence of relationship of witnesses for contestants. She considered only relationships and bias of appellant's witness.

(4) The learned Magistrate erred and misdirected herself in failing to apply the Rules of circumstantial evidence which give rise to decision by inference. See cases.

ON SENTENCE

The appellant is aggrieved that :

(1) the sentence is severe, gives no option of a fine yet it is cruelly punitive and induces a sense of shock thereby justifying an intervention by this Court.

(2) The learned Magistrate has failed to consider the submissions made in mitigation

(3) The conclusion reached in conviction is not proved beyond reasonable doubt and as such may have trappings of miscarriage of justice.

(4) The evidence adduced leaves room for a possibility of doubt on the events of the day and the past relationship of parties.

Mr Hlaoli Counsel for the appellant accordingly pleaded that sentence be not increased in the event of appeal against conviction being dismissed on the grounds that:

(a) the appellant is a first offender

(b) both parties had been drinking liquor which might have influenced their

normal character and behaviour

(c) the appellant has dependants who shall suffer on his loss of employment

(d) the complainant is not innocent person of vulnerable disposition.

The summary of the evidence by the Court below is that the complainant, an employee of the UNDP, works as a secretary in that organisation. She is a mother of two children aged 23 and 20 respectively.

The complainant knows the appellant and had known him previously when the two used to be neighbours. At the time the appellant was a tenant at Hlabi's residence; occupying (the 'ma-line').

On 13th May 1997 the complainant returned from work and decided to put on fresh clothes before leaving her house for her sister's house to meet Mr Thabo Leponesa the car repairer there.

The place has a restaurant and also sells beer. The complainant saw Mr Leponesa and the appellant conversing next to the beer counter. This was at around 8 p.m. when the complainant interrupted their conversation and spoke to Mr Leponesa.

Apparently the appellant also wanted to talk to Mr Leponesa and an uneventful exchange more in the nature of jest than anything took place between the complainant and the appellant. The appellant left and the complainant and Mr Leponesa shifted to some corner where they remained drinking. The complainant was drinking a quart of hansa.

At closing time the bar lady suggested that as the complainant and the appellant were going in the same direction she shouldn't worry as the appellant would escort her.

The complainant asked the appellant to buy her beer. He complied. The complainant was quick to tell the Court below that by this act she didn't suggest that the appellant would get anything in return.

She told the Court below that there is no love affair between her and the appellant. However long in the distant past the appellant had once said he loved her.

The appellant accompanied the complainant out of the bar. When they were about to reach the spot that marks a separation of ways to their respective homes, the

complainant says the appellant told her that he wanted her to go and sleep at his house, and leave in the morning. The complainant protested saying she would do no such thing and told the appellant that he should go to his home while she was going to hers.

There and then he grabbed her by the wrist fiercely and firmly saying also "you are going to my house with me neighbour". The complainant says there was nothing playful in the appellant when uttering these words. Her protests fell on deaf ears.

The complainant failed to free herself. She said that the appellant dragged her into Mokitimi's yard. She tried to free herself but fell down; and as she decided to stay put on the ground the appellant fetched her a slap and ordered her to stand up. The appellant ignored her protests and questions why he was hitting her; and lifted her.

She said her face was caught in the wire and got torn as the appellant forced her through the fence. He dragged her towards his door. At this time she says she had only one shoe on.

The complainant told the Court below that the appellant forced her into his house. He forced her past the kitchen into the bedroom where a young boy of about

17 was sleeping on the ground. He ordered the boy to go and sleep in the kitchen. The appellant gave her rough treatment culminating in his cocking a firearm at her. She says this is an AK-47. As she shouted and cried the young boy came and tried to stop the appellant from assaulting and harassing the complainant. She tried to seize this moment to escape through the window but found it had burglar-proofing while the door was locked.

The appellant came at her grabbed her roughly and told her she would eventually oblige. He threw her on the bed, removed her panties, warned her against making too much noise as she was shouting; and having overpowered her inserted his penis into her front passage without her consent and thereby raped her.

Under cross examination it was suggested that sex was by consent, and that the only reason she got rough-handling from the appellant was that she protested against some love affair the appellant had with the complainant's relative Lineo. This the complainant denied vehemently.

Indeed PW8 Dr Tsolo testified that on examining the complainant's vagina she

found that there were scars or scratches on the perineum. She was able to establish that the complainant had had sex with a male shortly prior to the examination.

She testified that the complainant had a scar below the left eye as well as on the forehead.

This would tend to corroborate the complainant's story that the flesh of her face caught on the wire as she was forced through the fence by the appellant. If I may go further, this would have no bearing on the assault he meted as a result of the protest imagined by the appellant that the complainant raised against the love affair between her relative Lineo and the appellant. It has none whatsoever because such assault, if at all relevant to Lineo affair, occurred inside the house and not before the sexual act which according to the appellant went off without an incident, - the cause of his assault on the complainant coming only afterwards when she is supposed to call him names including dubbing him a satan. The tear caused by the fence, on credible evidence, occurred before the parties proceeded into the house.

The Crown in the Court below also called witnesses who indicated that they heard the shouts and cries from the appellant's house on the relevant night and times

but give different explanations for their failure to intervene. The 17 year old appears to have been suborned by someone to deny hearing the shouts and noises heard by neighbours some distance away. His evidence was properly rejected by the Court below.

In relating his story in the Court below the appellant said he had been in love with the complainant for approximately two years and that they used to frequent the restaurant in question a number of times beyond count and that especially when his wife was away like in the instant occasion the complainant would spend the night at his house and leave the next day at early dawn i.e. about 4 a.m. after nights of sex and passion.

The appellant testified that after drinking their liquor he and the complainant left for his home. A couple of metres from the restaurant the complainant complained about the appellant double-crossing her with her close relative Lineo. This apparently passed without an incident.

He went further to show that about 10 metres away from a shop, he and the complainant went past a night-watchman. This stage of the journey in my view

appears to coincide with the period in the complainant's evidence when shortly afterwards she says she protested vigorously and loudly against accompanying the appellant to his own home.

Indeed it appears to me that the main purpose of the appellant making mention of this nightwatchman albeit so late in the day in the proceedings is to give a lie to the allegation by the complainant that she was crying out for if she was, then this nightwatchman would have heard and come to intervene or indeed to give evidence to support the complainant's claim.

However the mistake the appellant is making when raising this important issue so late in the proceeding is that because of its sheer importance, and if true at all, it ought to have been put to the complainant; but it was not. The appellant's lame excuse for failure to have had it put to the complainant is simply that he forgot to have it put. Under such circumstances the law is clear. The raising of this important issue so late is a last minute fabrication and afterthought which should be rejected on the score of inanity. Not only so; but because in this respect the appellant seems to have had a clear motive to lie because he must have had something to hide, the Court is at large to utilise this unsavoury attitude as strengthening the case for the Crown.

I accept the Crown's submission therefore that the appellant's grievance that the court *a quo* erred in rejecting his evidence *in toto* is baseless because nohow could that court regard it as reasonably possibly true because :

(a) while at page 10 of the record a question put on behalf of the appellant to the complainant was that the accused would tell the court that he proposed love to Lineo and that the complainant didn't like this, at page 51 the appellant said it was true he was in love with Lineo and the complainant was aware of the relationship

(b) while at page 11 it was stated by his counsel the appellant said he would bring evidence to show the complainant and he were in love none was forthcoming as it turned out.

() while at page 13 it is stated by his counsel that the accused will tell court that it is true he clapped the complainant and beat her or that he gave her a punch in the eye because she was calling him names i.e. satan and insulting him, at page 51 (last line) the appellant emphatically says "I never hit her with my fists"

(d) while at page 16 the appellant through questions put on his behalf by his counsel admits going with four soldiers to the complainant's place; and further says no soldier said that the appellant had said he had beaten and raped the complainant; however in his entire evidence the appellant makes no mention at all of ever going to the complainant's house with the soldiers. In this respect then the

complainant's statement as to what the soldiers said concerning the appellant should stand; namely that the soldiers accompanying the appellant came to ask for pardon for their friend Montšuoe.

(e) A question of great importance as to what the state of the appellant's mind was should not be overlooked with regard to his approaching PW3 Posholi Rasethuntša the complainant's son.

PW3 shows that after he learnt of the rape of his mother by the appellant he met up with him and the appellant tendered apologies to him. It is questionable if the appellant didn't rape the mother that he should feel the need to apologise to the son.

PW3 accepted as a fact that the appellant had raped his mother. The question raised at page 26 suggests that the appellant had come to apologise to PW3 for something different from what PW3 took him to be apologising for. The pretence by the appellant that PW3 must have understood him wrongly for he only had gone to apologise for the fact that the love affair had come to the surface, is exploded by the clear indication at p.53 that the appellant had reason to suspect that the question of rape and not just the existence of a love affair had been made known to PW3.

At p.53 the appellant thus is unable any longer to keep up the pretence he projected earlier that PW3 understood him wrongly, for now in his own

words the appellant is recorded as having said ".....what I mean by our things have been exposed *I mean that our affair has been exposed in a bad way such that she was now claiming me to have raped her"*

(f) The question of the stage when the jacket belonging to the appellant tore is of vital importance. The appellant said it tore before the duo got into the house. But the complainant says it tore when they were already inside the house and before sex.

Apart from the fact that the appellant said nothing to rebut this crucial piece of evidence, it falls to the Court to rule on the proven facts at what stage and in what circumstances the jacket tore.

Taking into consideration that the appellant would have the Court believe that the jacket tore over the Lineo issue it was indeed pertinent that he should have put it to the complainant that the jacket tore over the Lineo issue and not, as claimed by the complainant, over the fact that the appellant was forcing her while already in the house to eventual sex.

While the Court is busy trying to resolve these two contrary versions a third one is introduced on behalf of the appellant in head 2 paragraph 2 line 3 of the appellant's

heads of argument that the jacket got torn after sex.

Now given that the appellant made much capital of the fact that he and the complainant had undressed to the point of nudity in order to enjoy their sex freely, and that the complainant caused the quarrel by raising the Lineo issue after sex, could he then be wishing to be understood to suggest that during the middle of the night and amidst this quarrel he picked up the leather jacket from where he said he had placed it nicely before sex, and wore it such that the complainant tore it during this violent encounter after sex!!

This in my view is another factor which necessitates the rejection of the appellant's story on the one hand and calls into play on the other hand an entertainment of an inference that he says this because he has something to hide. Because this is inconsistent with innocence it necessarily strengthens the case for the Crown.

Mr Hlaoli argued that the factors raised in ***Blom vs Rex*** 1939 AD 188 at 202-3 have not been considered by the learned Magistrate in this case. In my view such factors would arise if the case in point is based totally on circumstantial evidence. But this instant one is not because direct evidence is supplied by PW1 the complainant.

In ***Velakathi vs Regina*** Case No.56 of 1984 (unreported) at page 5 The Swazi Court of Appeal said :

> "There is no rule of law requiring corroboration of the complainant's evidence in a case such as the present one. 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 in their evidence; and accordingly should look for corroboration of all essential elements of the offence.
>
> Thus in a case of rape the trial court should look for corroboration of the evidence of intercourse itself; the lack of consent and the identity of the alleged offender. If any one of these elements are uncorroborated the court must warn itself of the danger of convicting and in the circumstances it will only convict if acceptable and reliable evidence exists to show that the complainant is a credible and trustworthy witness".

In the instant case the element of identity of the appellant has been satisfied. The element of sex taking place is common cause.

What is in issue is if sex was with consent. Immediately when the question of injuries that the complainant sustained arises, the question of consent becomes vitiated. It becomes even more and more vitiated to the point of extinction when the story given by the appellant is inconsistent with innocence. In this regard the fact that he lied on a number of important issues strengthens the case for the Crown.

The Court has found that the complainant's story as supported by the encounter the appellant had with PW3 provides sufficient facts which are inconsistent with the appellant's innocence.

The Court has looked with care to ensure that relevant caution was exercised by the Court below to avoid "inherent danger".

Circumstances in which inherent danger is avoided appear to be all present in the instant case.

I can only distil some of them by reference to ***S vs Snyman*** 1968(2) SA 582 AD at 585 E where they were neatly set out by Holmes J.A. They are :

1. Corroboration of the complainant in a respect implicating the accused.
2. Absence of gainsaying evidence by him.
3. (A finding as to) his mendacity as a witness.

The appellant's sorry state falls neatly into the three categories set out above.

The fact among others that the complainant had no longer a shoe on one of her

feet when she got into the appellant's house satifies point (1) in that the shoe was discovered the next day along the path where the complainant was forced to tread by the appellant. Nohow could the shoe have fallen if the duo proceeded peacefully to the appellant's home.

Point (2) is satisfied among others, by the fact that the appellant failed to bring evidence to prove the love affair.

Point (3) is satisfied by the fact, among others, that he lied that the sexual intercourse was with consent. He lied that he was in love with the complainant.

It was suggested that the five year imprisonment term was severe in the light of the fact that the Magistrate did not even consider imposing a fine.

My reaction is that in all my experience both before going on the Bench while serving in the High Court and when on the Bench proper - this spans a period of no less than twenty eight years - I have not come across a case of rape where a fine was imposed instead of a custodial punishment. Besides, as long ago as 13th February, 1989 in CRI/REV/572/88 ***Rex vs Lehana Griffith*** (unreported) at p.2 this Court

referred to ***R vs Billam & Others*** (1986) 2 ALL ER 985(C.A.) regarding sentencing in rape cases; and cited Lord Lane C.J.'s guidelines at pp 987-8 as follows :

> "There are however, many reported decisions of the court which give indication of what current practice ought to be and may be useful to summarise their general effect".
>
> The Learned L.C.J. proceeded
>
> ".....For rape committed by an adult without any mitigating or aggravating features, a figure of five years should be taken as the starting point in an uncontested case".
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> He further said :
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> "The crime should in any event be treated as aggravated by any of the following factors :
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> (1) violence is used over and above the force necessary to commit the rape;
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> (2) a weapon is used to frighten or wound the victim;
>
> (3) the rape is repeated.
>
> In either one or all the above categories 'the sentence should be substantially higher than the figure suggested as a starting point'".

The case of the instant appellant falls neatly within the first two of the above despicable categories. That it should be suggested that the learned Magistrate should have imposed a fine when the sentence he imposed seems to have been out of all proportion with the horrendous aggravation reflected, astonished me. That I in turn,

turn, and almost more than ten years after hearkening to the message that lenity of sentencing does not give sufficient protection and comfort to the victims of rape, should be asked to intervene in this case appears to demand of the law to turn logic on its head.

Mr Hlaoli took issue that the complainant did not report to anybody in the neighbourhood of ma-line (an ever-congested dwelling complex). The record in my view shows that she tried the door closest to the appellant's but the door was not let open to her because there was nobody inside. The complainant's attempt to do what the law requires of her being foiled by events beyond her control cannot properly be regarded as proof that she was not raped. Moreover it is the appellant himself who furnished the information that the complainant knocked next door after leaving his house. Surely it cannot be entertained that she went knocking there for purposes of going to inquire after the health of the occupants there!

The Court in this case while rejecting the appellant's defences and evidence as false takes a serious view of the fact that the appellant even threatened the complainant with a firearm during the struggle that culminated in her getting exhausted and thus succumbing to rape.

I need hardly refer to intoxication in rape cases because as far as I am concerned the court below dealt satisfactorily with that aspect of the matter.

I take a dimmer view of the appellant's sordid act in the light of the fact that the rape followed what amounted to a kidnap.

The appellant is sentenced to (9) nine years' imprisonment less 2 months.

.....
J U D G E
16th May, 2000

For Appellant : Mr Hlaoli
For Respondent : Miss Dlangamandla