IN THE HIGH COURT OF LESOTHO

R E X

vs

LETHOLA SEFALI

Review Case No.90/2000 C.R. 82/99
Review Order No.8/2001 In Qacha's Nek District

ORDER ON REVIEW

This case comes before this court on automatic review.

The accused, a boy of 23 years alleged to have raped an 80 year old woman was acquitted of rape by the learned magistrate and being found guilty of Common Assault was sentenced to pay M1,000-00 or undergo 1 year imprisonment.

The learned magistrate had accepted that while the crown had proved some essential elements of rape against the accused, the crown had failed to prove an important element namely: penetration. The court also

appreciated that corroboration of the complaint's story was not necessary but that in lieu of corroboration the court had to caution itself before accepting complainant's story. According to the court *a quo,* penetration had not been proved, such proof being provable by medical evidence.

On the outset, this court takes the liberty to commend the learned magistrate on her/his painstaking research and reasoning. Unfortunately, the learned magistrate finding is not in line with current judgments in sexual offence(s) cases.

While it was complainant's evidence that accused had threatened to kill her on a number of occasions, it was complainant's evidence that

> One night the accused viz. Lethola Sefali came into the house in which I was sleeping, stealthily; I believe he put off the light which I had left still on when I slept. When I woke up, he was already on top of me, having already inserted his penis into my vagina.

She goes on:

> I struggled but in vain as he continued thrusting back and forth until he finished. When he pulled

> out his penis, he then put/inserted his hand into my vagina after which he then throttled me.

Further,

> I went to Machabeng Government hospital where the doctor prescribed some medication.

Also,

> I had not consented to the accused inserting his penis into my vagina.

In his cross-examination of the complainant, accused does nothing to deny complainant's allegations against him.

> Question by accused: When I came to you was it light or dark?

> Answer by Complainant: I do not know because I was asleep when your came in. However, all that I remember is that when I slept I had the light on; however, when I came round I found that there was someone on top of me and that it was dark.

I am to emphasise that accused's question suggests that he came to the complainant. At this juncture, I am aware that the learned magistrate

accepted that accused was sufficiently identified and with this finding I agree.

It is also to be emphasised that in the administration of justice courts of law are not robots or automata simply following the leader - they follow precedent where facts in a given case are similar. A court well instructed having marshalled its facts as the learned magistrate has done should then proceed or to have proceeded to ask itself whether facts in the case in which the court is seized are similar to a given case.

In the instant case the complainant is an old lady well nigh beyond life's expectation and it is doubtful whether those who attended her would have acted as expected ordinarily. I am referring to the fact that though she appears to have consulted a doctor it does not seem that she was examined though I doubt at her age any doctor would be brave enough to examine her for her complaint. I do not, however, agree with the learned magistrate that because of her age complainant was sinile; the reason for this is that people differ in their development some developing earlier than others. In any event I have found nothing suggesting senility in her evidence.

As for corroboration of complainant's story, courts seem to have moved

away from this. Whether or not there was penetration, I doubt if this can only be proved by medical evidence as the court *a quo* seemed to imply. Has to be remembered that when allegedly complainant was raped she was asleep and her sensory perceptions dethroned and incapable of resistance. In favour of the court *a quo*, the court has found that the accused entertained necessary *mens rea* to rape.

Apparently no semen was observed for the reason that complainant was not examined. But it has been said where there is no ejaculation in the vagina by accused the proposition that there was no penetration supports the accused. However, it would seem absence of spermatozoa does not disprove rape and that penetration can be 'achieved without ejaculation having occurred in the vagina'. (see *S. v. N., 1988 (3) S.A. 450 (A.D.) At 463I.* In the instant case, has to be remembered that the complainant barring sinility which was not proved, was fully conscious of accused's acts and given her age and hence experience, she could not have been wrong that ejaculation occurred for in her evidence implying penetration she said 'I struggled, but in vain, as he continued thrusting back and forth until he finished.' Has also to be recalled that complainant was not seriously challenged in her evidence.

As for cautionary rule with regard to sexual offences, it is superseded, rescidivist and anachronistic and so is penetration in the sense that only medical proof is the *sine qua non* for one can imagine women being raped in remote outlying areas where, because of inaccessibility to medical attention, absence of medical evidence would make them objects of rape at will and without recourse to the law -; such a situation would be untenable to say but the least. Indeed such an approach would be chauvinistic and an affront to feminine dignity and access to justice. Has been said 'sexual intercourse is ------ a relationship in which personality is supremely important ----' *Smith and Hogan Criminal Law - 7th Ed. p.456.* We cannot speak of a relationship and personality between complainant and accused for the latter can only be seen as a social pervert assuming he is guilty.

The important element in rape is 'the defendant having had carnal knowledge of the victim 'forcibly and against her will.' *Snyman (Criminal Law 424)* defines rape as consisting 'in a male have unlawful and intentional sexual intercourse with a female without her consent'. It has been said *stuprum involuntararium* takes place when a man has unlawful intercourse with a woman who is asleep, or a woman in a stupor due to drugs or a woman bereft of reason. According to Hoexter J. in *R. v. Ryperd Boesman, 1942 (1) PH H 63 (SWA)* quoting from questions in *Carpzovius' Practica*

Nova Rerum Criminalium, Part 2, Quaest, 69. Obs.2, in the case of women incapacitated by sleep, drugs or mental defect, stuprum is neither violentum nor voluntarium and it would seem the view taken is that the punishment should be less severe than for violentum and more severe than that for voluntarium. In the instant case I have already said that complainant was incapacitated by sleep.

In the Boesman case above, Schreiner J.A. while concurrng went further to state that in the ordinary kind of case the absence of consent is proved by the complainant's evidence that she did not consent supported by proof that her will was overborne by force. In the instant case the victim was insensible owing to sleep. In *S.v. S;1971 (2) S.A. 591 (A)* it was said the conduct of the woman is always an important factor when it must be inferred whether she consented or not. I am mentioning these factors not because they are in issue for the court *a quo* has dealt with them. They are mentioned to clarify the law and heighten their importance.

In *R. v. Jackson, 1998 (1) S.A.C.R 470 (SCA)* the surgeon could not confirm there was penetration though there were abrasions on her vaginal mucosa and buttocks consistent with unlubricated sexual intercourse.

It was in Jackson's case above argued on behalf of the appellant that the trial could had misdirected itself in 'not truly applying the cautionary rule in respect of the evidence of complainants in sexual cases and that the magistrate had paid lip service to this. Counsel for the state had gainsaid this arguing that 'the basis, meaning and ambit of the cautionary rule should be revisited in that the rule, as presently applied in practice, was discriminatory towards women (p.473) Oliver, J. (p.474) referred to *S. v. Snyman 1998 (2) S.A. 582 (A) at 585C - H* per Holmes J.A. restating the cautionary rule as applicable, in practice, in sexual cases which required

> (a) the recognition by the court of the inherent danger aforesaid; and
>
> (b) the existence of some safeguard reducing the risk of wrong conviction, such as corroboration of the complainant in a respect implicating the accused, or the absence of gainsaying evidence from him, or his mendacity as a witness----.'

It is to be recalled this is the basis on which the trial court approached this case. While it may be said that Olivier J.A. was upbeat about the rule as to its '*raison d'etre* and justification extensive and impressive,' the learned judge quoting from several sources found no justification for the notion that

'women are habitually inclined to lie about being raped' and that the empirical research 'refutes the notion that women lie more easily or frequently than men, or that they are intrinsically unreliable witnesses' (pp.474-5).

In the course of his judgment, Olivier J.A. had also referred to an English Law Commission Working Paper (No.115, 57-58) which found no evidence to substantiate the cliche' that the danger of false accusations is likely to exist merely because of the sexual character of the charge. A judgment by the Supreme Court of California was also referred to in *P. v. Rincon-Pineda (14 Cal 3rd 864)* which found 'despite a detailed examination of empirical data' it was found no evidence existed 'that complainants in sexual cases are more untruthful than complainants in other cases.' The court had concluded that the rule was one without a foundation; found the rule 'unwarranted by law of reason; that it discriminated against women and denied them equal protection of the law'; 'further, assisted in the brutalisation of rape victims by providing an unequal balance between their rights and those of the accused.'

At p.475 Olivier J.A. had gone on"

'Few things may be more humiliating for a woman

> than to cry rape; she is often, within certain communities, considered to have lost her credibility; she may be seen as unchaste and unworthy of respect; her community may turn their back on her; she has to undergo most harrowing cross-examination in court, when the intimate details of the crime are traversed ad nauseam; she (but not the accused) may be required to reveal her previous sexual history; she may disqualify herself in the marriage market and many husbands turn their backs on a 'soiled' wife.' see also Lord Hale's views, see Geis; Lord Hale, witches, and rape 27 British Journal of Law and Society (1978) 90.

Rape whether on a virgin, a woman or old lady is humiliating and there is no reason why the version of the complainant cannot be accepted like any other credible witness unless the testimony is demonstrably false or self-contradictory. Lord Hale's remarks aside, I do not know how old people and in particular old women are looked upon in other societies. In purely African tribal communities old women instead on being looked upon with honour and respect by reason of their age often they are vilified and not taken seriously for any misfortunes befalling them for these befall them either because they are 'witches' or 'sinile.'

Armstrong in his *'Evidence in rape cases in Four Southern African countries,*

Vol.33 No.2 Journal of African Law (1989) 183 says at 193

> 'The cautionary rule in rape cases is based on the principle that women are naturally prone to lie and to fantasise and particularly in sexual matters and that they are naturally vengeful and spiteful and therefore likely to point a finger at an innocent man out of spite.'

In the course of his thesis Armstrong rejected the notion of women being naturally vengeful or spiteful or that the fantasised more. He rejected the notion as 'misoggymistic' and enough to be rejected out of hand. He also found the cautionary role to be discriminatory towards women and 'inappropriate in countries committed to equal rights of men and women.' Armstrong has also referred to 'the cautionary rule' as 'a lingering insult on women.'

Oliver J.A. for his part at p.476 found the cautionary rule in sexual cases to be based 'on an irrational and out-dated perception' which 'stereotyped complainants in sexual assault cases in which most victims were women.

In my view, whether the victim or rape is a virgin, a woman or an old

lady, the same approach has to be adopted by the crown in proving the guilt of the suspect who cannot be allowed to hide behind principles of cautionary rule on the wrong perception that in sexual cases a complainant's evidence alone cannot be relied on or if relied on the court has to caution itself for evidence of women in sexual cases is unreliable. If there is the suspicion that a victim is so old her evidence cannot be relied on: it is not something that a court can decide alone, there has to be proof. I find that the magistrate misdirected himself in relying on the cautionary rule to discharge the accused on the **Rape** charge and accordingly on review both the conviction and sentence are set aside and substituted with the finding that 'Accused is found guilty as charged.' As to sentence, I cannot but repeat that according to our law, rape is a capital offence. It is not for me to inquire why it was relegated to the magistrate's court while on the statute book it remains capital offence. Needless to say it is serious and prevalent having regard to the present Aids syndrome where, according to some, men rape infants and old women to rid themselves of the aids scurge. Be this as it may, the crime rape has always been looked upon as serious and is assuming serious proportions because of the Aids incident. The crime of rape is also increasing by leaps and bounds. I am not aware that there is formulation or any yard stick to go by but speaking for myself I would consider **Rape** worse

than murder much as they are equated on the Statute Book. A dead person is relieved of his miseries but not so a victim of rape who has to relive the stigma and lifes miseries associated with rape. I also shudder to conceive the sheer humiliation of an 80 year old grandmother having, against her will, intimacy with a youth of 23 years old! To me this is an aggravating factor quite apart from any injuries the old lady may have sustained.

I am aware of the accused's youth and I have considered this plus the fact that in retrospect he appears to have displayed a contrite heart. But since a deterrent is required in rape cases particularly involving the weak and defenceless, and it is also necessary to send a strong message to would-be rapists, accused having been found guilty of **Rape** is sentenced to 10 years imprisonment. I was of the view to sentence accused to 15 years imprisonment but having regard to the length of time this review took to reach finality I have decided to settle for 10 years imprisonment.

The magistrate who convicted and sentenced the accused or in his absence the magistrate in charge of the district, is to call accused before him and explain to him the result of these review proceedings.

If the accused has paid fine, it is to be returned to him.

By Order of Court.

G.N. MOFOLO
JUDGE
21st November, 2001.

c.c. **Magistrate, Qacha's Nek**
O/C Prisons, Qacha's Nek
O/C Police, Qacha's Nek
C.I.D. Police Headquarters
Central Prisons
Director of Prisons
Director of Public Prosecutions
All Magistrates
All Public Prosecutions