CRI/REV/15/2001

In the matter between:-

REX

vs

MOEKETSI NONE

Review Case No. 15/2001 **C.R. No. 64/2001**

Review Order No. 7/2001 **In Mohale's Hoek District**

JUDGMENT

Delivered by the Hon. Mr. Justice M.L. Lehohla on the 12th day of November, 2001

When this matter was placed before me on automatic review I gave a directive on 8th March, 2001 in the following terms :

"Registrar,

Please send back this record to the Subordinate Court for production of typed scripts enough in number to cover this Court, two Counsel, your office and an extra; urging the Subordinate Court to act with speed.

On arrival of those scripts have them distributed to accused's counsel and all parties concerned. Fix the date of hearing as well.

N.B. Write to the accused warning him to come prepared to argue either in person or through his counsel why in the event that this court finds that he was properly convicted, his sentence should not be confirmed.

I would urge that if the accused cannot secure himself counsel you should secure him one **pro deo** in view of the seriousness of this matter. You could, as an alternative option, use your good offices to let Legal Aid see if they can't offer help."

The above instruction was carried out and the case was eventually set down for hearing yesterday 25-09-2001. Happily, though not in attendance personally, the

accused was represented by Mr. Makholela (Legal Aid) who very competently argued the case for the accused. The court cannot thank him enough for the painstaking preparation matched by clarity of expression that radiated from every submission he made.

The accused whose case is under review pleaded guilty to a charge of rape preferred against him in the subordinate court, Mohale's Hoek. The charge set out that the accused had, on or about 16th February 2001, at or near Likhutlong in the district of Mohale's Hoek, had unlawful sexual intercourse with 'Mapitso Lekoeneha, a girl who at the time was aged six years and thus incapable in law of consenting to sexual intercourse and thereby did commit the crime of rape.

The court in a brief judgment sentenced the accused to 15 years' imprisonment and suspended 5 years of the said sentence for a period of 10 years provided the accused abstained from committing "any offence relating to unlawful sexual intercourse" during the period of the suspension.

The summary of the prosecution's facts of the case before the learned magistrate in the court below was that :

On 16th February, 2001 one Mookameli 'Molai was proceeding from work during midday going for lunch. While he was near the Cooperative [centre] he was confronted by 'Maleoela Baholo who was barely able to catch her breath as she came to him at a run to report that she saw an unknown male person getting into the forest with a very little girl.

Without waste of time Mookameli followed the general direction indicated to him as the direction allegedly followed by the stranger and little girl. Anxious moments were spent conducting a search everywhere. Finally Mookameli saw a male lying down some distance away. Mookameli hurried to the spot whereupon a male person instantly identified as the accused in this matter, rose; thus uncovering a little girl whom Mookameli saw under the accused.

The state of the accused's garb as observed and described by Mookameli to the public prosecutor who narrated it to the court below is that "Accused had his trouser unzipped and his penis [sticking] out of the trouser".

Mookameli confronted the accused with the question that the latter chose not

to reply to, namely "what are you doing in the forest with that child?". The accused's arrogant response to the question was in the nature of a counter-question, namely " Is the child yours?". The record reveals that when raising his counter- question the accused had raised his voice. Not only so, but he picked up his stick and attacked Mookameli with it. The latter warded off the blow with his bare arm and delivered an effective fist blow at the accused and felled him to the ground.

The little girl rose and ran away. Mookameli snatched the stick from the accused's grip, chased after him and dealt him a blow or so as the latter ran away and out of the forest. Mookameli raised an alarm. People rushed in response thereto, to the vicinity of the alarm, cut across the accused's path; effectively intercepting him from escape and threatened to assault him but for Mookameli's intervention in accused's favour.

The accused was frog-marched to the police who happened to be near Osman's filling station. He was handed over to them. The little girl too accompanied the police to the charge office.

The public prosecutor, further in his outline, indicated that 'Mamoliehi

Lekoeneha is the mother of the little girl. Having been alerted to the incident concerning her daughter she proceeded to the police charge office and found her daughter there. The police released her daughter to her to take to a doctor for medical examination. Medical examination conducted by Dr. Mozie revealed no external injuries . The doctor, according to the public prosecutor's outline, indicated that the little girl was a virgin. However her hymen was "freshly torn" and had bruises and a swell on the vagina towards the inside. It was further indicated that the little girl was also bleeding from the vagina. The examination was said to have been painful. No spermatozoa were found inside the little girl. The doctor indicated that the little girl had not yet gone for menstruation. He formed an opinion that she had been raped because of the fact that the examination was painful and also because she was bleeding through the front passage. The Medical report was handed in and made part of the record in the court below marked Exhibit "A". I have had a look at it in the record before me.

Trooper Sekepe is the one to whom a large group of people handed over the accused while that policeman was on patrol duty along the Mohale's Hoek main street. Having received the explanation relating to the accused from Mookameli the police trooper cautioned and gave the accused a charge of rape.

As for the little girl 'Mampitso Lekoeneha, the outline of the public prosecutor regarding her was that she had been sent to a butchery to buy some meat around midday when she was accosted by a man she didn't know. He told her to come to her after buying the meat but she didn't comply. When she reached her home she again saw the same man who called her and this time she obliged him. The stranger gave her money to buy eat-some-more biscuits. But before she could the man took her into the forest. Inside the forest the man took off her panty, pulled down his trousers and laid on top of her. The little girl felt his penis at her front passage. Then Mookameli pitched on the scene and asked the man what he was doing. The man rose, a scuffle ensued between him and Mookameli. Mookameli got the better of the stranger who decamped and fled. The little girl too rose and ran to explain to Mampe who took her to the police charge office. Along the way the little girl saw that stranger being taken to the police charge office where she also was being taken to.

As stated earlier the accused was convicted on his own plea. It was further indicated during that phase of proceedings that he had no previous convictions.

In mitigation the accused confessed to having done "what is being complained of ". He further said "I am praying to the parents of that little girl. I did not know

what I was doing. I will never ever rape".

On his part the presiding officer stated that he was satisfied that the facts disclosed the offence charged. He harped on the fact that a horrible act was perpetrated against a six year old girl.

In argument Mr. Makholela sought to persuade this court that the outline of facts disclosed that Statutory rape had been committed. Thus it was wrong to have convicted the accused of common law rape. In any event the crown had denied itself the opportunity to convict the accused of statutory rape because as it had wrongly charged the accused of common law rape it was out of the question that he could be convicted of statutory rape because statutory rape cannot be an alternative charge to Common Law rape since it was not drawn as an alternative charge in this proceeding.

Mr. Makholela for the defence developed his argument by submitting that if properly charged under the statutory offence supported by facts disclosed the particular section of the statute contravened ought to have been set out. Thus the accused ought to have been charged with contravening Section 3 (1) of Women and Girls' Protection Proclamation 14 of 1949. The section reads :

"Any person who has unlawful carnal connection with a girl under the age of sixteen years or who commits with a girl under that age immoral or indecent acts or who solicits or entices a girl under that age to the commission of such acts, shall be guilty of an offence and being convicted thereof shall be liable, at the discretion of court, to a fine not exceeding one thousand rands or to imprisonment for any term not exceeding six years".

Learned counsel went further to indicate that it is a gross irregularity that both conviction and sentence that ensued are inconsistent with what should have been the correct charge. He submitted that the accused suffered double jeopardy in the sense that the outline of the case did not relate to the charge to which the accused pleaded guilty.

I cannot help feeling that learned Counsel's contention and submissions in this respect are specious. In my view the accused was charged with Common Law rape to which he pleaded guilty.

The outline of the facts disclosed the commission of the offence charged. The fact that the complainant was under the age of giving consent does not oblige the

public prosecutor to charge the culprit statutorily even where as in the instant case the accused was caught virtually in the act.

The outline of the crown case relating to what would have been Mookameli's testimony discloses the offence of common law rape. He approached the accused in the forest as the latter was lying on the ground. When he surprised the accused about what the accused was doing Mookameli saw the little girl under the accused as the accused rose and made to attack Mookameli. Meantime the accused's penis was dangling freely from his unzipped trousers. If all this, coupled with the opportunity the accused had had of being in exclusive company of the little girl screened by trees in the forest from immediate surprise, does not offer sufficient corroborative evidence of the little girl's allegation that establishes the commission of rape, then it becomes difficult to comprehend when rape shall ever be rape. Again if the accused's penis which was freely observable to Mookameli as it protruded in a semi turgid state from the accused's unzipped trousers does not provide evidence of what use it had just been put to, then the avowed question of being caught with a smoking gun would cease to be of any relevance in law. The unwholesome result would be that many a criminal would go scot free while the law does nothing to come to the assistance of their victims. That is what the law, properly applied cannot countenance. In the

result I reject the contention that the accused was wrongly convicted. I have thus come to the conclusion that the accused was properly convicted of the crime he had pleaded to and that the charge preferred by the crown against him was the proper one to put to him. It cannot be overlooked that a perfectly healthy girl who went about her mother's errands without any complaint regarding her private parts before accompanying a stranger into the forest was observed bleeding from her front passage immediately after the stranger was roused from lying on top of her by Mookameli. Before she went into the forest with him there was no question of her hymen having been "freshly torn". Why should the hymen be freshly torn, immediately on the accused being seen to dismount her. The answer is simple, namely he had inserted his male organ int her with the result that it caused that fresh tear.

Mr. Makholela demurs at the fact that the offence having allegedly been committed on 16th February, 2001 the accused was convicted on 20th February of that year. I find nothing untoward in a trial that is conducted soon after the offence. The trial that follows immediately after the offence has the merit of preserving evidence in its freshness in the sense that witnesses can be relied upon to remember events more distinctly than if the trial had been delayed.

Mr. Makholelela after making submissions regarding points I have dealt with and dismissed above proceeded to some fresh ground on the basis of which he sought to persuade the court of the accused's entitlement to acquittal.

The fresh ground in point was that the accused who was not represented in the court below was not informed of his legal rights; further that the accused should be told of the existence of legal aid and be encouraged to avail himself of its services. Otherwise failure of justice might result in which event accused would necessarily be entitled to his acquittal. These points were emphasised regard being had to the fact that the charge here is of a serious nature which must have been clear even at the start of the trial that it was more than likely to be liable to carry a heavy sentence should the conviction be secured.

In accepting the virtue entailed in the above submission and demurring at the fact that nothing has been recorded by the court below to indicate the contrary I would hasten to indicate that this court echoed the same sentiments in CRI/A/37/88 **Lehlohonolo Pulumo vs Rex** (unreported) at page 3 as follows:

"It has to be pointed out that there are great advantages [to gain from]

recording the statements made by any of the parties to court proceedings; the questions and answers ought therefore to be recorded".

Having expressed itself in quotes immediately above this court went further to find solace elsewhere as follows:-

'I am not unmindful of the remarks in **Rex vs Sibia** 1947 (2) SA 50 (A.D.) by Schreiner J.A. at pp 54 to 55 **et seq** that:

"I do not wish to be understood as suggesting that it is an irregularity of which the accused could take advantage, if no such record is made. Speaking only from my own experience I do not think that it could be inferred from the absence of any reference thereto in the judge's notes or in the short-hand record that the accused was not asked whether he had any witnesses to call".'

By extension of the same rule it would follow that absence of any reference in the magistrate's notes to the question whether the accused wished to have legal representation, does not necessarily mean he was denied services of one.

Learned counsel for the defence went further to indicate that the court below failed to canvas and investigate the accused's personal circumstances. In the result it was not known if the accused was employed, single or had any dependants all of which factors have a bearing on the consideration of what sentence to impose. I agree with this submission.

Learned counsel further submitted that the court below failed to consider the accused's age; and that had it done so it would have imposed a less severe sentence. Learned counsel accordingly asked the court to observe that the sentence imposed induces a sense of shock regard being had to the fact that the accused is a first offender.

With regard to the accused's age I observe that the charge sheet which went through the hands of the learned magistrate in the court below is given as 32 years. It would be absurd that given such a distinct state of circumstances the magistrate imposed the sentence he did without regard to the accused's age when it was glaringly present before his face. I don't accept learned counsel's submission in this connection therefore.

Furthermore rape is a serious offence, generally speaking. It is particularly more offensive when an innocent minor of very tender age is induced to become a victim in it by being plied with promise of money to buy biscuits or sweets. For a man aged 32 or thereabouts who manifests such lewd and wicked conduct severe sentence is deserved. For the proposition supporting the view that rape is a serious form of offence requiring robust treatment of perpetrators thereof this court has had reference to:

CRI/A/9/2001 Lereng Germond Sello vs Rex (unreported)

CRI/A/10/2000 Ismael Mashongoane vs Rex (unreported)

CRI/A/1/2000 Moshe Montsuoe vs Rex (unreported)

CRI/REV/245/89 Selepe Kao vs Rex (unreported)

I need hardly stress the fact that rape is a revolting offence; doubly revolting when real possibility exists that HIV/AIDS may be communicated to the victim through the culprit's odious act; the result of which could be real death after a period of untold suffering. Rape of a virtual toddler therefore calls for the severest possible sentence. The fact that rape carries the death sentence amply bespeaks the utter revulsion with which it is regarded by this society. It is perhaps time that subordinate

courts which by law cannot pass the death sentence should, when faced with duty to try such cases as the present, instead of imposing sentences limited to their jurisdiction, commit them to the High Court for consideration of even imposing the ultimate sentence in order to ensure permanent removal from community of the nauseating menace to the safety and chastity of the innocent young of our society. Thus before time is long over-due it is necessary for this aspect of the law to come alive and stop lying idle on the statute book.

The court observed that the learned magistrate suspended a fair amount of the sentence imposed, thus demonstrating that he did take into account the accused's personal circumstances even if he didn't specifically say so.

However this court aware that the court below suspended the 5 year portion of the sentence for 10 years did inquire from Mr. Kotele for the crown if this was fair. Initially he said it was but subsequently when this court pointed out that for murder which is more heinous than rape; and where a sentence of 10 years is not uncommon yet the law admits of no suspension of any sentence whatsoever, he conceded that a suspension for an additional period of 10 years would virtually subject the accused to a total of 20 years' punishment, something which anybody who has received 10

year's imprisonment for murder cannot dream of suffering. In parenthesis this court does not wish to be seen to be detracting from the popular expression that rape is fate worse than murder. Quite to the contrary in comparison with the victim of rape this court subscribes to the view that the sudden ill fate that stops with the instant onset of death suffered by the victim of murder is **ex post facto** a form of relief from his undeserved misery, while on the other hand the victim of rape undergoes an on-going and living form of psychological trauma which is no less than bizarre and night-mare-like death in the form of dehumanisation for rest of the victim's life.

Thus this court while confirming the conviction and taking into account the fact that the accused pleaded guilty and thereby showed his remorse and didn't waste the time of the court feels that the justice of this case would be served by interfering only with the suspended portion of the sentence to the extent that the accused is sentenced to 15 years' imprisonment 5 of which are suspended for two years on condition that he is not convicted of an offence involving sex or indecent assault committed during the period of suspension.

Finally this court orders that the Registrar of this court should cause a copy of this judgment to be sent to the Minister of Justice with my recommendation that

Mookameli 'Molai's commendable actions be brought to the public eye and given due recognition by relevant authorities of this Kingdom.

My reasons for this are that Mookameli 'Molai immediately set about looking for the culprit and victim on receiving communication of the relevant witness's suspicion concerning the simultaneous disappearance of the stranger and little girl into the forest. He risked his life in his successful attempt to rescue the victim. He luckily disarmed his attacker at great risk to himself regard being had to the fact that he was not armed. He used only such amount of force as would enable him to subdue his assailant after disarming him and thereby successfully effecting a private citizen's arrest - a very rare feat to perform on all accounts.

Most commendably he protected the culprit from threatened and real assault by the public who were overcome by their justified sense of indignation towards the accused's sordid act. He successfully handed the culprit over to the police thus ensuring that the ends of justice would finally be served. Otherwise the accused's fate could as well have been decided in the street with possible fatal consequences and frustration of justice. This serves as an example of how important it is not to take the law into one's own hands no matter how indignant one feels towards the

accused's perceived acts of abominable perversion.

M.L. LEHOHLA

JUDGE

12TH NOVEMBER, 2001

For Crown : Mr. Kotele

For Defence : Mr. Makholela

accused's perceived acts of abominable perversion.

M.L. LEHOHLA

JUDGE

12TH NOVEMBER, 2001

For Crown : Mr. Kotele

For Defence : Mr. Makholela

copy : Magistrate - Mohale's Hoek
O/C Police - Mohale's Hoek
O/C Prison - Mohale's Hoek
O/C - Central Prison
CID - Police Headquarters
Director of Prisons
Director of Public Prosecutions