CRI/A/9/2001

IN THE HIGH COURT OF LESOTHO

In the matter between :-

LERENG GERMOND SELLO

vs

REX

JUDGMENT

Delivered by Hon. Justice M.L. Lehohla on the 20th day of August, 2001

On 18th June 2001, this court acting in terms of section 328 of our CP&E directed the Registrar to set the above appeal before it as soon as possible.

The actual minute appearing on the Judge's file reads:

"Registrar please set the matter down as soon as possible because the

appellant is in custody."

The court further gave the Registrar a directive as follows:

"Ask the appellant to come prepared to argue in person or through his counsel why sentence should not be appreciably enhanced in the event that conviction is found to be proper and correct."

The appeal was accordingly set down for 08-08-2001 but only heard the following day owing to the fact that Miss Nku who initially was to appear for the Crown was held before another Judge in a criminal trial.

On 09-08-2001 Miss Dlangamandla replaced Miss Nku for the crown while Mr.Makotoko appeared for the appellant.

The appellant was charged with the crime of rape for having heard sexual intercourse with Lebohang Mphuthi without her consent, or in the ALTERNATIVE the accused was charged with contravention of section 3 (1) of Proclamation 14/4 3 (sic) as amended - (Women and Girls Protection)

"in that upon or about the period between 1st June, 1998 and the 30th day of October, 1998 and the 30th day of October 1998 and at Hlotse Reserve in the district of Leribe, the said accused did unlawfully and intentionally have unlawful sexual intercourse with Lebohang Mphuthi who was 15 years

by then."

Although the record does not show that any amendment was effected to the year number of the Proclamation in point it seems to me that the correct Proclamation dealing with "Women and Girls' protection" is Proclamation 14 of 1949 as opposed to Proclamation 14/43 appearing in the alternative indictment.

Section 3(1) of Proclamation 14 of 1949 provides that :

> "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**."

After conviction and sentence the appellant duly filed his notice of appeal based on the following grounds:

(a) The Learned Magistrate erred in law in convicting the appellant on the strength of the uncorroborated evidence of the complainant which evidence did not even have the necessary safe-guards.

(b) The Learned Magistrate erred in law in convicting the accused on circumstantial evidence which point (sic) out to various conclusions which are not consistent with the guilt of the Accused/Appellant.

(c) The Learned Magistrate erred in assuming facts which are not sustained by the evidence and basing her judgment upon them.

(d) The sentence imposed by the court is too harsh taking the particular circumstances of the case into consideration

The rape indicted in the main charge is alleged to have taken place during the period, dates and the place set out in the alternative charge.

The appellant aged at the time 48 years, pleaded not guilty in the court below but was convicted and sentenced to two years' imprisonment by that court presided over by then Resident Magistrate Mrs Nthunya.

The evidence led in brief, in a rather prolonged proceeding in the court below revealed that the complainant was born on 15-04-1983 and that during the period covered by the incident she was barely 15 years old according to PW1's evidence and her Mother 'Manoha PW4.

The complainant was at that time attending school at St. Saviours in Leribe doing standard VI. Her way to school lay fairly close to the appellant's residence.

One day when the complainant's school had gone on a trip to Tsikoane, she met the appellant who scraped an immediate acquaintance with her, engaging her in small talk about whether she knows him, and that he knew her parents and her sibling, including that he had often seen her go past his house. The young girl's interest having been thus aroused by the glib use of a foxy old man's tongue it was no difficult matter for him to ask her to come to his house on her way to school, and she easily obliged.

He engaged her in small talk again in the house, asking her what class she was in and having thus thoroughly gained her confidence by manipulating her he asked her to come via his home again on her way to school the following morning. She complied. The little girl testified before the Resident Magistrate that nothing happened that day and the appellant asked her to go home.

The next morning the appellant opened his curtain, beckoned to PW1 to come to his house and told her that whenever she saw the curtain open at his place she should come there. An additional development to the liaison occurring between PW1 and the appellant was that on subsequent occasions when PW1 had responded positively to the curtain signal and gone to the appellant's home on her way to school is that she would be favoured with either M20.00 or M10.00. It was never disclosed to her why these sums of money kept on being given to her by the appellant.

of what had been going on between the complainant and the appellant was that they had previously been engaging in sexual intercourse and that the appellant was in the habit of giving the complainant sums of money each time sex was to take place. It so happens that on this last occasion sex did not take place.

The appellant's reaction to this damning indictment by the complainant's mother was a speechless bowing of his head. This conduct which is alleged by the complainant to have been portrayed by the appellant is so reminiscent of the vital aspects of **Jacobs vs Henning** 1927 TPD 324 cited at page 571 of **The South African Law of Evidence** 4th Ed. by Hoffmann and Zeffertt that it bears reproduction as follows:

> "However, as Van den Heever has pointed out, a court which has believed the plaintiff's evidence will seldom have much difficulty in unearthing some item of corroborative evidence. In **L** vs **M** corroboration was found in the fact that the parties had been seeing a great deal of each other, and in **Jacobs** vs **Henning** the plaintiff was confirmed by evidence that the defendant said nothing when the girl's father taxed him with being the course of her pregnancy."

The remarks of the Court in **Jacobs** above with regard to the fact that the defendant when thus confronted merely lowered his head and said nothing were that no matter how unassertive a man might be, when confronted with the charge thus laid to him if it was false, he would react in a manner that showed his rejection of it as a sign of his utter indignation towards what he regards as a false accusation.

The same could fittingly be expected of the appellant's reaction in the instant case. But all the evidence led showed that he did none of the things a man might do when his conduct is projected as being consistent with a woman's story and inconsistent with his innocence.

In fact when asked by the complaint's mother what he was to say to the fact that PW1 said he would give her money, have sex with her and say to her not to tell anyone all this the court below was told that "he raised his hands and said that thing should remain between the two of them."

This is a further factor which shows that the appellant must have realised that the sordid saga of his implausible act could not bear any further scrutiny. Thus he preferred it to remain concealed.

However, when confronted by the police the appellant denied ever giving the complainant any M10.00.

Under cross-examination PW1 was taxed about the structure of the house and relative aspects of its rooms. I think that although cross-examination in this respect was somewhat excessive it nonetheless helped show that the complainant had been inside the house of the appellant. It also helped turn the purpose of the cross-examiner's persistence on its head in that while at page 15 it was suggested to PW1 as follows:-

"[Accused] would further say you used to go to his place to fetch [Mamello

Makhooane] in the morning and then go to school---------?
I went to his place only to see him. I never went there to fetch anyone and I never saw that person"

at page 18 the cross-examiner to my bewilderment put it to PW1 as follows:-

"You have never been into this house at all and this is why you are not familiar with its set-up–? I did not end in the kitchen but I never came into these rooms."

To my mind it becomes plain that the cross-examiner by at once suggesting that PW1 had gone to the appellant's place for whatever purpose and in the same breath suggesting that she had never been to that place, is projecting his client's instruction as blowing hot and cold. From this instance it becomes easy to see why the appellant declined to give evidence in his defence. Of course I am keenly aware that an accused bears no onus to prove his innocence. It is the crown which bears the onus to prove an accused's guilt beyond reasonable doubt throughout. But where there is *prima facie* evidence against the accused, he declines discharging the evidential burden at his own risk.

The position is well stated in the invaluable works of S.E. Van der Merwe *et al* styled **EVIDENCE** at page 417 as follows:-

"The State will have established a *prima facie* case; an evidential burden (or duty to adduce evidence to combat a *prima facie* case made

by his opponent----) will have come into existence i.e. it will have shifted, or been transferred, to the accused. In other words, a risk of failure will have been cast upon him. The onus still rests on the State; but, if the risk of losing is not to turn into the actuality of losing, the accused will have the duty to adduce evidence, if he wishes to be acquitted, so that, at the end of the case the court is left with a reasonable doubt--------."

It also appears that the story cast on crown witnesses as what the appellant would tell the court was flawed by falsity throughout.

PW1 was told on behalf of the appellant that she denied knowledge of the appellant at the lady D.S.'s office. It turned out that PW1 was present before the D.S. accompanied by her parents while the appellant was also present. My reading of the record does not even remotely suggest that PW1 denied that she knew the appellant while at the D.S.'s office. It was never put to D.S. to confirm that PW1 ever said she didn't know the appellant while at the D.S.'s office.

The further false suggestion placed before PW1 on behalf of the appellant was that PW1 was given the R5.00 coin in order to deliver it to Mamello a relative of the appellant allegedly staying with him and allegedly attending school with PW1.

The testimony by both PW1 and the Principal of St. Saviours School in Leribe PW8 Mabafokeng Sengoai indicated that there is nobody fitting the name and description of Mamello Makhooane in that school. The learned magistrate in the court below was entitled to reject this false suggestion and in the process ask herself

what the motive for this false trail that the defence was bent on letting her follow was. The obvious reason would be she was thus being led astray because the defence had something sinister and implausible to hide. Could it have been merely the unwarranted invitation of a minor to come to his house for purposes only of being treated to the appellant's largesse? I think not. As the unrebutted evidence of PW1 showed it was sex.

It becomes immediately curious also why the appellant would decide not to hand the money direct to the spurious Mamello who stays with him and rather give it to PW1 to deliver it to her.

PW4 proved by means of school registers that there never was or had been a child named Mamello Makhooane at her school. It is the quality of PW2's truthfulness that she was not cross-examined on questions which had lavishly been heaped on PW1 in an attempt to show her in worse light than she could have been. Why indeed could she have denied the knowledge of a school mate Mamello if there was in fact any such character whom she frequently came to see at the appellant's home? The attempts by the defence to cast PW1 in the mould of a liar have in my view had a detrimental effect by boomeranging on the party seeking to benefit therefrom.

The consistency with which the appellant gave PW1 the money established a pattern of conduct that he indulged in to induce the impressionable minor less than a third his age at the time to have sex with him. He was cunning in his scheme to

cultivate a measure of confidence that the minor should repose on him such that when he suggested to her not to tell anybody of the implausible and shameful secret going on between him and the minor girl he almost succeeded but for the fact that the timing of the minor's mother finding her daughter in the situation in which she was i.e. in the appellant's yard, having been in the appellant's house, alone with him and carrying an unaccountable R5.00 coin from him left the minor no option but to make a clean breast of her evil secrets to her mother and tell all that had been going on behind the scenes aided hitherto to survive under a well kept cloak of secrecy.

PW2 Mamajara Lehloenya's evidence went to show that the appellant is her co-worker and her Junior employed as a Town Clerk in the Hlotse Township while she was a District Secretary in the Leribe District of which Hlotse Township is a part.

In October 1998 the appellant came to her office saying that there was a woman wishing to see her on a complaint that the appellant had been giving her daughter PW1 sums of money in the amounts of M5.00 or M2.00.

The appellant and PW4 the woman who was coming to the D.S. to complain came into PW2's offie. It is in there that PW4 charged that the appellant had turned her daughter into his wife by having sex with her. The appellant is said to have denied this charge. He however stated that he used to give money to PW1 because

PW1 was friends with the appellant's niece who stayed with him. The court however at this stage knows on credible evidence that the so-called niece was the product of the appellant's fertile imagination. Be it remembered that the niece is the same girl who it was said would be handed the money by PW1 who obtained it from the appellant for the purpose. The same niece would be none other than Mamello Makhooane concerning whom credible evidence showed was non-existent except perhaps as a being of reason in the appellant's mind. In short much as the appellant wished it to be believed that Mamello was at school together with the complainant school records proved him a liar in the first flight in this regard.

Curiously, although to the police as shown above the appellant is to have denied giving PW1 any M10.00 however the statement of PW2 at page 21 of the record is not denied that "Accused informed me that he used to give the child those amounts of money because she was friends with his niece who stayed with them."

The phrase **he used to give the child those amounts** betrays a continued pattern of practice. Thus this uncontroverted statement puts it beyond doubt that the appellant did not give PW1 only R5.00. PW2 was not cross-examined on the statement that the appellant used to give the child these amounts of money. The learned magistrate was perfectly entitled to believe PW2 on that. Why then should the appellant deny to the police that he gave the child M10.00 yet he says nothing before court when PW2 shows he admitted giving the child sums and sums of money? The lie in this inconsistency is consistent with guilt.

The D.S. later had PW1 to confront with the appellant. Her story was at

variance with that of the appellant. The Subordinate Court could thus be scarcely faulted for accepting the only version that was presented to it being that of the Crown and rejecting the hope entertained by the appellant that in the face of his fanciful defences the court might just be duped into confirming his innocence.

The defence made much of the fact that the appellant was not charged disciplinarily for misconduct. But I think this effort was a grasping at the straws of a drowning man because his boss had unequivocally advised PW4 in the appellant's presence to lodge a complaint with the police. This was done and a charge immediately laid against the appellant.

PW3 Mpho Mphuthing corroborated PW1's story that at times they walked together to school as they attended the same school. PW3 is aged a year younger than PW1.

PW3 testified that at times the appellant would call forPW1 to call round his house. PW1 would wait for PW3. Then after a few minutes' wait PW3 would see PW1 emerge with some money. Sometimes in the amount of M10.00. At other times in the amount of M20.00. It was thanks to PW3 that PW4 got to learn of what was taking place between her daughter and the appellant. Like a dutiful parent she took immediate steps and dismantled the aura of secrecy the appellant had cunningly hemmed around PW4's daughter. Of course PW1 never told PW3 what she was consistently being given the money for. To that extent the secret was kept away even from PW1's relative who was her age-mate and school- mate.

Under cross-examination PW3 was awakened into an embarrassing yet false recognition that the money was given to PW1 to give to Mamello. Embarrassing because even though false PW3 was not in a position to deny it. Thus even though PW3 couldn't deny it her failure so to do did not and could not make the statement that the appellant was said to be going to make true. The text goes:

> "Accused would tell this court that *he used to give money to your aunt so that she gives it to Mamello.* Can you deny —? I cannot deny." See page 27 of the record.

I have italicized the phrase in the above quotation and sought to under-score particularly the phrase *he used to give* as a further illustration that the appellant's instruction to his counsel could never have been consistent for it should be recalled that it became necessary for the astute prosecutor in re-examination in the court below at page 19 to put the question as follows:

"Was it the first time accused gave you money when he gave you M5.00-----? No" because an attempt had been made to either deny that other sums of money i.e. M20.00 and M10.00 had been given before or to water down any such previous gifts.

An attempt was made by the defence to make it appear as if the appellant took the complainant to be much older than she was.

At page 31 at the cross-examination of PW4 the complainant's mother it was put to her and the text goes as follows:

"How old did you say your daughter was ----?
She was born in May, 1983.
Accused would tell this court that according to his observation,
your daughter seems to be born in 1980-?
I deny"

The defence being tried to be raised by raising this question has serious defects of its own quality. First it stands in oblique conflict with the appellant's attitude that he never slept with the complainant. For it suggests that while on the one hand he denies having ever slept with her on the other it suggests that if the appellant slept with her then he hopes to be acquitted of the charges he faces because the complainant was above the magical and decisive age of 16 laid down by the statute.

Before I refer to the relevant section of the statute which the appellant seems to rely on albeit lamely, I should point out that the examination carried out by the doctor on PW1 showed that she had had sex the previous day. This did not come from PW1's evidence but from the doctor. PW1 had indicated that she had last slept with the appellant long before she received R5.00. But from the doctor's evidence it appears on that day the complainant had had sex. The conclusion is that the complainant had had sex with someone other than the accused. Moreover the medical evidence had shown that PW1 at the time of the examination on 30-10-98 had been sexually active. However PW1 said she had been sexually active with the appellant.

Now coming to the relevant section of the Proclamation on Women and Girls' Protection one finds it is stated in Proc 14/49 section 3 (2)

"----------Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the Court before which the charge is brought- (a) that the girl at the time of the commission of the offence was a *prostitute,* that the person so charged was at the said time under the age of twenty-one years and that it was the first occasion on which he was so charged;"

I have italicized the word prostitute because it is the nearest in meaning to the criticism levelled at the complainant that she was sexually active and had slept with at least one other male than the appellant. While the undeniable fact of the complainant fitting the description of the word prostitute raises the appellant's prospects of acquittal I am afraid that he should lose on the swings what he has made on the round abouts. He loses because while admittedly it appears the girl was, to put it bluntly a prostitute, I cannot see how a man of his age i.e. 48 at the time could accommodate himself within the confines of the age below 21 years specified in the statute if his defence were to succeed. Thus even though the girl was sexually active at the time covered by the charge the accused in order to succeed should show that he himself was under the age of 21 years at the time.

Sub-section (c) provides as follows:

"That the girl or the person in whose charge she was, deceived the person so charged into believing that she was over the age of sixteen years at the said time."

Evidence shows that neither the complainant nor her mother PW4 who is the person in whose charge PW1 was, deceived the appellant into believing that PW1 was over sixteen years of age. The appellant merely contents himself with a question put from the bar that as far as he could observe the complainant seemed to have been born in 1980. One would have wished to know the basis of his observation and the impression that PW1 seemed to have been born in 1980. Since there is no such basis it stands to reason that this observation merits rejection on the score of absurdity.

Mr. Makotoko for the appellant charged that the complainant could not have been a reliable witness inasmuch as she did not confide to the court that she had had sex with someone other than the appellant. Much as it is regretful that this was not in PW1's evidence- in - chief the fact of the matter is that she was being led by a prosecutor who could be relied upon to know what he/she was doing inasmuch as he or she on examination of statements within his/her possession decided that the relevant evidence would be adduced on behalf of the Crown by the doctor who testified and gave evidence which, inferentially speaking, showed that although PW1 had had sex over the previous 24 hours preceding examination conducted it must have been with someone else than the appellant because in her own evidence PW1 excluded the appellant from such possibility. That this was the case does not absolve the appellant from his own brand of sexual activity carried on earlier, more especially as indicated by section 3(1) (a) which affords protection of under aged females not just in name only but truly in fact.

The fact that the defence sought to be raised had a high degree of falsity touching unnecessarily even on manure that PW1 was supposed to buy, does not

improve the lot of the Appellant. See page 31.

Mr. Makotoko demurred at the fact that the crown while at once admitting in their heads that the learned magistrate exercised her discretion judicially when passing the sentence she gave, surprisingly submit that the sentence is too light. I most heartily share with Mr. Makotoko his bewilderment regarding this apparent contradiction in terms and resultant fit of misapprehension on the part of the crown. Logic and common sense cannot countenance need for interference by an appellate court if indeed the discretion was judicially exercised by the magistrate when passing sentence because sentencing is primarily in the trial court's discretion.

Mr. Makotoko further took the crown to task by pointing out that the learned magistrate seems to have excluded any conviction relating to unlawful sexual intercourse but in the process has failed to say of which of the four other sets of alternatives specified in section 3 (1) i.e. commission of (a) immoral or (b) indecent acts; or [a man who] (c) solicits or (d) entices " a girl under 16 years of age to the commission of such acts."

Again here Mr. Makotoko has a point that is in form only valid but not so in substance.

I say this because the charge is of rape in the main and breach of section 3 (1) in the alternative. The final verdict is guilty as charged. The complaint is directed at the cloudy reasoning by the learned magistrate where she said at page 55

> "Although the direct evidence of what actually transpired in that house was that PW1 was not corroborated in so far as it related to sexual intercourse being (sic) taken place between herself and accused on various occasions, circumstances show that something unusual was taking place in that house. Something that accused was prepared to pay for."

Mr. Makotoko accordingly submitted that the appellant was convicted of "something unusual" and which is not any of the alternatives set out in the statute or referred to in my judgement above. I accept this criticism and would hasten to say the magistrate here committed an irregularity.

But as the tenor of reliable evidence indicated in my view that sex indeed took place and because the law could not countenance such an absurdity as to conclude that the court convicted a person of something that is not covered by the statute I would read "guilty as charged" to mean guilty in respect of what is specified in the section in question.

Because the appellant couldn't be found guilty under both the main and the alternative charges at once he should be discharged from the offence appearing in the main charge.

Ample evidence showed that sex took place between PW1 and the appellant. There was evidence of use of money to induce sex to take place. There was opportunity for sex to take place. There is an oblique suggestion that it took place

because the appellant according to his observation the complainant seemed to have been born in 1980.

My reading of the record places PW1 in the category of credible witnesses involved in sordid acts. Otherwise if her style of life should be allowed to prejudice her testimony in all cases as unreliable on that account therefore as good as false, no prostitute need bother laying complaints of rape before the police because courts of law would invariably acquit the culprits. Her sordid acts ought not to have blinded the court below to PW1's evidence i.e. that sex was going on between her and the appellant on an ongoing basis. Under age girls tempted by money to engage in illicit sexual acts and sex workers who are sexually molested must enjoy the protection afforded to them under the law.

To buttress the point that it is not the reasoning but the verdict that can legitimately be appealed against I wish to rely on CIV/T/598/95 **Masupha Ephraim Sole vs LHDA** (unreported) by Ramodibedi J who said at page 4:

> "I should like to say at once that the appeal by the Applicant has largely been based on the mistaken premise that an appeal lies against findings in a judgement yet in law an appeal only lies against a judgement or order and not against findings."

In the same judgement is cited the authority of C of A (CIV) No 10. Of 1998 **'Mathato Tabea Lefosa** vs **'Maneo Doris Ntsoaki Mooki** & ors (unreported) at p.5 as follows:

"It needs to be said immediately that in several respects, this appeal proceeds on the mistaken premise that the appeal competently lies against findings in a judgement. This is not so. It is trite that an appeal only lies against a judgement or order in the sense analysed in **Dickson and Anor vs. Fisher's Executors** 1914 AD 424 at 427 and **Holland vs Deysel** 1970 (1) SA 90 (A) at 92 C - 93.----------Thus if a party considers that orders have been granted for the wrong reason, or even more generally, that there are certain findings made in the course of a Judgement to which the party objects, it has no entitlement on that basis alone to institute an appeal. The crisp test is: did the court err in making the orders which it granted? "There can be an appeal only against the substantive order made by a court not against the reasons for judgment. (**Administrator, Cape vs Ntshdwagela** 1990 (1) SA 705 (a) at 715 per Nicholas AJA)"

Though I have gone to great lengths to treat of this aspect of the matter, it was not seriously relied on as one of the grounds of appeal as it is not set out among them. It only arose in arguments as a sudden query against what it was actually that the court below convicted the appellant of.

However I take solace in the provisions of our CP&E Act No 7 of 1981 section 329 (1) to this effect:

"In case of any appeal against a 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 Proclamation 1938 or under section 8 of the High Court Act 1978 [may]

(a)

(b)

(c) give such judgement 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."

Subsection (2) rams the point home by providing that :

"Notwithstanding that the High Court is of the opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings unless it appears to the court of appeal that a failure of justice has resulted therefrom."

Mr. Makotoko argued that the evidence of PW1 was not corroborated and that because there were no safeguards it ought to have been rejected and the appellant acquitted.

This court has repeatedly drawn attention to **Velakathi vs Regina** case No 56 of 1984 (unreported) at page 5 by the Swazi Court of Appeal consisting of Maisels P, and Isaacs AJA where Hannah J in delivering the judgement concurred in by the other honourable appeal court judges who also served in Lesotho said:

> "There is no rule of law requiring corroboration of the complainants 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 fact that the complainant is a minor rules out the question of consent.

In keeping with **Velakathi** above **T.T. vs Rex** 1971-73 LLR 266 at 268 an

authority graciously submitted to me by learned counsel for the appellant, albeit for a different consideration, is authority for the view that:

> "The cautionary rule does not require that the trier of fact should be told or should warn himself that there must always be corroboration in these cases."

The learned Smit JA sitting with Schreiner P and Maisels JA concluded at page 270 with concurrence of other members of the court that :

> "In view of all this evidence implicating the appellant, the magistrate was perfectly justified in accepting the evidence of the complainant and rejecting that of the appellant. This court is satisfied that, notwithstanding the magistrate's failure to warn himself of the special dangers inherent in the evidence of children and victims of sexual assaults, there has been no miscarriage of justice and that court, if it had properly warned itself, would inevitably have convicted."

I have no doubt that these remarks can be aptly adapted to the instant situation. Consequently I find that the appellant is guilty of breaching Provisions of Proclamation 14/49 section 3 (1) as charged.

With regard to sentence in rape cases this court has repeatedly drawn attention to guidelines outlined in **R vs Billam & Ors** [1986] 1 ALL ER 985 (C.A.) at pp 987-8

where it is stated that

> "------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."

In **T.T. vs R** above the learned Smit JA said "The sentence of four years' imprisonment imposed by the High Court is in the circumstances not excessive."

One of the remarks made by this court regarding sentencing in rape cases is that with benefit of hindsight and experience gathered through the passage of years it appears that protection of rape victims warrants higher sentences than has hitherto been the case.

In Review Cases 71 and 81 of 1988 **Rex vs Neo Janki and Rantjana Khauta** the words of Cullinan C.J. as he then was are all the more comforting. In CRI/REV/51/200 **Rex vs Tseliso Phatsoane** (unreported) at page 8 this court in reference to Review cases 71&81 of 1988 said :

> "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."

In CRI/REV/572/88 **Griffith Lehana** (unreported) at page 5 the sentence of 8 years' imprisonment was substituted for that of 5 years' imprisonment.

In CRI/A/10/2000 **Mashongoane** vs Rex the court set aside the suspended portion of six years' imprisonment. Reliance was heavily reposed on Cullinan C.J.'s approach in **REV/127/88 Rex vs Khotso Nalana** where for attempted rape 5 years' imprisonment was substituted for the 18 months' imprisonment imposed by the court below.

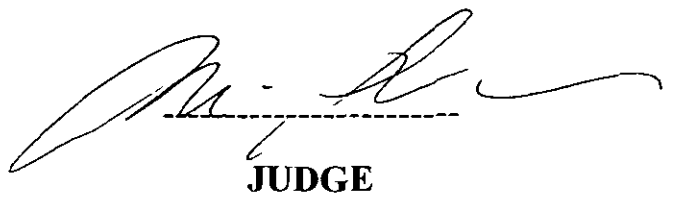
In the instant case the appellant, for his repeated sordid acts committed against a minor, should count himself lucky that the maximum prescribed by this antiquated law is only six years' imprisonment.

It is time the penalty in this statute were enhanced to keep abreast of the advance made in imposing penalties under the common law.

I acknowledged with appreciation that the Hon. Ismael Mahomed till recently the President of our Appeal Court imposed 15 years' imprisonment on a rapist in South Africa where the Hon. Mahomed was Chief Justice before his sudden death (God bless his soul).

Having said this I would set aside the sentence imposed by the subordinate court and impose 6 years' imprisonment in place thereof.

It is so ordered.



JUDGE

20th August, 2001

For Appellant : Mr. Makotoko

For Crown : Miss Dlangamandla

& Miss Ntelane