CRI/A/10/2000
IN THE HIGH COURT OF LESOTHO

In the matter of:

ISMAEL MASHONGOANE
vs
REX

JUDGEMENT

Delivered by the Hon. Mr. Justice M.L. Lehohla on the 10th day of August, 2001.

This appeal has appeared several times on the roll without being heard.

On 8-9-2000 when it first appeared the judge who was to hear it was unavailable hence the matter was postponed till 15-11-2000.

On that day the Crown was represented by Miss Mofilikoane while there was no appearance on the side of the appellant.

The appellant's name was called three times on the Public Address System and the orderly who did so, came to report "no response" in Court.

When the record of appeal reached the Judge's desk on 04-07-200 from subordinate Court Thaba Tseka, I gave the following directive to the Registrar of this Court i.e.

> "Registrar : please place on roll and warn 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 confirmed."

The Court had noticed that for a particularly aggravated form of rape the appellant had received a somewhat light sentence which was rendered even more ineffectual by suspending half of it to three years' imprisonment which falls far below the starting point of five years repeatedly made mention of in Judgements and review orders of this Court in such cases as : CRI/REV/51/2000 Rex vs. TSELISO PHATS'OANE (unreported); CRI/REVs/75 and 81/81 Rex vs. (1) NEO JANKI (2) KATJANA KHAUTA (unreported) by Cullinan C.J. as he then was CRI/REV/5 72/88

Rex vs. GRIFFITH LEHANA (unreported) CRI/A/1/2000 MOSHE MONTSUOE vs Rex all of which rely on Rvs. BILLAM & ORS [1986] 1 ALL ER 985 (C A) in respect of the guidelines suggested for sentencing in rape cases. For a benign form of rape the starting point according to BILLAM above should be 5 years where the accused pleads guilty. Where there are aggravating factors the starting point is given as 8 years where use of force beyond that

necessary to accomplish rape is applied. Where several other factors such as use of firearms or any form of weapons are used or are threatened to be used to induce submission the sentence should be appreciably higher than the 8 year starting point. The same should be the case where rape is repeated or the victim is a minor in the care or custody of the culprit.

On 15-11-2000 the matter was postponed to 05-02-2001 because again the appellant did not attend court.

On 05-02-2001 the Court once more assembled. The appellant did not respond to the call by the orderly to report in Court.

The following note summarises the recorded minute of the day on Court's file:

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"For Crown : Miss Mofilikoane

For appellant: no appearance. Appellant's name called 3 times on the P.A. system Orderly reports : no response.

Miss Russell the Assistant Registrar informs Court that she wrote to the appellant's Counsel informing her (i.e. Miss Ramafole) that the matter would be heard today as well as delivering notice of hearing to Police Thaba Tseka.

Miss Mofilikoane assures Court that she met the appellant's Counsel and notified her of the present date of hearing and of the Court's concerns about non-appearance of either the appellant or his Counsel on previous occasions."

The appellant had been charged with the crime of rape of one Moleboheng Mokebe allegedly committed on 5th July 1998 at Ha Ramokoatsi in the Thaba Tseka District. The appellant had pleaded not guilty to the charge and the matter went to trial. Witnesses were called, led and cross- examined. But at the end of the day the appellant was convicted of rape and sentenced to six years' imprisonment of which

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half was suspended.

He appealed against the Subordinate Court's "Judgement" on the grounds that.

1) the learned Magistrate misdirected himself in holding that the appellant raped complainant for the following reasons :

a) the evidence adduced at trial did not support the conviction of rape more especially because the other defence witnesses as well as the Court witness supported the accused in his alibi.

b) further grounds of appeal will be filed as soon as the record of proceedings as well as the judgement are available."

The further grounds of Appeal are as follows :-

1. The learned Magistrate misdirected himself in finding that the Appellant raped the complainant for the following reasons:

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a) The mere fact that the accused failed to mention that his mother was in the shop with him is not in itself a basis for conviction on a charge of rape (sic) the Appellant's story about his mother was corroborated by the Court witness who was not in any way biased.
b) The complainant's story and that of her witnesses ought to have been treated with caution since they were her relatives and there is no excuse whatsoever why the complainant did not raise an alarm even when it is alleged that the Appellant ran away when PW 2 arrived, in fact it must be pointed out that the same witness failed to answer or say why he did not raise an alarm or chase the assailant. Furthermore it is clear from the evidence of PW 2 that he never saw the person who is alleged to have raped the Complainant.
c) The learned Magistrate erred in holding that simply because the Court witness 'Marorisang did not talk to other people except the complainant therefore her evidence was to be dismissed as a coincidence.

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d) The complainant mentioned in her evidence that she went to the shop once to buy a candle and left before the Court witness, herself left, (sic) It is submitted that the question which was posed by the Court i.e. what time, and by whom was the complainant raped has not been answered by the Crown who had to answer and proof (sic) same beyond reasonable doubt.
e) The mere fact that the doctor concluded that penetration did occur does not necessarily mean that the complainant was raped. The doctor's evidence that (sic) not in any way corroborate (sic) the offence of rape (sic) this is supported by the use of the words "it is impossible to rule out rape."

The so-called further grounds of Appeal above seem to be argumentative and on that account tend to obscure the issues being sought to be drawn to the Court's attention. Ground (e), where it seeks to deal with the doctor's evidence, merely serves to obscure the point being tried to be made.

It is of vital importance for all practitioners charged with the important task of

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formulating grounds of appeal to heed the importance of maintaining brevity, clarity and conciseness in going about that exercise. As it is now it is impossible to see the wood for the trees in these grounds of appeal.

The only ground of appeal that is clear to me is the first one in the first set of grounds which is based on the appellant's alibi.

In response to this ground it is important to note that the Magistrate's conclusion that the appellant's alibi was false is to be gathered from the evidence the magistrate relied upon saying, according to DW 3 Makhosi Mashongoane, who supported the Crown case that "the accused did have time [meaning I think occasion] to go out of the shop whilst the shop was still open" see page 18 of the judgement.

It is clear that in going out of the shop the appellant's identifiable features or face where not covered hence the witnesses's ability to say they saw him.

To buttress this point reliance should be reposed on the authority submitted by Miss Mofilikoane for the Crown that in R vs. Hlongoane 1959 (3) SA 337 at 340 -41 it was said

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> "The legal position in regard to alibi is that there is no onus on the accused to establish it and if it might reasonably be true he must be acquitted. But it is important to point out that in applying this test, the alibi does not have to be treated in isolation.....the correct approach is to consider the alibi in the light of the totality of the evidence in the case and the Court's impression of the witnesses."

It would indeed be naive for the learned magistrate to overlook readily available evidence which in part is firmly based on common sense that the appellant was seen by people who knew him within the vicinity of where the offence took place and allow himself the leisure of some conjecture that even as the appellant was seen in point A he in fact was in point B lying tens of miles away from point A.

I accept the submission by the learned counsel for the Crown that the learned magistrate has not misdirected himself in convicting the appellant of rape. The learned magistrate didn't base himself on the failure of the appellant to mention his mother's presence. Instead he convicted him in the light of the evidence adduced by the complainant and other crown witnesses. He only highlighted the disparity

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> between the appellant's version and that of his own witnesses to indicate how hopeless the appellant's case was. Needless to add the appellant's position is placed in particularly dim light by three factors (1) absence of gainsaying evidence by him (2) a finding from the facts that he is a liar and, (3) the medical evidence that corroborates the act of sexual intercourse though for some obscure reason made light of in ground (e) by the appellant as follows "it is impossible to rule out rape."

The magistrate cannot be faulted for believing the complainant's story that the appellant raped her if he found her to be a credible and reliable witness. Nor can he be faulted for believing PW 2's story that the latter saw the appellant running away. The fact that PW 2 didn't raise an alarm cannot detract from the fact that the man he saw running away was the accused. PW 2's explanation that he didn't raise an alarm is plausible in the light of the fact that he didn't know why the appellant was running away. PW 2 in this regard has the credit of not falling into the temptation of falsely saying he raised an alarm when he saw the appellant run away because he knew the latter had just been raping the complainant. For being this honest PW 2 should rather be praised for truthness than condemned as adducing false evidence.

It is worth bearing in mind the importance of a Swazi Court of Appeal decision

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with regard to corroboration, in Velakathi vs Regina Case No 56 of 1984 (unreported) at page 5 as follows :-

> "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.
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> 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 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 credible and trustworthy witness."

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In the light of the approach adopted by the learned magistrate in the court below I find that he cannot be faulted for believing the complainant and PW 2 whose evidence places the appellant within the vicinity of the scene of events and inside the time frame of the occurrence thereof.

With regard to sentence the rule is trite that sentence is pre-eminently a matter for the discretion of the trial court. Thus an appeal court cannot lightly interfere unless the discretion was not exercised judicially. See Lebitsa & anor vs. R 1980 (2) LL R 404.

In the light of the desirability to send out a message to rapists as long ago as 1988 as illustrated by JANKI and KHAUTA above that the game is not worth the candle it would seem in halving the sentence of 6 years' imprisonment imposed by the court below the learned magistrate has failed to heed the Superior Courts' clarion call to seriously come to the aid of rape victims.

In CRI/REV/132/97 Rex vs. Teboho Melamu this court expressed its gratification that even in South Africa a clarion call has been sounded to illustrate that those who indulge in rape are not to expect any treatment with kid-gloves from

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Courts. This court said :

".....it is gratifying to note that last week the Chief Justice of South Africa, the Honourable Ismael Mahomed, till recently the President of our Court of Appeal, imposed a sentence that gave a clear warning to rapists that they would be warehoused for a long time if they persist in indulging their unwholesome lust against the will of women and girls in that country." (the sentence imposed was 15 years' imprisonment as against 4 or 7 years which till recently were the norm).

The message I am trying to transmit to Subordinate Courts should come into clearer perspective in the light of the following considerations.

In Phatsoane (unreported) at page 9 above is cited the case REV/127/88 Rex vs Khotso Nalana decided by Cullinan C.J. as he then was as far back as 30th March, 1988. In contrast to sentences which till the recent past had been imposed by Lesotho Courts for rape cases the learned Chief Justice on review in that case set aside an 18 months' imprisonment imposed by a Magistrate Class 1 at Butha Buthe

for attempted rape and imposed 5 years' imprisonment in place thereof. Thus if as far back as in 1988 for attempted rape the culprit received no less than 5 years' imprisonment it would not sound right that for rape actually committed and accomplished the culprit should get away with an effective term of only 3 years' imprisonment which is the balance of the 6 years whose half was suspended.

Taking every factor into consideration I felt that the Justice of this case required that conviction be confirmed but the suspension of the sentence be set aside and in its place a sentence of six years' imprisonment be imposed.

It is so ordered.

JUDGE
10th August, 2001

FOR APPELLANT : NO APPEARANCE
FOR CROWN: MISS MOFILIKOANE