

IN THE HIGH COURT OF LESOTHO

In the matter between:

MOTLALEPULA CHELE

APPLICANT

VS

REX

RESPONDENT

JUDGEMENT

Delivered by the Honourable Mrs Justice K.J. GUNI
On the 13th March, 2002

The appellant in this matter was charged and convicted of the crime of rape by the subordinate court-sitting in MASERU and sentenced to five years imprisonment. He has appealed against conviction on the following grounds:-

1. The Learned Magistrate erred in ruling that there was a case to answer by the accused when the crown had not established a prima facie case in respect of every element of the crime with which appellant charged.

2. The Learned Magistrate erred in concluding that the complainant did not raise alarm because she was ashamed.
3. The Learned Magistrate erred in overlooking or neglecting the evidence that there were several opportunities in which the complainant could have raised the alarm but failed to do so.
4. The Learned Magistrate erred in overlooking or neglecting the fact that the complainant's evidence that she was strangled and her arm twisted was not corroborated by either any other witness who was informed of the act or the medical report.
5. The Learned Magistrate erred in disregarding the evidence that P.W.2 was not allowed access into the house when she came back from her home and that she neither met the complainant on the only way to her home or hear any kind of struggle in the house.
6. The Learned Magistrate erred in admitting in toto and caution the uncorroborated evidence of the complainant as to the absence of consent and penetration.

The history of facts of this case are as follows. On the night of 24th January 2001 at about 7 p.m. the appellant came into the complainant's house. He entered the house through the kitchen door. He found the little boy of 13 years of age therein. He asked him about the whereabouts of the complainant. The little boy indicated to him the complainant is in the sitting room. She was at that time reading her bible. The appellant enquired from

her what part she is reading in her bible. Perhaps she indicated. The appellant remarked to the effect that the believers such as that complainant cheat or are cheated by the bible or some such nonsense. He quoted a verse from the bible where it is said “ask and you will be given.” Was he preparing the ground for his mission? The answer will emerge as the facts unfold. The complainant nevertheless endeavoured to explain to him what the quoted extract from the bible meant. Because she had pots on the cooker still cooking their supper, she went into the kitchen. She invited the appellant to come along. She might have genuinely felt the urge to engage the appellant in this bible discussion. The appellant did not take up the invitation immediately. The complainant peeped through from the kitchen and saw the appellant standing. He appeared shocked or bewildered to the complainant. When she noticed his reluctance to come into the kitchen and the fact that it was getting late at night, the complainant asked the appellant to leave and suggested that they could continue the discussion the next day. He refused to leave. He remained therein until the

super was served. That 13 years old boy took his plate of food after he was served, to his bed and ate while sitting on his bedding. When he finished his super he got into his blankets and therein he remained, ready to sleep.

The appellant took his time to eat. According to the evidence of both PW1 AND 2, the appellant eat so slowly that the two got fed up of waiting for him to finish. They were lying inside their blankets on their beds. The complainant told the appellant to go because she was really tired and needed to retire. The appellant, standing by the door, slammed shut it in front of him while he remained inside. Although he was hidden behind the fridge his head peered above the fridge. The child informed the complainant who was almost asleep that the appellant is still inside the house. The complainant woke up and got off the bed. She proceeded towards the appellant. Seeing her come the appellant actually went out and shut the door behind him this time. The complainant still proceeded to the door to ascertain that it was shut and locked as it banged.

Having satisfied herself that the door was well secured she returned to her bed after putting off the lights. They slept.

She was later that same night awakened. She heard some movements coming from the living room. When she peered from her bedroom she saw the appellant in the passage. She told him to get out. She approached him. She might have been angry because she told the court that she pushed him. She asked him what had he come for. He answered that he was visiting her, as he has always wanted her. He grabbed hold of her and tried to push her towards her other bedroom. She resisted. She pushed him and he fell. She then ran away and hid herself in the bathroom. The appellant got up and went to her bedroom which she used that night. He came out and switched off the light in the passage. He entered the bathroom still searching for her. He found her and grabbed hold of her. The struggle ensued. She loosened his grip and escaped. She ran out of her house. The appellant gave a chase. She fell. He then caught up with her and grabbed hold of her by her neck-

strangling or choking her. He pulled her back into the house. Once inside the house he pushed her onto the bed in the other bedroom. He was scolding and/or insulting her. He called her "satan". He complained that she pushed and fell him and not give him a vagina. They struggled. The complainant was trying to loosen his grip. He was as they struggled also removing her pants, which she was struggling to keep on her. He pinned her down. The complainant was getting tired. The appellant must have been gaining the upper hand. The appellant succeeded to remove her pants.

Realising that she was tired and the appellant was gaining the upper hand in the struggle the complainant suggested that he should go home to fetch condoms. He did not. He had sexual intercourse with her without her consent and without the condom. The complainant had an added worry of being infected with HIV Aids virus. While being so violated she thought the suggestion to go and fetch condoms could appeal to him and that he might leave for his home.

While raping her, the complainant noticed that the appellant was naked. She did not notice him remove his pair of trousers and underpants. This might just give an indication of how fears was the struggle leading to the actual act of rape. The struggle continued and eventually the complainant succeeded to push the appellant off. He fell down. The complainant got up and ran out again. This time she hit by the toilet outside her house. After some time she saw the appellant come out of her house fully dressed up. He walked passed her by the toilet. She heard him claim to himself that he will again have sex with her. He did not see the complainant standing by the toilet as he walked passed her. The complainant ran back into her house. She discovered that that child was no longer there. Apparently she does not know when and how the child left her house. She then ran to that child's home to find it. When she knocked at the door of the child's home there was no response. She returned to her house where she closed both the

sitting room and kitchen doors which she found still opened. She slept.

At about 04.30 hours she got up and went to the child's home to check again. She met the child's brother who reported to her about the presence there of the child. The brother also pointed out to her that the child has given a report to him about what had happened last night. The complainant then went to make a report about the rape to one of her neighbours who advised her to go and report the matter to the police. The complainant decided to go to the headman first before going to the police. This is the normal procedure.

At the headman's place the complainant related the events of the night to the headman in the presence of the appellant who has been there together with her. The headman indicated to the complainant that he (the headman) is being brought into the love affair matter and apparently not prepared to assist the complainant. The quarrel between the headman and the complainant arose as a result. The altercation between them

attracted attention of the neighbours of the headman. One of those neighbours came to enquire about the quarrel. The complainant report once again what had happened between her and the appellant. The headman's neighbour asked the appellant if what is being related is true. The appellant admitted that he raped the complainant. This man asked the appellant why he did that. In an apparent attempt to justify his action the appellant claimed that the complainant is his lover. Whereupon this man asked him further if at all it is necessary to rape one's lover. The appellant seemingly having run out of answers, told that man that he should not ask him that. This man pointed out to the appellant that as long as he is there at the chief place he will be asked such questions. It is common practice in village courts for all the villagers present thereat to take part in the investigation and determination of the matter before that court. It would appear from the exchange of questions and answers at that village court the appellant had been nursing the sexual desires for the complainant over a long period unknown to this complainant. She recalled that he

proposed love some time back but she was not interested and she even went further to tell the appellant's wife about that proposal. The complainant was not aware that the appellant is secretly in love with her. He seemed to have harboured in his heart the love or hate to get her one day. He claimed to have been in love with her since the time she lived in two rooms in the heighbourhood. The complainant extended those two rooms into a big house in which she was raped more than seven years ago. This is how long the appellant claims he has been in love with the complainant.

The complainant, who did not hide her dissatisfaction regarding the manner in which the headman handled her case asked him to refer her to the senior chief. Pretending to relent from his position of none interference in "private love affair" the headman told her that he will bring the referal letter to her that evening. He did not. The complainant proceeded to the senior chief-PW4 without the referral letter from the headman.

After receiving the complaint, the chief asked the complainant to return the next day. The following day the appellant who must have been called by the chief was present when the complainant related the case of rape against him before the chief. As previously before the headman the appellant persisted in his admission of having raped the complainant and justifying it on the grounds that they (he and the complainant) are lovers. It is obvious the chief - PW4 did not buy the appellant's story. She referred the matter to the police who arrested and charged the appellant with the crime of rape. He was convicted of rape. He has appealed against this conviction.

The effect of the grounds of appeal is a negation of lack of consent. The complainant is accused of failing to raise the alarm. Is it obligatory to raise an alarm? Which Law compels the victim to raise alarm? She was raped in her own house in the middle of the night. She was choked or strangled when she called that little boy who sleeps at her house. She was asleep

when this intruder awakened her. Everyone must have similarly been asleep in their homes. Whom could she call for help at that ungodly hour of the night? There is no law which compels the victim of rape to raise alarm. Raising of alarm mere indicates or proves lack of consent. Lack of consent to sexual intercourse can be sufficiently proved by some other ways. For example the victim's evidence that she said "no" to sex.

Another reason is that she had succeeded previously to push and fell the appellant. That must have given her confidence that she can defend herself. Although the appellant did not appear drunk. He smelt alcohol. That might have confirmed the complainant's believe that she can manage to get rid of that drunk from her home. She hid herself in the bathroom with the belief that failing to find her, the appellant will leave for his own home. The learned magistrate properly accepted as reasonable the reasons the complainant gave for getting no help from inside or outside her home that night.

The appellant, being a man was much stronger than nearly half a century old woman. She could not sustain a protracted struggle. The alcohol may have been taken by the appellant only to help him summon some dutch courage in order to attack the complainant. Evidence shows that he did not appear drunk but only smelt alcohol in his breath at close quarters as they struggled with the complainant.

There is evidence that sexual intercourse did in fact occur between the complainant and the appellant. True there is no medical evidence to support that the appellant and complainant had sex. It could have been helpful but medical evidence is not the only competent evidence on which the court could rely for its finding that rape has been committed. Where there is other evidence such as evidence of eye witnesses, the accused being such a witness by his admission, the court may still convict in the absence of medical evidence: There is evidence of the complainant. There is evidence of the appellant that sexual intercourse did take place between the complainant and the

appellant. (MOKHELE MOTSEPE and KELEBONE LETHOBA V Rex CRI/A/434/96 (unreported) at page 6 of cyclostyled record by LEHOHLA J.)

The complainant is further accused of failing to report the crime at the first opportunity. The complainant woke up at 4.30 hours, the morning of the night she was raped. She went to report the rape to her neighbour. This is an old woman who since 1983 has never had any sex with a man. She is devout Christian. She is embarrassed and ashamed. The violation by the rapist is very dehumanising. That is why of all the crimes against the person, rape is the most unreported. The complainant must have summoned all the power within her system to get courage to go and report to her neighbour - PW3. Most of the time rape victims are inhibited by the feeling of shame to publicise the fact of rape. The learned magistrate properly found that the report was made at the first opportunity PW3 was the first adult the complainant met that morning. She specifically went to her to make that rape report.

The cultural influence makes some people shy or reluctant to use certain words. The vulgarity of the language used by the appellant was intended to insult and hurt the complainant. Calling her “satan” and asking her stupid questions like, why does she fell him down and not give him a vagina; that he has always wanted her and that she will give him the vagina merely shows the extend of his contempt for her. He has no respect for himself or anyone. The complainant and the police are accused of being unsure when they used words indicating the likely charge as attempted rape or indecent assault. In sesotho a word used is “Peto” for rape. “Tlhekefetso” for attempted rape. The use of those words does not prejudice the appellant because he has at all time admitted raping the complainant. He understood exactly what he meant when he admitted raping her because she was refusing to have sex with him. The choice of words preferred by the appellant throughout, e.g. at the headman’s place, at the chiefs place and before the police clearly show the court that he understood perfectly the charge he was facing. It

may have been the attitude of the police initially to charge the appellant with an attempted rape or indecent assault. The investigations and the appellant's discussions disclosed an offence of rape. He was charged with rape. He admitted raping the complainant. There is no ambiguity.

CONCLUSION:

This is a proper case for a counter appeal against sentence. Law office is always caught napping. The perusal of the record clearly showed that the appellant was correctly convicted. But comparing the sentence with the present trend of sentencing in similar cases, this one was out of step. There are aggravating features:

1. Appellant was uninvited guest. But nevertheless he was entertained - served with the super. He abused complainant's hospitality.
2. He ignored appeals from the complainant to leave the house because it was late and they (complainant & the child were already under the blanket & ready to retire for the night.

3. He pretended to be gone while in fact he was still in the house. He slammed the door in front of him & hid behind the fridge. This is an indication of premeditation and deceit.
4. He was already by that action - torturing his victim He exhausted her with anxiety. He attacked the complainant under the cover of darkness. He took advantage of dealing with some old woman who was half-asleep and tired.
5. Most of all, he returned to the complainant's house in the middle of the night when everyone must be fast asleep.

Order:-

The appellant was properly convicted
The conviction and sentence are confirmed.
The appeal must fail and it is dismissed.


K.J. GUNI
JUDGE

For applicant - Mr. Thulo
For Respondent - Ms. Maqutu