IN THE HIGH COURT OF LESOTHO

In the matter between

Rex

Vs

THETHANOBANE QHOCHAMBANE

REVIEW ORDER
26TH JUNE, 02

Review case N0.70/02 — *CR. N0. 100/02*
Review order N0. 3/02 — *In Qacha's Nek*

The accused in this case is a very young man of twenty-one years of age. The complainants are two little girls. The eldest is fifteeen (15) years old and the youngest is thirteen years old. These two girls were travelling together on foot in the company of a little boy of four (4) years of age. They are residents of HA MOSHEBI in the SEHLABATHEBE AREA.

On the 4th May 2002 round about 3.00 o'clock in the afternoon, these three children were travelling on foot from HA MOSHEBI going to HA THEMATHE. As they approached towards HA MUOANA village they saw a boy seated at the caves near which the footpath they were travelling on passes.

Just as they passed this boy, he hit the elder girl with the stick which he had in his possession. The three children scattered-running away for their dear lives. The girls-being older than that little boy of four (4) years of age ran faster and further than him. Realising that they were leaving the little boy behind, they feared for his safety. They then reduced their speed so that the little boy caught up with them. It was not only that little boy who caught up with them. Their assailant was also able to catch up with them. As he caught up with them, they recognised and identified him as the villager from HA MOSIUOA.

He threw stones at them and ordered them to go into the cave. He ordered them to leave the little boy outside the cave still threatening to harm them if they failed to comply. They tried to resist. He threatened to hit them with his stick. They were far from any village. There would be no point to raise an alarm. Considering their ages, (13 years and 15 years) they could not in law be regarded as consenting to the attack and its consequences. There is irrebuttable presumption that a girl under the age of sixteen (16) years is incapable of consenting to sexual intercourse. M 1949 (4) SA 831 A 834. 742; RVZ 1960 (1) SA 739 A at RV SCOUT ALLY 1907 TS 336 at 338,339. The mental defect of the girl so young as these two complainants totally – vitiates consent. Their mere tender age does in my opinion raise an irrebuttable presumption that they are so devoid of any reason that they cannot exercise any judgement at all on the question of whether or not they consent to sexual intercourse. RV RYPERD BOESMAN 1942 (1) PH H63 (SWA). Furthermore, their failure to raise an alarm, bearing in mind that they were far away

from any village, cannot be regarded as indicative of their consent.

Once in the cave the two little girls were ordered by the accused to remove their panties. They complied. Every order this accused gave to the two girls was accompanied with a threat to assault them with his stick which he held in his hand as he commanded them. The two girls were at all times acting under the fear of their personal safety as a threat of assault hang over them. This fear too denied them freedom to act freely and voluntarily.

The accused commenced to have sexual intercourse with the youngest of the two complainants. He continued the process on the fifteen-year-old whom he actually savaged as shown on the medical report – EXHIBIT "A" which was produced before the court by consent of all the parties. The evidence indicates that the accused was having this sexual intercourse with the two girls one after the other and in the presence of each other. When he had satisfied his lust he ordered them to go on their way. He drove them like his cattle from the cave back to the footpath. He then took a different route and disappeared behind the mountain. As they walked the elder girl felt some heat and wetness between her legs and in her vagina. She then noticed that she was bleeding and that her clothing was soaked in blood at that region. As the accused disappeared behind the mountain, the children ran back to their home. As they ran, they met a man on horseback. They reported to him what has happened to them. This was to satisfy the so called making the report at the first opportunity requirement. This man took these children to SEHLABATHEBE. There he made the report. The two girls were then taken to the chief's place. At the

chief's place one woman was asked to examine the two girls. Her examination revealed that the two girls had been raped. The two girls were advised not to wash themselves although they were instructed to continue their journey to their destination. They went. On the 5th May 2002 which was the very next day they were sent to the POLICE POST where they were given the forms to go to the Hospital. They went to MACHABENG HOSPITAL. At the hospital the Dr. examined both girls. The two forms from the POLICE POST were filled in and made into medical report after the examination of the two girls.

The medical reports in respect of both girls were produced as EXHIBITS "A" and B" by consent before the trial court. Both exhibit "A" and "B" show without a doubt that a forced penile entry was made into both girls' vaginas. The accused was arrested and charged with the crime of rape. He pleaded guilty to the charge and was correctly convicted thereupon. The accused who is a young man of twenty-one (21) years of age was sentence to 7 seven years imprisonment without an option of a fine.

This is one of those cases where the presiding learned magistrate has considered each and every factor personal to the accused when assessing an appropriate sentences. The learned magistrate also properly considered all those factors which pertain to the commission of this offence. There are other factors pertaining to this accused, which the learned magistrate place an excessive and undue weight. The plea of guilty to the charge may have been induced by the fact that the accused could not see any other way out. It may have been induced by his sense of contrition. The plea of

guilty should not be regarded as a sign of contrition where the accused does not expressly say that he is contrite.

The accused must have surely realised the abhorence of his actions against those little girls when in mitigation of his sentence, he begged to be pardoned. But like a typical hypocrite instead of accepting his responsibilities, he took a dive and turn when he reneged that he intended to do what he did. His claim that he was pushed by the evil spirit is partially correct because as a man he should have resisted that influence of the evil spirit. Succumbing to the influence of evil spirit and committing the acts such as those committed by the accused, made him evil. He lost completely his human nature. Savaging two little girls, one after the other, in the presence of each other, he was better than no dog.

There is no evidence that other than physical examination to determine whether or not the complainants were raped, there were any tests carried to determine whether or not in this era of HIV and Aids, those girls were infected by the said virus.

Without any consideration for their tender age and possible innocence this accused may have straight away sentenced them to death if he has infected them. He definitely had no qualms to impose the death penalty on the two girls. What was the wrong that they have committed against him? None. He has committed rape. This is one of those crimes which in this kingdom the price to be paid by the wrongdoer of such an act,

is the surrender of his life. SECTION 297 (1) (B) CRIMINAL

PROCEDURE AND EVIDENCE ACT 1981.

This accused has been very lucky. He got away from the death penalty – not for raping one little helpless and defenceless girl but for raping two of them. Although there is no evidence that he waylaid them he seemed to have had no scruples to pounce on them as they passed. He does not claim that it is the convenience which placed him in their path. At 3.00 o'clock in the afternoon those children may have not expected any harm to their lives. The daylight provided some sense of security. This fact the accused was aware of. That is why he drove them into the cave where he could commit his henious acts under the cover of the cave . The accused was therefore not stupid. His actions were well thought out and calculated.

This case was place before me for review. It is one of four cases of rape that were brought to me for review in one day. They are all from the subordinate court at QACHA'SNEK. This factor alone causes concern. The frequency and violent manner with which these offences are committed, must be source of worry to everyone concerned. The accused in those other cases were sentenced to ten (10) years imprisonment without an option of a fine. There are no compelling reasons why this accused should be treated differently. These other accused raped the women in their age group. Each of the accused in those other cases raped only one girl. This accused went way out of his league. He took advantage of the complainants' tender age. The degree of seriousness in this case is hier than in those others. He must be sentenced to ten years imprisonment for each

count. For those reasons his sentence is enhance to twenty years imprisonment.

K.J. MAFOSO-GUNI

MAGISTRATE QACHA'S NEK

O/C POLICE QACHA'S NEK

O/C PRISON QACHA'S NEK

O/C CENTRAL PRISONS

CID POLICE HEADQUARTERS

DIRECTOR OF PRISONS

DIRECTOR OF PUBLIC PROSECUTIONS

ALL MAGISTRATES

ALL PUBLICPROSECUTORS