

IN THE HIGH COURT OF LESOTHO

In the matter between:-

LESOLE MOLAPO

APPELLANT

and

REX

RESPONDENT

JUDGMENT

Delivered by the Honourable Mrs Acting Justice Hlajoane
on 3rd Day of May, 2002

The Appellant had appeared before the first class Magistrate Leribe, charged with the crime of rape. He pleaded not guilty to the charge and the prosecution led only the evidence of the complainant and thereafter closed its case. The defence called only one witness and the accused himself gave no evidence. The Court convicted him of indecent assault and sentenced him to 3 years imprisonment. The appeal is against both conviction and sentence.

The evidence led by the Crown was briefly that the accused and the complainant knew each other though not lovers. On the 1st July, 1999 around six to seven in the evening the complainant met the accused on the way. She in fact was going to collect her cassette from the accused, and on being told by the accused that the cassette was not there she went back home.

It was the evidence of the complainant that as she returned, the accused followed him. In an effort of discouraging the accused from taking her to have gone to him for something else, the complainant told the accused that she had gone to him only for her cassette and nothing more. It was then that the accused manhandled her by attempting to fall her to ground. Complainant raised an alarm but the accused blocked her mouth and fell her down. He then took off her panties and started having sexual intercourse with her. After the accused had satisfied his lust he then said, “you and me are lovers from now onwards.”

The complainant then showed she went home and reported the incident and the police were also informed. She was later examined by doctor. It is worth mentioning that though the medical report is in the Court’s file it was never handed in as part of the evidence. It has only been in her opening address that Crown showed that the accused would not deny that the complainant was

examined by the doctor. In his cross examination the accused made it clear that he was raising a defence of *alibi*. He showed that on the day in question he had been in the company of one Jacob and Sabata for the whole day at a shebeen and that they only parted very late. There is no other evidence to be considered because accused's witness showed they parted at about 10 - 11 p.m. when complainant had shown it was around 6 - 7 p.m. when she was raped. Crown thus failed to counteract the defence of *alibi*. **Tšeliso Lempe vs Rex C of A (CRI) No. 7 of 1996.**

Accused who was unrepresented did not himself give evidence but only called one witness D.W.1. The witness showed that they had been with the accused at the bar drinking beer for the whole of that day. That they only parted at about 10:00 to 11:00 p.m.. When asked if there was never a moment that the accused might have been away from their company, the witness showed it was not possible because accused was the one who was buying them beer, and that accused never disappeared from them for anything more than 20 minutes.

As his grounds of appeal, the appellant raised the following points:

- (i) That the Crown has failed to establish and prove the essential elements of crime of rape or the

related charges for which the accused might competently be found guilty.

- (ii) Evidence of the complainant is not corroborated.
- (iii) Crown's evidence riddled with conflicts .
- (iv) Court misdirected itself in failing to apply **Section 175(3) of the Criminal and Evidence Act of 1981.**
- (v) The Crown failed to counteract the accused's defence of *alibi*
- (vi) Magistrate erred and/or misdirected himself in sentencing the accused without showing the considerations which influenced his decision.
- (vii) Magistrate erred and/or misdirected himself in not giving reasons for his judgment.

In all fairness the Respondent is not supporting the conviction. The accused who as already stated was not represented disclosed his defence at the very initial stage, the defence of *alibi*. This was when he cross examined the complainant.

The defence of *alibi* is essentially the straight-forward denial of the prosecution case on the issue of identity. [**Hoffman & Zeffert 3rd Edition - South African Law of Evidence at P. 484**]. But, the accused person never bears the burden of proving his *alibi* it being sufficient if the *alibi* might reasonably be true. With this defence, the evidence led by the accused person is not considered in isolation, but considered within the totality of the evidence in the case as well as the Court's impression of the witnesses; **R v Hlongwana 1959 (3) S.A. 337**. It is a defence which I take to be very slippery in the sense that once rejected as false, the accused will be in the same position as if he has given no evidence on the merits, **S v Chabalala 1986 (4) S.A. 734**

It is without doubt that the police if ever a report was given to them never pursued any line of enquiry to contradict the accused's statement as to his whereabouts on that day. No evidence was given by the police, though the introductory statement by the Crown stated that it was not disputed that the police were informed about the rape allegations and that the complainant was examined by the doctor. The medical report was never handed in in evidence even if it was an admitted piece of evidence. Maybe it is because is not saying anything to support the prosecution's case. The evidence of the complainant has not been corroborated, the offence being a sexual offence. As was pointed out in **S v**

Mtswein 1985 (1) S.A. 290, caution must be exercised in attaching too much weight to the fact of an accused's evidence being untruthful.

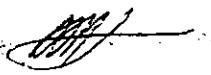
The police whom it is alleged the report was given, made no efforts whatsoever to check appellant's movements for that day or try to seek or present contradictory evidence that could question the acceptability, veracity or reliability of appellant's movements for that day.

Not only that essential elements of the crime of rape have also not been proved, and accused could not have been found guilty to a lesser offence because not even an assault was proven. The defence of *alibi* negates every possibility of accused having committed anything at that time.

The Magistrate has failed to give reasons for his judgement and sentence which reason ought to have been given at the same time that sentence was given **Mojela v Rex 1977 LLR 321**.

In all fairness therefore the Magistrate ought to have invoked the provision of **Section 175 (3) of Criminal Procedure and Evidence Act of 1981** by acquitting the accused after the close of the Crown's case. For the reasons given

the appeal is upheld, the conviction and sentence are set aside and replaced by
acquittal of the accused


A.M. HLAJOANE
ACTING JUDGE

For Appellant: Mr Mofoka

For Respondent: Ms Lesupi