C of A (CRI) No. 7 of 2004

IN THE COURT OF APPEAL OF LESOTHO

In the matter between

THULOANE MOHOASE **APPELLANT**

and

REX **RESPONDENT**

Held at Maseru on 8 October 2004

CORAM: STEYN, P
RAMODIBEDI, JA
SMALBERGER, JA

Summary

Conviction of rape in Magistrate's Court – committal for sentence to the High Court in terms of Section 293 of the Criminal Procedure and Evidence Act 7 of 1981 – presiding judge ordering a retrial – conduct irregular – proceedings set aside and matter remitted for sentence before another judge – proper interpretation of sections 164, 293 and 294 of the Act raised but not decided – need for definitive interpretation stressed.

Smalberger, JA

[1] The appellant, in the circumstances set out more fully below, was convicted in the High Court by Guni J and an assessor of rape (count 1) and attempted murder (count 2). He was sentenced to 40 years imprisonment on count 1 and 20 years imprisonment on count 2. The learned judge ordered the sentences to run

concurrently with effect from 18 November 2001. The matter before us arises from an appeal noted by the appellant against his convictions and sentence.

[2] The appellant was originally tried in the Magistrate's Court, Mohale's Hoek, on a count of rape only. The charge against him arose out of events which occurred on 18 November 2001 when the complainant was severely assaulted and allegedly raped. The main issue at the trial was the identity of the perpetrator of the alleged offence. At the conclusion of the trial the appellant was convicted of rape. Thereupon the learned magistrate invoked the provisions of section 293 (1) of the Criminal Procedure and Evidence Act 7 of 1981 ("the Act") and committed the appellant in custody to the High Court for sentence. This occurred on 14 February 2003.

[3] What happened thereafter is not apparent from the appeal record before us, but the Crown and the appellant are in agreement that what occurred is the following. The matter came before Guni J in the High Court for sentence on 18 February 2004 – more than a year after the date of committal for sentence. (There is no explanation for what *prima facie* would appear to be an unconscionable delay in this regard. There may well be a valid reason or excuse for the delay. In any event it would not seem inappropriate to refer the responsible authorities to the old adage that justice delayed is justice denied.) Ms Lesupi appeared for the Crown and Mr Mokaloba for the appellant. The court heard argument in relation to sentence after which the matter was adjourned for the passing of sentence to 9 March 2004.

[4] It is common cause that at the resumed hearing, and apparently without counsel being given a further opportunity of being heard, Guni J ordered that the appellant be retried by the High Court in Maseru and set the trial date for 30 March 2004. The notes in the court file do not reveal on what grounds or with reference to what section or sections of the Act such order was made. When the matter eventually proceeded the Crown was given leave to introduce a further count, that of attempted murder. It became count 2 and the rape charge count 1. The charges were put afresh to the appellant, he pleaded not guilty to both and the trial proceeded to its conclusion. Judgment was given on 4 June 2004 and the appellant was held to be guilty on both counts. The appellant was later sentenced to the terms of imprisonment set out above.

[5] At the hearing before us we raised the question whether Guni J had acted within her powers in ordering and proceeding with a retrial of the appellant or whether her conduct amounted to an irregular exercise of her powers. I am of the view, for reasons that follow, that the latter was the case. Both Mr Mokuku for the Crown, and Mr Mokaloba for the appellant, appear to accept that Guni J's power to order a retrial, if it exists, has to be found within the four corners of the Act.

[6] The relevant provisions of the Act dealing with committals to the High Court for sentence (disregarding for the moment section 164) are sections 293 and 294. They provide as follows:

"293 (1) Where on the trial by a subordinate court a person whose apparent age exceeds 18 years is convicted of

an offence, the court may, if it is of opinion that greater punishment ought to be inflicted for the offence than it has power to inflict, for reasons to be recorded in writing on the record of the case, instead of dealing with him in any other manner, commit him in custody to the High Court for sentence.

(2) For the purpose of this section, the aggregate of consecutive sentences imposed upon any person, in case of convicting for several offences at one trial, shall be deemed to be a single sentence.

294(1) If a subordinate court commits a person for sentence under section 79, the court shall forthwith send a copy of the record of the case to the High Court.

(2) A person committed to the High Court for sentence shall be brought before the High Court at the next convenient session thereof or earlier if so directed by the High Court.

(3) When a person is brought before the High Court pursuant to sub-section (2), the High Court –

(a) shall enquire into the circumstances of the case; and

(b) if satisfied from the record of that person's guilt shall thereafter proceed as if that person had pleaded guilty before the High Court in respect of the offence for which he has been so committed; or

(c) otherwise may decline to proceed and make such orders and give such directives as it may consider appropriate for the purpose of dealing with the question of that person's guilt.

(4) If the High Court passes any sentence under this section upon any person, that person shall be deemed to have been tried and convicted for the offence concerned before the High Court.

(5) Section 293 and this section are in addition to, and not in derogation from any provisions of this or any other laws relating to criminal appeals and reviews."

[7] As previously pointed out, Guni J did not indicate on what provisions of the Act she relied to order a retrial. She presumably relied upon the wide discretionary provisions of section 294 (3) (c) of the Act. In my view she was not entitled to do so, even accepting for the moment that section 294 has application to the present situation. It was a prerequisite to hearing the parties in relation to sentence (which was the course on which she embarked) that she should have been satisfied, in terms of section 294 (3) (b), as to the appellant's guilt. The fact that she called upon the parties to deal with the question of sentence shows that she was so satisfied. And it appears from her note on the record that she adjourned the matter to 9 March 2004 for sentence.

[8] The record of the proceedings in the Magistrate's Court is before us. The record, *prima facie*, clearly establishes the appellant's guilt. I say *prima facie* as the merits were not debated before us

and it remains open to the appellant to persuade us to the contrary at a later stage. If Guni J was not satisfied as to the appellant's guilt, it is difficult to comprehend (1) why she followed the course she initially did and (2) how she ultimately came to convict the appellant, as the rehearing produced no evidence that had not previously been given and canvassed, so that any doubts she had about his guilt could not have been assuaged sufficiently to justify his later conviction. In the circumstances she was obliged to follow the course prescribed by section 294 (3) (b) and was not entitled to invoke the provisions of section 294 (3) (c). To the extent that she acted in terms of section 294 (3) (c) she acted irregularly.

[9] Why then did Guni J order a retrial? We do not know what motivated her as she gave no reasons for her decision. According to Mr Mokaloba, in the course of his address on sentence he raised the question of the magistrate having acted irregularly because he had not made use of an official interpreter at the trial. If that was the reason for Guni J ordering a retrial it amounted to an alleged irregularity being compounded by a further irregularity as her conduct could not be justified on that ground. If the reason was to enable the Crown to bring a further charge against the appellant, this was equally impermissible. Any subsequent rehearing would in any event have had to be confined to the question of the appellant's guilt in respect of the rape charge, which formed the basis of his committal for sentence. There would have been no legal justification for the introduction of a new charge (attempted murder) against the appellant. One must however, be careful to guard against unwarranted speculation. I have raised the matters above (as reasonable possibilities) simply because one does not know why Guni J ordered a rehearing.

[10] In my view Guni J acted beyond her powers in directing a retrial. Consequently all the proceedings that followed upon her order in that regard were irregular and fall to be set aside. The matter must revert to its original committal stage – which required no more than

that sentence proceedings should commence and be completed before the High Court. The matter will have to be remitted to the High Court for that purpose. In view of what occurred it would be inappropriate for the matter to proceed before Guni J. The interests of justice require that the question of sentence be dealt with afresh by another judge.

[11] It follows that the merits of the appellant's conviction do not fall to be considered at this stage. Any appeal (or review) in respect of the conviction in the Magistrate's Court is premature until sentence has been passed in the High Court following a remittal. The appellant's right to challenge his conviction has not been compromised in any way – it is simply in abeyance until all the proper procedures have been followed.

[12] The offence to which this matter relates was allegedly committed on 18 November 2001. The appellant's trial in the magistrate's court commenced on 26 June 2002. His conviction and committal for sentence to the High Court was on 14 February 2003. In view of the delays that have occurred the further proceedings in this matter should, in the interests of justice, be dealt with in the High Court as a matter of urgency and, if possible, given preference on the roll.

[13] It would be improper for us to express any firm view on what an appropriate sentence would be. To do so would be to usurp the function of the judge entrusted with the duty of sentencing the appellant. However, we feel obliged to point out that the sentence

of 40 years which Guni J sought to impose on the rape charge is, in our *prima facie* view, excessive. We say no more.

[14] If it is correct, as we were informed, that Guni J directed a rehearing without affording counsel for the Crown and the appellant an opportunity to be heard, she acted precipitately and irregularly in that respect as well. The parties were clearly entitled to be heard in relation to a matter materially affecting them. Counsel for the appellant also complained from the bar that Guni J had failed to treat counsel during the hearing with the necessary courtesy and respect. We are not in a position to determine whether or not that was so. Every judge is entitled to conduct and control the proceedings before him or her, within certain established procedural parameters, as he or she sees fit. But it goes without saying that judges, while entitled to exercise firm control, must always act with dignity and restraint in keeping with their high office. And it is equally true that patience and courtesy are hallmarks of a good judge.

[15] The appellant was committed for sentence in terms of section 293. I have proceeded, for present purposes, on the assumption that section 294 (3) is applicable to that situation. The marginal note to section 294 refers to: "Procedure on committal for sentence under section 293". However, section 12 (2) of the Interpretation Act 19 of 1977 provides that:

> "Marginal notes and headings in the body of an Act form no part of the Act but shall be deemed to have been inserted for convenience of reference only"

(See too **DURBAN CORPORATION v ESTATE WHITAKER** 1919 AD 195 at 201 where reference was made to "the danger of allowing marginal notes to influence the construction of a statute.") The marginal note may therefore be disregarded when interpreting

section 294.

[16] It is arguable that on a proper reading of section 294 its operation is confined to cases of committal by a subordinate court for sentence under section 79 of the Act and that none of its provisions apply to section 293. In this regard it could be argued, *inter alia*, that section 294 (1) specifically refers to a section 79 committal; it therefore has a limited initial point of reference; what follows in subsections (2) and (3) must, both logically and contextually, be limited to section 79 committals; there is nothing to suggest that the subsections are of wider, more general application; and their provisions do not, either in express terms or by necessary implication, encompass or extend to section 293.

[17] The above argument is strengthened by the fact that sections 79 and 293 of the Act deal with significantly different situations. Section 79 deals with that which pertains at the end of a preparatory examination when an accused (in terms of section 74 (1)) is asked to respond to the charge against him. If he pleads guilty then, after certain prescribed formalities have been complied with, the presiding magistrate is obliged ("shall") commit him for sentence before the High Court (section 79 (3)). The purpose of a preparatory examination is to establish whether a *prima facie* case exists for committal of an accused to trial. Its function is not to test or evaluate evidence or to ultimately determine guilt. A committal in terms of section 79 follows on a plea of guilty to the charge as formulated in circumstances where there may be room for misunderstanding or error. Accordingly it is understandable that the Legislature should provide, in terms of section 294, a

special regime for section 79 committals to ensure as far as possible that there is no miscarriage of justice.

[18] By contrast a section 293 committal takes place after a trial and conviction. A trial allows for the proper testing and evaluation of evidence; it has built-in safeguards designed to avoid or lessen the danger of a wrong conviction. It is therefore arguable that the Legislature did not consider it necessary for any consideration to be given to the correctness of the conviction and that it intended that a section 293 committal should proceed from the premise that the conviction is in order and falls to be dealt with on that basis. All that is then required is that the judge before whom the matter comes in the normal course should have regard to the record and conviction and thereafter deal with it in the same manner as any other matter where he or she is required to pass sentence. The presiding judge would not be called upon to determine the correctness of the conviction. Once sentence has been passed the accused, if so minded, would be entitled to exercise such right of appeal or review as he may have. If that interpretation of section 293 were to be correct Guni J would in any event have been confined to sentencing the appellant and would not have had the power to order a retrial.

[19] The problem with the above interpretation may lie in the provisions of section 164 of the Act. Section 164 deals with the situation where (1) a person has been committed to the High Court by a subordinate court for sentence or (2) his case has been remitted by the Director of Public Prosecutions to a subordinate court for sentence. It would seem that the committal ((1) above) can only take place in terms of section 79; the remittal ((2) above) occurs in terms of section 90 (1) (f) (where reference is made to section 79). Thereafter follow provisions in subsections (2), (3) and (4) which broadly approximate those of section 294 (3) in effect.

[20] It seems unlikely that the Legislature could have intended section 79 committals to be dealt with in both sections 164 and 294. There would normally be a presumption against tautologous or superfluous provisions. This could support an argument that section 294 was not intended to be restricted to section 79 committals – which in turn might justify the conclusion that its provisions were intend to extend and apply to a committal under section 293.

[21] A definitive interpretation of sections 164, 293 and 294 is called for in the interests of the administration of justice. In view of the conclusion to which I have come it is not necessary to express a final view on their meaning and ambit. Nor would it be appropriate to do so without the benefit of full argument, which we have not had. The Director of Public Prosecutions is requested to consider taking such steps as the law permits to bring the question of the interpretation of these sections before this Court.

[22] In the result the following order is made:

1) The proceedings in the High Court before Guni J relating to the retrial of the appellant on charges of rape and attempted murder, his convictions in respect of such charges and the sentences imposed in regard thereto, are set aside.
2) The matter is remitted to the High Court for sentence in compliance with the provisions of section 293 of the Criminal Procedure and Evidence Act 7 of 1981.
3) It is directed that the matter is to proceed in the High Court before a Judge of that Court other than Guni J.
4) The Registrar of the High Court is requested, in the interests of justice, to treat the matter as one of urgency and to grant it precedence on the roll as far as possible.

_____

J. W. SMALBERGER
JUDGE OF APPEAL

I concur: _____

J. H. STEYN

PRESIDENT OF THE COURT OF APPEAL

I concur: _____

M. M. RAMODIBEDI

JUDGE OF APPEAL

Delivered at Maseru this 20th day of October, 2004.

For Appellant: Mr V. M. Mokaloba

For Respondent: Mr T. Mokuku