C OF A (CRI) No.11 of 2005

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

Rex **Appellant**

And

Janki Paseka **Respondent**

CORAM : GROSSKOPF, J.A.
PLEWMAN, J.A.
GAUNTLETT, J.A.

Heard : **28 March 2006**
Delivered : **11 April 2006**

SUMMARY

Sexual offence in terms of Sexual Offences Act, 3 of 2003 – penal provisions of Magistrate's Court Second Class – Section 4(a) (1) (e) of Subordinate Courts (Amendment) Act – Section 31 of the Sexual Offences Act – effect thereof on magistrate's jurisdiction.

For the Appellant : Advocate T. Dlangamandla
For the Respondent : Advocate Makholela

JUDGMENT

Plewman, J.A. :

1. This appeal has revealed an unfortunate and disturbing situation.

This Court's powers in the exercise of its appellate jurisdiction in criminal matters is circumscribed by statute, namely section 7 of the Court of Appeal Act, No.10 of 1978. Section 7(2) of that Act was amended by section 2 of Act 8 of 1985 in a very significant respect. However, when the appeal record in this matter was delivered to the members of this Court and when the matter was called, all three members of this Court were equipped with the Act in unamended form. In this form this Court would not have had jurisdiction to entertain the appeal. This led us to raise the question of our jurisdiction with counsel for both parties. Both conceded that on the wording of section 7(2) (as it read in the statutes furnished to us) the court could not entertain the appeal. Neither counsel drew our attention to the 1985 Amendment. Neither counsel, it seems, was even aware of the amendment. On this basis the Court adjourned for us to prepare a judgment in terms of which the appeal would have been struck from the roll.

It was only in the course of preparing our judgment that we ourselves came across the amending Act. This necessitated our recalling counsel to deal with the changed circumstances which arose in consequence of the amendment. One can only express concern and regret that counsel prepared so in – adequately. It now seems clear that the Director of Public Prosecutions is

entitled to appeal and that we may therefore entertain the appeal in this matter.

2. It is necessary to set out the background. The Respondent (to whom I will refer as "the accused"), a youth of 18 years, was arraigned for trial before the magistrate's court at Mohale's Hoek. This is a subordinate court of the second class. The accused was charged in terms of section 8(1) of the Sexual Offences Act, No.3 of 2003. The particulars of the charge were that the complainant, a child of five years of age, was subjected to an attempt by the accused to have sexual intercourse with her.

The accused pleaded guilty to the charge and was convicted on his plea. In terms of the Sexual Offences Act, and subject to the provisions of section 31 to which I will presently refer, a minimum sentence of imprisonment for a period of not less than ten years for an offence of the nature of that in question is provided. It is also necessary to record that the penal jurisdiction of the trial magistrate was limited by section 4 (a) (1) (e) of the Subordinate Courts (Amendment) Act to a fine of M16,000 and imprisonment for a period of eight years.

3. It is against that background that attention must be directed to the provisions of sections 31 and 32 of the Sexual Offences Act.

Section 31 provides as follows:

> "31 (1) Save for the Central and Local Courts, the sentences under Section 32 shall apply and be enforced by all courts *unless* extenuating circumstances or the proper consideration of the individual circumstances of the accused or lawful intimate relations between the perpetrator and the victim dictate otherwise.
>
> (2) Where the appropriate penalty is beyond the ceiling of penal powers of the trial court, it shall, after conviction, send the case to the High Court for sentence" (emphasis added).

Section 32 provides certain minimum penalties-in this case, ten (10) years imprisonment.

The record shows that the learned Magistrate followed the precepts of the section literally. In the course thereof she recorded a finding that the individual circumstances of the accused did "not warrant a lenient sentence" and she then sent the case to the High Court for sentence.

4. The accused appealed to the court *a quo*. It was at this juncture that matters became somewhat confused. It was argued before the court *a quo* that in as much as the magistrate did not have the power to impose the statutory minimum penalty, she had no jurisdiction to hear the matter at all. The phrase adopted by both counsel (also in this Court) was that where there is no power to punish, there is no power to try. Reliance was placed by both counsel, and the court *a quo,* in the decision on M. Mabea and Another vs Magistrate for Butha-Buthe and another 1993-4 LLR-LB 122. This case dealt with the jurisdiction of a magistrate to try a case of robbery. It can be

accepted that it is a correct decision on its own facts but, as shall I show, the Act with which we are concerned is not to be so construed as to limit the jurisdiction of the magistrate's court to try the matter.

The court a quo concluded that the magistrate had had no power to try the case because her penal jurisdiction did not exceed eight years, whereas the minimum penalty in terms of the Sexual Offences Act was ten years.

The court then held that the proceedings in the magistrates court had been irregular and such proceedings were set aside. The case was ordered to commence *de novo* before a magistrate of competent jurisdiction. It is against the order so made that the appellant appeals.

5. Appellant's argument was that the Sexual Offences Act creates an exception to the rule that where there is no power to punish there is no power to try. I do not think this is a correct formulation of the true construction of the section. The proper construction of section 31 (1), in my view, is that it grants a court having a lesser penal jurisdiction than would entitle it to impose a compulsory sentence, jurisdiction to deal with a sexual offence and to embark, in the case of a conviction, on the enquiries set

out (namely the existence or otherwise of extenuating circumstances of individual circumstances of the existence of relevant intimate relations which would call for a lesser penalty.) If no grounds are found to exist justifying a sentence less than the statutory minimum then the court's penal powers become relevant. What then must occur is provided for in section 31 (2) which requires a reference to the High Court. There is no room for any further enquiry and the High Court must then impose an appropriate sentence. Obviously such sentence could exceed or be less than the minimum if this is appropriate.

6. In the result the magistrate dealt correctly with the matter and the court *a quo* was incorrect in setting the proceedings in the Magistrate's Court aside. The appropriate order in these circumstances is that this Court must set aside the High Court order and direct that the matter be remitted to the High Court for that Court to impose an appropriate sentence. I therefore make an order in the terms set out above.

7. There is one further observation to be made. The record before us is not paginated or for that reason, adequately indexed. This is something of which this court has frequently had occasion to complain. This complaint must now be repeated. It is particularly regrettable that counsel for the Appellant–the Law

Office of the Director of Public Prosecutions –should have felt that she could certify the record with such defects. In addition it must be strongly urged that steps be taken to ensure that members of this Court are supplied with correctly annotated statutes.

C. PLEWMAN
JUDGE OF APPEAL

I agree : H. GROSSKOPF
JUDGE OF APPEAL

I agree : J.J. GAUNTLETT
JUDGE OF APPEAL

Delivered at Maseru, 11 April 2005

For the Appellant : Advocate T. Dlangamandla
For the Respondent : Advocate Makholela