IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CRI) 1/10**

In the matter between:-

NKHESOA PELEA **1ST APPELLANT**
MATUBANE TSOAELI **2ND APPELLANT**

and

REX

CORAM: RAMODIBEDI P
SCOTT, JA
THRING, JA

HEARD: 9TH April 2013
DELIVERED: 19TH April 2013

SUMMARY

Conviction based on circumstantial evidence – identification of culprits disputed – evidence for the Crown unsatisfactory – conviction set aside on appeal

JUDGMENT

THRING, JA

[1] Their plea of not guilty notwithstanding, the two appellants were convicted in a Magistrate's Court of contravening section 8 (1) of the Sexual Offences Act, No. 3 of 2003, in that they were found to have had unlawful sexual intercourse with the complainant, then a girl aged 15 years, on or about 27 February, 2008. In terms of the applicable legislation, they were then committed to the High Court for sentence, where they were each sentenced to 12 years' imprisonment. They appeal to this Court against both their convictions and sentences.

[2] According to the evidence of the complainant, on 18 (not 27, as alleged in the charge sheet) February 2008 she was sent to some fields to fetch vegetables at about 3 p.m. Whilst she was there, a man appeared wearing nothing but underwear and a Kupa-head hat and carrying a lebetlela stick which had yellow sellotape on it. This man raped her, she says. Then another man appeared on the scene, also wearing only underwear, and he, too proceeded to rape her. Neither man spoke. The

complainant did not know them. She did not identify either of the appellants as the culprits. In fact, when she later reported the matter to her chief, she, on her own evidence, implicated one Rantŝiuoa and one Mofana as being the two men who had raped her: this, she says, was on the strength of information which she had been given by the mother of one Maseseli, who told her that the latter two men had been following her when she was on her way to the fields. Maseseli's mother was not called as a witness. At some later stage, it seems, the complainant switched her accusation to the two appellants. This, she says, was because she was told by one Molefi that it was the appellants who had raped her. Molefi was also not called as a witness. It is painfully clear that the complainant was quite unable, from her own knowledge and observations, to identify either of the two men who raped her on the day in question, whenever it may have been.

[3] The complaint's mother gave evidence. She sowed further confusion regarding the date of the offence, saying that on 2 February, 2008, 16 days before the date given by the complainant, the latter came home crying and claiming that she had been raped by two men. The evidence of the

complainant's mother takes the identification of the culprits no further.

[4] Moruti Mafika, a 17-year-old boy, was called as a witness for the prosecution. He knows both appellants. He says that on 8 February, 2008, a Friday, at about 2 p.m. he was in a certain gully watering his donkeys when he saw the two appellants in the gully, putting on their clothes about ten to fifteen paces away from him. When they saw him, he says, they hid away. Later, the witness saw them again, coming up from the gully and going up towards the mountainside. He greeted them, and they responded. They said that they were going to the mountain to get a certain plant. The witness says that he later heard that the complainant had been raped in a certain field. He does not say when he heard this. This field is about 30 paces from the gully in which he saw the appellants putting on their clothes, he says.

[5] The evidence of two troopers in the Lesotho Mounted Police was also led for the prosecution. The first of these, Trooper Letima, says that on 27 February, 2008 he went to look for the first appellant at a place called Boqate. When the first appellant saw him approaching he ran

away. However, he was duly arrested and charged. The second trooper, Trooper Bokopane, says that on 29 February, 2008 he met one Karabo Pelea, who told him that the second appellant had run away after he had been accused of rape. The witness left a message for the second appellant with Karabo Pelea, to the effect that the second appellant should report to the police. Later the same day the second appellant duly handed himself over to the police.

[6] That was the case for the Crown.

[7] Both appellants gave evidence. They both say that on the afternoon of 8 February, 2008 they were at a certain graveyard with others preparing a grave for a funeral. They deny that they raped the complainant, or that they saw the prosecution witness, Mafika, that day.

[8] The Magistrate, in his reasons for judgment, having pointed out, correctly, that there was no direct evidence implicating the appellants, and that the evidence against them was circumstantial in nature, nevertheless found that, when he considered the Crown's evidence in its entirety there was no reasonable inference other than that

the appellants were guilty as charged. Their defence had failed, he said to create a doubt in his mind "as against the Crown's evidence". He was convinced beyond reasonable doubt that the appellants were responsible for the offence.

[9] Circumstantial evidence can, of course, often be a notoriously dangerous platform on which to base conviction in a criminal case. It is hardly necessary to reiterate the well-known passage from the judgment of **Watermeyer J.A**. in **R. v. Blom**, 1939 AD 188 at 202, the locus classicus on this question:

> *"(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the influence cannot be drawn.*
>
> *(2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct".*

[10] It seems to me that the prosecution case against the appellants falls short of passing this test in several material respects. First, the only witness who places the appellants in the vicinity of the scene of the crime is Mafika: but, on the face of it, he does so on a different day from the day on which the complainant and her mother say that the crime was committed. There are several confusing contradictions as to the date of the offence: was it Saturday, 2 February, 2008 (the complainant's mother's evidence), Friday, 8 February, 2008 (Mafika's version), Monday, 18 February, 2008 (the complainant's averment) or Wednesday, 27 February, 2008 (the date alleged in the charge sheet)? If, in fact, Mafika saw the appellants in the gully on a different day from that on which the complainant was raped (and this, in the circumstances, does not seem to me to be impossible), then very little remains of the case against the appellants. There are then certainly insufficient proved facts before the Court from which an inference of their guilt could safely be drawn.

[11] But even assuming in the prosecution's favour, without deciding, that the events deposed to by Mafika did take place on the day on which the crime was committed, it appears to me to be inconsistent with the guilt of the

appellants, first, that Mafika says nothing in his evidence about either of the appellants wearing a Kupa-head hat or carrying a lebetlela stick with yellow tape on it, as the complainant says was the case. Yet, on the prosecution case, at about 2 p.m. on that day the appellants must have been on their way, or preparing, to rape the complainant. Where, then were these articles when Mafika saw them?

[12] Secondly, why, one wonders, were the appellants at that stage putting their clothes on, rather than removing them?

[13] Thirdly, why, at that stage, were they moving away from the gully and towards the mountainside?

[14] In his reasons the Magistrate speaks in glowing terms of Mafika's credibility as a reliable witness. But even taking his evidence at face value, the above questions which arise from it make it impossible, in my view, to draw a necessary inference of guilt against the appellants. The possibility cannot in my opinion reasonably be excluded that the men who raped the complainant were not the appellants: indeed there is evidence, albeit hearsay in nature, that two other men were seen on the day in

question following her on her way to the fields, and she in fact initially implicated them as the culprits before the chief. Moreover, Mafika admits that he was present when the complainant did this; so, he says, was the first appellant. Why, then, did Mafika not immediately come forward and divulge to the chief that he had seen the two appellants in the vicinity of the scene of the crime that day in suspicious circumstances? Mr. Mokuku, for the Crown, conceded in argument before us that there was room on the evidence before the Court for possibilities other than the appellants' guilt. In my opinion the concession was well made.

[15] There is, of course, the evidence that the first appellant ran away from the police, and (insofar as it may be admissible) that the second appellant hid from the police when they came looking for them. But flight from or evasion of the police are not necessarily indications of guilt, and there may be other explanations for such conduct. Couched in the language of the test formulated in **R. v. Blom, supra,** the mere fact that the appellants ran away or hid falls far short, in my opinion, of excluding every reasonable inference save that they are guilty.

[16] I conclude that the convictions are manifestly unsafe and that the Magistrate erred in reasoning as he did in convicting the appellants. The appeal is upheld and the conviction and sentence of both appellants are set aside.

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W.G. THRING
JUSTICE OF APPEAL

I concur.

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M.M. RAMODIBEDI
PRESIDENT, COURT OF APPEAL

I concur.

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D.G. SCOTT
JUSTICE OF APPEAL

For Appellants: Advocate K. Ndebele and
Adv. T. Lesupi

For Respondent: Adv. T. Mokuku