IN THE HIGH COURT OF LESOTHO

In the matter between:

SEBOEANE MOTSEKI

V

R E X

JUDGEMENT

Delivered by the Honourable Mrs. Justice K.J. Guni
on the 19th day of February 1996

In the Subordinate Court sitting in the district of Leribe, this Appellant was charged and convicted of failing to provide the person to be maintained with adequate food, clothing and medical Aid in contravention of Section 3 of Proclamation No 60/59 as Amended by ORDER No 29 of 1971 (The Deserted Wives and Children (Amendment) Order 1971.

The Appellant was initially charged with failing to provide adequate maintenance for his wife and child. At the

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end of the trial the learned magistrate absolved the Appellant from liability to maintain his wife. He was accordingly acquitted on a charge of failing to provide adequate maintenance for his wife. He was found guilty of failing to provide adequate maintenance for his son. The appeal is against this conviction.

The grounds for this appeal are as follows:-

1. The learned magistrate misdirected himself in holding that appellant is the father of the child.

2. The learned magistrate misdirected himself in holding that the question of marriage and paternity were res judicata.

3. The learned magistrate erred in making an order of absolution from the instance in respect of the marriage instead of acquitting the appellant in respect of the maintenance of the mother (ALSO the order of absolution is foreign to criminal law).

4. The judgement of the learned magistrate is against the weight of the evidence and is bad law.

The first ground is that the learned Magistrate misdirected himself in holding that Appellant is the father of

the child. Evidence led at the trial shows that the parties (Appellant and Complainant) eloped. The negotiations that followed after that elopement were directed towards the parties' eventual marriage. To the parents of the mother of this minor son the Appellant presented himself as a son-in-law. Although the marriage cattle had not been paid the agreement that the parties are husband and wife had been reached. On more than two occasions this Appellant admitted paternity of this son. Appellant according to the evidence of PW 3, in the company of his mother, he approached PW 3 who is the father of the mother of the minor child who is to be maintained. It is the evidence of PW 3 that the matter of marriage between the Appellant and the minor child's mother was entered into as a result of his admission of his paternity. The two families apparently according to PW 3 agreed that the Appellant and the mother of he minor child should be married. This evidence of PW 3 is supported in material respects by that of PW 4 who as the member of the family of the Appellant's wife, was involved in the resolution of the problem of elopement and consequential pregnancy and birth of this minor child. To the parents and relatives of the mother of this minor child the Appellant never ever denied paternity of this minor child. According to the evidence of PW 4 it was the Appellant who approached the in-laws and notified them that he had taken the wife to the hospital to deliver the said child.

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The overall picture built by the evidence led before the court acquo is to the effect that this Appellant regarded himself as the husband of the mother of this minor. The same feeling of the existence of marriage between the parties is expressed by the mother of the said minor. The question of marriage was not decided by the court acquo on the grounds that it has no jurisdiction. There is no appeal against that decision. Evidence has established that there had been recognition and acceptance by this Appellant that he is the person responsible for the maintenance of the minor child whom he supported until they separated with his mother.

It was argued on behalf of this Appellant by Advocate Teele that the mother of this minor child, when asked when did she marry the Appellant, her answer was that she married the Appellant on 17th March, 1989. It is further suggested that this child was not conceived during the period of marriage of the parties. There was no competent expert evidence to show if this minor was born pre-maturely or whether it was full term pregnancy of a human being which should be nine months. In her evidence in chief the mother of the minor child indicated that the minor child was born on 13th July 1989. It is Advocate Teele's contention that if this child was born on 13th July 1989, four months after the date of marriage of the parents, the Appellant could not possibly be the father more especially because the mother of the minor child claimed that

she was pregnant for nine months. Although Advocate Teele described her as the best person to know, she still is no expert in that matter. There is no evidence that she was equipped with special expertise rather than common notions of mankind. In the absence of expert evidence by special gynaecologist, there is no way the court can accept as impossible that this minor child is the son of this Appellant - MITCHELL v MITCHELL and Another 1963 (2) SA Page 505 at 507.

On the second ground of Appeal the learned Magistrate is said to have misdirected himself in holding the question of marriage and paternity were res judicata. There was evidence produced, in that trial court, that the Appellant and his father-in-law had appeared in the first instance before a local court where the Appellant was sued for six herd of cattle for elopement with the daughter of complainant who in this case is the mother of his minor son. The judgment was entered against the Appellant by the local court sitting at Maputsoe. The Appellant appealed against the judgment to Tsifa-li-Mali Central Court. The appeal was dismissed. Examination of those judgments indicated that the court found that the Appellant had eloped with the daughter of the complainant. Appellant was found liable to pay as claimed six herd of cattle at M500-00 each to the complainant. The question of whether or not that elopement resulted in

consummation of marriage was nevertheless not decided by the local court. The central court at Tsifa-li-Mali when dismissing the appeal did not enter into the matter to make a determination on the merits whether or not there was marriage between the appellant and complainant's daughter. To this extend the question of marriage was not res judicata.

On the question of paternity there was abandoned evidence that the minor child for whose maintenance the Appellant was held liable was conceived during the period when the Appellant and the mother of that minor child were having sexual relations. Whether or not this baby was born after the full term of human pregnancy was not determined by production of expert evidence. Where parties lived together as husband and wife there is a presumption though rebuttable, that children born of such parents are their children. The learned Magistrate cannot be faulted by finding that the minor child was the son of the Appellant who must therefore be held liable to provide adequate maintenance for him. Having found that the Appellant was failing in his duty the learned Magistrate was correct to find him guilty as charged in terms of Section 3 A of Proclamation 60/59 As Amended.

This appeal must fail.

K. J. GUNI
JUDGE

CRI/T/27/94

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

vs

NKHAHLE MOTHOBI

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla on the 4th day of September, 1996

I must first of all express my gratitude to the witness Dr Shafiuddin Shaikh who has given evidence in this Court.

In brief he has indicated that this is not the first time he has appeared before Court to give evidence concerning the accused.

He stated that he is a consultant specialist; that is a psychiatrist holding an MB Degree from Gujarat University in India. He is also

possessed of a two year Diploma in Psychological Medicine. All in all this entailed a total of seven years' training. He is presently stationed at Mohlomi Hospital - a facility taking care of those suffering from the disease of the mind; and he does examination of out-patients at Queen Elizabeth II Hospital too. He has had considerable practice examining, by order of Court, mentally defective patients who appeared both in the High court and even once in the Court of Appeal.

At the request of this Court, the witness was asked to examine the accused. He in his own words said he reassessed him on the 23rd and 24th August, 1996. Prior thereto he had furnished this Court with reports dated 5th October, 1995 and 20th December, 1995.

He personally interviewed the accused using services of an interpreter. The interpreter was a psychiatric nurse. He kept a record of the interview and prepared a report. The report was handed in and marked Exhibit "C" dated 8th August, 1996 and it bears the witness's signature. The witness referred extensively during the cause of his evidence to this report, it reads as follows :

"That's the Medical Report.

REX vs Nkhahle Mothobi CRI/T/27/94

I referred to Medical Reports on above accused person on dates 5th October and 20th December, 1995.

I reassessed him on 23rd and 24th August, 1996. During the

interview, he was irritable and later became angry and did not co-operate well".

The conclusion the witness came to is that there is no change in the patient's mental condition. This latter aspect of the witness's statement relates to the findings of the 5th October, and 20th December, 1995.

At this latest stage of the report dated 28.08.96, the witness had benefit of scientific method based on what is called "A rating scale for fitness to stand trial". This is what he administered and the witness referred to page 734 of this wonderful works dated June 1996.

The entire document consists of hardly 5 pages and I have asked that the Registrar should photocopy it and have it incorporated into this Judgment. The important portion which should be incorporated consists of extracts starting from the phrase "Criteria for fitness to stand criminal trial" and ends with the phrase "(vi) they could be used in training other disciplines to evaluate triability". The text is encorporated thus immediately below while the pamphlet from which the extracts are made shall remain on file for fuller reference and more complete reading :

Criteria for fitness to stand criminal trial

F.J.W. Calitz, P.H.J.J. van Rensburg, H. Oosthuizen, T. Verschoor

Objective. To identify criteria whereby triability can be determined.

Design. Questionnaire survey. The final rating was decided on the basis of a structured psychiatric interview.

Setting. Oranje Hospital, Bloemfontein.

Participants. A total of 736 questionnaires was sent to 176 judges of the Supreme Court, 480 magistrates and 32 attorneys-general and state advocates in South Africa and Namibia, and 3 psychiatrists and 15 clinical psychologists working in forensic psychiatric units in South Africa. With the information from the completed questionnaires, rating criteria were compiled. The rating criteria were applied by means of a structured interview to 100 persons referred in terms of section 77(1) of the Criminal Procedure Act 51 of 1977. A multiprofessional psychiatric team was requested to evaluate the same 100 observandi independently.

Results. A total of 298(40.5%) of the questionnaires were returned. From the data of the completed questionnaires, 19 legal items, 17 psychiatric items, 2 special laboratory tests and 2 psychosocial items were identified as the most important and clear diagnostic indications for the evaluation of triability. The similarity between the findings of the researchers and those of the multiprofessional psychiatric team was meaningful to 1% of significance. For the proper application of the criteria a cut-off point of 31 was determined. A score of 31 or higher therefore indicates that a patient is unfit to stand trial, while a score of less than 31 indicates triability.

Conclusion. The application of the proposed final rating criteria as a single method of rating is at the very least just as reliable as the multiprofessional team in evaluating fitness to stand trial. The proposed criteria, used as a single rating instrument, are cost-effective in terms of time and staff, avoid unnecessary hospitalisation and ensure that mentally ill accused will have a fair trial.

S Afr Med J 1996; 86: 734-737.

The law demands that, to receive a fair trial, an individual must possess sufficient mental capacity to comprehend the nature and object of the proceedings and his own position in relation to those proceedings; he must also be able to advise counsel rationally in the preparation and implementation of his own defence. If he is unable to do one or more of these, he is 'incompetent to stand trial' and usually transferred as a state patient. It has always been a problem to determine the triability of accused persons, mainly because of costly evaluation methods, cumbersone procedures, unnecessary hospitalisation and inadequate vague criteria. While the final decision on competency is a legal one, the courts often call upon psychiatrists and, in some cases, psychologists for an advisory opinion.

In many jurisdictions, however, the court has consistently failed to inform the examining psyciatrist or psychologist what questions it wishes answered. Even if a specific request for an evaluation of competency to stand trial is made, it appears that the vast majority of psychiatrists and psychologists have no awareness of what legal test or criteria to apply. If they deal with the question at all, many seem to feel that the accused must be free from any symptoms of mental illness before he is triable.

Conclusion

The conclusion of this study is that the application of the proposed final rating criteria as a single method of rating is, at the very least, just as reliable as the multiprofessional team in evaluating whether someone is fit to stand trial.

The proposed criteria, used as a single rating instrument for determining triability, have the following advantages, viz.:

(i) they are cost-effective in terms of time, staff and finances;

(ii) they avoid unnecessary hospitalisation;

(iii) they could act as a screening method;

(iv) they will prevent a mentally ill accused from inappropriately being declared a state patient;

(v) they ensure that mentally ill accused will have a fair trial; and

(vi) they could be used in training other disciplines to evaluate triability.

The examiner indicated the accused as having scored 51. The break-off point in the scoring scale is 31. The witness made the Court to understand that at 31 - at score 31 an accused person is reckoned to be incapable of standing trial . It stands to reason then that at score 51 he is a lot much worse than at the break-off point.

The witness conducted this test in an endeavour to determine whether the accused could stand trial. He relied on the rating scale published in South Africa by a team of Experts;

(1) F.J.W. CALITZ DP.PHIL

(2) P.H.JJ VAN RENSBERG MD

(3) H. OOSTHUIZEN LLD

(4) T. VERSCHOOR LLD

all of the University of Orange Free State attached to the department of Psychiatry and Criminal Law relating to the subject "Criteria to use to determine ability to stand a criminal trial".

I fully endorse the witness's view that theirs is a valid and accepted test. On the basis of the questionnaire appearing on this document the Court was made to understand that the work is divided into four sections:

The first is legal item
the next is psychiatric item
followed by special item
and finally psycho-social item

ranging from 0-3 in each item. The examiner was reading, during the conduct of this examination, these items to a nurse who in turn translated the same to the accused and the answers obtained were rated in terms of degree of impairment. The fact that from the way the thing is graduated or calibrated the patient scored 51 when 31 itself put him in rather dim light satisfies me that he definitely couldn't stand trial. The witness testified that the patient consistently in all occasions that he was interviewed and treated complained of insects in his head making funny sounds.

The rating scale test was administered first on 24th August, 1996 and the accused or the patient was not on medication as he is still not on any today. Thus he was fully conscious and well orientated in terms of time and surroundings. It is the opinion of the witness that it is highly unlikely that the

accused or the patient could have been given any drugs before the examination the witness administered.

The conclusions reached and the opinion formed by the witness were that the accused is suffering from delusional (persistent persecutory type of) disorder. Indeed I also bear witness to the fact that accused actually charged me with persecuting him even though I had always gone out of my way to be particularly gentle with him bearing in mind that I had benefit of perusing the preparatory record before meeting him in Court. The witness went further to express his wish to add something on what he had stated before Court; and what he told the Court I found very spell-binding and very revealing indeed. He said that after the 24th after examining the accused he administered what is called abreaction treatment through the veins of the accused. In this process the patient is made drowsy but not fully asleep. The whole point for doing this was to ensure that if he had consciously tried to evade answering questions or was cagey about telling the examiner anything or was trying to suppress his knowledge of things, this way his resistance to the questions is removed and his resistance gets loosened up. While the patient was in this state the examiner asked him to remember what occurred on the 22nd December, l99l; that is the day of the events. The patient started at the same point that he had indicated on previous occasions, viz, that he departed from the place of work after slaughtering a sheep and left for home. He had some few drinks. A friend had asked to take him home but he declined. When he reached home he saw people who were enjoying some drinks. They offered him some but he declined to take any. Then they started taunting him that he

had had so much drink that he couldn't take any more. He also, according to the witness remembers talking to a lady related to the deceased and he left for home.

What the witness found significant was that before the abreaction treatment the patient was not able to remember any of the things which he now remembered or referred to while under the induced state of drowsiness. He couldn't remember these things while he was in a conscious state. I underline this aspect of the matter as really revealing indeed and pay particular heed to the importance of the pamphlet that I referred to before.

The witness went further to indicate and emphasise that the patient couldn't recollect anything related to the offence and that he was completely blank regarding the offence. The witness further, in a general way, stated that - in view of the past medical history of the patient and especially his version of having had drink - he was alerted to the fact that some people in this sort of condition i.e. people who take drink for a long time, go into a blackout, but others recover from it, while in the case of the accused it appeared that he was completely blank.

For purposes of the ruling I am going to make I am indeed pleased to learn that the accused, if he undergoes medication, can recover and that during treatment he wouldn't be exposed to any of the factors which precipitated his abnormal behaviour. That's as far as the evidence that I have heard goes.

In the addresses, I have been asked by the Director of Public Prosecutions - and Counsel for the accused sharing the same view - that the condition of the accused falls within the ambit of Section 166 read with Section 17.

s. 166(i) reads as follows :

> "If, when the accused is called upon to plead to a charge, it appears to be uncertain for any reason whether he is capable of understanding the proceedings at the trial, so as to be able to make a proper defence, the procedure prescribed by s.17 shall be observed".

s.172 subsection 2 reads as follows :

> "If the Court finds the person charged with an offence insane or mentally incapacitated pursuant to subsection 1, the judicial officer presiding at the trial shall record such verdict or finding, and shall issue an order committing such person to some prison pending the signification of the King`s Pleasure".

In brief this is what in fact I intend doing.

I accordingly make record of the fact that the accused at the time of commission of the offence was mentally incapacitated to the extent that he would not be able to understand the proceeding and in turn make a proper defence.

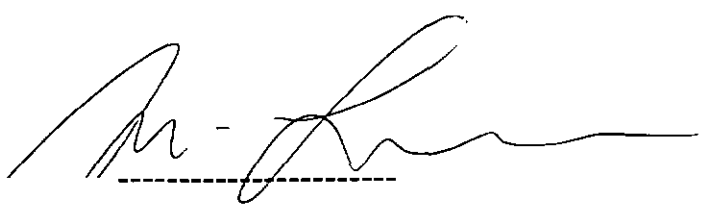
I order therefore that he be committed to some prison pending the signification of the King's Pleasure.

It should be plain here that in fact even in the words of the Court of Appeal in **Ts'itso Mats'aba Vs Rex** C. of A. (CRI) 5/90 (unreported) this is not a conviction, the accused is not being said to be guilty of anything.

The words in that case by Kotze' J.A. concurred in by Browde J.A. and Leon J.A. at pages 4 and 5 are -

> "Thus expounded, the concluding portion of the special verdict reads :
>
> > 'but (he) was mentally disordered or defective so as not to be responsible according to law for the act or omission charged at the time when he did the act or make the omission' ".

I may only add for emphasis that the accused was not made to plead before the above conclusion was reached.



JUDGE

4th September, 1996

For Crown : Mr. Mdhluli

For Defence: Mr. Lesuthu