CRI /APN/406/96

IN THE HIGH COURT OF LESOTHO

In the matter between:

SABILONE MOTSIELOA **Applicant**

and

THE DIRECTOR OF PUBLIC PROSECUTIONS **1st Respondent**
THE CLERK OF COURT **2nd Respondent**

REASONS FOR JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
on the 30th day of August, 1996.

This is an application for review of certain case No. CR. 282/96 of Maseru Magistrate's Court. The application is made on Notice of Motion with prayers couched in the following terms:-

(a) Ordering the Second Respondent to dispatch the record of the proceedings within Fourteen (14) days of receiving this application;

(b) Reviewing and setting aside the decision of the Learned Magistrate as it contravenes the Children's Protection Act 1980;

(c) Granting Applicant further and/or alternative relief.

On the 19th August 1996 I reviewed, corrected and set

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aside the decision of the learned trial Magistrate in the matter and intimated that reasons would folow. These are the reasons.

The accused appeared before a Subordinate Court of the First Class for Maseru district charged with the crime of rape "or alternatively abduction."

I deem it convenient to reproduce the whole charge herein to highlight some of the irregularities that are apparent in the said proceedings before the learned trial Magistrate. It reads:-

> **"That the said accused is charged with the crime of Rape.**
>
> **In that upon or about the 28th day of January, 1996, and at or near Likolobeng in the Maseru district, the said accused did unlawfully and intentionally have sexual intercourse with 'Malebetha Nonyana, a Mosotho female who was at that time aged 14 years and incapable in law of consenting to sexual intercourse, and did thereby commit the crime of Rape.**
>
> **OR alternatively Abduction.**
>
> **In that upon or about the 28th day of January, 1996, and at or near Likolobeng in the Maseru district, the said accused did unlawfully and intentionally take and abduct 'Malebetha Nonyana, a minor female, out of the control and against the will of Mokete Nonyana, her father, and 'Malesoma Nonyana, her mother, her lawful guardians, with the intention of marrying or having sexual intercourse with the said 'Malebetha Nonyana."**

Now the impression created in the main charge that a female aged 14 years is "incapable in law of consenting to sexual intercourse" is completely untenable in law. The law, as I conceive it to be, is that at common law a girl over the age of 12 years is deemed capable of consenting to sexual intercourse.

See Hunt Milton: South African Criminal Law and Procedure Revised Edition Vol. II at p 452.

Perhaps the Public Prosecutor and the learned trial Magistrate had in mind what is known as statutory rape under Women and Girls' Protection Proclamation No.14 of 1949 in terms of which consent is immaterial. Whatever the case may be however I am satisfied that the charge as it stood was fatally defective and prejudicial to the accused. It is important that public prosecutors decide beforehand whether to proceed in terms of the common law or in terms of the Statute. In turn the charge must make it clear to an accused person what offence it is intended to allege. This court disapproves of the hybrid type of charge that was preferred in this case.

The accused's age reflected in the charge sheet is 16 years. I agree with Mr. Matooane for the Applicant that this ought to have put the presiding Magistrate on inquiry as to the correct age of the accused. Yet, surprisingly this was not done. Nor did the learned trial Magistrate estimate the accused's age in terms of section 340 of the Criminal Procedure and Evidence Act 1981.

See Matiase Sesene v Mohale's Hoek Magistrate's Court and The Attorney-General CRI/REV/169/89 CRI/APN/36/90 (unreported)

in which Cullinan C.J. had this to say:

> **".....there is sufficient on the record to indicate that the accused apparently gave the appearance of youth in the court below. That was sufficient to put the magistrate on enquiry. Once an accused appears to the court to be a child,then the court is obliged to conduct an enquiry as to the accused's age and to make a determination in the matter. The learned trial Magistrate in this case has the best of evidence available to him, that of a parent, yet he never ascertained the accused's age. Where a parent is not available, or he is uncertain as to age, medical examination as to age can always be ordered. Any resulting doubt as to the exact age of an accused, particularly where the question of imprisonment arises, must obviously be beneficially resolved, in favour of the accused."**

I respectfully agree. Fortunately I have before me an affidavit of the applicant's mother which confirms that he was only 16 years old.

I find it totally inexcusable that even though the age of the applicant was recorded as 16 years in the charge cheet yet this was of no consequence at all as the proceedings before the learned trial Magistrate show. The latter did not sit as a Children's Court in terms of the Children's Protection Act No.6 of 1980. I observe that he could only have sat as a Children's Court if the Director of Public Prosecutions had directed so in terms of Section 5(2) of the Children's Protection Act 1980. There was no such directive by the Director of Public Prosecutions.

Then the record shows that this young applicant who was unrepresented at the trial and was apparently not even advised as to his rights to legal representation conducted his own defence and was expected to cross examine crown witnesses effectively. At the end of the day he was found "guilty as charged" on both "counts" and was sentenced as follows:

Count I :Four (4) years imprisonment without the option of fine.

Count II :Six (6) months imprisonment or M600.00 fine.

The sentences were ordered to run concurrently.

In my judgment it cannot be right in law that a person who is charged in the alternative may be found guilty on both alternative charges at the same time. This is an irregularity so gross as to be a traversity of justice calculated to prejudice the accused. Consequently I consider that there has been a miscarriage of justice in this matter.

In mitigation of sentence the applicant is recorded as having uttered only one sentence namely "I ask to be pardoned."

Now this Court has repeatedly warned presiding officers not to play a passive role at the stage of mitigation of sentence but to actively help canvass personal circumstances of unrepresented accused persons with a view to passing a proper balanced sentence. It is shocking to see that this

warning has gone unheeded to the detriment of the proper administration of justice.

See Moeketsi Mots'oari v Rex CRI/A/22/84

in which the Honourable Acting Mr. Justice J.L. Kheola (as he then was) made the following remarks:

> **"There is no doubt that many magistrates fail to make any investigation into the personal circumstances of the accused before passing sentence. The present case is a typical example of that. After the verdict was pronounced the prosecutor informed the Court that the accused had no previous convictions. The record reads:**
>
> "In mitigation: Pray for clemency."
> Sentence: Three years' imprisonment."
>
> **Clearly the trial court made no inquiry about the personal circumstances of the appellant because if it had done so the record would reveal that. The proper procedure is that where an accused person is not represented by a legal practitioner the Court must make the investigation by putting questions to the accused in order to find out why he committed the offence and then consider an appropriate sentence for him in the circumstances."**

With respect I entirely agree.

To crown it all the learned trial Magistrate sentenced the applicant to a term of imprisonment "without an option of a fine" as aforesaid in total disregard to section 26 (1) of the Children's Protection Act 1980 which crisply provides that:

> **"No child shall be punished by imprisonment."**

The tragedy, as I see it, is that many Magistrates do not familiarise themselves with the Children's Protection Act with shocking results as shown above. One begins to wonder how many children are languishing in prisons throughout Lesotho amongst hardened criminals in contravention of the letter and spirit of the Act.

In all the circumstances of the case I am satisfied that there was a miscarriage of justice and that the applicant was thereby prejudiced. I had thought of a retrial but it seems to me that the applicant who has actually spent four (4) months already in prison at his age and amongst hardened criminals has suffered enough punishment for what appears to be no more than abduction for it seems to me that the evidence on record clearly shows that the applicant took away the complainant with the intention to marry her as opposed to simply ravishing her by way of rape. He actually took her to his home where she spent the whole night in the presence of his mother.

I attach due weight to the applicant's cross examination of the complainant's mother 'Malebona Nonyana (PW3) to the following effect:

"Q: What question did I ask you?
A: None.
Q: Did I not ask you whether you were not asking for cattle (bohali)?
A: You did not."

The applicant persisted with this question in his cross examination of policeman Thakaso whom he asked:-

"Q: What did PW3 say
A: She said she did not want your cattle."

In the circumstances I have come to the conclusion that a retrial would not be proper.

In the result the convictions and sentences are set aside and the accused is acquitted.

M.M. RAMODIBEDI
Acting Judge

For Applicant : **Mr. Matooane**

For Respondent : **No appearance**