CRI\A\434\96

IN THE HIGH COURT OF LESOTHO

MOKHELE MOTSEPE 1st Appellant

KELEBONE LETHOBA 2nd Appellant

Vs

R E X Respondent

JUDGMENT

Delivered by the Hon. Mr Justice M.L. Lehohla

On the 7th day of April, 1997

The two appellants employed as soldiers in the Lesotho Defence force were charged and convicted by the Learned Magistrate Mr Lesenyeho of rape in Count 1 and sentenced to five years' imprisonment; and of assault with intent to do grievous bodily harm in Count 2 and sentenced to two years' imprisonment each. The sentences were ordered to run consecutively as appears in the learned Magistrate's photocopied manuscript. But the typed script prepared by the appellants' counsel's office indicated that sentences were to run concurrently.

The appellants were, at the time of the alleged offences committed on 31st January, 1996, aged 25 and 26 years respectively. The victim was aged 54 years.

When the matter was first placed before court on 19th July, 1996 it was by way of application for bail pending appeal. Apparently the appellants had breached conditions of bail imposed by the subordinate court in that they had threatened to assault or even kill crown witnesses. Thus their bail was revoked by that court on 4th May, 1996.

The High Court thus refused to grant the appellants bail as things stood in July, 1996 and went further however to order that if by 19th October, 1996 the record from the subordinate Court was not furnished to the High Court they were at large to re-apply.

A hastily photocopied record was prepared and forwarded to the High Court. On 25th November, 1996 the court expressed its willingness to proceed with the case using the record at hand. Thus the matter was, after some hick-ups as to service on the other side, finally tabled for hearing on 9th December 1996. On this latter day it was found prudent by all concerned to delve into the matter of the appellants' appeals. Moreso because the type-script was in hand even. Thus the Court proceeded to hear arguments and submissions by respective counsel.

The record reveals the dismal story of PW1 'Malebohang Leboto to the effect that having gone to bed at about 8 p.m. on 31st January, 1996, while still in the watches of the night and at the estimated hour of around 9 p.m. she heard a rough and forceful opening of her door by someone. She asked who it was but was vouchsafed no reply. She put on the light and noticed by aid of that light that the

intruder into her house which was not locked in the first place was appellant 1 Motsepe. When she asked what he wanted he just ignored her and sauntered outside. Thereupon PW1 (the complainant) followed him into a room next door.

In there PW1 found 'Mamasoatsi the occupant of the room in company of appellant 2 and a military Sgnt Molopo(PW3) and some other regular beer drinkers at that place. This room is notorious for beer sales.

PW1 appealed to the medley of humanity found in that room to reprimand appellant 1 for encroaching upon her privacy without permission. Appellant 2 asked appellant 1 if he heard that PW1 was complaining that he had gone into her room. Thereupon appellant 1 replied mockingly that PW1 was saying "nyoee, nyoee" meaning she was either nagging or making insufferable whimperings. All in all appellant 1 appeared to be dismissive of the complainant's appeals for intervention against appellant 1's nuisance.

PW1 who must have felt very irritated indeed, left the room in a fit of anger only to storm back in carrying some paraffin which she emptied on appellant 1. There and then appellant 2 fetched her a fist blow followed by many others as appellant 1 closed ranks and made common cause with him in raining blows on the wretched woman.

The complainant was subjected to savage kicks with booted feet all over her body by the two appellants. The complainant was so perplexed by this violent treatment that she was not able to see what was happening in the room in which she was. She heard PW3 ask the two assailants what they were doing but was ignored by them.

She got to notice that all other people except the two appellants had gone out and fled from the room. She didn't know when they so fled. As she was lying down trying to recover from the battering suffered by her body she felt when appellant 1 took off her panty and inserted his penis into her vagina. She also heard when appellant 2 urged appellant 1 to finish quickly as he also was itching to gratify his sexual lust; saying this appellant 2 was standing astride the complainant. It seems that PW1 had been rendered numb by the assaults because she said she couldn't resist when appellant 1 took off the panty she was wearing because she was very weak.

When appellant 1 had finished doing his sordid deed on the complainant, appellant 2 took his turn in having sexual intercourse with the complainant without her consent and against her will.

The complainant estimates that her ordeal in 'Mamasoatsi's room could have lasted two hours.

Thereafter the appellants dragged the complainant telling her to go and report to appellant 1's wife that she had poured paraffin on the other's husband. When the complainant asked for money from his tormentors as she could not see appellant 2 said that was none of their business. Having pulled and dragged the complainant to a place the surroundings of which were not familiar to her the appellants once more raped her. She passed out. When she came to she realised that it was then late dawn as she could hear sounds of wheelbarrows being pushed by early risers. She thus asked for help as at this time the appellants had apparently left, but only it seems, temporarily. Thus as the complainant asked for help she heard appellant 2 approach. (She identified him by his voice as he did so). He kicked the

complainant once more. Passers-by came to the complainant's rescue. It was while she was being thus helped by those people that she heard appellant 1 say "we thought she was dead. Is she still alive?"

The complainant was placed in vehicle and driven to Queen Elizabeth II Hospital.

The cross-examination elicited nothing in the appellants' favour.

PW1's story is corroborated by PW2 Lieketseng Bulane who was in 'Mamasoatsi's room when PW1 came and asked PW3 to reprimand appellant for intruding into her room while she lay in bed in order to go to sleep. PW2 saw when PW1 went out followed shortly afterwards by appellant 1 who later came back into 'Mamasoatsi's room followed by PW1 who threatened to drench appellant 1 with paraffin for tormenting her as he had previously done. She did in fact pour paraffin on appellant 1. PW2 saw when the two appellants struck out with fists at PW1 and kicked her. PW3 tried to intervene but to no avail. When PW2 tried to go out appellant 2 closed the door and said no one would go out. He even put off the light. PW2 took advantage of the darkness in the house and managed to slip out of the door as it was not locked. Little children were woken up by the commotion which had ensued. For instance the 13 year old Limpho on asking why his mother was being assaulted, was fetched a kick on the stomach by appellant 2 who was observed doing this by PW2 who was at the doorway when it occurred. The door was closed again with the little Limpho trapped inside but he managed to come out through the window.

PW2 and Limpho went to raise the alarm at Limpho's uncle. On their way

back they heard appellant 2 urgently asking appellant 1 whether he was not through. PW2 says she heard appellant 2 ask why appellant 1 was delaying so much before ejaculating.

PW2 also heard when PW1 said she wanted to be given her shawl. But appellant 1 said he would only give it to her on their way to appellant 1's wife.

These are all factors which corroborate the material aspects of the complainant's story that she was raped by the two appellants as indeed it was made clear by appellant 2 that he wanted to take his turn after appellant 1 who was taking unduly long before ejaculating. To my mind there couldn't have been any talk of ejaculation unless sexual intercourse was taking place. Such sexual intercourse which is denied by the two appellants, took place without PW1's consent as she testified. Thus the appellants' denial that it took place in circumstances outlined by the crown witnesses is false beyond doubt and was properly rejected by the court below.

Thus in the light of overwhelming evidence of sexual assault on the complainant it cannot avail the appellants that medical evidence does not establish rape because no vaginal smear was performed owing to lack of facilities at Queen Elizabeth II Hospital.

Mr Rakuoane stated that there wasn't going to be any appeal regarding conviction for assault. The only appeal would be as to sentence. The appeal on conviction related to rape.

He expressed the wish that the doctor had given evidence. He was

dissatisfied that nothing was consequently said about the physical nature of the complainant. He accordingly submitted that because there hadn't been any physical examination by the doctor some doubt exists which should redound to the appellant's favour.

I may just add that it beggars description that the ploy used by the appellants to draw the complainant, from possible help she might have obtained from Limpho's uncle was no more than just a heartless stratagem in that to date the complainant has not been confronted with appellant 1's wife to say why she poured paraffin on her husband yet the reason for dragging the complainant from her premises and denying her the shawl was said to be just as told by the complainant and not denied by either of the appellants. Needless to say the complainant was left in the forest far away from her house and nowhere near appellant 1's wife's place!!

In my view authorities are legion that doubt which should be given in favour of an accused person is reasonable doubt. Any doubt that is based on factors which are outweighed by proven facts, and which is inconsistent with solid foundation on which those facts are based, cannot avail for it cannot be reasonable.

In the face of overwhelming evidence based on facts which are inconsistent with the innocence of the appellants, coupled with their outright falsehood in an attempt to disentangle themselves from a hopeless situation they created against themselves, it would go against the grain that I should allow myself to be persuaded to propound a test that is not required by the law all in the name of upsetting a conviction properly secured by the Court below. The law does not require proof beyond all doubt. If this were the case I am afraid the worst fears of Lord Denning in ***Miller vs Minister of Pensions*** (1947) 2 ALL ER 372 at 373 would be realised

that fanciful possibilities would, if allowed by law, result in the course of Justice being deflected and the community being failed protection in the process. All that the law requires is proof beyond reasonable doubt, and not proof beyond all or shadow of doubt that the accused is guilty.

Maisels P in Appeal Case No.4\1984 ***Clement Kobedi Gofhamodimo vs The State*** (unreported) at p 6 makes reference to Mr Justice Story's remark when charging a jury in ***Williams' Trial(wigmore,*** 3rd ed. Vol 7 at p.420 as follows :

> ".....There always remains some ground for the conjectures of the doubting..... But we must act as reasonable men on reasonable evidence ....." (Emphasis supplied by me).

Of paramount importance to bear in mind in sexual cases is that

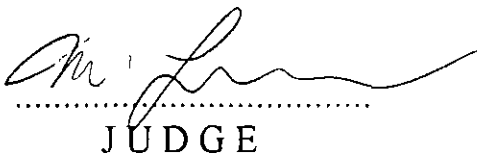
> ".....There is no rule of law requiring corroboration of the complainant's evidence..... but there is a well-established cautionary rule of practice in regard to complainants in sexual cases in terms of which a trial court must warn itself of the dangers inherent in their evidence and accordingly should look for corroboration of all the essential elements of the offence. Thus in a case of rape, the trial court should look for corroboration of the evidence of intercourse itself, the lack of consent alleged and the identity of the alleged offender".

See APP. Case No. 56\84 ***Vilakati vs Regina*** (unreported) at 3- Swaziland Appeal Court decision. I feel that all these requirements have been fulfilled in the instant case. Further -

> ".....If any or all of these elements are uncorroborated the court must warn itself of the danger of convicting and, in such circumstances, it will only convict if acceptable and reliable evidence exists to show that the complainant is a reliable and trustworthy witness".

I don't find the complainant behindhand in this quarter either.

As earlier stated the appeals against both conviction and sentence as the case may be are dismissed. I may only, for the sake of clarity necessitated by two conflicting versions on sentence in the Court below; repeat that sentences are to run concurrently.



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J U D G E
7th April, 1997

For Appellants : Mr Rakuoane
For Respondent: Mr Thetsane