

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

Vs

SHIBILANE MAKEBE

Review Case No. 27/ 2011
Review Order No. 04/ 2011

CR 579/ 2010
Leribe District

ORDER ON REVIEW

This matter on automatic review came from the Leribe Magistrate's Court. The accused was charged with contravention of *Section 3(2) of the Sexual Offences Act No.3 of 2003* and sentenced to eight years imprisonment without the option of a fine.

The accused pleaded not guilty to the charge and a full trial proceeded before the magistrate. The accused had legal representation and all procedural aspects were adhered to in the trial.

According to the evidence before the court the complainant was a teacher at Qoqolosing High School and lived at Sebothoane. The accused lived in a two-roomed house nearby

with his wife and two children, and was employed as a security guard at a shop; but also used to fetch water for the complainant and got paid M10.00 for four twenty litre containers full of water.

The accused and complainant seem to have developed a cordial relationship, to the extent that in her evidence the complainant revealed that she had once given accused an amount of M100.00 after he had borrowed that amount from her. Complainant testified that he refunded M40.00 of that amount but was still owed M60.00 when the alleged offence occurred.

On the night of the 17th September 2010; complainant says she was asleep around 2:00 am when accused entered her bedroom and woke her up. She saw the accused because she slept with her light on. The accused asked her for money and she told him she had none to give to him, and that she still expected him to refund the M60.00 owed to her.

She says the accused then demanded sex from her and she refused, whereupon he forcefully fell her down and strangled her. Removed her panty and raped her.

When he was through he said she must put the light off and asked her to warm some water for him to take a bath. That

was because she was on her monthly period at the time. Her evidence is that she did so. The accused persistently asked her not to tell anybody about the rape and she says she agreed out of fear. When asked by accused what she would say to his wife if she heard her screams and saw her scratches, she replied that she would say she was bitten by a spider. The accused then left and complainant slept.

In the morning the accused returned to complainant's house and asked complainant to go to his house and tell his wife that if she heard her scream the previous night it was because she had been bitten by a spider. She agreed that she would do so. Apparently the complainant had not yet decided to report the rape to the police. She then went into the house crying, took the water accused had used the night before to wash and threw it out.

One `Mateboho appeared at that stage and saw her crying. She asked her what was wrong. Complainant told her accused had raped her. Mateboho went away and later came back with a neighbour, an older woman who told her not to wash and to go to the police. Later accused's wife came and inquired as to what had happened and she told her that her husband had raped her. She then went to the police to report, and obtained the medical form. Accused was accordingly charged.

In her cross-examination Mrs. Nku for the accused put it to the complainant that she and accused had a love affair, which complainant denied. She put it to her that they had consensual sex which she also denied. The defence argued in the trial addresses that the evidence of all the other witnesses who were told by the complainant was not admissible to prove the rape as they were all told by her of the events. It was further submitted that even though the cautionary rule was abolished by the Act, the court is still obliged to exercise caution without the requirement for corroboration.

I am not persuaded that at the end of the day the defence was able, through cross examination, to show that the sex was consensual. I would therefore confirm the conviction.

I am however concerned with the sentence of eight years sentence without the option of a fine and I consider it in the circumstances to be rather harsh for a first offender with all other factors taken into account.

My attention was however drawn to *Section 31 and 32 of the Act* which prescribes the minimum penalties, and in the case of a first offender it is indeed eight years without the option of a fine. The magistrate passed a minimum sentence and accordingly this court cannot interfere.

Since no extenuating circumstances or individual circumstances of the accused were considered the court was bound to pass the minimum sentence at least.

Both conviction and sentence are therefore confirmed on review.

L. A. MOLETE
ACTING JUDGE

24th March 2011

CC: All Chief Magistrates
All Magistrates
Magistrate Leribe
All Public Prosecutors
O/ C Police Leribe
O/ C Prison Leribe
CID – Leribe
Director of Public Prosecutions