

**CRI/A/0001/2014
CR113/2013**

IN THE HIGH COURT OF LESOTHO

In the matter between:

LETŠEPILENG MASHAPHANE

Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS Respondent

JUDGMENT

Coram: Hon. A. M. Hlajoane

Date of Hearing: 26th May, 2014.

Date of Judgment: 14th August, 2014.

Summary

Appeal against conviction and sentence on a charge of rape – Though accused was not directly identified, the hat and overall left behind at

the scene were identified as those belonging to the accused – Appeal dismissed and conviction and sentence confirmed.

Annotations

Statutes

1. Section 12 of Lesotho Constitution 1993

Books

Cases

1. R v Radebe and S v Mbonani 1988 (1) S.A 191 H-J

2. Phomolo Khutlisi v R 1993 LLR & LB 18 at 21

3. Mokemane v DPP 1990-94 LAC 614 at 615

[1] This is an appeal against both conviction and sentence. The appellant was charged and convicted of contravening section 3 (2) of the Sexual Offences Act and was sentenced to a term of ten (10) years imprisonment without an option of a fine.

[2] The appellant has advanced the following as his grounds of appeal.

- (a) That the magistrate misdirected herself in convicting him despite there being no evidence supporting the conviction.

- (b) That there was serious doubt in the prosecution's case and the judgment premised solely on supposition and utter speculation contrary to factual evidence given.
- © That it was a misdirection by the magistrate to have concluded that the fact that appellant ran away from his place amounted to admission of guilty despite appellant's explanation that he was attacked and even beaten with a fighting stick.

[3] This Court had occasion to have gone through the proceedings at the trial stage and learned of the evidence tendered. P.W.1 was the complainant herself, 'Malekhetho Tšokolo. Her evidence briefly was that she was sleeping alone in her house when she heard a "*Tu*" sound the first time. The second time she was aware that the sound came from her window.

[4] Her evidence was that she uncovered her face with the blankets and saw a person entering through her window stepping on the table. The person ordered her to sleep and when she refused he threw her on the bed threatening to kill her. The witness was crying and kicking all that time. They struggled together as the person wanted to insert his penis into her private parts, but eventually she was overpowered as the person throttled her. The person managed to rape her.

- [5] The witness continued to cry to free herself and managed to stand up. The person had put his hand on her mouth and the witness bit his hand. As there was moon light the witness in her struggle managed to identify the appellant even by his voice. She pulled the appellant to the open window so that she could raise an alarm. There was a voice of someone at the door outside and on the sound of that voice appellant released her. The appellant escaped through the window.
- [6] The witness unlocked the door and people who were already outside chased the intruder to the donga. She followed the chase but came back to go to the chief's place as they disappeared from her sight. But before getting to chief's place she met Malikoiling and together they went to chief's place who came with them to the witness's place. Somewhere outside they picked up a white overall. Inside the house near the bed a maroon hat with some other colours was found. The suspect was eventually caught that night.
- [7] The other witness Lereko Matela as P.W.2 had told the Court he was a police officer. He must have been the complainant's neighbor as he said he had on that evening heard a voice of a woman crying. He is the man whom P.W.1 said he heard a voice at the door asking as to what was happening.

[8] P.W.2 had seen the person coming out of the window. He also confirmed that there was a moon light on that night. He chased that person. The person outran him. He saw when P.W.1 and one Masilo picked up a white overall near P.W.1's house. He was there when maroon hat was found in P.W.1's house. The hat and overall were connected with the appellant.

[9] He went with others to appellant's place to check if he was home but he was not at home. But whilst there they saw a person near accused's toilet. The person run away when he realized he had been noticed. They chased after him and brought him to the chief's place as they found it was indeed the appellant.

[10] P.W.3 'Malikoiling had said in evidence that she knew appellant as son to her sister-in-law. She only came to the scene after she had been invited by P.W.1. According to her P.W.1 had said she did not know the name of the person who had raped her. But after he was arrested P.W.3 saw that it was the appellant. But after the arrest P.W.1 on seeing the appellant said he had raped her.

[11] P.W.3 was asked about the white overall that was before Court and she said on the day in question she had seen appellant wearing a white overall during the day, though when he was

brought before the chief after the act he was putting on a grey blanket.

[12] P.W.4 Masilo Selebalo said the appellant was a son to his brother. He heard a cry as he was sleeping. He woke up to find people gathered at P.W.1's place. He came to know that P.W.1 had been raped that night. As they followed the trace of people who chased after the culprit they found a white overall. On inspecting the overall he said it belonged to the accused. He also identified the hat found in P.W.1's house as belonging to the appellant. He was present when a person was seen near accused's toilet. He identified him as accused. He was pursued and when they had caught up with him it was found it was the appellant.

[13] P.W.5 was the Police Officer, Police Constable Rampai. He visited the scene and confirmed entry was gained through the window. The table and chair of the house were broken which confirmed what complainant said that the rapist stepped on the table after he had entered through the window. He was the one who cautioned and charged the appellant of rape. He handed in the exhibits of white overall and hat. The medical report was also handed-in by consent.

[14] The accused took witness stand and in his defence he pleaded *alibi*. He had shown that he had been drinking at some place away from home. That when he was chased from near his toilet he was only arriving from the beer drinking place, and was already in the early hours of the next day.

[15] Looking at the evidence as a whole can it therefore be said the trial Court ought not to have convicted the appellant as it did? P.W.1, the complainant had identified the accused that night and also identified his voice. P.W.2 though had said P.W.1 had said had not identified the rapist, the magistrate however said in her judgment that considering the opportunity for observation she was doubtful if P.W.1 indeed did identify the appellant as the rapist.

[16] The magistrate further showed in her judgment that had P.W.1 clearly identified the rapist she could have told everyone who came that night that it was the appellant who raped her. I am with her on that line of thinking.

[17] P.W.3 had said appellant ran away from near his toilet when he saw them. Like the magistrate said, why did he run away from his place? It was a guilty conscience. But also the hat and the white overall were identified as those of the appellant by P.W.3, his relative who said she had seen the accused wearing a white

overall that day though when he was arrested he was in a different attire.

[18] P.W.4 also who said appellant was a son to his brother identified the overall as that of the appellant. So that the magistrate cannot be faulted to have concluded that on the evidence presented before her it was clear that the appellant was the rapist.

[19] I therefore find that the appellant had been properly convicted of rape of the complainant. The evidence pointed at him as the culprit.

[20] On the question of sentence the appellant has said the seriousness of an offence does not always justify passing of a heavy sentence. He advocated for consideration of partial and actual circumstances under which a crime has been committed. That is the position of the law, but rape by its very nature is a serious offence calling for a heavy sentence.

[21] I must hasten to mention that despite service of process of this appeal on respondent's office there has been no appearance. Even when the matter was set down for 26th May, 2014 for argument, no one appeared for the respondent. No heads were filed for respondent's side.

A.M. HLAJOANE
JUDGE

For Appellant: Mr Ntšihlele

For Respondent: