

IN THE HIGH COURT OF LESOTHO

CRI/S/003/2013

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

And

KUTLOANO SHAI

RESPONDENT

JUDGMENT

Coram : Honourable Acting Justice E.F.M. Makara
Dates of Hearing : 26 February, 2014
Date of Judgment : 6 March, 2014

Summary

The Magistrate Court referred the case for sentencing by this Court in terms of S31 (2) of the Sexual Offences Act since it felt that the punishment to be imposed exceeded its sentencing powers. This Court determined that the conviction was evidentially founded. It transpired, however that the Magistrate had not considered her S15 (a) discretionary powers on sentencing before deciding to refer the matter for sentencing by this Court. Had she done so, she might have discovered that she might have avoided the minimum ten (10) years for the one within her sentencing jurisdiction. Mitigating factors found to exist in that ex-facie the record of the proceedings, there is doubt on the accused's ability to draw distinction between right and wrong, he is uneducated, unsophisticated and simplistic in his approach towards life. On this basis, Eight (8) years of sentence instead of the minimum 10 years are imposed in accordance with S15 (a).

CITED CASES

S v Zuma 1995 (4) BCLR 401

S v Tsiloane 1977 (3) S A 336

S v Mahomotsa 2000 (2) SACR 435

STATUTES

The Sexual Offences Act 2003

Constitutional Litigation Rules 2000

Introduction

[1] The Court is seized with this case in consequence of a decision by the Magistrate of the district of Quthing to refer it for sentencing by this Court. The background is that the accused had appeared before the Trial Court against a charge of *contravening S 15 (1) (a) of the Sexual Offences Act*.¹ A resume of it was that the accused had at the material time and place committed a sexual act with a disabled complainant by having sexual intercourse with her.

[2] Following a plea of innocence to the charge tendered by the accused, the Court heard the testimonial evidence presented by the complainant, Mrs. Noha, Lekhula Jankie, Matseliso Noha who is the complainant and who on account of her disability was assisted one Relebohile Kou. In the meanwhile, the statement of Maneo Ts'oaeli who is a psychiatric Nurse was admitted by the defence without reservation.

¹ The Sexual Offences Act No 3 of 2003.

[3] The Counsel for the defence duly cross examined the Crown witnesses and led its defence through the accused himself and thereafter, strategically closed the defence. The cross examination in essence was focused on testing the ability of the complainant to have identified the culprit at the material time and place. It apparently failed to shake the evidence of the complainant on the accuracy of her identification of the accused as a person who had committed the offence.

[4] At the end of the proceedings, the Trial Court had convicted the accused for the offence and she acting pursuant to S 31(2) of the Act, referred the case to this Court for sentencing. The Section details:

Where an appropriate penalty is beyond the ceiling of penalty powers of the trial court, it shall after the conviction send the case to the High Court for sentence.

It is clear from the provision that the Trial Magistrate has referred the matter for sentencing by the Court because she has determined that it attracts a sentence exceeding her jurisdiction.

A Summary of the Background Facts

[5] The facts which constituted the basis of the conviction of the accused by the Court *a quo* unfolds that he had:

1.1 On the 30th January 2013 at around 5am, accused entered into a house in which complainant slept. He entered her blankets while

she was in bed and started raping the complainant. The complainant saw the accused person. The complainant screamed for help and the accused fled through the window. The complainant's grandmother was awoken by the noise and asked the complainant what was happening. The complainant told her grandmother that the accused person had just raped her. The complainant's grandmother saw the accused person escape and even identified his clothing. The complainant had also identified the accused as she knew him. They were villagers and met on several occasions. Infact she immediately mentioned his name when she was asked who raped her.

1.2 It is further evidence of the crown that accused person was further identified on the same day wearing the same clothes that he was seen wearing during the commission of the offence.

1.3 Evidence further shows that the accused person was further pointed by the complainant to be the perpetrator when they were at chief's place.

1.4 Under cross-examination, the complainant held steadfastly to the fact that she positively identified the accused. She even went as far as to say that he knew him even by his scent because the accused raped her several times. Secretary, proceed from 2.1 to 2.4 of the Crown's Submissions on Sentencing.

The Arguments Advanced by the Counsel for the Parties

[6] The Counsel for the Crown endeavoured to persuade the Court to maintain the sentence imposed by the Learned Magistrate. The basis of his position was primarily that the conviction has been evidentially founded. He illustrated that by pointing out that the revelations thereof indicated that the accused had raped the victim for several times; she had convincingly identified her as a person she had known for a long time as her fellow villager and that her grandmother who featured as PW 1 had well corroborated her evidence on the presence of the accused at the scene at the material time.

[7] Addressing the reference of the matter for sentencing by this Court in accordance with S 32(a) (vi) in recognition of the limited powers of the Magistrate Court; he advised that the Trial Magistrate had acted properly since the accused has been convicted of a serious offence.

[8] Notwithstanding the strong belligerence maintained by the Crown that the Court should impose a heavy sentence upon the accused; he prudently agreed that the punishment should take into account the offender's social background. In this respect, he conceded that the man was his intelligence was demonstratively low and that he is uneducated.

[9] On the other hand, it transpired to the Court that the emphasis of the case presented for the accused was on the challenge mounted against the *fairness of the trial* before the Magistrate Court. They were challenged for their compliance with the S 12 rights in the Constitution. In the same connection, he invited the Court to review those proceedings on the basis of the procedural irregularities he has complained about. He has in that regard relied upon a decision in **S v Zuma 1995 (4) BCLR 401 para 16** where the Court had directed:

We will consider the concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts in the light of the affidavit of the Applicant. That makes it

impossible for this Honourable Court on the strength of the review papers to discard the submission that irreparable trial-related prejudice has been caused to Applicant.

[10] The Court in passing regards the constitutional based arguments and the relief sought for thereon to be misconceived and raised before a wrong forum. A litigation direction has been given in **Nko v Nko**² regarding the approach and a Court of competent jurisdiction where a constitutionality of an act or decision is the subject matter. There it was clarified that where this is the case, the litigation should be initiated through the instrumentality of the Constitutional Litigation Rules.³ It was basically cautioned that such cases should not be heard by the High Court sitting in its ordinary jurisdiction.

[11] It is further realised that a substantial part of the arguments rose for the accused have been devoted on challenging the conviction on procedural grounds. This is irrelevant to the case before the Court since by operation of S 31 (2), it is enjoined to complement the proceedings which have already commenced in the Magistrate Court by simply passing the appropriate sentence. The question of the correctness or otherwise of the procedure followed it that Court falls outside the terms of reference of this sitting. Review proceedings

² [2000] LSCA 5 [PARA 5 & 6]

³ These are the Constitutional Litigation Rules 2000. They were promulgated by the Chief Justice to provide a procedure in the constitutional oriented proceedings. Ever since they were introduced this class of litigation has consistently been administered in accordance with their direction. The end result is that the Chief Justice appoints a panel of three judges to preside over the matter and to sit as a Constitutional Branch of the High Court.

could be brought for that purpose. Incidentally, the Counsel agreed that the procedural challenges were not appropriate for the present litigation.

[12] The Court and the Counsel for the accused identified the fact that the relevant part of the representations made for him proceeds from paragraph 9 to 12 of his heads. It is stressed that the rest are unrelated to the case. The appropriate question introduced for the accused is that the determination of the sentence is pre-eminently within the discretion of the Court and that the legislature can not interfere with that judicial prerogative. Whilst the Court subscribes to that view, it, however, becomes conscious that the Counsel is not alive to the provisions of S 31 (1) of the Act which details:

(1) Save for the Central and Local Courts, the sentences under section 32 shall apply and be enforced by all courts unless extenuating circumstances or the proper consideration of the individual circumstances of the accused or lawful intimate relations between the perpetrator and the victim dictate otherwise.

The Findings and the Decision of the Court

[13] It transpires from the wording of S31 (1) that the Court is at liberty to discretionarily determine a qualifying punishment for each case in recognition of its merit. Thus, the Magistrate should on record demonstrate that she had addressed her mind to the particular circumstances of the case before she committed it for sentencing by this Court. The significance of the Section has been

initiated by S 32 read in conjunction with S 15 (a) of the Act. When the two sections are in isolation from S 31 (1) they create the understanding that there is a mandatory prescription of ten years for a person who has been convicted of any of the offences provided under S 32.

[14] The analysis made in relation to Sections 31(1) and 32 read with 15 (a) concerning the issue of the mandatory or the discretionary nature of the prescribed 10 years of imprisonment, automatically renders it unnecessary to consider the jurisprudence developed in **S v Tsiloane 1977 (3) S A 336** and **S v Mahomotsa 2000 (2) SACR 435**. There, the Court was confronted with a situation where the statute had in mandatory terms prescribed a minimum sentence to be imposed. *The decision was in short that the prescription denied the Court the opportunity to consider the merits in each case and that it would not countenance that.* In the instant case, the Court has statutorily been endowed with the discretion.

[15] This could be a typical case where in principle the legislatively contemplated 10 year imprisonment would be an ideal sentence. However, the Court has after a thoughtful consideration, realised that the accused commands a questionable degree of intelligence to judge between rights and wrong, lacks education and even basic sophistication. These factors constitute some mitigation. Whilst this

is so, the Court is challenged to impose upon him a sentence which would serve as deterrence to him and which would register a societal rejection of his exploitation of a person with a physical disability and expose her to the sexually transmitted diseases.

[16] The accused is sentenced to serve eight (8) year term of imprisonment without an option to pay fine. This should operate from the 5th of June 2013.

[17] The Court recognises with appreciation a well research based thoughtfully written judgement by the Trial Magistrate.

**E.F.M. MAKARA
JUDGE**

For the Applicant : Adv. Tsoeunyane Instructed by Law Office

For the Respondent : Adv. K. Monate