

IN THE HIGH COURT OF LESOTHO

In the matter between: -

REX

vs

PASEKA PHIRI

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete

on the

15<sup>th</sup> June, 1999

On the 1<sup>st</sup> October 1997 the accused appeared before the Mafeteng Subordinate Court facing a charge alleging that on the 21<sup>st</sup> September 1997 the accused did intentionally and unlawfully have sexual intercourse with one Tlotlisang Morabaki, a Mosotho girl aged 9 years and thus incapable of giving consent. In the case of REX vs SIMON SEALA - 1976 LLR 241 at 242 Cotran CJ as he then was observed - "If the girl

complainant is under the age of 16, the carnal connection with her is statutory offence under the provisions of section 3 (1) of the Women and Girls Protection Proclamation (No. 14 of 1949), sometimes labelled 'statutory rape/ In that event consent is immaterial  
“.

The accused who was not legally represented at the trial pleaded guilty to the charge and after the public prosecutor had outlined the facts disclosed by the evidence in his possession which were confirmed as true by the accused, the learned magistrate brought in a verdict of "guilty as charged." In the case of Rex vs Sechaba Oatu. 1991 - 96 (2) LLR 1332, the accused had been charged with rape (of a girl aged 8) and alternatively with having contravened section 3 (1) of the Proclamation 14 of 1949 and my brother Ramodibedi A J. as he then was, held that the courts do not approve of a verdict in terms "guilty as charged" in a case where the accused person is charged in the alternative and that the trial court must always determine which offence the accused is found guilty of and state so in clear and unambiguous terms in the interests of justice and certainty. In the present case however the accused was charged with common law rape and there was no alternative charge under the Proclamation.

According to the facts as outlined to the court by the public prosecutor in terms of Section 240 (1) (b) of the Criminal Procedure and Evidence Act of 1981, the accused is a Mosotho adult aged 35 years. On the 21<sup>st</sup> September 1997, the complainant – Tlotlisang Morabaki - then aged 9 years and her friend Lineo Maketsi were collecting vegetables in the yard of one Mafitoto Monyane. The accused, who is a well-known resident of the village arrived and invited the complainant to go and collect sepaile vegetables in his garden. The accused thereupon accompanied the young complainant leaving Lineo behind. The accused then invited the complainant to go into his house promising her money and some mealie meal. After the complainant had entered, the accused closed the door and ordered her to go down and took her panty off and got out

of his pants. He then thrust his penis into the vagina of the complainant who then screamed in pain.

The medical report made by Dr Sethinyane indicates that vaginal examination was painful and consistent with penetration, that the hymen was bleeding that there were bruises of the vulva. Complainant's uncle one Mahlomola Mokebe having received a report from Lineo came and knocked at the door and the complainant replied "ke 'na enoa, malome". Upon entry, the accused was found hiding under the table naked and was apprehended and taken to the village chief. The complainant was subsequently taken to the doctor at Mafeteng hospital where the examination was made on the 23<sup>rd</sup> September 1997.

The accused accepted the facts as outlined and was convicted as charged. The prosecutor then informed the court that the accused had no previous convictions. In mitigation the accused then states as follows: -

"I do not deny this at all. May court exercise leniency. I have a calf to compensate the complainant with"

Court: - "This is a serious kind of a case. I do not think the powers I have will meet its seriousness. I therefore commit accused to the High Court for sentencing."

This was a proper thing to do in the circumstances of this case under the provisions of Section 293 (1) of the Criminal Procedure and Evidence Act of 1981. The courts worldwide view rape as a very serious offence which manifests the crude and animalistic nature of the offender's conduct. Each rape case has its own particular circumstances and in some cases, aggravating factors may exist. Young age of the complainant may be one of them, and the age of the accused may be another (S. v. V. - 1989 (1) SA 533). It is the malicious taking advantage of a young complaint to satisfy

the lust of the adult accused, which aggravates the offence. The accused has not pleaded intoxication or any matter which influenced the ghastly conduct on a defenceless little girl who has as a result been traumatised, perhaps for her entire life.

Rape is indeed a capital offence under our law (section 297 (1) (b) of the Criminal Procedure and Evidence Proclamation). The court cannot however sufficiently demonstrate its revulsion and displeasure at the despicable conduct of the accused because in this case the accused is first offender and has pleaded guilty to the charge, and has been awaiting sentence for about two years – this latter fact is taken into consideration in sentencing him. This court also takes note of the fact that rapes of young girls by adult males in Lesotho is occurring of late with monotonous frequency and that stringent punishments have to be meted out to the perpetrators of these sordid crimes. In *Rex vs Phamotse Mafethemane* -1991 - 92 LLR (Bulletin) 51, my brother Lehohla J. appositely observed as follows: -

" I wish to point out that a body of authority exists in support of the view that rape committed in circumstances which are aggravated should be met with severe penalties. The question of the complainants' youthfulness is one such aggravating factor. The trauma of being subjected to not only the act but being made focal point of amusements in the courts and throughout the period of investigations cannot be overlooked."

I associate myself with the learned remarks of Lehohla J; (see also comments of my brother Molai J. in *Rex v Nsabimana Shabani and others* - 1991-92 LLR 55 at 99.

I therefore confirm conviction in terms of section 164 of the Criminal Procedure and Evidence Act. The accused is again unrepresented before this court and in mitigation he informs the court that he has a young wife and two children. He says he does not know what caused him to rape the little girl. He states that he regrets what he has done and that it will never happen again.

I had the good mind to sentence the accused to a rather longish term of imprisonment in order to express the court's attitude towards sexual offence committed by the accused. In sentencing the accused, I have to consider the seriousness of the offence

and the particular circumstances of the accused. It should also be borne in mind that empirical studies have shown that long terms of imprisonment while protecting the society from the criminals also have the adverse effect of criminalising them. In this case the accused who is illiterate cut a very remorseful picture when the court asked him why he committed the act. He did not know, neither could he explain the sordid behaviour. Whilst he did not seem mentally disturbed, his unexplained behaviour does require some investigation in one form or another. A term of imprisonment will certainly facilitate reform or reflection and possibly rehabilitation.

The accused is therefore sentenced three (3) years imprisonment - with a recommendation that the sentence be served at Mafeteng or Mochale's Hoek Prison where the accused may receive rehabilitative treatment from a psychiatrist or social worker.

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S.N. PEETE

JUDGE

For Crown: Mr Thetsane

Accused: In person