R. v. YOHANI MPOROKOSO.

CRIMINAL APPEAL CASE NO. 12 OF 1939.

Rape—must be evidence of penetration—if woman asleep she cannot consent to intercourse—native custom should be proved by evidence—to succeed on appeal the appellant must show that the verdict is unreasonable and cannot be supported by the evidence.

The facts and the law appear from the judgment hereunder.

The Federal Supreme Court is not limited in its approach to the determination of appeals under section 13 (1) of the Federal Supreme Court Act, 1955. See *Abram Chiteta* v. *Reg.* 1960 S.J.N.R. 33.

Robinson, A.C.J.: The accused person, Yohani Mporokoso, was convicted on 15th March, 1939, on a charge of raping one Mulenga, a girl aged about 11 years and 10 months, but who had already been through the tribal puberty ceremony. He now appeals against conviction but does not wish to be present.

The Crown story is that the accused, although disapproved of by the girl's parents, used to pay his addresses to the girl. By Bawemba native custom, the complainant being a " Chisungu " girl, i.e., of an age between puberty and marriage, could not be touched except by the man she was to marry. Before marriage, the matter is formally arranged by the prospective husband giving an " nsalamu " (betrothal token) to the father, or person *in loco parentis*, of the prospective wife. In this case the girl was not promised to the accused or anybody else.

About 1st March, 1939, the complainant and others went to a wedding at a neighbouring village and beer was drunk. The accused was also there and he too drank beer. They returned in the evening and the complainant and Chisela, a girl friend, went to their hut where they sleep with two small children. During the night, after they were asleep, the complainant was woken up by finding the accused on top of her and having sexual connection with her. This woke up Chisela who corroborates seeing the accused on top of the complainant. Nothing was said for about two days and then Chisela informed Chanda, the girl's mother, who thereupon attempted suicide by hanging.

The defence is that the accused never touched the girl on the night alleged by the Crown but he admits sleeping with her about three weeks previously and alleges it was with her consent. He set up an alibi by saying that after the wedding, mentioned by the Crown witnesses, he returned with his friend Thomas and they slept together in one hut. But Thomas was called by the Crown and he said in evidence that he woke up during the night and found his friend had left the hut although he was there again in the morning.

The learned Magistrate sat with two native chiefs as assessors who advised him on native custom. They advised him, during the course of the case, that in their view, that if a girl lost her Chisungu, she could not possibly conceal the fact for more than a day or two. She would not dare do it as she would believe she herself would die and she would contaminate the other children in the village and her elders until she was purified. They rejected the accused's story and accepted the story of the Crown. The learned Magistrate also took that view and convicted the accused of rape *contra* section 113 Penal Code.

In my opinion there was ample evidence on which the Magistrate could accept the Crown story as opposed to the accused. For the appellant to succeed he has got to show that the verdict is unreasonable and cannot be supported having regard to the evidence: *Rex* v. *McNair*, 2 Cr. App. R. 2. It cannot be said to be unreasonable when the evidence of the complainant and Chisela and Thomas is accepted. I think a doubt was in the mind of the Magistrate as to whether wording of section 113 Penal Code "... unlawful carnal knowledge ... without her consent ..." had been adequately fulfilled if she was asleep at the time. The doubt can be set at rest by citing *Reg.* v. *Mayers*, 12 Cox 311, the headnote of which reads "If a man has or attempts to have connection with a woman while she is asleep, it is no defence that she did not resist, as she is incapable of resisting. The man can therefore be found guilty of a rape, or of an attempt to commit a rape." Also *Reg.* v. *Young*, 14 Cox 114, the headnote being "While a married woman was asleep in bed with her husband, the prisoner got into bed and proceeded to have connection with her, she being then asleep. When she woke ... she flung the prisoner off. Held the prisoner was guilty of the crime of rape."

However, I am not satisfied that the proof here of rape is sufficient. To prove a rape it is necessary to prove penetration or partial penetration. The only evidence here is that of the complainant where she says "I woke up and found Yohani on top of me.... He had actually had connection with me." To put the matter beyond doubt she should have been asked further questions to elicit as to whether or not there had been penetration. It is unfortunate she was not examined at all.

I have one other criticism to make which is that in this case a good deal of native custom was propounded by the two chiefs sitting as assessors. Native custom should, of course, be proved by an "expert" native witness from the witness box, but though of interest, native custom was not essential here to the disposal of the case and so the trial has not been invalidated.

By virtue of the powers given me under section 300 (*a*) (ii) Criminal Procedure Code, I alter the conviction to one *contra* section 115 Penal Code (attempt to commit rape) and confirm the sentence and dismiss the appeal.