CRI/A/81/82

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

PETROSE BOLIBE Appellant

V

R E X Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.P. Mofokeng
on the 15th day of December, 1982.

The appellant was charged before the subordinate court of Leribe with dealing without permit, in a prohibited medicine or plant to wit dagga weighing 100.5 kg. To that charge he pleaded not guilty.

On the 24th March 1982, just after sunset, L/Sgt. Seako PW.1 was on the duty at a road-block at Mathata's. A "vehicle" with a white canopy came towards where L/Sgt. Seako was. It bore registration numbers YBX 6600. It was stopped by the witness. It was being "driven by the accused" (appellant). The other occupant of the vehicle ran away and escaped.

Appellant opened the canopy as he had been informed that his vehicle was going to be searched. Inside the witness found six (6) bags of dagga. Appellant was asked for a permit and had none. He was cautioned and charged.

The following day in the presence of the appellant the dagga was weighed. Appellant claimed that the vehicle belonged to somebody but there were no documents to support this.

/In cross-examination

In cross-examination of this witness, defence counsel put a very important piece of information which could have proved the police to be liars if that evidence had been made available to the court. It is this:

"Q. Someone was brought to you after arresting the accused?

A. No.

Q. Manare says he brought accused's colleague to you?

A. Not true."

Presumably that is what the appellant would tell the court.

Now after the witness, whose evidence I have just alluded to, the Crown closed its case. Immediately there was made an application for the discharge on the basis that the Crown had established no prima facie evidence against the appellant. This was opposed by the Crown. The ruling was that the application be dismissed. This was not surprising. It was premature. There was a prima facie case. The appellant had been charged with dealing. There is a presumption that where a person is found in possession of a prohibited plant weighing more than 115 grams, he possessed it for purposes of dealing. (See sec. 30(1)(a) of the Act). The onus is on the accused to discharge on a balance of probabilities. This the appellant did not do so. Instead he closed his case without leading any evidence. The prima facie evidence became conclusive proof. (See R. v. Basotho Makhethe & Others, CRI/T/32/78 (unreported) dated 17th October 1978 at pp. 13-15).

The appellant concerned himself with trying to show the court that the vehicle did not belong to him. In the course of this a certain Manare is supposed to have been brought to Sgt. Seako, who no doubt, would have come and denied the ownership or any knowledge of the dagga in the vehicle.

/however

However that may be, this mysterious owner of the vehicle never even left the ownership papers with the appellant. It was a very serious allegation against the police that they refused to take down evidence in favour of the appellant. But that allegation will remain untested and yet a stain on our police force. In the judgment of the case of Rex v Mota Phaloane, 1980(2) LLR. 260 at 277, Rooney, J. said:

> "The general and accepted practice is to put the defence case to the Crown witnesses, not only to avoid the suspicion that the defence is fabricated, but, to provide the witnesses with the opportunity of denying or confirming the case for the accused."

I entirely agree. But Maisels P., in the same case in 1981(2) LLR. 246 on the point is recorded as having said:

> "The important fact to my mind is that the defence version ... was not put to this witness or any witness of importance." and later
>
> "... it is important for the defence to put its case to the prosecution witnesses as the trial court is entitled to see and hear the reaction of the witnesses...(to the) allegation." (See Small v Small, 1954(3) S.A. 434.

But in the present case the appellant neither gave evidence himself nor called any evidence on his behalf. What was purported to be his version turned out not to be so but mere allegations which were baseless. Counsel should be weary to follow such a course because it is most unethical to do so.

The appellant was charged with "dealing" in dagga, if I may put simpler: Only the element of possession as opposed to ownership is relevant. The appellant was in possession at the time of arrest, of this prohibited plant and it was found that it far exceeded the minimum weight (115 grams) laid down by the law for the presumption to start

/operating.

operating. (See sec. 30(1) (a) of the Act).

In my view this appeal has been misconceived and is hereby dismissed.

J U D G E.

15th December, 1982.

For the Appellant : No appearances.

For the Respondent: Adv. F.L. Surtie.