

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

v

THE RESIDENT MAGISTRATE }
 JONATHAN MAGOME }
 AMBROSE SIZAKELE }
 MBUSO SHABALALA }

Respondents

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice
 T.S. Cotran on the 4th day of March, 1982

This is an appeal by the Director of Public Prosecutions in terms of section 73(8) of the Subordinate Courts Proclamation against the Judgment of the Acting Senior Resident Magistrate who summarily acquitted three accused persons on a charge of being in possession of arms and ammunition without a certificate contrary to s.3(2)(a) of the Internal Security (Arms and Ammunition) Act No. 17 of 1966.

The three accused persons arrived in a vehicle at the Lesotho border control check point of Sani Pass. At Sani Pass the check point is not situate exactly on the recognised borders of Lesotho but some 150 yards inside Lesotho. They alighted therefrom and proceeded to the post.

It is not clear from the evidence whether there is one building or two buildings at the post. I think that from the record in all probabilities there was one structure but divided into a customs section and a police section.

There was only one witness for the Crown Sgt. Lechesa.

The Sgt's evidence in chief was to the effect that he saw the three accused seated at the customs office at 11.30 a.m. on 21st April 1981. He was in civilian clothes at the time. He

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asked for their passports. A1 and A2 produced theirs but A3 said he did not have one. He did not speak Sesotho well. The three accused persons said they were ANC members and were refugees from South Africa and were on their way to see a Mrs. Tsinye a teacher and President of ANC in Maseru. At that stage they did not disclose they carried firearms and ammunition. A1 was the first to be ushered to the police part of the building and was made to stand against a wall and lift his hands up to be searched. At that juncture, and only then, A1 is alleged to have told the Sgt. to wait and declared he had a pistol on his person. The Sgt. did not wait and he did indeed find a loaded pistol and an extra loaded magazine.

A1 then volunteered the information that A2 and A3 (who were still in the customs section) also had pistols and that the vehicle they travelled in was full of other arms and ammunition. A2 and A3 were brought in from the customs section to the police section and searched. Both carried loaded pistols and magazines. The vehicle when searched contained what was described as an "arsenal".

The accused could produce no certificates to carry the arms and ammunition from the Lesotho authorities or other authorities.

The cross examination of the Sgt was confined to the following :

"I don't know whether a licence for a firearm in Republic of South Africa is valid in Lesotho. If a man from the Republic of South Africa has a licenced firearm and enters Lesotho from the Border I don't know whether such man is expected to declare such firearm. I am at the Border for the first time. I don't know whether I can charge a man from Republic of South Africa, who has a licenced firearm and declares it."

The defence argument was:

"It has got to be proved that accused had mens rea. A person who on entering Lesotho declares his firearm at the first port of entry has no mens rea to possess those firearms in Lesotho. If the port of entry is some distance away from the border in international law and also from the point of view of the laws governing the country, the area between the boundary and the port of entry is nomansland."

The fact of the matter, however, is that the accused did

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not tell the policeman that they were holders of certificates issued to them by the South African authorities. Since they said they were ANC members coming to seek refuge in Lesotho it is impossible to make an inference, without evidence, that they may have had such certificates.

The magistrate gave no written reasons for acquittal at the time and we do not know what he had said orally when discharging the accused. The Director of Public Prosecutions requested a case to be stated in terms of s.73(7) of the Subordinate Courts Proclamation. It was thought then apparently that the magistrate had acquitted them on the ground that they did not have "mens rea" but from the magistrate's reasons for Judgment filed on 13th November 1981 it is clear that this was not so. His reason was that as a matter of law the three accused persons were not in Lesotho at the time because they were still at the border post and had not crossed beyond it into Lesotho proper. He then went on to say that the accused persons were not given a chance to declare the arms and ammunition whilst in the customs section and that they had not intended to smuggle the arms into Lesotho for sinister purposes since they have come through a recognised border post. He continues by saying that the police should have pounced on them after they crossed the post etc..

It seems to me that the learned magistrate had erred on the law and had come to conclusions of speculative emotional nature not substantiated by the evidence he heard. The internationally recognised borders of Lesotho were crossed and the accused were 150 yards within Lesotho already. The physical situation of the check post was irrelevant to his inquiry which was whether or not they held firearms and ammunition certificates. Without hearing the accused he could not make inferences based on personal sympathies in violation of the prima facie evidence of the Sgt. There was before the magistrate only an argument that the accused intended to declare the "arsenal". The actual evidence was that A1 made the declaration only when he realised he was going to be searched at the charge office building or part of a building and surely they were in Lesotho then not in so called "No man's land". A charge under this Act is not analogous to instances of importation of prohibited articles or goods by tourists or travellers in contravention of the

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Customs and Excise Order 1970 and Regulations made thereunder where different considerations may apply.

The accuseds' acquittal was wrong in law and they should have been convicted. The appeal is allowed and in terms of s.73(10) I remit the case back to the magistrate who should give sufficient notice to all parties to appear before him, reopen the case, record a conviction, and then pass sentence. He can at this stage take into account the mitigating factors which appear to have influenced his mind.

It would seem that the three accused persons had been in custody from 21st April 1981 to the 28th July 1981. Mr. Peete tells me from the bar that the accused may no longer be in the country to-day. If the magistrate finds that this is in fact the case after the necessary enquiries and notices he should nevertheless alter the Court records in his registry in accordance with the law as laid down by the High Court in this Judgment and apply it in all future cases, viz,

- (1) That the borders of Lesotho are the geographical internationally recognised borders and not the physical situation of any particular border or police post therein.
- (2) That a person in possession of firearms or ammunition within those borders without his being able to produce a certificate from the Lesotho authorities is ipso jure guilty of an offence under this section of the Act.



CHIEF JUSTICE
4th March 1982

For Appellant : Mr. Peete
For Respondents: -