

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

v

MACUBU MACUBU

Respondent

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice
T.S. Cotran on the 30th day of September
1982

The accused Macubu Macubu was charged before a magistrate at Leribe with contravening s.4 read with s.9 of the Lesotho Liquor Commission Act (No.25 of 1974 Vol.XIX Laws of Lesotho p.84) and the particulars read that

"on the 16th January 1982 at or near Maputsoe border post the accused had unlawfully and intentionally imported or caused to be imported into Lesotho fifty cases of liquor without a permit issued by the Liquor Licencing Board".

Section 4 of the Act provides :

"No liquor shall be imported into Lesotho except by the Government of Lesotho through the agency of its Commission:

Provided that the Minister may grant such exemptions for such periods as he may deem necessary; and provided further that liquor imported into the Common Customs Area under item 407.02 of Schedule No.4 to the Customs and Excise Order No.14 of 1970, may also be imported into Lesotho."

The accused pleaded not guilty.

At the end of the Crown case the learned magistrate held that the accused had no case to answer and he was accordingly acquitted and discharged.

In terms of s.73(7) of the Subordinate Courts Proclamation (No. 58 of 1938 Vol. I Laws of Lesotho p. 594) the Director of Public Prosecutions required the magistrate

/to state

to state a case for the consideration of the High Court. The magistrate did so and the Director of Public Prosecutions has now appealed against the accused's acquittal in terms of s.73(8).

The evidence that was adduced by the Crown at the Court a quo can be summarised as follows :-

1. The accused arrived at the Maputsoe border post driving a Peugeot van. Before the barrier was lifted, he parked, alighted from the van, and walked to the customs section to fill a form. There were two persons present, a Mr. Mohaeka in all probability a customs officer (who did not give evidence) and Mohato Letsie(PW1) who was definitely a customs officer.
2. After filling the form Mr. Mohaeka, in Mr.Letsie's presence, apparently looked into the contents of the van and asked the accused what he carried in the vehicle to which question accused replied that he carried beer and added words to the effect that the "Minister's goods are never examined". The goods consisted of 50 crates of beer, 25 Castle and 25 Amstel.
3. Mr. Mohaeka told the accused to park the vehicle behind the office. This was still before the barrier was crossed. The senior customs officer in charge Mr. Makakole(PW2) was duly informed.
4. The accused had declared in the form he had filled that he carried "groceries and cold drink".
5. A Lt.Kolobe(PW3) the officer commanding Maputsoe police arrived. Eventually the vehicle and the beer crates were seized.
6. The accused did not actually cross the border with the vehicle or the goods. He was at the border post. The geographical internationally recognised border of Lesotho is the Caledon, but the Caledon had in fact been already crossed. The border post is 200 yards after the river.

The magistrate's opinion, if I understand it correctly, was that goods are imported if they had actually entered not beyond the internationally recognised boundary of Lesotho

(at the Caledon in this instance) but at the port of entry at Maputsoe and then only after the barrier is lifted and the goods go through the gate. Since this did not happen there was no importation. After acquitting the accused the magistrate ordered that he should be given the crates of beer and be allowed to take them back to the Republic of South Africa.

The accused, who was not represented, cross-examined at some length but not on anything material to the appeal and certainly not on the contents of the form he filled or the words he allegedly uttered when the crates were seen or found.

Section 9 of the Liquor Commission Act 1974 provides:

- "(1) Any person who contravenes any provision of this Act is guilty of an offence and liable on conviction to a fine of five hundred rand or six months imprisonment or both.
- (2) Any liquor illegally imported into Lesotho shall be confiscated by an officer."

It is common cause that the accused was not exempted by the Minister (of Finance) so the first proviso to s.4 supra did not apply. The magistrate also thought the Crown neglected to prove that the accused was not exempted under the second proviso.

I must confess that I initially had difficulty in finding what the second proviso to s.4 was all about. The Excise and Customs Order 1970 as printed in Vol. XV Laws of Lesotho p.97, though many of its sections refer to the "schedules", did not include any schedules at all. I have consulted the original gazette (Supplement No.1 to Gazette 25 of 17th April 1970) and the schedules are not printed there either, but there is no doubt that they have been printed as part of the law, though separately, in a volume that runs to 636 pages, under the heading "Customs & Excise Tariff 1970 Schedules 1-8" and formed part of the Supplement to the Gazette. Under the Law Revision (1966-1970) Order 1971 (it is printed accurately in Vol. XV 1970 - Laws of Lesotho xvii-xxii) the Law Revision Commissioner (and others before him if I may add) were empowered to omit publication of certain laws, which included in Part II of the Order (in item 11) "Laws or parts of laws which deal solely with

the rates of customs and excise duty payable or with remission rebates or refunds of duty". The schedules are in fact available in my library although I doubt if magistrates have this volume in the Subordinate Courts in the districts. This state of affairs continued for nine years until Act 2 of 1979 (Supplement No.1 to Gazette 25 of 20th July 1979) which incorporated into the law of Lesotho schedules 1-7 of the South African Act (in fact the same as Lesotho schedules), and amendments thereto by the new s. 120A. This provides:

- "(1) Notwithstanding section 16(a) of the Interpretation Act 1977 and anything contained in sections 49, 56 and 76(14) of this Order, amendments made to Schedules Nos. 1 to 7 shall not require publication in the Gazette.
- (2) Subject to subsection (3), Schedules Nos. 1 to 7 of the South African Customs and Excise Act as in force in South Africa shall have full force and effect in Lesotho, and any amendments thereto in South Africa shall have effect in Lesotho as from the date such amendments are made.
- (3) Whenever any amendment in South Africa relates to the "most-favoured nation" column of Schedule 1 to the South Africa Customs and Excise Act, such amendment shall be deemed to relate to the "fiscal duty" column of Schedule 1 to this Order.
- (4) The Director shall, at all times, maintain at the Customs Office, Maseru, an up-to-date copy of Schedules 1 to 7 to this Order and shall make such copy available for the information of the public".

The nett result of the customs and excise legislation is that, since 1979, the public, merchants, traders, lawyers and indeed magistrates and Judges, had to procure the South African schedules and amendments thereto to find out the law of Lesotho. If the Minister in Lesotho need not publish in the gazette any amendments the difficulty of finding the law is thus compounded. It is by no means unusual however for some countries, more so those which were governed by a colonial regime, to incorporate into their laws the laws of another country. For example the Merchants Shipping Acts of United Kingdom were part of the law of the Republic of South Africa until recently I believe. In Lesotho, up to this day, we have incorporated by law or proclamation some

Acts or Ordinances of the pre 1884 Cape of Good Hope legislation (some printed some not - see Preface and pp 1-10 Vol. I Laws of Lesotho 1960 - or some of the law of England; perhaps one of the most common can be seen in the Criminal Procedure and Evidence Act 1981 where the Lesotho courts have to refer to and apply some aspects of the law of evidence as it existed in the Supreme Court of Judicature in England prior to 4th day of October 1966 (see e.g. ss 231, 235, 241).

However the magistrate did not entirely rely on this second proviso of s.4 in acquitting the accused but on the meaning of the words "enter" and "import". In fact it would have been of no avail for item 407.02 of Schedule 4 covers rebates either partial or total on some goods entering Lesotho or the Republic by bona fide passengers. The full text now reads :

" Schedule 4

<u>Item</u>	<u>Tariff Heading & Description</u>	<u>Extent of Rebate</u>
407.02	<u>Goods imported in the same ship or vehicle as passengers' baggage by such person and cleared at the place where he disembarks or enters Lesotho:</u>	Full duty
407.02	(1) Per person, the following: 22.00(i) wine not exceeding 1 litre (ii) spirituous and other alcoholic beverages, a total quantity not exceeding 1 litre	Full duty Full duty
	24.02 Manufactured tobacco, not exceeding 400 cigarettes and 50 cigars and 250g of cigarette or pipe tobacco	Full duty
	33.06 Perfumery, not exceeding 300ml	Full duty
	(I) Other new or used goods of a total value not exceeding R80	
	(2) New or used, to a total value not exceeding R200 per person, excluding goods of a class or kind specified against tariff headings Nos. 22.00, 24.02 and 33.06 in paragraph (1) of this item "	Full duty less 20%

I do of course have sympathy with the magistrate in being unable to find the law on the second proviso but there is no question of onus here. The accused had on his vehicle far in excess of the quantity specified in this item of Schedule 4.

I should further add that the accused could have had another bite at the cherry, so to speak, under the proviso to

s.10 of the Liquor Commission Act 1974 by satisfying the Director of Customs that his importation was legal. This reads :

"All Liouor confiscated under section 9 of this Act shall be dealt with in terms of section 91 of the Customs and Excise Order 1970:

Provided that such liouor shall not be disposed of until seven days have elapsed after confiscation, during which time it may be released to the importer if he satisfies the Director of Customs and Excise that it was imported legally:"

The accused did not do so.

The learned magistrate found as a fact that the accused declared the beer at the border at Maputsoe, but with respect, this is a complete distortion of the truth. The written declaration the accused had completed (and this was never challenged and was found to be a "fact" by the magistrate) was that he carried "groceries and cold drinks". It will be stretching the words and the imagination to an unreasonable limit to include beer in such a description. I think it is as clear as anything can be that the accused, but after making the false declaration, did disclose he had beer when the officers were looking or about to look into the vehicle and tried to use the Minister's name to bring it into the country which only the Liquor Commission had a monopoly so to do and to which neither of the provisos to s.4 applied. For the purpose of this appeal it is irrelevant to pursue the enquiry whether or not the goods were in fact the Minister's goods. It may be the accused person simply used the Minister's name without his authority.

In the Director of Public Prosecutions v Magome & others CRI/A/64/81 dated 4th March 1982 - unreported but under appeal - a case of unlawful possession of firearms in contravention of the Internal Security (Arms and Ammunition) Act 1966 (Act 17 of 1966 Vol. XI Laws of Lesotho p. 82) this court held that for the purposes of that Act Lesotho means the geographical internationally recognised boundary of Lesotho irrespective of the actual position of the port of entry specified in s.6 of the Customs and Excise Order 1970 which can vary between a few meters to several hundred or thousand meters. Under the Liquor Commission Act the importation of alcoholic beverages is prohibited but not possession simpliciter of the commodity so there is some distinction. By s.10(1)(c) of the Customs

/and

and Excise Order 1970 goods (excisable, subject to tax or proscribed) brought "overland are deemed to have been imported at the time such goods entered Lesotho. However it does not necessarily or invariably follow that a person arriving at a port of entry with goods is guilty of an offence. It all depends on the circumstances. If a person crosses the Caledon river with a loadful of unlicensed liquor at night no where near a customs post and is caught he surely entered Lesotho and his mens rea having manifested itself from his conduct and surrounding circumstances he is guilty of an offence under s.9. If a person crosses the Caledon with a loadful of unlicensed liquor but proceeds normally to the customs port of entry, he may, or may not have committed an offence. He is required by s.12 of the Customs and Excise Order 1970 to make a declaration. If he makes a truthful declaration it is most unlikely that a court will find him guilty under s.9 but if he makes a false declaration, or by word or deed manifests an intention to cross the customs border gate (as this accused did) he is surely guilty of illegally importing the goods from the moment he crossed the Caledon, not passing the gate or barrier erected at the port of entry.

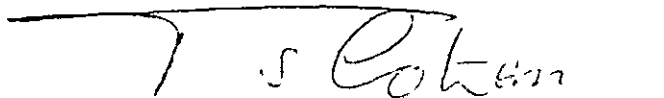
In my opinion therefore the magistrate's analysis and reasoning are bad in law.

If I am wrong, and if for the purposes of the Liquor Commission Act, a person and his goods are not within Lesotho until the customs gate is lifted and he and his goods proceeded beyond, then this accused, very clearly in my view, had attempted to import the beer and was therefore guilty under s.9 as read with s.183 of the Criminal Procedure and Evidence Act 1981 and is subject to the same punishment and the goods subject to the same consequences of confiscation. This is mandatory and is not akin to the powers of a magistrate under s.6(2) of the Importation and Exportation of Livestock Proclamation (No.57 of 1952 Vol. III Laws of Lesotho 1960 p. 2016). It is only if the goods have been declared that a possible escape from the rigors of the Liquor Commission Act may be allowed. The magistrate's great worries about the tourist industry are more imaginary than real because in my view no offence can be committed if a true or even a negligent declaration has been made. The most that can happen to a bona fide or negligent tourist carrying more than the allowance provided in item 407.02 of the 4th Schedule would have entailed no more than temporary seizure of the goods until he leaves the country.

The appeal must therefore be allowed.

In exercise of the powers conferred upon me by s.73(10) of the Subordinate Courts Proclamation the acquittal of the accused is hereby quashed and substituted by a conviction for the offence as charged. The accused will pay a fine of M50 or one month imprisonment in default. He is given 10 days to pay the fine. The vehicle, if not already released, must be returned to the accused for the conveyance itself is not subject to forfeiture in terms of the Act under which the accused was charged.

If the accused wishes to appeal leave is hereby granted.



CHIEF JUSTICE
30th September, 1982

For Appellant : In Person

For Respondent: Mr. Peete

copy : Director of Customs and Excise