CRI/A/15/84

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MALEFETSANE MALOKOLOKO Appellant

v

R E X Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 27th day of September, 1984.

The appellant (hereinafter referred to as accused 1) and two others appeared before the Subordinate Court of Leribe charged with contravening s. 3 (a) of Dangerous Medicine Act No. 21 of 1973, it being alleged that on or about 5th September, 1983 at or near Mpharane in the District of Leribe they each or both or all wrongfully and unlawfully dealt in 9 bags of dagga weighing 151 kilograms without permit.

Accused 1 and 2 pleaded not guilty but accused 3 pleaded guilty to the charge. The public prosecutor did not, however, accept the plea of guilty tendered by accused 3 and the trial proceeded as if all the three accused had pleaded not guilty.

At the end of the trial, all the accused were found guilty as charged. A sentence of 2 years imprisonment was imposed on accused 1 and 2. Accused 3 was sentenced to a fine of R500 or 15 months imprisonment in default of payment of the fine.

Only accused 1 has appealed against both his conviction and sentence on the grounds that the conviction was against the weight of evidence and the sentence excessive.

In support of its case, the crown called two traffic police officers who testified on oath that at about 8 p.m. on 5th September, 1983, they were on duty at Mpharane when

2/ they noticed .....

they noticed a vehicle with registration Nos D1507. The vehicle appeared to be loaded with something on its back. They followed and stopped it. When their vehicle was stopped, the occupants tried to escape and run away but the police officers ordered them to stop and they did. They were found to be the three accused. They were asked what was on their vehicle and accused 3 replied that it was the property of accused 1 and 2. This was said in the presence and hearing of accused 1 and 2 who did not, however, object. On inspection, the vehicle was found to be loaded with the 9 bags of dagga. A permit authorising them to be in possession of the dagga was demanded from the three accused but none of them produced any. All the accused were brought to Maputsoe police station together with the dagga. The dagga was subsequently weighed in the presence of the accused when it was found to weigh 151 kilograms. The accused were cautioned and charged as aforesaid.

Accused 1 and 2 did not testify on oath but made unsworn statements from the dock. They told the court that on the night in question they were from accused 1's home at Fobane in the area of Mapoteng. Accused 3 who was travelling in the vehicle Registration No. D 1507 gave them a lift on the way. When they came to Mpharane, the vehicle was stopped by the police officers who asked what was loaded on the vehicle. Accused 3 said it was loaded with their property but accused 1 and 2 denied. When it was inspected, the vehicle was found to be carrying the 9 bags of dagga. They were then arrested and taken, together with the dagga, to Maputsoe where they were formally charged after the dagga had been weighed. Accused 1 and 2 denied that they knew that accused 3 was conveying dagga in his vehicle and said they had, therefore, nothing to do with the dagga.

The evidence of accused 3, who testified on oath, was that earlier on the day in question he was approached by accused 1 and 2 and a third person who was not charged. He was asked to convey the dagga for M100. Accused 1 and 2

3/ were to show him .....

were to show him where the dagga was to be found in the area of Mapoteng. He accepted and left with accused 1 for the dagga. Accused 2 had gone ahead to arrange the dagga where it was to be collected. Accused 1 directed him to the spot where they found accused 2 with the dagga. They loaded the dagga and returned. Accused 3 confirmed that when they came to Mpharane on their way back, they were stopped by the police officers who asked what was loaded on the vehicle and he replied that it was the property of accused 1 and 2. He further confirmed that accused 1 and 2 had never denied that what was loaded on the vehicle was their property which was found to be dagga. They were then arrested and brought to Maputsoe police station together with the dagga.

According to the trial magistrate, if the dagga were not their property, as accused 1 and 2 claimed, a natural reaction for them would have been to object immediately when, in their presence and hearing, accused 3 told the police officers that it was. He accepted the evidence of the police officers supported by accused 3 that accused 1 and 2 never objected that the dagga was their property.

It was not disputed that the dagga was found in the vehicle in which the accused were travelling and it weighed 151 kilograms. On the face of it, there was a rebattable presumption, under the provisions of s.30(1)(a) of the Dangerous Medicine Act, supra, that the accused were dealing in dagga. Accused 3 made no attempt to rebut the presumption. Accused 1 and 2 disputed possession of and, therefore, dealing in the dagga. The evidence of accused 1 and 2 was, however, rejected in favour of the evidence of the police officers and accused 3.

As has been pointed out earlier while accused 3 testified on oath, accused 1 and 2 made unsworn statements from the dock. The terms in which the rights of the accused, who were not represented at the trial, were explained at the close of the Crown case are not clear from the record of proceedings. But, as accused 1 and 2 were allowed to make unsworn statements from the dock while accused 3

4/ testified on .....

Act, 1981, it seems to me that our position has changed from that of South Africa and the law as stated in S. v. Vezi supra, no longer applies in full i.e. although, under the new Act, we have S. 220 which is worded in the same terms as the repealed S. 215(1) of the Criminal Procedure and Evidence Proclamation, supra, we no longer have S. 214(3). Instead we have section 217(3) which clearly provides:

> "(3) an accused may not make an unsworn statement at his trial in lieu of evidence but shall, if he wishes, do so on oath, or as the case may be, on affirmation." (my underlining)

The use of the word "shall" in the above quoted section makes it mandatory for an accused person to testify on oath if he wishes to but he can no longer make a statement from the dock. That being so, the trial magistrate clearly misled the accused by explaining to them that they had a right to make an unsworn statement from the dock in terms of the decision in S. v. Vezi, supra. If he explained the accused's rights in terms of the three alternatives stated in that decision, it must be accepted that the trial magistrate took the view that their unsworn statements carried less weight than the sworn evidence of the police officers and accused 3. It was obviously a misdirection on the part of the magistrate. The accused simply had no right to make unsworn statement from the dock.

In my view, the trial magistrate cannot be permitted to mislead accused 1 and 2 into believing that they have a right to make unsworn statements from the dock and then turn round and say their statements carried less weight. It was a serious irregularity which no doubt prejudiced the case of accused 1 and 2. On this ground alone their conviction cannot be allowed to stand.

Although accused 2 did not lodge an appeal, the interests of justice demand that he be treated in the same manner as accused 1. As regards accused 3, who testified on oath, it cannot be justifiably said the irregularity prejudiced his defence and he, therefore, deserved the

6/ same treatment .....

testified on oath, it can safely be presumed that the accused's rights were explained in terms of S. v. Vezi 1963 (1) S.A. 9 according to which decision :

> " An accused who is unrepresented at his trial should be afforded an explanation of the courses open to him at the close of the prosecution case, namely, that he may give evidence on oath or make an unsworn statement from the dock, that if he decides upon the latter course he may not be cross-examined nor questioned by the court, but that generally evidence on oath carries more weight, or that he may remain silent if he so wishes."
> (vide-the head note)

The decision in S. v. Vezi, supra, was, however, based on Sections 220(1) and 227(3) of the South African Criminal Procedure Act No. 56 of 1955 (as amended). It is perhaps useful to quote the sections :

> "220 Oath. - (1) No person other than a person described in section two hundred and twenty-one or two hundred and twenty-two shall be examined as a witness otherwise than upon oath ....."

> "227 .....
> (3) Nothing in this section shall affect any right of the accused to make a statement without being sworn : ....."
> (vide - S.A. Law of Criminal Procedure by Swift, 1957 Ed. pp. 319 and 330).

Under our now repealed Criminal Procedure and Evidence Proclamation No. 59 of 1938 we had corresponding Sections 215(1) and 214(3) which read as follows:

> "215(1). It shall not be lawful to examine as a witness any person other than a person described in either of the next two succeeding sections, except upon oath."

> "214 .....
> (3) Nothing in this section shall affect any right of the accused person to make a statement without being sworn ....."

Because the sections of our old Criminal Procedure and Evidence Proclamation No. 59 of 1938 were more or less identical with the sections of the S.A. Criminal Procedure Act, supra, the decision in S. v. Vezi 1963 (1) S.A. 9 has always applied in Lesotho. However, with the coming into operation of our new Criminal Procedure and Evidence

5/ Act, 1981, it .....

same treatment as accused 1.

In the circumstances, both the convictions and sentences of accused 1 and 2 are set aside. I, however, find no good reason to disturb the conviction and sentence against accused 3. It is ordered that accused 1 be refunded his appeal deposit.

B.K. MOLAI,
JUDGE.

27th September, 1984.

For Appellant : Mr. Mofolo,
For Respondent: Miss Nku.