C.R./206/86

IN THE HIGH COURT OF LESOTHO

In the matter of:

R E X

v

1. NKATANA PHATELA
2. MOSIUOA NTHO

JUDGMENT

Delivered by the Hon. Acting Mr. Justice M. LEHOHLA on the 29th day of August, 1986

This matter came before me on automatic review.

The two accused appeared before the Class I Magistrate sitting in Qacha's Nek on a charge involving contravention of Section 16(1) as amended by Section 17A of Proclamation 8/21.

The charge sheet stipulated that on or about 20th July 1986 at or near Nene cattle post in the district of Qacha's Nek, the said accused did unlawfully and intentionally have in their possession a carcass of or portion of carcasses of slaughtered stock for which there are reasonable grounds of suspicion that such carcass is stolen and the accused failed satisfactorily to account for such possession.

On 30th July 1986 both accused pleaded guilty to the charge.

Accused 2 is the herdboy of Accused 1. On 20th July, 1986 a stock theft drive was mounted in the area of Accused 1's cattle post. A search in the surroundings of this cattle post revealed a carcass of a beast which had been hidden near the hut situated there. The narration of evidence in the possession of the Public Prosecutor showed that Accused 1 had hidden this carcass after finding it in Accused 2's and some other young boys' hands. The hide was also discovered as a result of the search. Accused 1 was also responsible for its concealment before discovery. Further evidence was to the effect that

/Accused 1 ...

Accused 1 partook of large chunks of meat offered to him by Accused 2 and other herdboys. He never bothered to inquire where such large quantity of meat emanated from.

It appears that the beast had been slaughtered by Accused 2 with the assistance of some other herdboys. The beast belonged neither to them nor to Accused 1. However it was not established whose it was.

Accused 1's involvement in the crime charged is confined to his active participation in the concealment of the remainder of the carcass and the hide and consequent failure to give satisfactory explanation of his and Accused 2's possession of the hide and portion of the carcass.

Both Accused accepted as accurate the outline of the Crown case and were accordingly convicted as charged.

Accused 1 was sentenced to pay a fine of M200 or serve time for 18 months. Accused 2 was sentenced, presumably under Section 308 of the C. P. & E. Act 1981 for the age of this Accused is rendered as 18 years, to receive fifteen strokes with a light cane.

That Section reads: The Court before which a male person under the age of 21 years is convicted of an offence may, in lieu of any other punishment, sentence that person to receive ..... whipping not exceeding 15 strokes with a light cane ..... .

Section 62(b) (as amended) of the Subordinate Courts Proclamation 58/1938 states that : A Subordinate Court of the First Class may punish any person convicted of any offence in the manner stipulated in that section and further provides

/that ...

that "save as is specially provided by this Proclamation or any other law". The wording then lays stress on the fact that such manner should not be more severe (than as laid down) in :

(i) .....

(ii) .....

and lastly gives that magistrate power to impose a sentence of

(iii) whipping, subject to the provisions of Section seventy two and to any other provisions hereinafter contained, not exceeding fifteen strokes with a cane.

It would appear then that from the reading of the foregoing the learned magistrate acted within the provisions of both the C. P. & E. and the Proclamation.

However Section 72(1) supra provides that "The punishment of whipping shall in no case (except where a male child under the age of eighteen has been sentenced under the Criminal Procedure and Evidence Proclamation) be inflicted until either the proceedings in the case have been returned with such a certificate ..... or the High Court has affirmed the sentence of the Subordinate Court." (My underlinings)

It would appear from the reading of the above Section that while so far the procedure followed in terms of Section 308 of the C. P. & E. is quite in order to the extent that Accused qualifies to be dealt with under that Section by virtue of the fact that he is under the age of 21 years on the one hand; on the other hand Section 72(1) of the Subordinate Courts Proclamation makes things not as plain-sailing as would appear at first blush in as much as it makes exception of the procedure to be followed where an

/accused ....

accused is not under the age of 18 years. If he is under the age of 18 then the 58/1938 Proclamation leaves him to be treated in terms of the C. P. & E. Act Section 308. But if he is 18 and over a different approach is called into play according to the letter and spirit of the 58/1938 Proclamation.

Accused 2 is 18 years old. But because he is not over 21 years he is still subject to Section 308 of the C. P. & E. Section 62(4) of 58/38 Proclamation provides that "the punishment of whipping shall be subject to the provisions of Section 72 hereof and shall only be imposed for:

(i) assault of an aggravated or indecent nature or with intent to do grievous bodily harm

(ii) Culpable Homicide, robbery .....

(iii) <u>any statutory offence for which whipping may be imposed as a punishment</u> (underlining mine)

It would appear therefore that (iii) immediately above places accused 2 in a position where he can be dealt with under Section 5(2) of Procl. 80/21. To that extent there is a conflict between the C. P. & E. and the stock theft Proclamation in as much as the latter disallows whipping of a first offender.

To the extent also that the Legislature found it fitting to categorise offences under 62(4)(i)&(ii) as offences where whipping can be administered, to my mind, that serves as an indication to the Courts to be very tardy of administering whipping sentences in respect of offences not included in the said Section 62(4)(i)&(ii) notwithstanding Section 62(4) (iii) and Section 308 of the C. P. & E. At

/all costs ...

all costs a liberal interpretation should be preferred. This is a golden rule in interpretation of statutes. The least painful method of punishment especially for first offenders should be preferred, bearing in mind that as reflected in Cap.2 of the Institutes ad 220 "Minima poena corporalis est major qualibet pecuniaria" i.e. (the smallest bodily punishment is greater than any pecuniary one). This will help avoid the glaring unfairness embodied in the observation that "the higher classes are more punished in money, but the lower in person). Cap 3 Inst. 220.

I have made reference to the Institutes immediately above merely to illustrate that at least by implication they advocate derogation from corporal punishment in a general manner while Section 5(2) of Proclamation 80/21 definitely prohibits it. It is advisable therefore that when interpreting and applying provisions of statutes where by operation of one statute accused is referred for treatment under another statute, the maximum penalty prescribed by the latter statute excludes corporal punishment, the letter and spirit of its internal arrangements are not undermined.

I say this in view of the fact that Section 62(4)(iii) while indeed empowering the learned magistrate to impose whipping in respect of any statutory offence for which whipping may be imposed as punishment, the statutory offence concerned in this case is stock theft governed by Proclamation 80 of 1921, Section 5(2) of which as amended provides that:

> " Notwithstanding anything to the contrary contained in sub-section(1) the Chief Justice may .....confer upon any Court or upon any person designated by name who is entitled to

/preside ....

preside over a Court jurisdiction to impose in respect of a second or subsequent conviction for an offence under this proclamation ..... the following penalties or any of them, as specified in the notice:

(a) imprisonment .....not exceeding four years
(b)
(c)
(d) ..... a whipping not exceeding eight strokes.

It should be clear then that notwithstanding Section 308 of the C. P. & E. which allows whipping up to a maximum of fifteen strokes, and notwithstanding Section 62(4)(iii) supra which allows whipping only so far as is allowed under the statutory offence for which whipping may be administered, the particular statutory offence being the Stock Theft Proclamation 80 of 1921, Section 5(2) of which as amended restricts whipping to a maximum of 8 strokes only, and further restricts imposition of such strokes to second and subsequent offenders, Section 308 supra cannot apply nor can any whipping powers in so far as they derive from Section 62(4)(iii) supra.

As envisaged by provisions of Section 62(4)(iii) Stock Theft is a form of statutory offence for which whipping can be imposed as a punishment. Section 308 of the C. P. & E. empowers the magistrate to impose that whipping penalty pursuant to provisions of 62(4)(iii). But the stock theft proclamation says such whipping can only be administered to second and subsequent offenders.

It stands to reason therefore that notwithstanding the salutary effect that whipping could have on accused 2 the operation of law militates against such an eventuality.

/I would ...

I would in the result confirm the conviction and sentence in respect of accused 1 and further confirm the conviction in respect of accused 2 but set aside his sentence of fifteen strokes with a light cane and substitute the following:

> Accused 2 is sentenced to twelve months' imprisonment or M120.00 fine of which half is suspended for two years on condition that accused be not convicted of an offence involving theft of stock committed during the subsistence of the suspension and for which he is sentenced to a minimum of six months' imprisonment without an option of a fine.

M. L. LEHOHLA
ACTING JUDGE

29th August, 1986